IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)

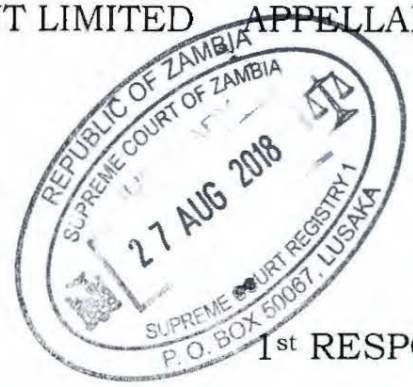
APPEAL NO. 211/2015
SCZ/8/218/2015

BETWEEN:

BASE PROPERTY DEVELOPMENT LIMITED APPELLANT

AND

NEGGIE NACHILIMA CHILESHE
(As Administratrix of the Estate of the
Late Michael Dereck Chileshe) 1st RESPONDENT



MICHAEL CHISHA CHILESHE
(As Administrator of the Estate of the
Late Michael Dereck Chileshe) 2nd RESPONDENT

MUBANGA CHILESHE 3RD RESPONDENT

Coram: Mwanamwambwa, DCJ, Kaoma and Kajimanga, JJS

On 7th August, 2018 and 27th August, 2018

For the Appellant : Mr. A. Chileshe - Mambwe Siwila and Lisimba Advocates

For the Respondents: N/A

JUDGMENT

Kaoma, JS delivered the Judgment of the Court.

Cases referred to:

1. **Charity Oparaocha v Winfridah Murambiwa (2004) Z.R. 141**
2. **James Mbewe and Potati Malunga v James Mwanza (2012) 2 Z.R. 87**
3. **Zulu v Avondale Housing Project Limited (1982) Z.R. 172**
4. **INDO Zambia Bank Limited v Mushaukwa Muhanga (2009) Z.R. 266**

5. **Base Chemicals Zambia Limited and another v ZAF and another -S.C.Z. Judgment No. 9 of 2011**
6. **Mwenya and Randee v Kapinga (1998) Z.R. 23**
7. **Mirriam Mbolela v Adam Bota – Selected Judgment No. 26 of 2017**
8. **Investrust Bank Plc v Hearmes Mining & Trading Limited and others – Appeal No. 137 of 2015**

Legislation referred to:

1. **Intestate Succession Act, Cap 59, sections 5, 9, 19 and 43(2)**
2. **Lands and Deeds Registry Act, Cap 185, sections 33 and 34**

Other works referred to:

1. **Webster's Dictionary**
2. **Black's Law Dictionary, 10th edition, Bryan A. Garner, Editor in Chief, Thomson Reuters pages 1008 and 1430**

This appeal is against a judgment of the High Court by which the court allowed the 1st and 2nd respondents' claims against the 3rd respondent and the appellant.

The undisputed facts are that the 1st respondent is the widow and administrarix of the estate of the late Michael Dereck Chileshe who died intestate on 10th January, 1997. He left behind some property, including Farm No. 2303/P, Twin Palm Road, Ibex Hill, in Lusaka which is the subject of this appeal. The 2nd and 3rd respondents are sons of the deceased. The 2nd respondent is a co-administrator of the estate of the deceased. The 3rd respondent was the administrator of the estate from 16th July, 1997 when he was appointed by the Local Court up to 29th March, 2012 when his

appointment was revoked, due to mismanagement of the estate.

Thereafter, on 2nd May, 2012 the 1st and 2nd respondents obtained Letters of Administration out of the Probate Registry of the High Court. The respondents and five other children of the deceased were also beneficiaries of the estate under **section 5** of the **Intestate Succession Act, Cap 59** of the **Laws of Zambia**.

On 12th January, 2012 the 3rd respondent purported to sell to the appellant, in his capacity as administrator, a portion of the farm measuring 2.5 acres. The farm has a total of 20 acres. The 1st and 2nd respondents claimed that the sale was done without their knowledge or consent. When their effort to reverse the sale failed, they commenced an action by writ of summons against the 3rd respondent and the appellant seeking, among other reliefs:

i) **A declaration that the 3rd respondent's appointment as Administrator of the estate of the late Michael Dereck Chileshe was null and void on account of illegality and that the same was obtained without the consent or authority of the beneficiaries of the said estate as a result of which the 3rd respondent had no authority or power to sell Farm No. 2303/P or any part or subdivision thereof as well as any part of the estate of the late Michael Dereck Chileshe;**

