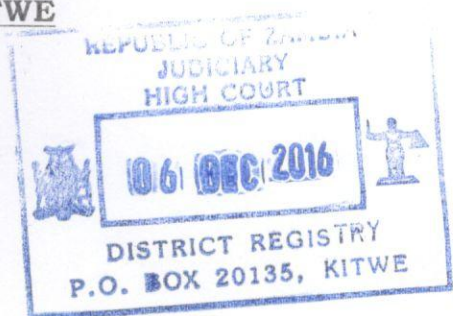


**IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT
(CIVIL JURISDICTION)**

2014/HK/397

HOLDEN AT KITWE

**BETWEEN:
JOHN MASEKA
AND
IRVIN MUTALE**



APPELLANT

RESPONDENT

Before; Madam Justice C. B. Maka-Phiri

For the Appellant: In person

**For the Respondent: Mr. M. Kapukutula, Legal Aid Counsel from
Legal Aid Board**

J U D G E M E N T

Cases referred to:

- 1. Zambia Telecommunication Co. Ltd v Muyawa Liuwa Z.R. (2002) 68.**
- 2. Mwiimbu v Habeenzu (1977) Z.R. 111.**

Legislation referred to:

- 1. The Local Court Act, Chapter 29 of the Laws of Zambia.**
- 2. The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia**

This is an appeal against the Judgement of the Subordinate Court sitting at Kitwe delivered on 17th April, 2014. The history of this case shows that it was commenced in Kitwe Local Court by the Appellant, John Maseka, who sued Irvin Mutale, the Respondent herein. The Appellant's claim was that the Respondent had bought

house No. 614 Kwacha, Kitwe from the wrong person. Upon hearing the parties, the Local Court upheld the Appellant's claim and ordered that the house be evaluated and sold and the proceeds be shared between the parties in the ratio of 60% to 40% respectively and that the Respondent should vacate the house.

Being dissatisfied with the Local Court's decision, the Respondent appealed to the Subordinate Court and advanced one ground of appeal as follows;

- 1. That the lower Court erred by ordering that he should be evicted from the house in question and by awarding the Respondent the ownership of the house because it was not within their jurisdiction.**

The Subordinate Court heard the matter de novo. The trial Court noted that the Local Court had no jurisdiction to hear the matter. The Appellant's evidence was that the Respondent bought the house in issue from **Rhoda Zuze** in 1998 who was not the owner of the house. That the owner of the house was the late **Phoeby Kazhama** who had even sued the Respondent at Buchi Local Court but died before the matter could be determined. The Appellant stated that he was duly appointed as administrator for Phoeby Kazhama's estate. The Appellant stated further that he had been staying in the same house until when the Respondent took occupation after he bought it.

The Appellant's witness, PW2, Ian Kazhama Chishaleshale, stated that the house in dispute belonged to his late mum Phoeby Kazhama. PW2 stated that the house was passed on to her mother

after his grandfather died and that she bought the house as a sitting tenant and registered it in her name. He stated further that some years later, his mother's sister, **Rhoda Zuze Kazhama** sold the house to the Respondent. PW2 stated that in 2013 his mother discovered that the house had been sold and she sued the Respondent. PW2 stated that his late mother used to live in Ndeke but he did not know whether she used to check on the house.

The Respondent's evidence was that in 1998, his cousin, DW2, Mary Mwamba, bought the house in issue for him and his siblings using funds from his deceased's parents' benefits. At the time, the Respondent was young together with his siblings and as such could not change ownership of the house in his name. The Respondent stated that in 2013, his attempt to change ownership of the house into his name resulted in the deceased, Phoeby Kazhama suing him at the Local Court stating that he had forged documents. The said Phoeby Kazhama died before the case could be determined. The Appellant however sued him again.

DW2, Mary Mwamba, was the Respondent's cousin and the one who bought the house on behalf of the Respondent. She explained that she negotiated the purchase of the house with Rhoda Zuze Kazhama who presented to her the Title Deed and received the purchase price of K2,750,000(old currency). DW2 stated that after 16 years she had wanted to effect change of ownership of the house into the Respondent's name seeing that he and his siblings were now grown. The council advised DW2 to look for the owner of the

house and or advertise the change of owner. The Respondent was however sued before the change of ownership process could conclude. DW2 stated that the Appellant was in occupation of the house at the time that it was bought but he vacated. The Respondent has been occupying the house from 1998 until 2013 and no person laid claim on the house.

