

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

APPEAL NO 179/2018

BETWEEN:

**ALIKANILE PHIRI
TIMOTHY PHIRI**

**1ST APPELLANT
2ND APPELLANT**

AND

LEONARD SINKALA PHIRI

SEENGE SEENGE M

PRICILLA E. PHIRI



1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

CORAM: KONDOLO, MULONGOTI AND SIAVWAPA, JJA

On 25th September and 19th November 2019

FOR THE APPELLANTS: IN PERSON

FOR THE RESPONDENTS: IN PERSON

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

1.0. INTRODUCTION

1.1. This is an appeal from the Judgment of the High Court presided over by the Hon. Mr. Justice M. Chitabo, SC. This was a subsequent appeal from the Judgment of the Subordinate Court and leave to appeal was granted in the Judgment of the Court below.

2. BACKGROUND

- 2.1. The Appellants are mother and son while the Respondents are grandchildren of the 1st Appellant born of her daughter who is now deceased by the name of Alice Phiri.
- 2.2. The dispute involves a house which was offered to the 2nd Appellant for purchase by the Lusaka City Council.
- 2.3. The Respondents claim the house as beneficiaries of their mother's estate who they claim was the owner of the said house.
- 2.4. On the other hand the Appellants' claim is that the disputed house was bought for the 1st Appellant by her children and as such the Respondents had no claim on it.

3. FIRST APPEAL

- 3.1. First in the Subordinate Court, the Magistrate found that the Appellants had no Certificate of Title and that the 1st Appellant was a dependent of Alice Phiri and could only benefit from the estate pursuant to Section 3 of the Intestate Succession Act.
- 3.2. An order of possession was made in favour of the Respondents. The Appellants, dissatisfied with the judgment, lodged an appeal in the High Court.

4.0. **SECOND APPEAL**

4.1. Three grounds of appeal were advanced namely;

1. *That the trial Magistrate erred in law and fact by ordering that the Appellants vacate the premises in question considering the fact that the Local Court has no jurisdiction to hear a matter of this magnitude considering the property in question.*
2. *That the trial Magistrate misdirected herself when she failed to take into account the circumstances under which the Appellant came into possession of the house in question.*
3. *That the trial Magistrate misdirected herself when she failed to take into account the fact that the house in question was purchased by the three siblings for their mother Alikanile Phiri who is the 1st Appellant herein and that there is overwhelming evidence to prove that fact.*

4.2. An additional ground was filed on 10th November 2017 which is as follows;

“The lower Court erred in both law and fact when it failed to give a fair evaluation of the evidence before it and failed to find that the 1st Appellant had an equitable interest in the property being house No.9 Chembe Road Libala Stage 4A, Lusaka.

4.3. After considering the grounds of appeal and the arguments before him, the learned Judge was of the view that the sale between the 2nd Appellant and Alice Phiri was effective and as such the house in issue belonged to Alice Phiri thereby entitling the Respondents to benefit from their mother's estate. The learned Judge dismissed the appeal on all the grounds.

5.0. **THIS APPEAL**

5.1. Dissatisfied with the Judgment of the Court below, the Appellants lodged an appeal anchored on four grounds as set out in the Memorandum of Appeal filed into Court on 21st May 2018.

5.2. The grounds are as follows;

1. *The Hon. Judge erred in law and in fact by not taking into consideration the undisputed fact that the three children of the 1st Appellant; Timothy, Jenala and Alice contributed some money towards the purchase of the house for the 1st Appellant which gave the 1st Appellant an equitable right in the property and that the issuance of the Title Deed in the name of Alice was a matter of family constructive trust.*
2. *The Hon. Judge also failed to discern the undisputed fact that the three children of the 1st Appellant; Timothy, Jenala and Alice made contributions towards the purchase of the house for the 1st Appellant negates the contradictory and*

fraudulent claims made by the Respondents that Alice Phiri bought the house from Timothy.

3. *The Hon. Justice failed to discern that the only money that changed hands between Alice and Timothy was the undisputed contribution which Alice made towards the purchase of the house for their mother, the 1st Appellant.*
 4. *The Hon. Justice failed to discern that it was fraud on the part of the Respondents to claim ownership of property which equitably belongs to the 1st Appellant whose Title Deeds were issued in the name of their mother Alice as a matter of constructive family trust.*
- 5.3. In the heads of argument filed by the Appellants, it is submitted that having found that Alice Phiri made a contribution towards the purchase of the house from the Council, it was illogical for the learned Judge to also hold that Alice Phiri purchased the same house from the 2nd Appellant as Alice would have paid twice for the same house.
- 5.4. It was further submitted that it was the decision of the family for the children to buy the house for the 1st Appellant by which reason the 1st Appellant acquired an equitable interest in the house.

- 5.5. As regards the Certificate of Title being issued in the name of Alice, it is argued that the intervention was to create a family constructive trust.
- 5.6. The Appellants also argued that it was fraudulent for the Respondents to claim that their mother, Alice, bought the house without producing evidence by way of receipts.
- 5.7. The 2nd Respondent only filed heads of argument whose main thrust is that no family meeting was convened at which it was decided that the house would be held in trust for the 1st Appellant. He further submitted that had there been such a decision, the Certificate of Title would have stated that the house was held in trust for the benefit of the 1st Appellant.
- 5.8. He maintained that the sale is evidenced by all the steps taken leading to the issuance of a Certificate of Title in the name of Alice Phiri. Allegations of fraud were dispelled.

