**IN THE HIGH COURT OF MALAWI**

FAMILY AND PROBATE DIVISION

MZUZU REGISTRY

PROBATE CAUSE NO. 135 OF 2019

IN THE MATTER OF THE ESTATE OF CHRISPINE NG'OMA (DECEASED)

AND

IN THE MATTER OF SECTION 43 OF THE DECEASED ESTATES (WILLS, INHERITANCE AND PROTECTION) ACT, CAP. 10:02 OF THE LAWS OF MALAWI

AND

IN THE MATTER OF AN APPLICATION FOR GRANT OF LETTERS OF ADMINISTRATION BY JOYCE BANDA

AND

PROBATE CAUSE NO. 52 OF 2020

IN THE MATTER OF THE ESTATE OF TADEO KAUSWE (DECEASED)

AND

IN THE MATTER OF SECTION 43 OF THE DECEASED ESTATES (WILLS, INHERITANCE AND PROTECTION) ACT, CAP. 10:02 OF THE LAWS OF MALAWI

AND

IN THE MATTER OF AN APPLICATION FOR GRANT OF LETTERS OF ADMINISTRATION BY STAWA GONANI

**CORAM:** **Honourable Justice T.R. Ligowe**

C. Mandala, Counsel for the Appellant

A. M. Mhone, Official Interpreter

J. N. Chirwa, Recording Officer and Court Reporter

## ORDER

Ligowe J,

1 There came two applications for letters of administration before this court which, because of their similarity, I ordered should be dealt with together: Probate Cause No. 135 of 2019, *In the matter of the estate of Chrispine Ng'oma*, and application for letters of administration by Joyce Banda; and Probate Cause No. 52 of 2020, *In the matter of the estate of Tadeo Kauswe,* an application for letters of administration by Stawa Gonani.

**The form of application**

*The Title*

2 Either application, among everything else in its title, states that it is *"In the Matter of Rule 3 of Probate and Non-Contentious Rules Under Section 22 of the Deceased Estates (Wills, Inheritance and Protection) Act"* (sic). There are a few irregularities to correct in this heading.

3 The first is a typo on the correct name of rules cited. This can be checked by proof reading. The Rules are called *Probate (Non-Contentious) Rules* not *Probate and Non-Contentious Rules.* I can only repeat Mambulasa J in a recent decision in *Re Edward Gwazantini*, Probate Cause No. 479 of 2020 (Principal Registry) (unreported) with reference to *Re Deceased Estate of Silanju Thauzeni,* Probate Cause No. 468 of 2020 (High Court of Malawi) (Principal Registry) (Unreported) and *Anderson Katanga -vs- Peoples Trading Centre,* MSCA Civil Appeal No. 81 of 2016 (Sitting at Lilongwe) (Unreported) that: -

> "While it is human to make mistakes or indeed fall into error, it is important for counsel to pay attention to these minute details in the preparation of court documents. They must be proof-read, even if it means several times, if that is what it will take for them not to cause confusion or indeed not to be rejected by the Court

in worst case scenarios. I make these observations in good faith so that together we improve the standards of our legal practice in the country and minimize delays that come with poor preparation of court documents."

4 The second is whether indeed an application for letters of administration is a matter of Rule 3 of the Probate (Non-Contentious) Rules and whether the rules are under Section 22 of the Deceased Estates (Wills, Inheritance and Protection) Act.

5 Section 22 of the Deceased Estates (Wills, Inheritance and Protection) Act gives power to the Chief Justice to make Probate Rules – (a) regulating proceedings for the grant of probate and letters of administration and other proceedings under the Act; (b) for the procedure to be observed in relation to wills deposited under section 8 and for the preservation, copying and inspection of wills and grants of probate and administration; (c) prescribing fees and forms; and (d) generally in relation to matters of probate and letters of administration. Incidentally, no such rules have been made yet.

6 For the Rules, the Act saves, in section 89 (1) (a), subsidiary legislation made under the Wills and Inheritance Act, which it repeals. The Rules that are in effect are therefore the Probate (Non-Contentious) Rules under the Wills and Inheritance Act. Under these Rules indeed, an application for letters of administration is governed by Rule 3. However, in the Act that is in effect, the Deceased Estates (Wills, Inheritance and Protection) Act, applications for letters of administration on intestacy are provided for under section 43. This is why it is proper to cite section 43 of the Deceased Estates (Wills, Inheritance and Protection) Act, as the primary law, as read with Rule 3 of the Probate (Non-Contentious) Rules under the Wills and Inheritance Act, as the subsidiary law, in the title for the application.