DW3 was **Rhoda Wendy Kazhama Zuze** and sister to deceased, Phoeby Kazhama. She stated that house No. 416, Kwacha, Kitwe, belonged to his late father who upon his demise, the family decided that the eldest child, Phoeby be given the mandate to look after the house. DW3 stated that when the Council decided to sale houses to sitting tenants, the two pooled resources together and bought the house which was registered in Phoeby Kazhama's name. That subsequently Title Deeds were issued in the deceased's name and she took custody of them. After some time, the two agreed to sale the house and the deceased found the buyer but DW3 was called in to conclude the sale and title deeds were released to the buyer. DW3 subsequently met the buyers who paid her the purchase price and she in turn surrendered the Title Deeds to the purchaser. DW3 stated that she handed over the money to the deceased but they differed over the sharing of the same. DW3 was later informed that the Appellant had taken out action over the house. DW3 stated that the Appellant was not related to her father and had nothing to do with the house.

In his Judgment dated 17th April, 2014, the Magistrate found that the Appellant did not produce any document to show that he was duly appointed as administrator in the estate of the deceased Phoebe Kazhama for him to have locus standi in the matter. Secondly that at the time when the house was sold in 1998 the Appellant was in occupation of the house and was ordered to vacate. The Magistrate wondered why the Appellant or the deceased did not sue at that time if at all they were not aware of the sale of the house. The Magistrate further noted that the deceased Phoebe Kazhama was a Kitwe Resident from 1998 up to 2013 when she died and wondered why she would not check on the person who was in occupation of her house for over 15 years. The Court rejected suggestions that the deceased did not know that some people were staying in her house for that period. The Court further noted that the house was sold in 1998 and that in terms of the Law Reform (Miscellaneous) Act, the action was statute barred. The Court found that the Appellant had no cause of action against the Respondent and that in any case the sale of the house to the Respondent was properly done. The Magistrate dismissed the Appellant's case and ordered that the title of the house be changed into the Respondent's name as legal owner.

Being dissatisfied with the Judgment, the Appellant filed a Notice of appeal and advanced the following grounds of appeal:

- 1. The trial Court erred by its preference of obtaining fresh evidence from the Plaintiff while rejecting the evidence given by the Defendant and his witness by not recording their statements.**

2. The learned trial Magistrate erred to disregard the fact that the late Phoebe Kazhama as a sitting tenant purchased House No. 614 Kwacha, Kitwe pursuant to the government directives of 1996 and was registered by Kitwe City Council as owner thereof, as evidenced by Certificate of Title No. 5800 issued by the Council.
3. The learned Magistrate erred in Law and fact by finding that the Respondent was just a crank and busy body interested to grab the house, wasting the Court's time because he had no proof that he was the appointed administrator.
4. There was no contract of sale for the sale or disposition of the said House No. 614 Kwacha Kitwe by Phoebe Kazhama to any other person or persons or at all. The finding by the Court below to the effect that Irvin Mutale, the Respondent, had bought the said property was wrong both in fact and law.

The Appellant's heads of arguments were filed into Court on 11th September, 2015. The gist of the submission was that the Respondent did not raise the issue of the action being statute barred and wondered how the trial Court made such a finding. The Appellant cited the case of Masusu Kalenga Limited and another v Richmans Money Lenders Enterprises ⁽¹⁾ where the Supreme Court stated that:

"Where an issue was not raised in the Court below, it is not competent for any party to raise it for the first time on appeal."

The Appellant further submitted that the trial Court did not receive fresh evidence from him notwithstanding that the matter was heard denovo. The Appellant's contention was that the trial Court only received fresh evidence from the Respondent and as such, he was not heard. The Appellant submitted that he was desirous to have

this matter tried so that he could produce evidence in Court relating to his appointment as administrator of the Estate. The Appellant cited the cases of **Attorney General v Steven Luguru⁽²⁾** **and Edith Nawakwi v Lusaka City Council⁽³⁾** which cases, in my considered view are of no relevance to this appeal.

The Appellant argued further that Rhoda Kazhama did not exhibit any letter of sale of the house in issue duly signed between the deceased, Phoeby Kazhama and the Respondent. That in terms of section 40 of the Law of Property Act, 1925, all disposition of land or any interest in land must be in writing and signed by the party to be charged or some other person lawfully authorised.

The Appellant further cited the case of **Zambia Telecommunication Company Limited v Muyawa Liuwa⁽⁴⁾** in aid of his submission that this appeal should be determined by way of a rehearing with leave of Court so as to admit fresh evidence. I must state that the cited case in the context of this case has no relevance. Suffice to note that in this case at no time was the hearing of the appeal ever threatened.