ii) **A declaratory order to annul the sale of the property known as Farm No. 2303/P or any part or subdivision thereof by the 3rd respondent to the appellant as the same was illegal and unlawful.**

iii) **An order for the appellant to return the Certificate of Title relating to Farm No. 2303/P to the 1st and 2nd respondents;**

iv) **An order that the 3rd respondent be liable to refund the appellant any or all monies received by the 3rd respondent from the**

appellant under the purported agreement for the sale of Farm No. 2303/P or any part or subdivision thereof;

v) **The return to the 1st and 2nd respondents of vacant possession of Farm No. 2303/P or any part or subdivision thereof taken and/or occupied by the appellant; and**

vi) **An order of interim mandatory injunction to restrain the appellant by its servants, agents, workers or otherwise from continuing with any construction works or any other works at all on Farm No. 2303/P or any part or subdivision thereof pending determination of the action at trial.**

The 3rd respondent accepted having sold a portion of the farm to the appellant but alleged that he acted legally as administrator in distributing the estate in equal shares to the beneficiaries; that the portion of land he sold was vacant land, which was equivalent to his share as a beneficiary and did not constitute the dwelling house which was left for the 1st respondent; and that he did not need the consent of the other beneficiaries to sell his portion.

On its part, the appellant averred that it knew the 3rd respondent as both a beneficiary and administrator of the deceased's estate and that it was a *bona fide* purchaser for value without notice, having signed a contract in respect of the land and been availed with consent to assign and property transfer receipt and clearance. It also counterclaimed, inter alia, for:

i) **A declaration that it is the lawful owner of the property known as Subdivision E of Lot No. 2343/M, Lusaka; and**

ii) **An order that it be paid damages to be assessed for all the losses arising from the failure to complete the works on time.**

The 1st respondent's evidence, as is relevant to this appeal, was that she only became aware of the sale when she saw surveyors demarcating the farm and placing beacons and burning the land. When she spoke to Alfred Chewe (DW1), he told her that he had bought the piece of land and that though he had seen her house, there was no need for him to go there because the 3rd respondent had the right to sell as administrator of the estate. She told DW1 that she was not selling but he insisted that he had the right to buy and would go ahead and build. She even offered to refund him the money but he refused. They took him to the police but they were told that the 3rd respondent had the right to sell as administrator.

It was also her testimony that on 28th March, 2012 she wrote to the Commissioner of Lands asking him to place a caveat on the property but to her grief, a month later, a title deed was issued to the appellant. According to her, each beneficiary's share of the farm could only be determined after the family had agreed and when she had gotten her share. She refused in cross-examination that the 3rd respondent told her that he was getting his share when he sold the

land or that he was entitled to sell part of the farm as administrator.

The 2nd respondent's evidence was that after their father's death, they agreed that the 1st respondent would live on the farm for the rest of her life. When they heard that the 3rd respondent wanted to sell part of the farm, they expressed reservation and tried to reconcile with him but he refused. On 11th January, 2012 they held a meeting where they decided to remove him from being administrator. Later, he went out of the country and upon his return, he learnt that the subdividing was going on. Two days later they were informed that the farm was being slashed.

According to the 3rd respondent, wrangles started after 2009 due to suspicion and petty jealousy amongst the siblings. A meeting was called to resolve the disputes but because of the violence associated with the family meetings, he decided to step down and get his entitlement from the estate. The 1st respondent did not object but the 2nd respondent did. At the end of 2011 he told his family that he was ready to step down. He went to the Local Court and was directed on how to distribute the estate. He got 2.5 acres and left the house for his mother. He told the other beneficiaries

that each was entitled to the same size of land. He sold his portion to the appellant to prevent encroachment. He told the 1st respondent that surveyors were going to place beacons. The 2nd respondent was not happy that he sold the front part of the farm.

He admitted in cross-examination that the farm was the matrimonial home; and that the value of the estate exceeded K16,000,000. However, he said it was not necessary to obtain a proper appointment from the High Court and that he was not informed on appointment that the value of the estate determined the court where he could get the appointment as administrator.

It was also his evidence that he was aware of the provisions of the **Intestate Succession Act, Cap 59 of the Laws of Zambia** on the distribution of the estate. He said it took him long to distribute the estate because it was not necessary to do so soon after his father died and that his role as administrator ended when he got the 2.5 acres. He considered what he got as part of the excess land and it was not necessary for him to obtain a court order before getting his entitlement.

