

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 117/2014

HOLDEN AT NDOLA

SCZ/8/111/2013

(Civil Jurisdiction)

BETWEEN:

ADMINISTRATOR-GENERAL (SUING AS ADMINISTRATOR APPELLANT
OF THE ESTATE OF THE LATE SAXON MULEBA)

AND

PAULINE MULEBA PECOSS	1 ST RESPONDENT
CATHERINE MULEBA	2 ND RESPONDENT
ATTORNEY-GENERAL	3 RD RESPONDENT

CORAM: Mwanamwambwa, D.C.J, Hamaundu, Malila, J.J.S.

On 1st December, 2015 and 2nd August, 2016

For the Appellants: Mrs N. Kalimukwa, Assistant Administrator-General
For the Respondent: Mr W. Mwenya, Lukona Chambers.

JUDGMENT

Mwanamwambwa, DCJ, delivered the Judgment of the Court.

Cases referred to:

- 1. Road Contractors Company Zambia Limited V. Pacific Parts (Zambia) Limited Appeal No. 146/2011**
- 2. William David Carlise Wise V. EF Harvey Limited (1985) ZR 179 (SC)**

3. Monica Siakondo (Suing in her capacity as Administrator of the Estate of the late Edith Siakondo) V. Frederick Ndenga (2005) ZR 22 (SCZ).
4. William Harrington V. Dora Siliya and Attorney-General SCZ Judgment No. 14 of 2011

Legislation referred to:

The Intestate Succession Act, Cap 59 of the Laws of Zambia, Sections 3 and 19.

This is an appeal from the decision of the High Court declaring the 1st Respondent as the legal owner of stand 2897, Lusaka.

The brief facts of the matter are that the Appellant is the Administrator of the estate of the late Saxon Muleba. The late Saxon Muleba was an employee of the Lusaka City Council and was allocated house number 2897, Madras, Lusaka. The late Saxon Muleba died on the 20th of March, 1995. At the time of his death, the deceased occupied the house as "self paying" tenant. The 1st Respondent's husband was appointed administrator of the deceased estate. After his death, the Lusaka City Council wrote to the Administrator of the deceased's estate stating that the family of the deceased should move out of the house within three months from the 15th of June, 1995. In the same letter, the Lusaka City Council informed the family of the deceased that after the expiry of that period, the house in question would be allocated to another member of staff.

On the 28th of November, 1995, the house was allocated to another member of staff, Mr Henry Mutale. In 1996, the President of the Republic of Zambia issued a directive to sell some Government Pool and Council Houses to sitting tenants. As a result of this directive, the house in question was offered to Mr Henry Mutale and title deeds were issued in his name.

The 1st Respondent's husband and his family were unhappy with the issuance of title deeds of the house in question to Henry Mutale. Therefore, he commenced a matter under cause number 1995/HP/4983 challenging the decision of the Lusaka City Council to offer the house to Mr Henry Mutale. Mr Henry Mutale was "the Defendant" in that action. The 1st Respondent's husband obtained an injunction restraining the Lusaka City Council from evicting him and his family. As a result of the injunction, the 1st Respondent's husband continued staying in the house and paying rentals to the Lusaka City Council from his own resources. Unfortunately, the 1st Respondent's husband died before the matter under cause number 1995/HP/4983 was concluded. Therefore, his wife, the 1st Respondent, was substituted as "the Plaintiff" in that matter. After hearing the matter in cause number 1995/HP4983, the trial Judge declared that the 1st Respondent was entitled, as sitting tenant, to possession of the house in question. The Court declared that the 1st Respondent was entitled, as sitting tenant, to be offered and to purchase the said house at the price at which the said house was offered to Henry Mutale. She directed the Lusaka City Council to offer to sale the house to the 1st Respondent.

After this judgment was delivered, the 1st Respondent obtained title to the said house and thereafter, transferred the property to the 2nd Respondent, through a Deed of Gift.