The Respondent's heads of argument are dated 7th March, 2016. The submission in response to ground one of appeal was that the trial Court was on firm ground when he heard the matter denovo and allowed both parties to adduce evidence and call witnesses. The Respondent submitted that in terms of section 58 (2) of the Local Court Act, the Subordinate Court as Appellant Court has discretion

whether or not to deal with an appeal from a Local Court by way of rehearing. The discretionary powers of the Subordinate Court when dealing with Local Court appeals was discussed in the case of **Mwiimbu v Habenzu**⁽⁴⁾ where the Court noted the approach that the Magistrate may take when faced with a Local Court appeal. It was the Respondent's submission that the trial Court clearly informed the parties that he was rehearing the matter. That subsequently, the Appellant gave evidence and called one witness, PW2, as evidenced by the record of proceedings. The Respondent noted that the Appellant's assertions that his evidence and that of his witness was not recorded were not true. Further that the Appellant's submissions that the matter be reheard is void of legal backing. The Respondent prayed that this ground of appeal should be dismissed for want of merit.

In response to ground two of appeal, it was the Respondent's submission that the Magistrate was on firm ground when he held that house No. 614 Kwacha Kitwe belonged to the Respondent and his siblings having bought it in 1998. Counsel submitted that the trial Court's finding was supported by the evidence on record.

In response to ground three appeal of appeal, the Respondent submitted that the trial Court's comments that the Appellant was a crack and busy body whose interest was to grab the house was on firm ground. This was because the Appellant did not adduce any evidence to show that he was the administrator of the estate of the late Phoeby Kazahama. That subsequently, DW3 challenged the

capacity under which the Appellant took out this action. The Respondent noted that it was ironic that the Appellant filed for the first time an order of appointment as administrator when he applied for stay of execution of Judgment. The Respondent's submission was that the document was an afterthought and was intended to give the Appellant a standing in a matter in which he has no sufficient interest. The Respondent urged the Court to dismiss this ground of appeal.

In response to ground four of appeal, the Respondent submitted that there was a written memorandum produced in Court to show that the house was sold to the Respondent. The Respondent contended that there was overwhelming evidence to show that House No. 614 was lawfully and properly sold to the Respondent. The Respondents prayer was that this appeal should be dismissed for want of merit.

At the hearing of the appeal, both parties informed the Court that they would rely on the respective heads of arguments. In addition Counsel for the Respondent made oral submissions to augment the written submissions. Counsel submitted that contrary to the Appellant's fourth ground of appeal that no contract of sale was executed by Phoeby Kazhama, the evidence shows that in fact, a written memorandum of sale was signed by **Rhoda Zuze Kazhama** and DW2 at the consideration of K2, 750,000(old currency). That the capacity in which **Rhoda Zuze Kazhama** sold the house was clearly explained in the Court below. Counsel submitted that the

sale transaction therefore satisfied the requirement as contained in section 4 of the **Statute of Frauds Act of 1664** which section provides that contracts for sale of land or disposition of an interest in land will be in writing for it to be enforceable.

Counsel further submitted that the Appellant was the caretaker at the house in dispute at the time it was sold and he moved out of the house after **Phoeby Kazhama** informed him that the house had been sold. He argued that since 1998, the Appellant did not contest the sale of the house. Counsel noted that the dispute over the house only arose 15 years later when the Respondent as beneficiary of the house started the process of name change upon attainment of majority. Counsel further noted that from 1998 to 2013, the late Phoeby Kazhama Chishaleshale never questioned the Respondent's stay in the house nor did she ask the Respondent to vacate the house. Counsel argued that no reasonable person would remove a caretaker from the house in which she has an interest and put in total strangers who occupy the house for 15 years. Counsel submitted that the Respondent and his siblings were legally in occupation of house No. 614 Kwacha, Kitwe.

On ground three of appeal, Counsel submitted that the Appellant did not adduce any order of appointment as administrator of the estate of Phoeby Kazhama both at the Local Court or Subordinate Court. The Appellant had therefore no *loci standi* in the matter. Counsel submitted that the lower Court was on firm ground when it ruled that the house in dispute belonged to the Respondent and his

siblings and that this finding is supported by evidence. Counsel further submitted that the appellant's claims that he was not given an opportunity to be heard cannot be sustained in the face of the record of proceedings which clearly shows that he testified in the lower Court together with his witness. Counsel prayed that the appeal be dismissed in its entirety and the Judgment of the lower Court upheld.