On his part, DW1 testified that the 3rd respondent approached him over the sale of the property in December, 2011. He was

interested and they went to the farm. He saw the area which was prime and strategic. Back at his office he called his lawyer and gave him instructions to proceed with the conveyance. The lawyer also went there. Thereafter, he relied on his lawyer's advice. They signed the contract in January, 2012. They were innocent purchasers for value as at the time of signing and making payment it did not come to their attention that there were misunderstandings in the family.

He testified, in cross-examination, that the 1st respondent only made contact when they moved on site and that it was up to the lawyer to ascertain the authority of the person who claimed to be the administrator. He confirmed having parked his vehicle at the house at the farm and that the 3rd respondent told him that he shared the property between his mother and his siblings but he was not suspicious. He said he did not meet the 1st respondent and the 3rd respondent did not bring her situation to his attention; he was basking in authority. Neither did the lawyers alert him that the land register did not indicate the 3rd respondent's appointment or that there was need for a court order permitting the sale of the land.

The court below considered the evidence and the submissions by the parties. It found as a fact that the respondents were

beneficiaries of the estate of the deceased; that the farm was the matrimonial home and part of the estate; and that the 3rd respondent was appointed as administrator of the estate in 1997.

The court then identified two issues for decision: firstly whether the appointment of the 3rd respondent as administrator of the estate was lawful; and secondly, whether the 3rd respondent had the authority to sell a portion of the farm to the appellant.

Concerning the first issue, the court found that the 3rd respondent was validly appointed as administrator by the Local Court, in the presence of the 1st respondent who did not object; that he carried out his functions as administrator for a period of over ten years without any serious effort by any of the beneficiaries to remove him; and that he had the power to deal with or dispose of any of the estate's property, if such disposal complied with the law.

We hasten to say that whilst we agree with the court below that the appointment of the 3rd respondent as administrator could not be invalidated on the ground that the 1st respondent and other family members did not consent to his appointment, the case of **Charity Oparaocha v Winfridah Murambiwa**[1] shows that the

question of appointment of an as administrator goes to the jurisdiction of the court.

In the above case, we had to ascertain the jurisdiction of the Local Court which appointed the appellant to be the administrator. We said **section 43(2)** of the **Intestate Succession Act** limits the jurisdiction of Local Courts in matters of succession to estates whose value do not exceed K50,000. That the deceased's estate had property within and outside Zambia, whose value went beyond the jurisdiction of the Local Court and we agreed that probate should have been obtained from the High Court. We refused to fault the trial Judge for having found that the appointment of the appellant by the Local Court as administrator of the estate of the deceased was null and void. We concluded that the consequence of such a finding was cancellation of the order of appointment *post facto*.

In this case, the value of the estate exceeded K16,000,000 but the 3rd respondent did not consider it necessary to obtain a proper appointment from the High Court. Following the **Charity Oparaocha**[1] case, the Local Court had no jurisdiction to issue letters of administration to the 3rd respondent even if he claimed

that he was not informed on appointment that the value of the estate determined the court where he could get the appointment.

Therefore, the appointment of the 3rd respondent as administrator was null and void, meaning that the 3rd respondent had no authority to deal with the estate of the deceased and any sale of a portion of the farm to the appellant was invalid. For this reason alone, this appeal would fail. However, we have decided to consider the merit of the appeal because of the confusion still surrounding administration of estates under the **Intestate Succession Act.**

We come now to the second question raised by the court below, of whether the 3rd respondent had authority to sell a portion of the farm. In deciding the issue, the court considered whether the appellant was a bona fide purchaser for value without notice and applied the case of **James Mbewe and another v James Mwanza**[2] where the High Court discussed the essential elements of the doctrine of *bona fide* purchaser of a legal estate for value without notice, namely there must be evidence that the agents acted in good faith; were purchasers for value; purchased the legal estate; and had no notice of any encumbrances.

The court did not hesitate to find that the appellant was a purchaser for value since the 3rd respondent was paid for the portion of the farm he sold. The court also found that they acted in good faith as there was no evidence that they were aware of any difficulties on the property until they had paid and were attempting to start developing it.

