MWANANSHIKU AND OTHERS v KEMP AND MWANANSHIKU (1990 - 1992) Z.R. 42 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., SAKALA AND LAWRENCE, JJ.S.
28TH MAY AND 27TH JUNE, 1991
(S.C.Z. JUDGMENT NO. 4 OF 1991)

Flynote

Succession Inheritance (Family Provisions) Act (United Kingdom) - Application of to relatives not mentioned in Act - To add words to include such relative amounting to altering or amending Act - Assistance to relative during life not creating obligation after death.

Headnote

The appellants were relatives of the deceased, who he had maintained during his lifetime. The deceased had died leaving a will in which the appellants were excluded. The appellants contended that it was open to the Court to apply the Inheritance (Family Provisions) Act (United Kingdom), which provided for the provision of maintenance for a certain category of persons (in to which the appellants did not fall), to Zambian circumstances and to order that provision be made from the deceased's estate for the maintenance of the appellants.

Held:

(1) That the Court was dealing with a very clear statute and the construction of a very clear will. It could be argued that to add the words necessary to include the appellants would not amount to altering or amending the Act and did not amount to taking away the assets of the beneficiaries.

(2) Further, that assistance to relative during one's lifetime did not necessarily create an automatic obligation after one's death. Wills had to be respected unless there were unreasonable or inadequate provisions to those specified in the will of entitlement in law .

Case referred to:

(1) Munalo v Vengesai (1974) Z.R .91.

For the appellants: A.M. Masiye, Andrea Masiye and Co.
For the respondents: J.H. Jearay, D. H. Kemp Co.
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Judgment

SAKALA, J.S.: delivered the judgment of the Court.

This is an appeal by the eight appellants against a ruling of the High Court on a preliminary issue dismissing the appellants' whole action with costs wherein they had prayed for orders for a provision of 25% of the net estate to be made out of the estate of Fredrick Arthur Mwananshiku for their maintenance and for discovery of documents with a view to ascertaining whether the true value of the deceased's estate had been correctly stated.

The undisputed facts in so far as they were relevant to the preliminary objection

were that the late Fredrick Mwananshiku, by his will dated 17th March, 1986, made no provisions for the appellants who were brothers, sisters and aunt, then living. He died on 10th February, 1988. On 22nd March, 1989, probate of his last will was granted to Derek Harold Kemp and Beatrice Kakungu Mwananshiku. The first three appellants are the testator's sisters. The fourth is the aunt and the last four are the brothers.

By an originating summons the appellants applied under the Inheritance (Family Provision) Act of 1938 as amended by the Intestate Estate Act of 1952 for reasonable provision to be made for their maintenance out of the net estate of the testator on the ground that they were dependants and are not capable of maintaining themselves. Before the hearing of the summons a preliminary issue was raised on behalf of the respondents to the effect that under the provisions of s.1 of the Inheritance (Family Provision) Act, the appellants did not qualify to apply under that Act.

The learned trial judge, after hearing the arguments on the preliminary objection, carefully examined the relevant provisions of the Act and concluded that he could not interfere with the testator's will by enlarging the class of claimants under the Act which action would amount to a legislative Act. He upheld the preliminary objection and dismissed the whole summons with costs. The appellants appealed to this Court against that ruling.

On behalf of the appellants, Mr *Masiye* filed very detailed heads of argument based on five grounds of appeal. We have very carefully considered the spirited arguments and submissions by Mr *Masiye* based on those grounds of appeal. For the reasons which will appear later in this judgment, we do not intend to deal with all the submissions in great detail. But we wish to say that we have considered all of them and some of them were, meaning no disrespect, very attractive but not appealing. We wish also to state that the preliminary issue was well taken. The learned trial judge was therefore entitled to make a ruling on that objection after hearing arguments and submissions. If, therefore, that ruling went to the root of the main action it cannot be argued later that the parties against whom the ruling was made had been denied the right to be heard. It follows, therefore, that the powerful submission and the numerous authorities cited by Mr *Masiye* relating to denial of the right to be heard cannot in the circumstances of this case assist the appellants. This then disposes of the first ground in the written heads relating to the right of a party to be heard.

