IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CIVIL APPEAL NO. 29 OF 1999
(Being High Court Civil Cause No. 3151 of 1999)

BETWEEN:

MRS JESSICA MZAZA SOMANJE.............................APPELLANT

- and

DAISY SOMANJE, HELGA SOMANJE,
TIMOTHY SOMANJE, EURITA SOMANJE............RESPONDENTS

BEFORE: THE HONOURABLE THE CHIEF JUSTICE, JA
THE HONOURABLE MR JUSTICE UNYOLO, JA
THE HONOURABLE MR JUSTICE MTEGHA, JA
Mtawali, Counsel for the Appellant
Salimu, Counsel for the Respondents
Mbekwani (Mrs), Official Recorder/Interpreter

J U D G M E N T

Unyolo, JA

This appeal emanates from a dispute as to who should apply for letters of administration in the estate of one, Harvey Robert Kulucheta Somanje, hereinafter referred to as “the

deceased".

After a long illness, the deceased instructed Messrs Wilson & Morgan, a firm of legal practitioners, to draft his will. A lawyer in the said firm duly drafted the will and made arrangements for the deceased to come with his two witnesses the next Monday, on 1st June 1999, for the formal attestation to the document. Unfortunately, as fate had it, the deceased died in the early hours of Sunday, 30th May 1999.

A dispute then arose in the aftermath of the deceased's passing as to who was to apply for the grant of letters of administration, the deceased having died intestate, as we have seen. There were two opposing sides, namely, the appellant, who is the deceased's widow, and the respondents, who are the deceased's children from an earlier marriage. The appellant's position was that she should administer the estate herself, or that, if that was not acceptable to the other side, then the parties' legal practitioners should apply for the grant of the said letters of administration. The respondents' position, on the other hand, was that the administration of the estate should be granted to the National Bank of Malawi (Financial Management Services) because of the Bank's expertise in the field of administration of deceased estates, and also because of its perceived neutrality in such matters. The parties failed to agree, whereupon the respondents initiated proceedings in the Court below seeking a declaratory order of the Court that the said Bank was best suited to be granted letters of administration.

The matter was tried in the Court below by way of affidavit evidence, and the intended will was exhibited, apparently to show what the deceased had wished in relation to who should be the executors and trustees of the estate. Clause 1 of the intended will shows that the deceased wanted the said National Bank of Malawi (Financial Management Services) to be the sole executors and trustees of the will.

The learned Judge in the Court below appreciated the fact that in the absence of full attestation, the intended will herein was not a will, in the legal sense. He, however, took the view that the Court could, nevertheless, look at the document to answer the question who the deceased intended to be the executors and trustees of his will. This is what the learned Judge actually said on this aspect:

"However the contents of this draft tells a story I cannot ignore. Had the will been legally executed there is no doubt late Somanje would have wanted the National Bank of Malawi appointed as sole Executors and Trustees of his will. I referred myself to the case of **Re Jebb** 1. [1967] ch. 666 where the construction of a will was the main issue.

There Lord Denning said this;

‘In constructing a will we have to look at it as the testator did, sitting in his armchair, with all the circumstances known to him at the time. Then we have to ask ourselves: “what did he intend?” We ought not to answer this question by reference to any technical rules of law. Those technical rules have only too often led the courts astray in the construction of wills.’

Now looking at the draft will of late Somanje, I want to pose the same question. With all the circumstances known to late Somanje at the time the draft was drawn what did he intend? I find no problem in answering that question. He intended to appoint the National Bank of Malawi as the sole executors and trustees of his estate. The fact that the draft will was not legally executed does not mean we should ignore the contents of this draft. In this unexecuted document, in my view, late Somanje wished his property to be disposed of by the National Bank. No one else.”

Further, the learned Judge pointed out that since the parties were at “loggerheads” and that both had an interest in getting a share of the estate, it would not be prudent to grant letters of administration to any one of them. He took the view that a “neutral” person ought to be appointed, and proceeded to appoint the said National Bank of Malawi (Financial Management Services) to be the receiver of the deceased estate pending the grant of letters of administration. Accordingly, the learned Judge granted the respondents’ prayer and ordered each party to pay its own costs.