On whether the appellant purchased the legal estate, the court quoted **section 9** of the **Intestate Succession Act** which states that, where the estate includes a house the surviving spouse or child or both, shall be entitled to that house: provided that- where there is more than one surviving spouse or child or both they shall hold the house as tenants in common; and the surviving spouse shall have a life interest in the house which shall determine upon the spouse's remarriage.

The court then observed that the matrimonial house sits on the farm and that the 1st respondent has a life interest in the house. The court believed the 1st respondent's evidence that she was not aware of the transaction and only became aware when she met DW1 and found that she did not authorise the 3rd respondent to carve out any portion of the farm. The court also found that the

"matrimonial house" in **section 9** is not limited to the actual house but also extends to the land on which the house sits.

The court also found that the land the 3rd respondent sold to the appellant was not 'excess land' but was part of the matrimonial house; that, as administrator, he had no power to dispose of the land or deal with it in a manner that was inconsistent with the 1st respondent's subsisting life interest without her consent; and that the 3rd respondent did not transfer a legal estate to the appellant.

On notice, the court found that the appellant had constructive notice of the beneficiaries' interest in the subdivision as there was no evidence that any effort was made to ascertain whether the 3rd respondent was selling with the authority of all the beneficiaries, especially the 1st respondent, who had a life interest in the farm.

The court also referred to DW1's testimony that he parked his car near the matrimonial house but did not go there as he believed that the 3rd respondent had the authority of beneficiaries to sell; and that he handed over the matter to his lawyers and only paid when they gave him the go ahead. The court observed that there was no evidence that the lawyers or the estate agents who handled the transaction, made any inquiries with the beneficiaries on the 3rd

respondent's authority to sell and found that the appellant was not a bona fide purchaser for value without notice.

As to the argument that the 3rd respondent did not need a court order to dispose of a portion of the farm, the court cited **section 19** of the **Intestate Succession Act**, subsection (2) of which provides that:

> **(2) Where an administrator considers that a sale of any of the property forming part of the estate of a deceased person is necessary or desirable in order to carry out his duties, the administrator may, with the authority of the Court, sell the property in such manner as appears to him likely to secure receipt of the best price available for the property.**

The court found that contrary to the 3rd respondent's claim that he made consultations and acted in accordance with the Act when he decided to distribute the estate and get his share of the farm, he did not distribute the estate when he carved out a portion of it and sold it to the appellant.

The court opined that had that been the case, the 3rd respondent could have applied to have the whole farm subdivided into parcels of land equal to the number of beneficiaries and that getting a portion for himself and leaving the remainder of the farm intact, cannot amount to distribution of the estate. The court

concluded that he did not distribute but only sold a portion of the estate and that he should have obtained the court's authority before selling. However, the court found that he had no right to sell the subdivision as it formed part of the matrimonial house and could not be sold without the consent of the 1st respondent.

Consequently, the court ordered that the appellant returns the certificate of title relating to the farm to the 1st and 2nd respondents; and that it yields vacant possession of the part of the farm now known as subdivision E of Lot No. 2343/M, Lusaka.

Further, the court invoked **section 34(1)(c)** of the **Lands and Deeds Registry Act, Cap 185** and ordered the cancellation of the certificate of title for the subdivision, as it was acquired after a fraudulent subdivision and sale by the 3rd respondent. The court also found that the appellant was not entitled to the reliefs it was seeking in its counter-claim but found the 3rd respondent liable to refund the appellant all monies he received. Finally, the court awarded the costs of the action to the 1st and 2nd respondents.

Aggrieved by the decision, the appellant filed this appeal advancing seven grounds framed as follows:

1. **The learned trial Judge erred in law and fact when, having correctly**

found on page J27 of the Judgment that the appellant was a purchaser for value and acted in good faith as they were not aware of any difficulties on the property until after they had paid and were attempting to start developing it, he contradicted himself on page J29 by holding that the appellant was not a purchaser for value without notice.