*Required papers for an application for letters of administration*

7 Either application is made by the applicant's legal practitioner writing to the Registrar at this Court, with the following documents enclosed: -

a. Summons for the application;

b. Sworn statements in support of the application (one by the applicant and the other by the legal practitioner);
c. Declaration as to death;
d. Draft copy of letters of administration;
e. Oath for administrator;
f. Administration Bond;
g. Estate Duty Affidavit;
h. Certified copy of death certificate;
i. Death Report;
j. List of beneficiaries;
k. Copy of the National Identity Card of the applicant; and
l. Receipt of filing fees.

8 This is obviously more than what is required by the rules. It demonstrates lack of knowledge, on the part of the legal practitioner, of how to go about making the application. This is probably a result of unwillingness to read the rules. Here is also another point of emphasis that, lawyers require constant reading of the law. Never assume that you are so familiar with the subject you are dealing with. Obvious mistakes like these can be avoided by refreshing on the relevant law every time you are dealing with a matter. The cost for neglect of this advice can be dire sometimes.

9 So, what sort of papers are required for an application for letters of administration?

*Oath for Administrator*

10 The first is the Oath for Administrator/ Administratrix. Rule 4 of the Probate (Non-Contentious) Rules states: -

> (1) Every application for a grant shall be supported by an oath in the form applicable to the circumstances of the case which shall be contained in an affidavit sworn by the applicant and by such other papers as these Rules or the Judge may require.

(2) On an application for a grant of administration with will annexed, the oath shall state whether any executors have been appointed by the will and if there have been any such appointed, whether the executors so appointed have renounced or are persons to whom probate may not be granted or have predeceased the testator or have died before obtaining probate or have died before having administered all the estate of the deceased or having been appointed by the will do not appear and take out probate and what the applicant's right to a grant is and whether any minority or life interest arises under the will or intestacy.

(3) On an application for a grant of administration in a case of intestacy, the oath shall state what is the entitlement of the applicant according to the rules for the distribution of the estate of the intestate, and who are the other persons entitled to shares in the estate.

(4) The oath shall state the deceased's domicile at his death, and the place and date of death.

(5) An affidavit for the purposes of this rule may be in one of the forms in Form I in the First Schedule with such variations as, subject to the provisions of these Rules, the circumstances may require.

11 There is in Forms I, IA and IB an Oath for Executors, Oath-Administration with will annexed, and Oath for Administrator (Intestacy) respectively. The law having provided a Form to be used, it means the oath which is the sworn statement in support of the application in this case, has to be drafted exactly as provided. Of course, variations which neither materially affect the substance of the form nor calculated to mislead, are allowed. Section 5 of the General Interpretation Act provides that: -

> "Where a form is prescribed or specified by any written law, deviations therefrom neither materially affecting the substance nor calculated to mislead shall not invalidate the form used."

This is why Rule 4 (5) above allows for variations to Form I as subject to the provisions of the Rules, the circumstances may require.

12 The form has directions on how to complete it. These directions must be followed closely. There is a sentence in Form IB, Oath for Administrator (Intestacy) which in my life on the High Court bench has caused trouble to many legal practitioners. I have had to send them back and forth to correct this sentence, all because, in my view, they neglect to read the rules. The sentence states: -

> "... that I am the ..... of the said decease and entitled to a part of the estate of the said deceased and am not aware of any person who has greater or more immediate interest in such estate except ..... that no minority or life interest arises out of the intestacy; ..."

13 This is where Rule 4 (3) has to be applied. The rules for distribution of intestate property are provided for in sections 16, 17 and 18 of the Deceased Estates (Wills, Inheritance and Protection) Act. The applicant should state in this part of the oath, their entitlement according to the rules for the distribution of the estate of the intestate, and the other persons entitled to shares in the estate.

14 This far, it should be clear to anyone that if the rules are followed, there is no need for the Summons for the application and Sworn statements in support of the application, as did the applicants herein. The oath for administrator, properly done, is enough. There is also no need for the list of beneficiaries as did the applicants herein, as the names of the beneficiaries and their shares will have been captured in the Oath for Administrator in accordance with Rule 4 (3) of the Probate (Non-Contentious) Rules.

*Administration Bond*

15 The second paper required is the administration bond. Rule 7 (2) of the Probate (Non-Contentious) Rules states: -

> "Subject to subrule (1), every applicant for a grant of letters of administration shall furnish to the Registrar an administration bond in Form II in the First Schedule with sureties to the satisfaction of the Judge. The amount of the bond shall be the gross value of the estate."