The Appellant, took over as Administrator of the estate of Saxon Muleba. As Administrator of the estate, the Appellant sought to secure the interest of the only child and beneficiary of the estate. She argued that the house in question formed part of Saxon Muleba's estate as it was offered to the 1st Respondent, in her representative capacity. That the 1st Respondent should not have obtained title in her name which she later transferred to the 2nd Respondent. Therefore, the Appellant brought an action against the 1st Respondent, by Originating Summons, for the following reliefs:

- 1. A declaration that the legal owner of stand 2897, Lusaka is the administrator of the estate of the late Saxon Muleba;**
- 2. An order for the cancellation of certificate of Title issued to the 2nd Respondent;**
- 3. An order for the issuance of Certificate of Title for stand 2897, Lusaka to the Administrator-General and Official Receiver as administrator of the estate of the late Saxon Muleba;**
- 4. Costs; and**
- 5. Any other relief the court may deem fit.**

After hearing the matter, the High Court was of the view that the late Saxon Muleba died before the government decision to sell all Government Pool and Council houses to sitting tenants

was made. That at the time of his death, the late Saxon Muleba was paying economic rentals to the Council for the house. The trial Judge also stated that the 1st Respondent was in occupation of the subject house after the death of the late Saxon Muleba and took over the paying of rentals to Lusaka City Council from her own resources and not from the estate. The Court added that it was whilst the 1st Respondent and her family were in occupation as sitting tenants that the presidential directive, on the sale of council houses, was issued in November, 1996. The Court stated that the High Court, in appeal No. 1995/HP/4983, found that the 1st Respondent was the sitting tenant of the subject house. That, therefore, all that it needed to resolve was whether the subject house formed part of the estate of the deceased.

The Court found that at the time the decision to sell was made by the Council, the deceased had already passed away. That as a result, the house could not have accrued to his estate or his beneficiaries. The lower Court went on to say that nowhere in the offer letter was it indicated that the offer to the 1st Respondent, was in her capacity as Administrator.

Dissatisfied with the above Judgment, the Appellant appealed to this Court on two grounds. These are:-

Ground one

That the learned Judge erred in law and in fact when she held that stand 2897, Lusaka does not form part of the estate of the

late Saxon Muleba when there is a judgment to the effect that it forms part of the estate.

Ground two

The learned trial Judge erred in fact when she held that the 1st Respondent who brought an action as administrator of the late Saxon Muleba was entitled to be offered the house in her personal capacity and not for and on behalf of the estate of the late Saxon Muleba.

We shall deal with both grounds of appeal at the same time because they are related.

In ground one of the appeal, it was submitted, on behalf of the Appellant, that the Judgment in cause number 1995/HP/4983, held that the house in question formed part of the estate of the late Saxon Muleba. That since there is no appeal against that Judgment, this court cannot tamper with it. Mrs Kalimukwa went on to submit that the 1st Respondent was in the house in question by virtue of her being a relation to the late Saxon Muleba, who was the occupier of the house at the time of his death. It was argued that at the time the presidential directive was given to sell government pool houses and council houses in 1996, the 1st Respondent was still in the house, pending the payment of the late Saxon Muleba's terminal benefits by the Lusaka City Council. That as a result, the 1st Respondent was not a sitting tenant of the house and could not accrue a right that accrued to the estate of the late Saxon Muleba. She cited **section 3(b) of the Intestate Succession Act, Cap 59 of the**

Laws of Zambia to support her argument on accrued rights. She added that the right accrued to the 1st Respondent as administrator of the estate and not in her individual capacity.

Mrs Kalimukwa referred to Cabinet Circular No. 12 of 1996 on the implementation of the Civil Service Home Ownership Scheme in clause 2.2 (a) (ii) which reads as follows:

“2.2 Eligibility to purchase a Government Pool House

(a) Eligibility:

In the process of identifying Civil Servants who are bonafide sitting tenants, the following criteria shall be used.

- (i) A spouse or children of a Civil Servant who dies but was not paid death terminal benefits and are sitting tenants in a Government pool house shall be entitled to purchase the house they occupied as part of the package.”**

She stated that the 1st Respondent is neither a spouse nor a child of the deceased. She contended that if the intention of the 1st Respondent was to secure the interests of the only child left by the late Saxon Muleba, she would have used her personal resources as claimed and the same could have been refunded to her after collection of the terminal benefits for the late Saxon Muleba. That alternatively, she could have requested the Lusaka City Council to deduct the purchase price from the terminal benefits. She added that it should have been the priority of the 1st Respondent to secure the interests of the child, but that instead, the 1st Respondent appropriated the house to herself and donated

it as a gift to her daughter without due regard to the interests of the only child of the estate. Mrs Kalimukwa argued that the 1st Respondent failed to carry out her duties as administrator in terms of **section 19(b) of the Intestate Succession Act** which requires that an administrator distributes the estate in accordance with the rights of the persons interested in the estate.