2. **That having correctly found on page J27 that the appellant was a purchaser for value without any notice of any difficulties on the property, the learned trial Judge erred in law when he held that the Administrator did not convey a legal estate; as the principle of bona fide purchaser for value without notice is an equitable remedy which has the effect of overriding strictly legal positions.**
3. **The learned trial Judge erred in law in finding that a matrimonial "house" under the Intestate Succession Act included the whole 20 acres when there was evidence that the 20 acres were subdivided by removing and selling only 2.5 acres comprising bare land leaving out the portion where the house sat.**
4. **The learned trial Judge erred in law by holding that the Administrator needed a Court order to sell his entitlement under the estate in the peculiar circumstances of this case where the Administrator is also the beneficiary.**
5. **The learned trial Judge erred in law and fact when he found on page J33 that the property sold to the appellant was acquired after a fraudulent subdivision and sale when no fraud was alleged and no evidence was proffered to that effect.**
6. **The learned trial Judge erred in law when he invoked the Lands and Deeds Registry Act and ordered cancellation of the Certificate of Title relating to the purchased property when no fraud or mistake was alleged or proved.**
7. **The learned trial Judge erred in failing to award costs to the appellants and failing to specify who was to bear the costs found for the 1st and 2nd respondents.**

In support of ground 1, counsel for the appellant submitted that the finding that the appellant was a purchaser for value without notice is supported by evidence and the reasons recited by the Judge when he found, first that the 3rd respondent was paid for the portion of the farm; and secondly, that they acted in good faith

as there was no evidence that they were aware of any difficulties on the property until after they had paid and were attempting to start developing it. Counsel cited the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[3] and urged us to reverse the finding that the appellant was not a purchaser for value without notice as it was not supported by evidence and was contradictory.

The gist of the argument in ground 2, is that the 3rd respondent was appointed as administrator of the estate of the deceased; he acted as administrator for over ten years; and as administrator and beneficiary, he sold a portion of the farm to the appellant. Based on the above, we were urged to exercise our equitable jurisdiction and consider the appellant as a bona fide purchaser for value without notice.

In support of ground 3, it was argued that the 3rd respondent sold only 2.5 acres of the farm which comprised bare land; that the portion where the house sits was not affected and is still in the 1st respondent's possession; and that **section 9** of the **Intestate Succession Act** only mentions 'a house' and not 'a matrimonial house' or 'matrimonial home' so, the use of the words 'matrimonial house' by the Judge is not within the scope of the Act.

It was argued, on the basis of the case of **INDO Zambia Bank Limited v Mushaukwa Muhanga**[4], that the word 'house' must be accorded the most common or ordinary meaning which does not encompass the land where the house is not sitting. Reference was also made to **Webster's Dictionary** (citation not provided) where, counsel argued, that 'house' is defined as:

> **"A structure intended or used as a habitation or shelter for animals of any kind; but especially, a building or edifice for the habitation of man; a dwelling place, a mansion."**

In ground 4, counsel agreed that in terms of **section 19(2)** of the **Intestate Succession Act**, it is a requirement for administrators under the Act to seek the authority of the court before selling any property forming part of an estate. However, he submitted that this provision is not applicable where the administrator is also selling as a beneficiary considering the difficulties he had with his brothers which prompted him to carve out and sell his share; and that there is no procedure to be followed by a beneficiary who sells his interest in an estate.

The core of the arguments in grounds 5 and 6, which counsel for the appellant decided to combine in his oral submissions, was that since no fraud or mistake was alleged or proved, the Judge

should not have invoked **section 34** of the **Lands and Deeds Registry Act** which allows cancellation of a certificate of title only in cases of fraud. The case of **Base Chemicals Zambia Limited and another v Zambia Air Force and another**[5] was quoted where we held that fraud must be specifically alleged and that its proof is greater than on a simple balance of probabilities.

Counsel also quoted **section 33** of the same Act and argued that a certificate of title is a protected document which may only be interfered with in case of acquisition by fraud or due to prior interest; and that the finding of fraud was perverse and made in the absence of any evidence and must be reversed.

Counsel insisted that even assuming the 3rd respondent did not pass the legal estate to the appellant because of **section 19(2)** of the **Intestate Succession Act**; **section 34(2)** ousts that law as long as the certificate of title was issued.

In ground 7, it was argued that even if the award of costs is in the discretion of the court, and if indeed, the 3rd respondent had no legal estate to pass to the appellant, thereby disqualifying it from being a bona fide purchaser for value without notice, the 1st and 2nd

respondents should not be awarded costs as they had condoned the 3rd respondent to act for so long without stopping him.

It was argued that at worst each party should have borne their own costs or the appellant should have been awarded the costs to be borne by the 3rd respondent who would have been responsible for all the problems brought about by the sale or having awarded costs to the 1st and 2nd respondents, the Judge ought to have attributed the costs to the 3rd respondent, particularly after finding that the appellant was a purchaser for value without notice. We were urged to allow the appeal.