To this form also section 5 of the General Interpretation Act applies. It also has directions on how to complete it which must be closely followed.

16 Subrule (1) allows that a trust corporation should not be required to furnish an administration bond. Otherwise in subrule (3),

> "Except where the sole surety is a bank or an insurance company or the value of the estate does not exceed £100, there shall be two sureties to every administration bond. A reasonable premium paid to a bank or an insurance company in respect of the issue of such a bond shall be a proper expense of administration."

17 Subrule (4) requires the Judge dealing with the application to so far as reasonably possible, satisfy himself that every surety is a responsible person.

18 The administration bond is basically an undertaking by the applicant and the sureties to pay to the Registrar of the High Court, the gross value of the estate if they fail to administer the estate according to law. It binds them to, when lawfully called on in that behalf, make or cause to be made, a true and perfect inventory of the estate to be administered, and to exhibit or cause the inventory to be exhibited in the High Court whenever required by law so to do. It also binds the sureties to administer the estate according to law, and to make or cause to be made a true and just account of the administration of the estate whenever required by law so to do. It also binds them to render and deliver up the letters of administration to the High Court if it later appears that any will was made by the deceased, which is exhibited in the Court with a request that it be allowed and approved accordingly.

*Proof of death*

19 The third paper is the proof of death. Rule 6 of the Probate (Non-Contentious) Rules provides: -

> "Every application for a grant other than an application for re-sealing shall be accompanied by the affidavit of a person who knew the deceased in his lifetime certifying of his personal knowledge the fact of the death of the deceased or such other evidence of death of the deceased as the Judge may approve."

20 The need for proof of death of the deceased cannot be emphasized. Upon issuing the grant, the Judge has to be satisfied as to the death of the deceased. There are some unscrupulous individuals who take away other peoples' property through legal processes as these. So, the sworn statement of a person who knew the deceased in his lifetime certifying of his personal knowledge of the fact of the death of the deceased is sufficient. Besides proof by way of a sworn statement, the Judge may approve any other satisfactory evidence of death. The practice has so far been to rely on death certificates duly issued under the National Registration Act 2010.

*Estate Duty Affidavit and Certificate of the Secretary to the Estate Duty Commissioners*

21 The fourth paper required is a copy of the Estate Duty Affidavit and a certificate of the Secretary to the Estate Duty Commissioners under section 33 of the Estate Duty Act. This is specifically required by section 33 of the Estate Duty Act as well as section 34 of the Deceased Estates (Wills, Inheritance and Protection) Act. Further to this, Rule 8 of the Probate (Non-Contentious) Rules states: -

> "Every application for a grant shall be accompanied by a copy of the Estate Duty affidavit and by a certificate of the Secretary to the Estate Duty Commissioners under section 33 of the Estate Duty Act.

This is for purposes of knowing the nature and value of the estate to be administered and whether Estate Duty has been levied.

22 Section 4 of the Estate Duty Act requires that there should be a duty levied and paid to the Government upon the principal value of all property belonging to the deceased at his/her death called 'estate duty.' Therefore, section 33 of the Estate Duty Act provides that: -

> (1) No grant of representation to the deceased shall be made unless a certificate of the Commissioners is produced to the effect that a proper estate duty affidavit as to the estate of the deceased has been made and delivered to the Commissioners, or, where the executor or other person accountable for duty does not know the value of any property and undertakes to the satisfaction of

the Commissioners to pay all estate duty in any manner arising in respect thereof, or for any other reason, the Commissioners permit the grant to be made.

(2) And the Commissioners may, if they think fit, refuse to give such a certificate until the estate duty has been paid or security for the payment thereof has been given to the satisfaction of the Commissioners.

(3) Every grant of representation after the commencement of this Act shall state that the certificate required by this section has been produced and shall give its date and such other particulars as to the certificate or the estate of the deceased as may be prescribed.

(4) The foregoing provisions of this section shall not apply where a fixed duty is paid and accepted in lieu of estate duty, or where the estate appears to the court or authority granting representation to be exempt from estate duty.

(5) Particulars of any fixed duty accepted in lieu of estate duty or that the estate appears to be exempt from estate duty shall be stated in the grant of representation.

23 I am yet to understand the rationale for subsections (3) and (4) given that a copy of the estate duty affidavit and a certificate of the Secretary to the Estate Duty Commissioners are required before an application for a grant of representation is considered. I would think that if granted, it would mean the Judge was satisfied that estate duty or any duty in lieu thereof was levied as required, and so, no need for specific mention of the same in the grant itself.