In ground two, Mrs Kalimukwa submitted that the 1st Respondent was acting in a representative capacity and not in her own personal capacity. She stated that when the circumstances of this case are assessed in light of the definition of the word “representative”, and the judgment in cause number 1995/HP/4983, there is no doubt that the 1st Respondent was acting in her representative capacity. She added that the 1st Respondent breached her duty as administrator of the estate and deprived the only child of the estate of a decent livelihood. She urged us to set aside the judgment of the High Court.

On behalf of the Respondent, Mr Mwenya submitted, in ground one, that this matter rests on the interpretation of the judgment in cause number 1995/HP/4983. It was argued that according to the reliefs in that case, one of the claims was that the 1st Respondent was entitled, as sitting tenant, to purchase the house in question. Counsel submitted that it should be noted that pleadings define the issues before court. Counsel cited the case of **Road Contractors Company Zambia Limited V. Pacific Parts (Zambia) Limited** ⁽¹⁾ and **William David Carlise Wise V. EF Harvey Limited** ⁽²⁾ to support his argument.

Counsel submitted that the 1st Respondent, having pleaded for a declaration that she was entitled to purchase the house in question, the court below was on firm ground to grant the relief sought. Counsel submitted that the Court below in the present appeal was on firm ground when it held that the house in question did not form part of the estate of Saxon Muleba at the time of his death. Counsel cited the case of **Monica Siakondo (Suing in her capacity as Administrator of the Estate of the late Edith Siankondo) V. Frederick Ndenga** ⁽³⁾ to support his argument.

In ground two, Mr Mwenya submitted, on behalf of the Respondent, that the issue of the 1st Respondent bringing the action in her representative capacity was settled by the amendments that were made to the writ of summons which were unchallenged under cause number 1995/HP/4983. That the 1st Respondent, in the reliefs, asked for a declaration that she was entitled, as sitting tenant, to purchase the dwelling house known as subdivision No. 1 Madras, Lusaka. Counsel urged us to dismiss this appeal.

We have considered the evidence on record and looked at the authorities cited by both parties. We note, from the arguments on behalf of the Appellant, that the issue to be resolved in this matter centres on the interpretation of the Judgment in cause number 1995/HP/4983. We also note, from the Appellant's arguments, that their contention is that the lower

Court in that matter held that the 1st Respondent was supposed to be offered to purchase the house in question in her representative capacity and not in her personal capacity. As a result of the foregoing, we are inclined to consider the judgment of the court below in cause number 1995/HP/4983. In that judgment, the court stated the following:

“Having considered the evidence adduced in this matter by the witnesses who were called by the parties to testify and having critically examined the documentary evidence on record and on the preponderance of probabilities, it is my considered view that as between the family of the late Saxon Muleba and the 2nd Defendant, the Plaintiff were the appropriate sitting tenants as the time the presidential directive to sell the council houses to sitting tenants was made by the President of the Republic of Zambia....

Returning to the Plaintiff’s prayers in the amended Writ, I find that the late Mr Muleba was the proper sitting tenant at the time when the Presidential Directive to sell Council houses to sitting tenants was made and as such, his estate was/is entitled to be offered and to purchase the said house.

I therefore declare that the allocation and sell of the house No. 1 Mopani Road, Madras to the 2nd Defendant by the 1st Defendant was wrongful, and therefore null and void ab initio. The offer and sale is accordingly set aside and cancelled forthwith on ground that the 2nd Defendant was not the rightful sitting tenant who has never been in possession or occupation of the said house before or after the

Presidential Directive to sell Council houses to sitting tenants was made.

Coming to the Plaintiff's prayers as pleaded in the amended Writ, I find that the Plaintiff is indeed entitled to possession of house No. 1 Mopani Road, Madras Lusaka. I accordingly declare that the Plaintiff is entitled, as sitting tenant, to be offered and to purchase the said house No. 1 Mopani Road, Madras, Lusaka at the price at which the said house was offered to the 2nd Defendant. I accordingly direct the 1st Defendant to offer to sale to the Plaintiff the said house at the said price within 21 days from today..."