It is against that decision that the appellant appeals to this Court. The crux of the appellant’s case is that the decision herein cannot be supported because the same was based on the contents of an unattested draft will which, in law, was not a will. The secondary matter raised is that the learned Judge erred in ordering, as he did, that each party should pay its own costs. It was contended that the Court should instead have ordered that the estate pay the costs.

In response, Counsel for the respondents submitted that he was unable to join with the learned Judge in basing his decision on the contents of an unattested draft will. Counsel submitted that the respondents, nevertheless, wished the lower Court’s decision to be upheld, but on different grounds. He relied in this regard on Order III, rule 3 of the Supreme Court of Appeal Rules. Counsel contended that the said National Bank of Malawi (Financial Management Services) was best suited for the grant of letters of administration because it is a trust corporation with expertise in the administration of deceased estates, and that the lower Court’s order in that sense cannot be faulted in the circumstances.

The crisp question for the determination of this Court is whether the Court below was right in having recourse to the draft will, to find out who the deceased intended to be his

executors and trustees and then use that information as the basis for deciding who should be granted letters of administration. Our answer to the question is in the negative. To start with, it is clear that the draft will herein was, by operation of law, not a will at all, since it was not signed or attested. That is why we say that the deceased died intestate, that is, without leaving a will. Needless to point out that in the form it is, the draft will cannot be used for purposes of finding out how the deceased intended his estate should be administered upon his death. In the same vein, the document cannot be used to find out who the deceased intended the said draft will to be his executors and trustees. We just cannot simply pick and choose, as it were.

It is also noted that the reliance which the lower Court put on the **Re Jebb** case cited above was misplaced. A proper reading of the passage quoted by the Court below from the case shows that the remarks there were made in a case in which there was a will and the court was dealing with the question of the construction of the will. It is of course different in the present case, where, as we have repeatedly said, there was no will.

The result is that the decision of the Court below on this point, based, as it was, on information contained in an unattested will, was, in our judgment, and on all the facts of the case, flawed and we are unable to support it on that basis.

Section 42 of the Wills and Inheritance Act is pertinent. The section provides that letters of administration where the deceased has died intestate may be granted to any beneficiary of the deceased estate. The section goes on to say that where more than one person applies for letters of administration, the court has a discretion to make a grant to any one or more of them, and in such case, the court has to take into account greater and immediate interests in the deceased estate in priority to lesser or more remote interests. Further, and this is very important, the section, in subsection (4) thereof, provides that where it appears to the court to be necessary or convenient to appoint some person to administer the estate, other than the person who, under ordinary circumstances, would be entitled to a grant of administration, the court may, in its discretion, having regard, inter alia, to the safety of the estate and probability that it will be properly administered, appoint such person as it thinks fit to be administrator.

As earlier pointed out, the parties in the present case failed to agree among themselves and also in the presence of their respective legal practitioners as to who should apply for the letters of administration. Each party mistrusted the other. It is also to be noted that there are minors in this case whose interests must be properly and sufficiently guarded and protected.

On the total facts, we are of the view that this is a proper case in which the court should invoke the provisions of the said section 42(4) above mentioned. We cannot agree more with Counsel for the respondents that the National Bank of Malawi (Financial

Management Services) is best suited for the granting of letters of administration, having regard to its status as a trust corporation and the indisputable expertise it has in the administration of deceased estates. We also have no reason to doubt the Bank's neutrality in the matter.

In the result, we support the appointment of the said National Bank of Malawi (Financial Management Services) as interim receivers and the grant of letters of administration to it. The decision of the Court below is therefore upheld, but on this different ground.

We now turn to the appeal against the order for costs. With respect, we do not see any real merit in the appeal on this point. It is trite that costs are a discretionary matter for the court. Admittedly, the discretion must be exercised judicially and in accordance with reason, fairness and justice. It is clear that the Court below made the order in an effort to preserve the monies that would be available for distribution to the beneficiaries during the administration of the estate. We support the order.

Accordingly, the appeal fails, and it is dismissed. As in the Court below, each party will pay its own costs of the appeal.

DELIVERED in open Court this 13th day of November 2001, at Blantyre.

Sgd ....

R A BANDA, CJ

Sgd ....

L E UNYOLO, JA

Sgd ....

H M MTEGHA, JA