In reply, the Appellant submitted that when the late Phoeby Kazhama learnt that the house had been sold to the Respondent, she went to the City Council where she was informed that the house had not been sold and she was subsequently asked to pay all outstanding arrears. The Appellant reiterated that the late Phoebe Kazhama sued the Respondent the moment she learnt that the house was sold but died before the case could be determined. That as administrator, he continued with the case in the Local Court. According to the Appellant, what the deceased knew was that the house was on rent until when she learnt that Rhoda had sold the house.

I have considered this appeal and the submissions filed by both parties. The starting point in determining this appeal is to note that the Subordinate Court heard this matter *denovo*. This was in line with the provisions of section 58(2) which states that;

“An appeal from a Local Court shall be dealt with by way of a re-hearing unless the appellant court in its discretion, shall see it fit to dispense with all or part of such rehearing.”

The Subordinate Court was therefore, for all intents and purposes, the trial Court. It should further be noted that the Local Court had no jurisdiction to hear the matter as the dispute between the parties involved a house which falls under the Housing (Statutory and Improvement) Areas Act, which Act defines Court as Subordinate Court. By hearing the matter de novo, the Subordinate Court cured any irregularities that may be associated with the matter having been commenced in the Local Court.

The first issue for determination as contained in the first ground of appeal is whether the trial Court did not receive fresh evidence from the Appellant. The record of proceedings clearly shows that the Appellant gave evidence in the lower Court and called one witness. What the Appellant stated in the lower Court as well as his witness has been captured at the beginning of this Judgment. It is therefore not correct that the trial Court only received fresh evidence from the Respondent. It is further not true that the lower Court while rejected the evidence that was given by the Appellant. Therefore as submitted by the Respondent, both parties were given an opportunity to be heard and were in fact heard on trial in the lower Court. It should be noted that the trial Court heard this matter denovo and as appellant court, I find no reason why I should hear it denovo again on appeal. The first ground of appeal has no merit and it fails.

The second issue in this appeal is whether the trial court disregarded the fact that the late Phoeby Kazhama was a sitting tenant who purchased house number 614 Kwacha, Kitwe and duly

had it registered in her name as evident on the Certificate of Title. The issue that was before the trial court was not whether or not the deceased, Phoeby Kazhama as a sitting tenant bought the house in issue and registered it her name? The issue was whether the Respondent bought the house from the wrong person. It follows therefore that it was not in dispute that the deceased Phoeby Kazhama was the registered owner of house no. 614 Kwacha, Kitwe. This was evident by the Certificate of Title No. 5800 shown before the lower Court and on record. It was further not in dispute that the house was sold to the Respondent in 1998. The dispute was whether Rhoda Zuze Kazhama, the sister to the deceased Phoeby Kazhama had the mandate to sale the house. Did the Respondent buy the house from the wrong person? Was the deceased aware that the house had been sold in 1998?

The undisputed evidence is that when the Respondent bought the house in 1998, he took occupation of the same soon thereafter in the same year. The Appellant was at the time living in the same house and he graciously moved out to enable the Respondent take possession or occupation of the house. The deceased was present at the time and was fully aware that the Respondent had taken possession of the house. The deceased never took any action to show that she had objections to the Respondent taking occupation of the house after buying it. The Respondent stayed in the house for 15 years and had no encounters with the deceased whatsoever. The conduct of the deceased clearly showed that she was fully aware that the house had been sold to the Respondent. The Appellant on

his part had glossed over the fact that he had to even move out of the house to pave way for the Respondent to take possession and occupation of the house. There is no reasonable explanation as to why the deceased never raised the issue of the house being sold by her sister without her authority for over 15 years other than the fact that she was fully aware that it was sold. I find the evidence of DW3 as being truthful and giving a true account what had transpired at the material time. If the deceased was under any honest but mistake belief that the house was on rent, who then received the rentals for over 15 years and how much was it? In any case, no reasonable house owner would be out of touch with his property or occupants of his house for over 15 years and yet he or she is within the same town. The deceased simply wanted to take advantage of the fact that the title deeds were still in her names at the time that the Respondent wanted to effect the change of ownership in 2013. Her attempt to justify her claim over the house by going to the Council and questioning whether or not the house had been sold does not make sense. The logical thing was for the deceased to confront the Respondent being the person in occupation and then find out how he had occupied her house for over 15 years. It is further strange that the deceased would ask the Council to issue her with a Certificate of Title in 2013, when she bought the house from the Council in 1996. Where was she all this time for her not to have concluded the sale transaction with the Council? These answers remain unanswered in the wake of the deceased's conduct.

