

IN THE SUPREME COURT FOR ZAMBIA

APPEAL NO. 12 OF 2016

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

MAKUMBA MWESHI

AND

DONALD MWESHI



APPELLANT

RESPONDENT

Coram : Mwanamwambwa DCJ, Malila and Mutuna, JJS

On 2nd October 2018 and - December 2018

For the Appellant : In Person

For the Respondent : In Person

J U D G M E N T

Mutuna JS delivered the judgment of the Court.

Statute referred to:

- 1) Intestate Succession Act, Cap 49

Case referred to;

- 1) *Wilson Masauso Zulu v Avondale Housing Project Limited* (1982) ZR 172

Introduction

- 1) The Appellant in this matter is aggrieved at the decision of the Learned High Court Judge

dismissing his application for an order of possession of plot number 19 Mukwai Road, Kitwe, a property forming part of the estate of his late father, Behonest Mweshi (the deceased).

- 2) By the action lodged in the Court below, the Appellant claimed before the Learned High Court Judge that despite being a beneficiary to the deceased's estate he had not benefitted from the distribution of the estate.
- 3) The Court rejected the Appellant's claim and found as a fact that he had benefitted from the estate because one of the properties forming part of the deceased's estate was given to him by the administrators of the estate as his share in the estate.
- 4) This appeal, therefore, questions this finding of fact by the Learned High Court Judge.

Background

- 5) The deceased was in a polygamous marriage with three wives, in which he fathered several children. Whilst in this polygamous marriage, he also had affairs with other women, one of whom was the Appellant's mother, with whom he fathered children with the net result that in his marriage and outside marriage he had a total of twenty children, the Appellant being one such child.
- 6) The deceased passed away in February 2002 following which the Respondent, one Charles Mweshi and one Mwelwa Mweshi were appointed co-administrators.
- 7) The estate of the deceased comprised various real and movable properties, which the Respondent and the other co-administrators distributed among the three widows and children of the

deceased. The Appellant contended that the Respondent and other co-administrators neglected to distribute any property to him. As of consequence of this, he commenced the action in the Court below.

The Appellant's claim in the High Court and the Respondent's defence

- 8) The action in the High Court was by way of originating summons supported by an affidavit pursuant to the ***Intestate Succession Act***, in which the Appellant claimed possession of plot number 19 Mukwai Road, Kwacha Township, Kitwe. He contended that as a beneficiary under the estate of the deceased, who had not been considered in the distribution of the estate of the deceased, he was entitled to the said property, which formed part of the estate of the deceased.

- 9) The Respondent's response to the Appellant's claim was that he and the other administrators had considered the Appellant in the distribution of the estate of the deceased by giving him house number 1177 Bulangililo Township, Kitwe in April 2008. That the Appellant had since been collecting rent from the said property which were directed towards his educational needs until September 2013 when he sold the property for the sum of K62,000.00.

Consideration by the Learned High Court Judge and decision

- 10) After considering the evidence, the Learned High Court Judge found that the distribution of the estate of the deceased had been the subject of litigation at the Kitwe High Court. As a consequence of this, the District Registrar had,

inter alia, ordered that ten of the several properties that formed part of the estate of the deceased should be administered in accordance with the **Intestate Succession Act** by either selling them or distributing them to the beneficiaries being the twenty children and other dependants.

- (1) The property numbered house number 1177 Bulangililo, Kitwe was one of the said properties which the Court found, in agreeing with the Respondent, had been given to the Appellant as his share in the estate. The Learned High Court Judge, declined to accept the Appellant's contention that he had not been considered in the distribution of the estate and accepted the Respondent's evidence that the Appellant had in fact been receiving rent from the said property

and that he was aware that it was being sold in 2013 because he informed the Respondent of the sale.

- 12) In conclusion the Learned High Court Judge found that the Appellant deliberately concealed the fact that he had benefitted from the estate of the deceased by way of house number 1177 Bulangililo Kitwe. She accordingly dismissed his claim.

Grounds of appeal to this Court and arguments by the parties

- 13) The Appellant is aggrieved with the findings by the Learned High Court Judge and has launched this appeal on three grounds as follows:

13.1 The Court erred in law and fact when it dismissed the application for possession of the vacant plot on Mukwai road Kwacha, Kitwe, which property forms part of the estate of the late Behonest Mweshi his biological father;

13.2 The Court below erred in law and fact when it dismissed his application for possession of the plot on Mukwai road Kitwe in accordance with section 5 of the Intestate Succession Act;

13.3 The Court erred by dismissing his application without having regard to the irreparable injury the decision might cause.

14) In articulating the ground of appeal the Appellant relied on the heads of arguments in which he was essentially restating the contentions he made in the High Court that he had not been considered in the distribution of the estate of the deceased. He argued further that house number 1177 Bulangililo Kitwe devolved to him from the estate of the late Samuel Sinyangwe.

15) The Appellant was essentially contending that the Learned High Court Judge made wrong findings of fact.

- 16) In his arguments in response, the Respondent took the position that the Learned High Court Judge's findings were on firm ground in view of the evidence led.

Consideration by this Court and decision

- 17) Having considered the record of appeal and the arguments by the parties, the issue that falls for determination is: did the Learned High Court Judge misdirect herself when she found that the Appellant benefitted from the distribution of the estate of the deceased by way of the Bulangililo property which she found devolved to him? It is also important for us to restate that trial Courts are the masters of evidence and as such, findings of fact will only be reversed by an appellate Court if they attain the threshold we restated in the case of ***Wilson Masauso Zulu v Avondale Housing***

Project Limited¹. The threshold is that the finding must be such that it is not supported by the evidence or it is perverse.


- 18) A review of the evidence on record, in particular the Appellant's evidence, reveals that he confirmed that he had been receiving rental for the Bulangililo property and that later he arranged to sell the property with his aunt. Prior to selling it he informed the administrators, one of whom told him that he was at liberty to sell the property.
- 19) The evidence revealed further that the Appellant, in conjunction with his aunt, sold the property to one Collins Kabaghe for the sum of K63,500.00. However, it would appear that the aunt received all the proceeds of sale and failed to account to the Appellant as she disappeared. This is what

has disgruntled the Appellant and prompted him to seek another property from the Respondent.

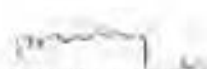
- 20) We cannot at all fault the Learned High Court Judge's findings in view of the foregoing evidence.

Conclusion


- 21) As a consequence of what we have said in the preceding paragraphs we find no merit whatsoever in the appeal and we dismiss it with costs, in both this and the Court below. These costs are to comprise the disbursements incurred by the Respondent in defending the action because he was not represented by counsel and they are to be taxed in default of agreement.



M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE



M. MALILA
SUPREME COURT JUDGE



N.K. (MUTUNA)
SUPREME COURT JUDGE