24 Because what is required is a copy of the Estate Duty Affidavit, it is proper that the copy should be one certified by the Secretary to the Estate Duty Commissioners. The Secretary is the Registrar General according to section 3 (2) (c) of the Estate Duty Act. We know the Registrar General is the Registrar of many things: births, deaths, marriages, companies, business names, political parties etc. The Secretary therefore needs to be careful to use the right stamp for work under the Estate Duty Act. In the Estate Duty Affidavit in respect of the estate of Tadeo Kauswe herein, a stamp of the Registrar of Companies was used. This

is not proper and the courts will not allow it. I also notice that the Estate Duty Affidavit has no Certificate of the Secretary to the Estate Duty Commissioners with it.

*Draft Letters of Administration*

25 Finally, the last paper required is the draft of the letters of administration to be granted. This has come as a matter of practice. Where the order applied for is in some particular form, the applicant will normally file the draft order together with the application. There is no harm doing this for applications for probate or letters of administration where possible, although Rule 18 (1) of the Probate (non-Contentious) Rules requires the Registrar to prepare the grant in the appropriate form. Subrule (2) states that: -

> (2) One of the forms in Form VIII and IX in the First Schedule shall be made with such variations, limitations and exceptions as the Judge may direct.

26 It must be clear now that the required papers for consideration of a grant of letters of administration are the Oath for Administrator, Administration Bond, Proof of death, a copy of the Estate Duty Affidavit and a certificate of the Secretary to the Estate Duty Commissioners under section 33 of the Estate Duty Act and a draft of the Letters of Administration. This applies *mutatis mutandis* to an application for probate.

27 There is no particular order of arranging the papers in the written application, but they read better when ordered as presented herein.

*Copy of Applicant's National Identity Card*

28 A copy of the applicant's national identity card is now required pursuant to the decision in *Re Estate of Michael M. Panyanja*, Probate Cause No. 779 of 2018 (Lilongwe Registry) (unreported). Justice Kenyatta Nyirenda gave a good reason for the requirement as follows: -

> "Regarding fraudsters, the situation is akin to that which has beset the insurance industry with regard to personal injury claims. There have been occasions where letters of administration have been issued and pension or gratuity has been paid out to "wrong people": the actual persons entitled to inherit the intestate estate are not

aware of the application having been made in their names and end up not getting what is due to them. Perhaps, it is time all applications should be accompanied by the National Identity Cards of the applicants."

The national identity Card should, in my view, be exhibited to the Oath for Administrator or Oath for Executor, whichever is applicable, as part of the description of the applicant.

**Manner of presentation of the Oaths and Administration Bonds**

29 One observation before we get back to the issue that gave rise to the present hearing. Forms I, IA and IB of the First Schedule to Probate (Non-Contentious Rules are the oaths, and Forms II and IIA are the administration bonds. They are in prose and difficult to read and understand. Better if they were in numbered paragraphs. They are sworn statements and I would submit that Order 18 rule 7 (1) of the Courts (High Court) (Civil Procedure) Rules should apply.

(1) The body of a sworn statement shall be divided into paragraphs numbered consecutively, each paragraph being as far as possible confined to a distinct portion of the subject.

This should be allowed under Section 5 of the General Interpretation Act as long as the deviations from the form neither materially affects the substance nor is calculated to mislead.

**The issue**

30 The hearing in this matter was in accordance with Rule 5 of the Probate (Non-Contentious) Rules, which states that: -

(1) All matters relating to grants may be disposed by a single Judge sitting in Chambers:

Provided that the Judge may adjourn any matter for determination in open court and give such directions regarding the attendance of any person in court in relation to the matter as he may deem appropriate.

(2) A Judge may refuse to make an order for any grant to be issued until all inquiries which he sees fit to make have been answered to his satisfaction and may

require proof of the identity of the deceased or of the applicant beyond that contained in the oath.

31 In *In the matter of the estate of Chrispine Ng'oma,* the application initially came as an application for a limited grant in respect of damages to be claimed in a personal injury matter to be filed after the grant. I asked the legal practitioner representing the applicant why he decided to apply for a limited grant. I also asked him whether, when the law requires a claimant seeking damages for loss of expectation of life in respect of a deceased person to be a legal representative of the deceased, the letters of administration should be obtained just on the basis of the pending action and no other property of the deceased. His response was that the deceased had no other property or money at time of his death. With this response I saw no point for the applicant seeking a limited grant, as the pending action is all the deceased has, and directed Counsel to apply for a full grant.

32 The copy of the estate duty affidavit for the application indicates the value of the estate of the deceased as NIL. So is the estate duty affidavit in *In the matter of the estate of Tadeo Kauswe.* This prompted me to ask, what property the administrators will administer if the deceased left no property. The response was that the value is not known yet, as the property in question are the damages anticipated in the legal actions to be commenced. Later I noted however, that the administration bonds clearly state that they bind the applicants and their sureties to the Registrar of the High Court in the sum of money in the form of damages to be awarded by the High Court in the civil matters the applicants intend to commence. I still asked how appropriate it is to apply for letters of administration of an estate that is not existent. In asking this question I had in mind that the pending actions could probably be for the benefit of the estates of the deceased persons in view of the holding in *Mbaisa v. Ibrahim Ismail Brothers* [1971-72] ALR Mal 321, that such actions can be brought by personal representatives only. My question is then, whether the grant for personal representation can be made on the basis of the pending action only, where the deceased left no other property.

33 It appears Counsel did not fully appreciate the question. He submitted that the law requires that such claims be brought by personal representatives of the deceased. He referred this court to sections 4 and 7 of the Statute Law (Miscellaneous Provisions) Act and submitted that that is why he brought the present applications.

34 Section 4 of the Statute Law (Miscellaneous Provisions) Act provides that where death of a person is caused by a wrongful act, neglect or default, and the act, neglect or default is such as would have entitled the person injured to maintain an action and recover damages in respect thereof if death had not ensued, the person who caused the death is liable to an action for damages for the benefit of the wife, husband, parent and child of the deceased. The action may be brought by the executor or administrator of the deceased, subject to section 7.

35 Section 7 provides that the action may be brought by and in the name or names of all of the persons for whose benefit such action would have been brought, where there is no executor or administrator of the deceased or if six months lapses after death of the deceased without the executor or administrator bringing any action.

36 These two provisions essentially mean that, where the action is for the benefit of the wife, husband, parent and child of the deceased, the beneficiaries should not really worry so much to seek for any grant for probate or letters of administration, because they can maintain the action in their own right as beneficiaries.

37 Part II of the Statute Law (Miscellaneous Provisions) Act which comprises section 10 only, provides for survival of actions generally. On the death of a person, all causes of action subsisting against or vested in him survive against him or as the case may be, for the benefit of his estate. With the exception however, of causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.

38 Actions under Part II should be brought by personal representatively only. The question remains, whether the grant for personal representation can be made on the basis of the pending action only, where the deceased left no other property. In other words, should it be the pending action to prompt an application for a grant for personal representation without any other property?

39 For sure, where the deceased left other property, it is straightforward. But should the deceased who left no property but was survived by an action against or for the benefit of his estate have no chance for personal representation when the law, especially Part II of the Statute Law (Miscellaneous Provisions) Act requires that such an action should only be brought by a personal representative?

40 I have come to conclude that the solution is in section 50 (1) of the Deceased Estates (Wills, Inheritance and Protection) Act. The provision states: _

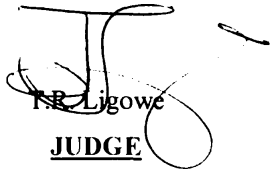
> "Subject to all such limitations and exceptions contained therein and, where the grant is made for a special purpose, for that purpose only, letters of administration shall entitle the administrator to all rights belonging to the deceased as if the letters of administration had been granted in the moment of his or her death."

41 The words "where the grant is made for a special purpose" imply that letters of administration can be made for a special purpose. One such, I think is for the purpose of defending or commencing a legal action or actions for the benefit of the estate of the deceased. Where such is the case, the oath for administrator must include a statement of the purpose for which the grant is required.

42 The oaths for administrators for the present applications do not have such a statement. I notice however that mention is made in the administration bonds that the intended administrators do bind themselves to the Registrar of the High Court in the sum of money to be awarded by the High Court in the civil matters to be commenced. This is commendable, but the purpose needed to have also been stated in the oaths.

43 I therefore direct that the oath for administrator in each application should be amended so as to include a statement of the purpose for which the grant is required. Corrections to the titles of the applications should also be made. And in *In the matter of the estate of Tadeo Kauswe,* the right stamp of the Secretary to the Estate Duty Commissioners should be used on the Estate Duty Affidavit plus, the Certificate should be filed together with it. After that, this court will grant the letters of administration.

44 Made in Chambers this 15th day of April 2021.



I.R. Ligowe
**JUDGE**