We have considered the record of appeal and the written and oral arguments by counsel for the appellant. We have not received heads of argument from the respondents who also did not attend the hearing of the appeal despite that they were served with the cause list through their respective advocates.

Grounds 1 and 2 are intertwined and attack the finding by the court below that the appellant was not a bona fide purchaser for value without notice. Thus, we shall deal with them altogether.

The main grievance by the appellant is that while the court below rightly found that they acted in good faith as there was no

evidence that they were aware of any difficulties on the property until they had paid and were attempting to start developing it, it contradicted itself when it held that the appellant had constructive notice of the beneficiaries' interest in the subdivision because there was no evidence that any effort was made to ascertain whether the 3rd respondent was selling with the authority of all the beneficiaries, especially the 1st respondent, who had a life interest in the farm.

Although there seems to be a contradiction in the above findings by the trial court, the court arrived at the correct conclusion when it held that the appellant had constructive notice of the interests of the other beneficiaries and therefore, it was not a bona fide purchaser for value without notice. **Black's Law Dictionary, 10th edition** defines bona fide purchaser for value at page 1430 as follows:

> **"Someone who buys something without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith, paid valuable consideration for property without notice of prior adverse claims."**

It is clear from this definition that 'bona fide purchaser for value' means a good-faith or innocent purchaser who buys for value without notice of any other party's claim or equitable interest

against the property. Therefore, for the purchaser to take the legal estate free from the equitable interest, they must not have notice or knowledge of the interest.

Where a purchaser is aware or should have been aware of the equitable interest, this affects their conscience and they are then bound by the interest. In the case of **Mwenya and another v Kapinga**[6], we held that where a purchaser had notice of any other party's interest in the property, that party cannot be a bona fide purchaser for value without notice.

In this case, the court properly held that the appellant had constructive notice of the interests of the other beneficiaries. The appellant was aware that the 3rd respondent was both a beneficiary and administrator and that he was selling the land as administrator. The evidence of DW1, which the court accepted, also shows that DW1 went to see the land (before the contract of sale was even drawn up). He parked his vehicle at the house on the farm and the 3rd respondent told him that he shared the property between his mother and his siblings.

Furthermore, the undisputed evidence of the 1st respondent was that she spoke to DW1, who told her that though he had seen

her house, there was no need for him to go there because the 3rd respondent had the right to sell as administrator of the estate. He insisted that he had the right to buy and would go ahead and build even when she told him that she was not selling.

The above evidence clearly shows that DW1 was aware of prior interests. Instead of being put on inquiry, he chose not to be suspicious. He did not ask the occupants of the farm if they had any interest before he instructed his lawyers to proceed with the conveyance and no inquiries were made by his lawyers or estate agents regarding the interests of other beneficiaries or the authority of the 3rd respondent to carve off or sell a portion of the land.

In these circumstances, the appellant could not successfully claim to be a bona fide purchaser for value without notice or that it acquired a legal estate in the land. As counsel acknowledged, if the 3rd respondent had no legal estate to pass to the appellant, it is disqualified from being a bona fide purchaser for value without notice. Therefore, grounds 1 and 2 must fail for lack of merit.

We turn now to ground 3 where the appellant attacks the finding by the court below that the matrimonial house included the whole 20 acres. Firstly, the appellant's argument that the words 'a

matrimonial house' are not within the scope of **section 9** of the **Intestate Succession Act** is petty. Although the section uses the word 'house', it is agreed that the farm was the matrimonial home.

Secondly, the argument that the common interpretation of 'house' does not cover the 20 acres of land where the house sits is flawed. A 'house' is a dwelling or residence but **section 9** does not limit it to the actual quarters. It is part of the land on which it sits.

Black's Law Dictionary (above) defines land at page 1008 as an immovable and indestructible three dimensional area consisting of a portion of the earth's surface, the space above and below the surface and everything growing on or permanently affixed to it. Therefore, the land which formed part of the matrimonial home cannot be separated from the house or termed as 'excess land' as the appellant thinks. Ground 3 must equally fail.

In ground 4, the appellant assails the court below for holding that the 3rd respondent needed a court order to sell his entitlement. It is settled that it is a requirement under **section 19(2)** of the **Intestate Succession Act** for administrators to seek the authority of the court before selling any property forming part of an estate. The oral argument in court, by the appellant's counsel, that this

provision is not mandatory is indefensible, particularly that the 3rd respondent sold the land as an administrator.