In the above matter, the 1st Respondent was the Plaintiff and she sued the Council and Mr Henry Mutale (the employee who was offered the house) as 1st and 2nd Defendants respectively. The Appellant was not party to the above matter. In our view, the above judgment has some contradiction. However, when read wholesomely, the findings of fact point to the fact that the late Saxon Muleba was not a sitting tenant and hence his estate could not be entitled to purchase the house. The trial Court found that the 1st Respondent, who was the Plaintiff in that case, was the rightful person to purchase the house as she was the sitting tenant. The evidence on record shows that at the time the presidential directive to sell the house was made, the late Saxon Muleba had already died. Further, before the late Saxon Muleba died, he was paying rentals to the council on a 'self payer' basis not as an employee of the council. When the 1st Respondent and her husband went to stay in the house in question, they continued paying rentals to the council on a 'self

payer” basis also. The above shows that the only way the estate of the late Saxon Muleba would have been entitled to buy the house was if the presidential directive was made before the deceased died. This is because he would have been entitled as a sitting tenant. Therefore, despite the contradiction, we are of the view that the court below, in cause number 1995/HP/4983, made findings of fact that deceased was not a sitting tenant. This finding supported the final holding of the court that the 1st Respondent was entitled to purchase the house in her personal capacity.

Further, there was no appeal against the judgment in cause number 1995/HP/4983. This means that the holding that the 1st Respondent (Plaintiff in that case) was entitled to purchase the house stood. It follows, therefore, that the argument by the Appellant that the house in question was offered to the 1st Respondent in her representative capacity cannot stand.

In their arguments, the Appellants submitted that according to **section 3 of the Intestate Succession Act**, the house in question formed part of the estate of Saxon Muleba. The said section defines estate as follows:

“estate” means all the assets and liabilities of a deceased, including those accruing to him by virtue of death or after his death and for the purposes of administration of the estate under Part III includes personal chattels...”

The above meaning of the word estate makes it clear that the asset or liability in question must have accrued to the deceased by virtue of death or after his or her death. In the case before us, the right to buy the house did not accrue to the late Saxon Muleba. He died before the presidential directive was made.

Further, the case of **Monica Siankondo (suing in her capacity as administratrix of the estate of the late Edith Siankondo) vs Frederick Ndenga**⁽³⁾, cited by the Respondents is very authoritative on the issue of when an asset or liability accrues. The brief facts of that matter are that the Appellant lived in house No. 1199/98, Choma, with her husband from April, 1995. The house belonged to Zambia Railways, the employers of her late husband. Her late husband died on 30th May, 1998. She testified that her deceased husband's employers offered her the house to buy. She used her husband's terminal benefits to buy the house in question. Subsequently, the Administrator of her husband's estate sued her saying that she was not entitled to buy the house. That the house had accrued to her husband before his death.

This Court held that-

"1. The facts clearly established that at the time of the death of the appellant's husband, Zambia Railway had not offered the house to the deceased and therefore could not have formed part of the deceased husband's estate.

2. The Intestate Succession Act did not apply to the house in issue because the house did not form part of the deceased husband's estate as he had not and never purchased it."


The above case is similar to the case at hand in that the decision to sell in both cases was made after the death of the deceased. We are of the view that the holding in the Monica case settles the Appellants argument on the meaning of the word "estate" in section 3 of the Intestate Succession Act.

The Appellant also submitted that according to the eligibility criteria to purchase houses by civil servants, a spouse or children of a Civil Servant who dies but was not paid death terminal benefits and are sitting tenants in a Government pool house shall be entitled to purchase the house they occupied as part of the package. However, the evidence on record shows that the family of the deceased was invited to collect the deceased's benefits on the 26th of January, 1996. This was way before the presidential directive to sell Houses which came later in November, 1996. Therefore, it is clear that the Appellant's argument on this issue cannot stand as the deceased's benefits were paid way before the presidential directive to sell government pool and Council houses.

We now come to the argument that the 1st Respondent failed to perform her duties as Administrator in accordance with the Intestate Succession Act. We have already stated above that the 1st Respondent was entitled to purchase the house in issue in her personal capacity, and hence the issues of her properly

performing her duty as administrator of the estate do not arise. Therefore, we do not find it necessary to deal with this argument. We say so on the authority of William Harrington V. Dora Siliya and Attorney-General ⁽⁴⁾, where we said that this Court can decide not to deal with an issue if deciding on the issue becomes unnecessary.

From what we have said above, we find no merit in ground one and two of the appeal and we dismiss them. Accordingly, we find no merit in this whole appeal and we dismiss it. We order that each party bears its own costs.


.....
M.S MWANAMWAMBWA
DEPUTY CHIEF JUSTICE


.....
E.M HAMAUNDU
SUPREME COURT JUDGE


.....
M. MALILA, SC
SUPREME COURT JUDGE