IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2016/HP/A0010

BETWEEN:

KILONGE NGINGA **APPELLANT**

AND

CATHERINE NGINGA **RESPONDENT**

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 28th DAY OF FEBRUARY, 2017

For the Appellant : In person
For the Respondent: Ms Naomi Phiri, Legal Aid Counsel

JUDGMENT

CASES REFRRED TO:

1. ***Alice Phiri V Margaret Mulenga 2013 VOL 3 ZR 362***
2. ***Monica Siankondo*** *(Suing as Administrator of the Estate of the late Edith Siankondo)* ***V Frederick Ndenga 2005 ZR 22***

LEGISATION REFERRED TO:

1. ***The Intestate Succession Act, Chapter 59 of the Laws of Zambia***

This is an appeal from a Subordinate Court judgment dated 17th September, 2015. The grounds of appeal are that;

1. *The trial magistrate erred in law and in fact by not giving the Appellant an opportunity to give his side of the story, in his capacity as Administrator of his late father's estate.*

2. *That the trial court erred in law and in fact by not considering the fact that the deceased had children, who are also beneficiaries of the estate of the late, and that it is not only the Respondent who is a rightful beneficiary.*

The history of the matter is that the Appellant had sued the Respondent on 11th August 2015, for reconciliation over estate as the Respondent had caused disputes over the same. The Local Court reconciled the parties and directed that the Appellant be given all the title deeds for the two houses, as he was the Administrator of the estate.

Being dissatisfied with the judgment the Respondent appealed to the Subordinate Court on the grounds that the Local Court erred in law and in fact when it ignored its first judgment directing that the Respondent be given the Kabanana Site and Service house, and the children be given the Kaunda Square house.

Further that the Local Court erred in law and in fact when it ordered the Respondent to give the Appellant title deeds for the two houses, as he was the Administrator of the estate, and that the court sells the house so that she could recover the money she had invested to build the house.

The Subordinate Court in its judgment ordered that the Respondent who was the Appellant before that court, be given possession of the matrimonial home, which possession would expire upon her death or re-marriage, and that no one should interfere with her interest or

trespass on the premises. The court also directed that the Respondent places a caveat on the property.

It is against this judgment that the Appellant now appeals. At the hearing of the appeal Counsel for the Respondent apologized to the court for not having filed any heads of arguments, as the Appellant had not served them with any. She indicated that they were however ready to proceed viva voce.

When I looked at the grounds of appeal, I noted that the major contention by the Appellant was that he was not given a right to heard in the appeal. I therefore directed that evidence be taken in the appeal, pursuant to Order XLVII Rule 18 of the High Court Rules which provides that;

"18. It is not open, as of right, to any party to an appeal to adduce new evidence in support of his original case; but, for the furtherance of justice, the Court may, where it thinks fit, allow or require new evidence to be adduced. A party may, by leave of the Court, allege any facts essential to the issue that have come to his knowledge after the decision of the court below, and adduce evidence in support of such allegations".

The Appellant in his testimony gave a background to the matter stating that his late father Samuel Nginga who lived at house number 21/09 Kabanana Site and Service died on 27th June 2014, after having suffered a stroke at home. After the burial he was appointed Administrator of his late father's estate as their

grandparents at a family meeting, had said that the children should who should be the Administrator. That this was after the Respondent had refused to be part of that process, after their grandfather had asked her.

It was his testimony that he was appointed Administrator on 4th July 2014 at the Matero Local Court, and there his duties as Administrator were explained, such as paying rates for the properties, keeping custody of the title deeds, and sharing the rentals for the properties according to the law.

As to what constituted the estate, the Appellant told the Court that there were two houses namely, house number 21/09 Kabanana Site and Service and a house in Kaunda Square whose house number he could not recall. The Appellant testified that after he was appointed Administrator, they sat down as a family and he authorized the Respondent, who is his step mother to be collecting the house rentals, even though the Local Court had told him that the rentals should be shared between the children and the Respondent.

This was on account of the fact that the Respondent had informed him that she was owing DMI and FINCA. That he had also allowed the Respondent to be collecting the rentals as he wanted her to renovate the Kabanana Site Service house with the same funds. It was his evidence that the Respondent collected K800.00 a month for the Kaunda Square house and K500.00 for the Kabanana Site and Service room at the back of the house.

Then in 2016 he had called a family meeting, at which the Respondent, the Appellants sister Nasilele, and brothers' Crispin and Ngenda were present. His half-brother, the son to the Respondent was not present. He suggested that his sister Nasilele who has four children and is not married be allowed to occupy the one room at the back of the Kabanana Site and Service house, in order to help alleviate her problems. Ngenda on the other hand requested to be given K600.00 in August of that year so that he could renew his driving licence. Crispin had nothing to say. The Respondent when asked if she had anything to say told him that she was his mother, and it was him who should have been asking her, and not vice versa.