The major ground argued at great length before us by Mr *Masiye* was that the learned trial judge miscontrued the provisions of s. 12 of the High Court Act, Cap. 50 and thereby came to wrong conclusion. This ground

appears as number five in the written heads of argument. Mr *Masiye* very strongly argued that a reading of s. 12 of the High Court Act, Cap. 50 as a whole lays down the principle that all adopted Acts (in this particular appeal, the Inheritance (Family Provision) Act of 1938, of the United Kingdom) can only apply to Zambia subject to 'local circumstances'. According to counsel the question for consideration before the learned trial judge was whether the local circumstances permitted the exclusion of

the applicants from the definition of the word 'dependants' and from benefiting from the estate of the deceased? But in his interpretation, according to Mr *Masiye,* the learned trial judge did not take into consideration the 'local circumstances'. Mr *Masiye* posed the question of whether the local circumstances in Zambia of this particular case would refuse a provision for maintenance to widowed sisters, a widowed aunt and to a brother sent to London for studies by the deceased himself. Mr *Masiye* submitted that the Court must enlarge the list under the Act to effect local circumstances pointing out that under the 1938 Act beneficiaries must be provided for morally and legally and that in arriving at the limit of dependants a number of factors must be taken into account, for example, the size of the estate; whether deceased looked after the claimants; the kinship; why the applicant must be provided maintenance; and financial claims made on the deceased while alive.

It was counsel's further arguments and submissions, based on s. 12 of Cap. 50, that the spirit of that section is in local circumstances and that in interpreting wills courts act with benevolence and liberalism, and not to go by the letter of the Act but by the spirit because if courts went by the letter the applicants would not be dependants while going by the spirit they are dependants.

Another submission by Mr *Masiye* on the same ground was that if nothing was taken away from the beneficiaries then there is no alteration to the statute.

In the written heads of argument on the same ground, Mr *Masiye* urged that the Court should construe the word ''dependants'' with such verbal alterations as may be necessary in the Zambian context and that enlarging the definition of ''dependant'' to include the applicants cannot be tantamount to affecting the substance of s. 1(1) of the Inheritance (Family Provision) Act, 1938 because by doing so, one is not shutting out the beneficiaries set out in the section, but merely adding a few more persons who, in the Zambian context, would be legitimate beneficiaries particularly taking into account the evidence that shows that the deceased made substantial contribution in material and money's worth towards the reasonable needs of the applicants.

Further on the same ground Mr *Masiye* pointed out that s.13 of Cap.50 has a bearing on this case and that his complaint with the trial judge was that despite drawing his attention to this section that law and equity must be administered together and that in the case of conflict equity must prevail, he failed to refer to the section in his judgment and no finding was made and that had he done so he would have arrived at a just verdict which would have been that although the applicants did not qualify under the law, they qualified under natural justice.

In reacting to these arguments and submissions, Mr *Jearey*, on behalf of

the respondents, briefly pointed out that s. 12(1) of Cap. 50 is an exclusionary subs and not an amending one; that s.12(2) is an amending subsection providing for verbal alteration to facilitate application of English statutes; for example, where the English statute would read *London Gazette*; in Zambia it would read *Government Gazette. Mr Jearey* further pointed out that what the appellants were asking the Court is to enlarge the category of claimants qualified under the 1938 Act. He submitted that that cannot be said to be verbal alteration not affecting substance.

He further submitted that to enlarge the category of claimants is to take away assets of the beneficiaries under the will.

On s.13 Mr *Jearey* submitted that this was irrelevant to this case as it dealt with situations where there was conflict between rules of common law and equity and that common law is not statute law and that rules of equity are not to be confused with rules of natural justice. Mr *Jearey* finally submitted that the trial judge was not only entitled to strike out the action but also justified. Mr *Jearey* also filed written heads of argument which we have also taken into consideration.