I am inclined to accept the Respondent's submissions that the deceased was fully aware that the house in issue had been sold and the argument that it was sold by Rhoda Zuze Kazhama is irrelevant. Both the deceased and Rhoda had an equal interest in the house that equally devolved to them from their father and they sold the house in joint corroboration. Any misunderstandings if any that arose between the two sisters after the sale of the house should not affect the Respondent. The deceased can not be allowed to emerge after 15 years and lay claim on the house which she was fully aware that it was sold. It is my considered view that ground two of appeal is misconceived in so far as it raises an issue that was not before Court. This ground therefore fails.

The gist of ground three of appeal was that the trial Court erred to have referred to the Appellant as a crank and busy body interested in grabbing the house. This was not a finding of fact per se but a description of the Appellant who had purported to have commenced this action on behalf of the deceased and yet he had no proof that he was duly appointed administrator. It is not in dispute that the Appellant did not produce any order of appointment as administrator both in the Local Court and Subordinate Court. Secondly, the originating process in the Local Court showed that the Appellant took out action in his own capacity. There was no indication that he was suing in his capacity as administrator of the estate of the late Phoeby Kazhama. Clearly the Appellant had no *locus standi* at the time that he commenced this action. The trial

Court was therefore justified to classify the Appellant as a busy body.

It should be noted that following the delivery of the Judgment at the Subordinate Court, the Appellant in his application to stay execution of Judgment pending appeal, strangely exhibited an order of appointment of administrator for the first time. This document was never produced in both the Local Court and the Subordinate Court and it was in my view an attempt by the Appellant to establish his interest in the matter. This document in so far as it was not produced in the Subordinate Court, can not be produced for the first time on appeal in the High Court. Doing so will be tantamount to bringing new evidence on appeal which action the Courts frown upon. Secondly, in so far as this appeal is concerned, there is no evidence to show that the Appellant was duly appointed as administrator of the estate of the late Phoeby Kazhama. Most importantly and as already stated, the Appellant took out action in his own personal capacity and not as administrator of the estate. It should be noted that infact the Appellant's quest for a re-trial before this Court is intended for him to introduce this document which comes as an afterthought in any case. I am therefore satisfied that the trial Court did not error in any way and I dismiss this ground.

The fourth ground of appeal was that there was no contract of sale signed between the deceased and the Respondent in relation to the house in dispute. As already noted under ground one of appeal, the deceased was fully aware that the house had been sold and the

person who signed on the memorandum of sale DW3, Rhoda Kazhama was no stranger to her. DW3's evidence which was not challenged was that it was infact the deceased who had found a buyer for the house while she simply handled the final part of the sale transaction. As already noted, the deceased simply wanted to take advantage of the fact that the Certificate of Title was still in her name all this while and as such she could ride on the law.

However, it is her failure and that of the Appellant to explain why it took over 15 years for the deceased to wake up from her slumber if at all she was the owner of the house. It should further be noted that the onus was on the Appellant to prove that the Respondent bought the house from a wrong person. This the Appellant failed to do as he had not given any plausible explanation as to why the deceased had to wait for over 15 years to lay claim on the house. Suffice to state that the sale transaction was in compliance with the statute of frauds as it was evidenced in writing. I therefore totally agree with the Respondent's submission in response to this ground of appeal.

Lastly but not the least, I wish to note that at the time when the Appellant commenced this action in 2014, it was statute barred. As correctly observed by the trial Court, the period of 12 years within which the deceased or Appellant should have commenced the action had elapsed. The question of an action being statute barred is a point of law and as such it can be raised even if not pleaded. Similarly, the Court is not precluded from considering the issue in

its Judgment even if the parties did not raise it if the issue is blatantly before it. The Appellant's argument therefore that the issue of the action being statute barred was not raised by the Respondent cannot be sustained.

With the foregoing, I come to the inevitable conclusion that this appeal has no merit. It is hereby dismissed. I order that each party will bear own costs. The lower Court's order that Kitwe City Council should proceed to effect change of ownership of the house in issue in the Respondent's name and that of his siblings is hereby upheld.

Leave to appeal granted.

Delivered this 6th day of December, 2016



.....
C. B. Maka-Phiri (Mrs.)
Judge