Further in his testimony, the Appellant stated that he had at that meeting suggested that they open a family account that would go towards assisting the family, for when their father had died, no one had assisted them. To his surprise the Respondent had stated that the Kabanana Site and Service house was hers, and that they should concentrate on the Kaunda Square house. That thereafter the Respondent had called a family meeting at the Appellant's uncle's house, who is the young brother to his late father.

At that meeting nothing was discussed and that is how the Respondent had sued the Appellant in the Local court. He explained that the Respondent thought that she had been given the Kabanana Site and Service house by the Local Court. As to the current state of affairs regarding the estate, the Appellant's testimony was that

Crispin lives in the one room at the Kabanana Site and Service house.

He also stated that on 26th June 2016 when he had gone to the Kabanana Site and Service house to collect the title deeds in the company of his sister and cousins, he found that the Respondent had placed a placard at the house, advertising the house for rent. Her explanation was that she was leaving the house, as he had been appointed Administrator when he was just a child. It was stated that currently the house is being rented at K1, 100.00 per month. When the Appellant went to collect the rentals at the month end of July, the tenant of the house told him that the rentals had been paid two months in advance.

However he had collected rentals after that, and when he wanted to give the Respondent her share in excess of K200.00, he had left it at Kabanana police, but she had declined to collect it, saying that she would be given the money in Court. The next thing he saw was a summons for him to appear before the Subordinate Court on appeal on 18th June 2016.

At that hearing only the Respondent, as Appellant before that court, was allowed to give her side of the story, and that he was only asked to take the title deeds for the houses to court. When he did the documents for Stand No 21/09 Kabanana Site and Service were given to the Respondent, and he was told not to go within one hundred metres of the Kabanana house. That the Subordinate Court had told the Respondent that she could occupy the said

house, but could not sell it, as it was not hers. She was however told to place a caveat against the property at the Ministry of Lands. The Appellant was not given a chance to testify at those proceedings.

He prayed that the interests of the children be looked at, especially his sister who should be allowed to live in the one roomed house. He was agreeable to the Respondent's suggestion that the house be sold and the proceeds shared.

In cross examination the Respondent told the court that he was thirty one years when he was appointed as Administrator. That the major assets under the estate were the two houses, although there were household goods in the Kabanana Site and Service house. As regards the number of children that the deceased had left, the Appellant explained that there were initially ten children but only four children are now living. He stated that at the time of his father's death, six children were alive.

With regard to ages and occupation of the surviving children, it was stated that the Appellant is a mechanical fitter, while Nasilele was born in 1981. She is a grade nine school drop-out who does not do anything. He further stated in cross examination that Maponga was born in 1982, and he is a driver, He is the Appellant's half-brother, and the Respondent's son. That Ngenda was born in 1986 and he runs a makeshift shop, while the last born Crispin was born in 1988, and he is unemployed. The Appellant stated that there is also

his half-sister, only known as Patricia's mother. She was introduced to them by their late father, in the 1990's.

As regards who rents the main Kabanana house, the Appellant in cross examination stated that the Respondent is in a better position to state, as he was banned from going to the house.

The Respondent in her testimony told the court that she married the deceased in 2000, at Saint Johns Parish. At the time he had four children, and she had one child with him. It was her evidence that at the time of their marriage, he had no property and together they built the house in Kabanana. That there is also a house in Kaunda Square, which the late had built with his first wife, who is also deceased.

She confirmed the Appellant's evidence that at the time of the deceased's death, the two houses and the household items in the Kabanana Site and Service formed the estate. The Respondent told the Court that the Kabanana Site and Service house was the matrimonial home, and she had remained in the said house with the children, when the deceased died.

With regard to the Appellant's testimony on how he was appointed Administrator of his late father's estate, the Respondent told the court that she was in mourning at the time, and could not say anything, and that is how the Appellant's grandfather told the children to choose the Administrator.

Her further evidence was that from the time the Appellant was appointed Administrator, she had continued living in the Kabanana Site and Service house, and only moved out when he approached her for a family meeting. At that meeting the Appellant's elder brother was not present. The Appellant complained that his sister Nasilele who has four children and had left her marriage, and needed shelter. However the Respondent stated that at the time she was paying Nasilele's rentals at K320.00, and would buy her mealie meal at K60.00 and food.

She also testified that the younger children Crispin and Chikuni, the late's nephew would go home drunk, eat all the food, and would threaten to burn her in the house. That she was staying with her late sister's children and two nephews, as well as Crispin the only one among the deceased's children.

As regards the events surrounding how she moved out of the house, the Respondent testified that upon her return from court, she had found Chikuni getting food from the pot, and when she asked him what he was doing, he told her not to be harassing them, and that he would burn her in the house, if she was playing. That is how she had phoned her brother in law and informed him of what had happened, and she moved into two of the four roomed house, left by her deceased child.