The fact that the Inheritance (Family Provision) Act, 1938 applies to Zambia was not and could not have been in dispute (see British Acts Extension Cap.50). The issue in the preliminary objection therefore was whether the appellants on their own affidavit evidence fell within the class of persons entitled to claim under that Act. Section 1(1) of the Act reads:

> ''Where after the commencement of this Act a person dies domiciled in England leaving:
>
> (a) A wife or husband;
> (b) A daughter who has not been married, or who is by reason of some mental or physical disability, incapable of maintaing herself;
> (c) An infant son; or
> (d) A son who is, by reason of some mental or physical disability, incapable of maintaining himself;
>
> and leaving a Will, then if the Court on the application by or on behalf of any such a wife, husband or son as aforesaid (in this Act referred to as a ''dependent'' of the testator) is of opinion the will does not make reasonable provision for the maintenance of that dependant, the Court may order that such reasonable provision as the Court thinks fit shall, subject to such conditions or restructions, if any, as the Court may impose, be made out of the testator's net estate for the maintenance of that dependant. . . .''

If we understood Mr *Masiye's* submissions very correctly he did not dispute the fact that the applicants are not within a class of claimants mentioned or included in that section of that Act. His major contention in his extensive arguments and submissions was that the application of that Act is subjected and modified by s. 12 of the Zambian High Court Act Cap. 50 and on the merits of each individual case. According to counsel the local circumstances would permit this Court to add to s.1(1) of the English Act of 1938 all the eight applicants who are brothers, sisters and aunt. Section 12(1) and (2) of Cap. 50 read:

> ''(1) All statutes of the Parliament of the United Kingdom applied to Zambia shall be in force so far only as the limits of the local jurisdiction and local circumstances permit.
> (2) For the purpose of facilitating the application of the statutes referred to in

> ss. (1), it shall be lawful for the Court to construe the same with such verbal alterations, not affecting the stance, as may be necessary to make the same

applicable to the proceedings before the Court.''

Mr *Masiye* argued that we must enlarge the list in the 1938 Act by including the applicants in order to effect the local circumstances based on size of estate; whether deceased looked after the claimant; kinship and financial claims made on the deceased when alive. We entirely agree with the learned trial judge that to do as suggested by counsel would undoubtedly amount to amending the 1938 Act which power we do not have. We are satisfied that this is not what is envisaged in s. 12 of .Cap. 50.

We are here dealing with a very clear statute and the construction of a very clear will. It cannot, in our view, be argued or suggested that to add the words 'sisters, brother and aunt', which the applicants are, to the 1938 Act would not amount to altering or amending the Act and that it does not amount to taking away the assets of the beneficiaries. If the Zambian Legislature had wanted the class of the applicants to be included in the 1938 Act it could have done so without any difficulty. We totally agree with Mr *Jearey's* submission that s. 12(1) of Cap. 50 is exclusionary to meet the local conditions and that 12(2) only permits verbal alterations. It is significant to note that the 1938 Act itself excludes a married daughter and a son who is not incapable of maintaining himself. What more than with the brothers, sisters and aunt who are not even mentioned in the Act?

The testator's will specifically excluded the appellants. So did the 1938 Act. It may therefore be said that perhaps this is the essence of making a will: to enable the testator to exclude some of the extended family members. It would further seem to us that even in the case of a deceased dying intestate, as observed by Doyle, C.J., in the case of *Munalo v Vengesa* [1] that customary law may be excluded if the deceased in some way diverted himself, perhaps by his way of living. In our view, assistance to relatives during one's life does not necessarily create automatic obligation after one's death. Wills must be respected unless there are unreasonable or inadequate provisions to those specified in the will and entitled in law.

Turning to arguments relating to s. 13 of Cap. 50 which provides for concurrent administration of law and equity, we agree with the submission by Mr *Jearey* that the provisions of that section are irrelevant to the appeal before us as there is no conflict between rules of common law and equity. And above all the Inheritance (Family Provision) Act 1938 is not common law but statute law.

Ground three and four relating to statutes *in pari materia* and Bemba traditional practices, respectively, were very briefly argued before us. The detailed submissions appear in the written heads of argument. We have very carefully examined those grounds as well. While sounding valid, they do not apply to this appeal and therefore do not assist the appellants. We have no doubt that perhaps the appellants may have a moral entitlement to the estate, but we see no such entitlement in law let alone in the will.

For the reasons we have set out, this appeal cannot succeed.

The appeal is dismissed with costs.
Appeal dismissed.