6.0. OUR VIEWS

- 6.1. We have carefully considered all the grounds of appeal, the heads of argument and the Judgment of the Court below and in our assessment, the learned Judge was on firm ground for the reasons we state hereunder.

- 6.2. In our view, the first three grounds seek to assert that the fact that the three named children of the 1st Appellant made contributions towards the purchase of the house is conclusive evidence that the same was bought for the benefit of the 1st Appellant.
- 6.3. As for the 4th ground, it is intended to portray the Respondents as fraudsters for claiming to be beneficiaries of a house which was not part of their mother's estate.
- 6.4. In our Judgment, we find the argument about contributions untenable for the reason that it is not evidence of who the ultimate owner was.
- 6.5. The evidence, as accepted by the learned Judge is that the property was offered to the 2nd Appellant for sale by the City Council.
- 6.6. He accepted the offer and paid a deposit of K850, 000. 00. The evidence also shows that the other contributors, Jane and Alice paid K300, 000.00 and K650, 000.00 respectively bringing the total to K1, 800,000.00. So, if the purchase price was K2, 580,000.00 as stated by one of the witnesses in the Subordinate Court, who paid the remaining K780, 000.00?

6.7. In fact, according to the testimony of Salati Phiri before the Subordinate Court as reproduced at page 4 line 3.1.2.9 of the Appellants' heads of argument, Timothy, the 2nd Appellant raised the other amount. This means that of the total purchase value of the property the 2nd Appellant contributed K1, 630,000.00 as against the K950, 000.00 contributed by the other two. So in the absence of evidence that the purchase was for the benefit of the 1st Appellant, only the Certificate of Title answers as to who the ultimate owner was.

7.0. **CERTIFICATE OF TITLE**

7.1. The only Certificate of Title exhibited is in the name of Alice Phiri and it is dated 12th November, 1999.

7.2. The argument by the Appellant is that after the contributions, the family sat and agreed that the Certificate of Title be issued in the name of Alice Phiri in trust for the 1st Appellant. The Certificate does not however, contain any trust clause in it implying that the registered owner is the sole beneficiary of the property.

7.3. The question then is how did the person who is not the offeree get the property to be registered in her name?

8.0. **GIFT**

8.1. The Appellants have argued that the registration of the property in the name of Alice Phiri resulted from the decision

by the 2nd Appellant to write to the Council advising accordingly as he had gifted the same to his elder sister, Alice Phiri. This is contained in a letter dated 28th August 1998 exhibited at page 64 of the record of appeal.

- 8.2. The learned Judge below however, rejected this argument on account of a sale witnessed by an assignment of the property from the 2nd Appellant to Alice Phiri. The said assignment is dated 28th October, 1999 and it is properly executed by the vendor and the purchaser and a witness accordingly.
- 8.3. Consent to assign was obtained and Property Transfer Tax paid in October 1999. The sequence is very clear as the Certificate of Title was only issued the following month in November 1999.
- 8.4. The issuance of the Certificate of Title in the name of Alice Phiri could not therefore, have been a consequence of the gift which was made a year earlier.
- 8.5. In any case, if the house was purchased for the benefit of the 1st Appellant, the 2nd Appellant would have no authority to gift it to another member of the family without the consent of the initial beneficiary. Only a person who is a beneficial owner can gift a parcel of land to another.

8.6. So this is evidence that if the 2nd Appellant could gift the property in 1998, then he could sell it in 1999, which he did. The learned Judge was therefore, on firm ground to find that the Certificate of Title was issued in the name of Alice Phiri as a consequence of the sale of 1999 and not the gift of 1998 which was clearly not effected as no deed of gift was executed.

9.0. **THE LAW**

9.1. Section 6(2) of the Property Transfer Tax Act provides that no Property Transfer Tax is payable where property held in trust or constructive trust is transferred to another person but for the same beneficiary. This provision of the law defeats the argument by the Appellants that the property was bought and held in constructive trust for the 1st Appellant.

9.2. If that were the case, a sale would not have taken place but a transfer from the 2nd Appellant to Alice Phiri without Property Transfer Tax being paid as the beneficiary would still be the 1st Appellant. Further, sub-section 3 excludes payment of Property Transfer Tax where property is settled in trust for the benefit of an immediate family member of the settlor.

9.3. So, as the learned Judge correctly held, there is no evidence of the 2nd Appellant or any other member of the family settling a

trust for the benefit of the 1st Appellant with respect to the house in issue.

9.4. Finally, the issue of fraud was dismissed by the learned Judge for non-pleading and lack of proof thereof. We find no reason to fault the learned Judge on that account.

10. **CONCLUSION**

10.1. All in all, we find the appeal to be devoid of any merit in its entirety. The learned Judge correctly dismissed all the grounds before him. We equally dismiss this appeal on all grounds.

10.2. we order that each party shall bear their own costs.



M. M. KONDOLO, SC
COURT OF APPEAL JUDGE



J. Z. MULONGOTI
COURT OF APPEAL JUDGE



M. J. SIAVWAPA
COURT OF APPEAL JUDGE