The Respondent told the court that she collects the rentals for the Kabanana Site and Service house, that is, K800.00 for the house, and K200.00 for the shop that she built there. However she pays

K200.00 for electricity from that money. That the Appellant collects the rentals for the Kaunda Square house, as that is what the Local Court said.

Her evidence was that she collected the rentals for only three months so that she could pay off the loan, as her late husband died three months before she completed the payments. She added that after finishing to pay off the loan, the court issues started. It was stated that during the pendency of the court case, she had continued collecting the rentals as the Appellant's relatives had told her to use the money to buy food since she was looking after Crispin, Chikuni and Nasilele.

She confirmed that she had told the Appellant that he should be collecting the K800.00 a month rentals from the Kaunda Square house, and added that she had told them that she would be collecting K500.00 for the room at the Kabanana Site and Service house.

The Respondent further told the court that she sold her farm, and renovated the Kabanana Site and Service with the funds realized from the sale, and that she had told the Appellant so. That she did not share the K500.00 collected as rentals from the one room at the Kabanana Site and Service house with the children, as they collected the rentals from the Kaunda Square house. In conclusion she testified that Nasilele wanted to get the television set, but that she had told her that it was a remembrance for her husband, and instead gave her the carpet and a bed.

In cross examination, the Respondent testified that when the deceased started constructing the house in Kabanana Site and Service, the Appellant's mother was living in Kaunda Square. That at the time the Respondent was also living in Kaunda Square. As regards her sources of income at the time, the Respondent stated that she used to sell second hand clothes popularly known as *salaula* as well as nail polish.

That she had saved money with the deceased and that is how they had cleared the plot and made bricks, and started building until they ran out of money. The Respondent further told the court in cross examination that thereafter she had bought fifty asbestos sheets, and also some planks from ZAFFICO, and that is how the house was roofed, and they moved in. It was stated that the house had no floor and only one door when they moved in, and it was completed from the deceased's salary at Duly Motors.

She also testified that the deceased retired from Duly Motors five years later, and she would sell charcoal and other things. Her evidence was that the house was built between 1982 and 1986. When asked when she had married the deceased, the Respondent testified that it was in 2002, but that the two had been cohabiting before the marriage, at the house she was renting in Kaunda Square.

She stated that she did not report Crispin and Chikuni to the police over the threats, but that after the deceased's death there was confusion as the two would shout at her and threaten her. She

added that it was the time that she gave Nasilele the bed and carpet, and she then reported the matter to the Victim Support Unit (VSU) in Emmasdale, as the children were becoming difficult.

That the VSU officers had asked the children how old they were, and what they did for a living. Further that the children were told not to be threatening the Respondent, and should work for their own things. She admitted that her son Maponga and the Appellant's brother had broken the windows and display unit, and she had reported them to the VSU. That the Appellant's sister had released Maponga from custody.

Her testimony was that she had had Maponga arrested so that the Appellant and his siblings could learn a lesson. Still in cross examination the Respondent testified that the Appellant started collecting the rentals on 26th June 2015 for three months, and that she had since been collecting the rentals and had used the money to buy food.

She agreed that the VSU had told her to be giving Nasilele food, as she is unmarried. She denied that the Appellant would take mealie meal monthly to the house when his father was alive, but that he would do so every three months.

I have considered the evidence.

It is a fact that the Respondent was married to the late Samuel Nginga who was the Appellants father. It is not in dispute that the Appellant's father died on 27th June 2014. It is a fact that when the

late died there were two houses that were registered in his name, firstly the house in Kaunda Square, and Stand No 21/09 Kabanana Site and Service.

The ground of contention by the Appellant is that the Subordinate Court on appeal from the Local Court in its' judgment misdirected itself in law and in fact when it held that the Respondent is entitled to exercise her life interest in the matrimonial home by having quiet possession of the same with freedom from encumbrances and that she should pay the rates for the property. The Appellant also contends that the Subordinate Court misdirected itself when it ordered that the Respondent should hold the title deed for the matrimonial home without changing it, and that she has no right to sell the said house.

That the Subordinate Court erred when it ordered that the Respondent be given possession of the said matrimonial home, which possession would expire on her death or re-marriage, and that no one should trespass on the property, and the Respondent to place a caveat on the property at the Ministry of Lands.

From the evidence on record it is clear that the Respondent claims that she contributed to the acquisition of Stand No 21/09 Kabanana Site and Service, which was the matrimonial home. She went to lengths to explain how the property was acquired, stating that the house constructed from resources provided by her late husband who had worked for Duly Motors and herself. That she used to sell second clothes popularly known as "*salaula*" at the

market as well as nail polish. That from the money saved from the sales they had constructed the house and she had bought fifty roofing sheets to roof the house.