In the case of **Mirriam Mbolela v Adam Bota**[7] we held that **section 19(2)** proscribes the sale of property (including real property) forming part of the estate of a deceased person without prior authority of the court and that this statutory provision was intended to prevent administrators of estates of deceased persons from abusing their fiduciary responsibilities by selling property forming part of such estates, without due regard to the interest of the beneficiaries; and that prior authority of the court is a *sine qua non* of a valid sale of such property.

We reiterated this in the case of **Investrust Bank Plc v Hearmes Mining & Trading Limited and others**[8], where we also stated that the appellant, in conducting due diligence, should have been alive to the limits placed upon the powers of an administrator of an estate in Zambia and should not have proceeded on its erroneous understanding that the 2nd respondent, as administrator had absolute power to deal with the properties as she deemed fit.

In this case, the court found that the 3rd respondent did not distribute the estate but only carved out and sold a portion without

the 1st respondent's knowledge or authority; and that he should have obtained leave of court before selling as required by section 19. However, this was not the reason for deciding as the court did.

The *ratio decidendi* was that the 3rd respondent, as administrator of the deceased's estate, had no power or right to dispose of or sell any portion of land that formed part of the estate or to deal with the land in a manner that was inconsistent with the rights of the beneficiaries as it formed part of the matrimonial house and could not be sold, particularly without the consent of the 1st respondent, who had a subsisting life interest in the house. We have no basis for disturbing this conclusion by the court. Hence, ground 4 must also fail.

In grounds 5 and 6, the appellant faults the trial court for finding that the portion sold to the appellant was acquired after a fraudulent subdivision and sale when no fraud or mistake was alleged and no evidence presented to that effect. The court is also faulted for invoking **section 34** of the **Lands and Deeds Registry Act** and ordering cancellation of the certificate of title in respect of the portion renumbered as subdivision E of Lot No. 2343/M.

We agree that fraud or mistake was not specifically pleaded. However, we are satisfied that the court below found that there were compelling factors showing, that there was deceitfulness in the manner the land was subdivided and sold to the appellant; that the appellant was not a bona fide purchaser for value without notice as it had constructive notice of prior interests in the land; and that the 3rd respondent had no authority to sell any portion of the estate as it formed part of the matrimonial house.

Intriguingly, the appellant's certificate of title at page 139 of the record of appeal was issued on 17th February, 2012 for 2.0235 hectares of land when the evidence was that only 1 hectare equivalent to 2.5 acres was sold to the appellant. The record also shows at pages 125 to 126 that the certificate of title was issued before Barclays Bank withdrew the caveat it entered against the property on 15th April, 1994. The caveat was only withdrawn on 2nd May, 2012. The question is how was the certificate of title issued?

Further, the lands register printout at page 123 of the record, shows at entry 1, registration on 4th May, 2012 of an assignment relating to a subdivision for 1 hectare of land. This was the same date of registration of the certificate of title. Amazingly, the printout

at page 128 indicates at entry 18 that an assignment was registered on the same date in favour of the appellant for 8.0937 hectares.

Furthermore, entry 19 indicates that a second certificate of title in the deceased's name was registered on the same date for 7.0937 hectares of land but there was no evidence of what happened to the original certificate of title dated 9th February, 1982.

On the entirety of the evidence on record, we are satisfied that the court below was on firm ground when it invoked **section 34** of the **Lands and Deeds Registry Act** and ordered cancellation of the certificate of title as there was clear evidence that it was obtained deceitfully and in disregard of prior equitable interests. Grounds 5 and 6 must also fail for lack of merit.

The original certificate of title issued to the deceased remains intact and must be surrendered to the 1st and 2nd respondents as directed by the court below. That means the second certificate of title in the deceased's name must equally be cancelled. The appellant must pursue the 3rd respondent for its money.

Lastly, regarding ground 7, the award of costs is always in the discretion of the court and in our view the court below exercised its discretion judiciously when it awarded costs to the 1st and 2nd

respondents who were the successful parties. The order for costs applies to both the appellant and the 3rd respondent in equal share. The appellant cannot escape blame for buying property in haste, ignoring prior equitable interests. Ground 7 too must fail.

In all, the appeal is dismissed. The appellant shall bear its own costs.

M. S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

R. M. C. KAOMA
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE