

IN THE HIGH COURT OF MALAWI
MZUZU DISTRICT REGISTRTRY
CIVIL CAUSE NO 111 OF 2014

BETWEEN

GIFT MOYO.....
.....PLAINTIFF

-AND-

CHIKUMBUTSO PAMELA UPINDI MOYO.....
DEFENDANT

CORAM: HONOURABLE JUSTICE D. MADISE

Mr. P. Ngwiwra, Counsel for Plaintiff

Mr. W. Mwafulirwa, Counsel for Defendant

Mr. Chawinga, Court Clerk

Madise J,

JUDGEMENT

1.0. Introduction

1.1. The Plaintiff in this matter commenced these proceedings by way of Originating Summons seeking several reliefs, orders and declarations against the Defendant. There is an affidavit in support of the summons which was filed by Gift Moyo suing on his own behalf and on behalf of five other minors.

1.2. The Defendant has filed an affidavit in opposition to the affidavit in support as well as the summons.

2.0. The Reliefs Sought.

a) A declaration that the Plaintiffs are entitled to a fair distribution of the property in the estate of the late Bodman Over Simon Moyo under Section 16 (5) and 17 of the Wills and Inheritance Act Cap 10:02 of the Laws of Malawi

b) A declaration that the Plaintiff has been treated unfairly in the manner in which deceased estate of the late Bodman over Simon Moyo has been so far distributed and that Plaintiff has been put under hardship as defined by Section 17 of the Wills and Inheritance Act Cap 10:02 of the Laws of Malawi.

c) A declaration that in the circumstances of the case the Plaintiffs being the only children of the late Bodman Over Simon Moyo are entitled to the house forming part of the deceased estate currently in the possession and occupation of the Defendant.

d) An order that the Defendant should account for all the property and interests that form part of the deceased estate acquired by her for her own use and benefit.

- e) An order that the Defendant should produce to the court the basis and /or authority for her claims to the property acquired by her in the estate of the deceased.
- f) An order restraining the Defendant from disposing of any property forming part of the deceased estate until fair distribution by the court.
- g) An order as to a fair distribution of the deceased estate of the late Bodman Over Simon Moyo.
- h) Any other just order of the Court.
- i) An order as to costs of this legal action

3.0 The Facts

3.1 As per the affidavit of Gift Moyo, the deponent is the first born son of the late Dovely Bodman Moyo who died intestate on 18 November 2010. The deceased left behind four children namely Gift, Nevie, Patience and Dovely Junior.

The children are from different mothers.

<u>Children</u>	<u>Mother</u>
Gift Moyo	Hawa Nkhoma
Nevie Moyo	Golie Botha
Patience Moyo	Emily Nyirongo
Dovely Moyo	Emily Nyirongo

3.2 The deceased constructed a house at Luwinga between 1996 and 2000 and invited his children to live with him until his death.

3.3 In 2004 the deceased married the Defendant and she joined the family in Luwinga. This union has no issue surviving. At his death

the deceased left behind a number of properties including motor vehicles, a farm at Chamalaza and house hold properties.

- 3.4** The vehicles were sold and the proceeds were handed over to John Tennyson & Associates for administration.
- 3.5** Gift Moyo alleged that the Defendant solely benefited from the estate to the exclusion of the children. It is further alleged that the Defendant has since occupied the house the deceased built and that she has taken over all house hold properties. That she has also taken over two vehicles and a farm at Chamalaza.
- 3.6** In conclusion Gift Moyo stated that the Defendant has married another man and they are living in house the decease built for his family.
- 3.7** In opposition the Defendant through her affidavit stated that she married the deceased in 2004 and the two were living together until his death in 2010. That the deceased had other children with different women whom he did not marry. She stated that when she moved in with the deceased and there were other children who were also living with them.
- 3.8** She however admitted that there are five beneficiaries of the estate to wit herself and the four children. She however denied that she had remarried and that she was living with the husband in the family house in Luwinda.