Thus the question that arises is whether the house, Stand No 21/09 Kabanana Site and Service, left by the Appellant's father falls to be distributed in line with the Intestate Succession Act, Chapter 59 of the Laws of Zambia? It is clear from the evidence that the deceased died intestate, as the letters of administrator of his estate were obtained from the Local Court.

Section 9 of the Intestate Succession Act distributes houses left under an estate. It provides that;

9. (1) Notwithstanding section five where the estate includes a house the surviving spouse or child or both, shall be entitled to that house:

Provided that-

(a) where there is more than one surviving spouse or child or both they shall hold the house as tenants in common; and

(b) the surviving spouse shall have a life interest in that house which shall determine upon that spouse's remarriage.

The evidence adduced shows that Stand No 21/09 Kabanana Site and Service was the matrimonial home for the deceased and the Respondent. In the case of ***MONICA SIANKONDO*** *(Suing as Administrator of the Estate of the late Edith Siankondo)* ***V***

FREDERICK NDENGA 2005 ZR 22 where the late Edith Siankondo's husband was not offered the house to buy by his former employer Zambia Railways, and she bought the house using her twenty percent share from his estate, the Supreme Court stated that;

"the facts clearly established that at the time of the death of the appellant's husband, Zambia Railways had not offered the house to him for sale. The house, therefore, could not have formed part of the deceased husband's estate. Above all, even if the deceased husband had been offered and purchased the house, it would not have been part of his estate, but a matrimonial home to which the appellant would still have been entitled."

In the case of ***ALICE PHIRI V MARGARET MULENGA 2013 VOL 3 ZR 362*** where the Respondent had sued the Appellant in the Local Court asking her to vacate the house left by the Respondent's late husband, and the Local court had held that the Respondent was entitled to stay in the house until her death or re-marriage, and that the house be changed into the Respondent's name, the Supreme Court on appeal had held that the Intestate Succession Act, Chapter 59 of the Laws of Zambia was not applicable to that matter, as the Respondent's claim was based on her argument that she had contributed to the purchase of the house, which was not based on intestacy.

In that case the Respondent had paid K271, 000.00 towards the purchase of the house, while the deceased had paid K200, 000.00. The Supreme Court found that based on her contribution towards the purchase of the house, the Respondent had acquired a beneficial interest in the house. It ordered on that basis that the house should be shared equally between the Respondent and the Appellant and her siblings who were the children of the late, and that if the Appellant and her siblings wished to keep the house, the said house should be valued, and they pay half the value to the Respondent.

That if the Appellant and her siblings were unable to pay the Respondent half of the value of the house, as directed by the Court, then the house should be sold and the proceeds shared equally by the two sides. What can be drawn from the two cases is that where a spouse contributes to the acquisition of a matrimonial home, they acquire a beneficial interest. Thus at the time of death of one of the spouses, the surviving spouse is entitled to their share of that house based on the beneficial interest acquired, and not based on intestacy.

Going by this, the question that arises is what interest is due to the Respondent in Stand No 21/09 Kabanana Site and Service? Her evidence that she contributed to the acquisition of the property was not challenged in a way, that it cannot be said that she did not make any contributions to its acquisition. I therefore find that the

Respondent did contribute to its acquisition and she acquired a beneficial interest in the property.

Therefore the lower court erred in holding that the Respondent had a life interest in Stand No 21/09 Kabanana Site Service, and was entitled to possess the same based on that interest, as her interest did not arise out of intestacy. I accordingly set aside the order of the lower court and order as follows;

Bearing in mind that there is insufficient evidence to show the levels of contribution by each party to the acquisition of Stand No 21/09 Kabanana Site and Service, the Respondent is entitled to one third of the value of Stand No 21/09 Kabanana Site and Service. The surviving children of the deceased including the Appellant and his half-brother born from the Respondent, as well as his half-sister known as Patricia's mother are entitled to two thirds of the value of the house to be shared equally among them.

If the Appellant and all his siblings want to keep the house they shall have the house valued, and they shall pay the Respondent one third of the value, and then keep the house. If they fail to pay the Respondent the one third value of the house, the said house shall be sold, and the Respondent given one third of the proceeds, and the Appellant and his siblings shall share the two thirds equally amongst themselves.

With regard to the Kaunda Square house, I am alive to the fact that the Appellants late mother may have acquired a beneficial interest

in that house, as the evidence shows that it was acquired when she was alive and married to the Appellant's father. As such the Respondent acquired no beneficial interest in it. It shall remain for the Appellant and his siblings. Each party shall bear their own costs of the proceedings. Leave to appeal is granted.

DATED THE 28th DAY OF FEBRUARY, 2017

Kaunda

S. KAUNDA NEWA
HIGH COURT JUDGE