3.9 She further denied chasing the children from the family home. According to her the children left to live with their uncle.

3.10 As for the family business she alleged that it was the uncle and Gift Moyo who had obtained letters of administration and were managing the transport business.

3.11 After the trucks were sold the proceeds were shared among the beneficiaries. She further denying taking over the transport business and the farm at Chamalaza.

4.0 The Issues

4.1 The main issues for determination are as follows;

- 1) whether the deceased died intestate,
- 2) Whether there was fair distribution of the deceased estate according to law.

5.0 The Law

5.1 The burden and standard of proof.

In civil matters there are two principles to be followed. Who is duty bound to adduce evidence On a particular point and what is the *quantum* of evidence that must be adduced to satisfy the court on that point?

The law is that he who alleges must prove. The standard required by the civil law is on a balance of probabilities. Where at the end of the trial the probabilities are evenly balanced, then the party bearing the

burden of proof has failed to discharge his duty, whichever story is more probable that the other must carry the day.

5.2 Section 16 Deceased Estates (Wills, Inheritance and Protection) Act 2011

Property in respect of which there is intestacy.

If a person dies without having left a will valid under Section 5, there shall be an intestacy in respect of property to which he was entitled at the date of his death.

Provided that if deceased person left a will which does not dispose of all of his property there shall be an intestacy in respect of the property which is not disposed by will.

5.3 Section 17. Principles of Distribution of Intestate Property.

(1) *The persons entitled upon a fair distribution shall be the wife, issue and dependants of the intestate whose shares shall be ascertained upon the following principles-*

(a) Protection shall be provided for the dependants of the intestate from hardship so far as the property available for distribution can provide such protection.;

(b) Every wife of the intestate shall be entitled to retain the household belongings used by her during the lifetime of the intestate;

(c) If any property shall remain after paragraphs (a) and (b) have been complied with, the remaining property shall be divided between the widows and children of the intestate;

(d) As between the widows and children of the intestate, their shares shall be decided in accordance with all the special circumstances including:-

- (i) Any wishes expressed by the intestate in the presence of reliable witnesses;*
- (ii) Such assistance by way of education or property or otherwise as any of widows or children may have received from the intestate during his lifetime;*
- (iii) Any contribution made by a widow or child to the value of any business or other property forming part of the estate of the intestate; and*
- (iv) whether any daughter of the intestate is married or unmarried, but in the absence of special circumstances the widows and children shall, subject to subsection (3) be entitled to equal shares;*

5.4 It is clear from the reading of the above provision that the Cardinal principle is based upon a fair distribution. What is fair is subjective depending on the circumstances of the beneficiaries and the deceased at the time of death. The court must however ensure that there is as little hardship as possible to the dependants.

5.5 In Section 17 (i) (c) of the Act specification states that;

If any property shall remain after distribution in (a) and (b) the same shall be shared between the widows and the children.

6.0 The Finding

- 6.1** The Facts in this matter are clear. There are four children of the deceased and a widow. All these are beneficiaries of the estate. There is a house at Luwinga which is being occupied by the widow (Defendant). The Defendant has no living child with the deceased. The other children of the deceased are no longer staying in the family house.
- 6.2** Only the Defendant is enjoying that property. I am of the considered view that all the beneficiaries should share the fruits of their father/ husband's sweat. This property must be shared fairly among the beneficiaries. I therefore order that the house in Luwinga should be sold and the proceeds shared among the beneficiaries in equal shares.
- 6.3** I further order that the farm at Chamalaza should be sold and the proceeds shared among the beneficiaries in equal shares.
- 6.4** I further order that the two remaining vehicles a Truck and a Spacio should be sold and the proceeds shared among the five beneficiaries in equal shares.
- 6.5** The orders must take effect within 28 days.

I order each party to pay their own costs.

It is ordered

Made in Chambers at Mzuzu in the Republic on 30th day of October, 2017.

Dingiswayo Madise

JUDGE.