**IN THE SUPREME COURT OF ZAMBIA**
**HOLDEN AT LUSAKA**

**APPEAL**
**NO.58/2014**
**SCZ/8/341/2013**

(Civil Jurisdiction)



**BETWEEN:**

**ALFRED KALABA** **1ST APPELLANT**
**WEBSTER CHINGWE** **2ND APPELLANT**

**AND**

**STEVEN KAPENDA** **RESPONDENT**

Coram: Mwanamwambwa, DCJ, Mutuna and Chinyama, JJS.
On 5th October, 2016 and on 28th March, 2017.

**APPEARANCES:**

For the Appellants: Messrs V N Michelo & Partners.
For the Respondent: In person.

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# J U D G M E N T

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**Chinyama**, **JS**, delivered the Judgment of the Court.

***Legislation referred to:***

1. ***Subordinate Courts Act, Chapter 28, Laws of Zambia Order 3, Rule***
2. ***Supreme Court Act, Chapter 25, Laws of Zambia, Rule 71(1)(b).***

3. ***Intestate Succession Act, Chapter 5, Laws of Zambia, Section 5(2).***

***Cases referred to:***

1. ***Malichupa and Others V. Tanzania Zambia Railway Authority (2008) 2 ZR 112.***
2. ***Gray Nachandwe Mudenda V. Dorothy Chileshe Mudenda (2006) ZR 56.***

This appeal is against the decision of the High Court at Kitwe, which upheld the judgment of the Subordinate Court of the First Class also at Kitwe, which determined that the offer to purchase and the subsequent purchase of house number 657 Buchi (hereafter, "the house") in Kitwe by the 1st appellant was irregular; that the certificate of title issued to him, in respect of the house, be cancelled and that the house be registered in the respondent's names, who has attained majority age, for his and any other beneficiaries' benefit.

This matter started in the local court and progressed to the Subordinate Court on appeal, which heard it afresh, before it went to the High Court, on a further appeal, and it is now before us.

The issue contended throughout the journey of the matter in the courts below is whether the house was properly sold to the 1st appellant. The history of the matter as can be gleaned from the oral

and documentary evidence deployed, particularly in the proceedings in the Subordinate Court follows below.

The house was part of the Kitwe City council's housing stock. Until 1968, it had been occupied by a Mr. Phiri who in that year migrated to Malawi. Mr. Thobo Kapyatila, an uncle to the 2ndappellant took over its occupancy and lived in the house duly paying rent, in the name of Mr. Phiri, to Kitwe City Council (hereafter "the Council"). In 1988 the tenancy of the house was transferred to the respondent's father, Mr. Stephen Kapenda senior (hereafter "the deceased"), under an arrangement called self-payer. The deceased had been living in the same house with Mr. Kapyatila as well as his two siblings, namely, the 1st appellant and one Albert Mukabe. The deceased was at the time working for the Council. He had three children, namely: Kaluba (the eldest), the respondent and Evans. The 1st appellant, Kaluba and Albert continued to live in the same house with the deceased. He was not residing with his father.

In 1994/1995, the deceased was offered to buy the house by the Council but he declined. In January, 1996, the deceased died.

The 2nd appellant, who had also been working for the Council, was appointed administrator of the estate of the deceased. In May 1996, the 2nd appellant applied to buy the house from the Council on the basis that he was the elder in the family; that he wanted to buy the house so that the deceased's son, Kaluba, together with the 1st appellant and Albert could continue to live in the house. He did state in the letter of application that the deceased's wife had passed away in 1991. At the time of the deceased's demise the respondent was aged 15 years and had not been living with his father.

The Council conducted some due diligence regarding the tenancy of the house and refused to oblige the 2nd appellant's application to buy the house because he had already bought a house of his own, situate within Kitwe, from the Council. The Council instead invited the 1st appellant to buy the house, on the basis that he was living in it, at a consideration of K21,008.

The purchase price of K21,008 was paid and a certificate of title dated 9th September, 1998 for the remainder of the term of 100 years from the 1st January, 1960 was issued in the 1st appellant's name.

In 2008, the respondent sued the 2nd appellant in the local court for not handing over the house to him but was unsuccessful. He appealed to the Subordinate Court.

In the Subordinate Court, the respondent's grievance was that the 2nd appellant had not complied with a directive made by the Council that the title deed was given to the 1st appellant only because he (respondent) had been less than 18 years, that when he became 18 years old the 2nd appellant should have caused the title deed to be given back to the respondent. He alleged that the K21,008 used to purchase the house was paid from his late father's benefits. He was worried that in the event that the 1st appellant died, the house would remain with the 1st appellant's wife or children and he (respondent) would lose out. He claimed that he was born alone and should have been chosen as administrator of his late father's estate.

The evidence of the witness called by the respondent in the Subordinate Court, Mr Peter Musamba, a Senior Legal Assistant at the Council, was that the deceased's record at the Council showed that he had three children namely: Kaluba Kapenda, Steven

Kapenda (respondent) and Evans Kapenda. According to the witness, the 2nd appellant was given temporary possession of the house when he was appointed as administrator of the deceased's estate. In explaining the Council's decision to give the house to the 1st appellant, the witness stated that the Council looked at the plight of the children who were still minors, their mother having died earlier. The 1st appellant was financially stable and able to buy the house and keep the family. He was found to be a "reasonable person" and was sold the house.

For the 2nd appellant's part, his evidence in the Subordinate Court, after recounting the history of the occupancy of the house, was that he had only seen the respondent once in December, 1995 when his father, the deceased, was sick and again after the deceased had died in 1996. He stated that, at the time, the 1st appellant and Albert were living in the house. The next time he saw the respondent was after four years in 2000, when he came to pursue his father's terminal benefits. He also said (in cross-examination) that the house was not put in the name of his uncle, Mr. Kapyatila's children, because they had grown up and dispersed.

He denied that the money used to buy the house was from the deceased's estate's benefit. He stated that the 1st appellant was in employment at the time.

The second witness called by the 2nd appellant was Albert Mukabe. The witness confirmed that he came to live with Mr. Kapyatila in 1982 at the same house and that the deceased joined them later in 1987. The witness also confirmed that the deceased had shown him and the 1st appellant the offer to buy the house from the Council but that the deceased had told them that he was not in a position to buy the house because he had a lot of shortages of money missing at his place of work. He stated that the 1stappellant bought the house following the Presidential decree to sell Council houses and following the failure by the deceased and the 2nd appellant to buy the house. He stated that the 1st appellant bought the house and a title deed was issued in his name in 1998.

In her judgment the magistrate found that it was not in dispute that the house was occupied by the deceased until his death. She found that the respondent was the deceased's son and that the deceased had three sons one of whom was the respondent,

all of whom were minors at the time of their father's demise. The court found that the respondent's father was given the house to live in as an incident of his employment and that he died shortly before the Presidential housing empowerment decree was made. The magistrate noted that it was not in dispute that the 1st appellant and Albert were living with the deceased at the time of his death. The magistrate also noted the abortive attempt by the 2nd appellant to purchase the house for the alleged benefit of the deceased's child (Kaluba) and the two brothers (the 1st appellant and Albert) and wondered why the Council did not consider the 2nd appellant's interest in favour of those named. The court regarded it as an error on the part of the Council to sell the house to the 1st appellant; that this led to the problems which gave rise to the court action. The court determined that the fact that the deceased may have declined an offer to buy the house should not affect the Presidential decree in 1996; that the deceased's estate could easily have afforded paying the purchase price. The magistrate found that the argument that the house was sold to a sitting tenant or that it was meant to be a family home was not supported by evidence. The magistrate reasoned that notwithstanding the history of the occupancy of the

house, the deceased was the (legitimate) tenant, as we understood the argument, and not the (extended) "family". The magistrate then made the following determination:

> **"I am aware that in councils, where an employee dies, the children or dependants on the list of the beneficiaries maintained by them are given preference to continue occupying it.**
>
> **Therefore, his estate should have been given first priority in terms of offer of the house because at the time, his terminal benefits had not yet been processed. In any case they still fall within the contemplation of the Presidential directive as to who a sitting tenant in such an event would be."**

The court concluded that the sale of the house to the 1st appellant was irregular. The magistrate deemed the "error" to be "curable" by virtue of **Order 3, Rule 2** of the **Subordinate Courts Act**[1] and ordered that the Council be joined to the proceedings as a respondent and that it cancels the certificate of title issued to the 1st appellant and register the property in the respondent's name for his and other beneficiaries' benefit.

Unhappy with the learned magistrate's decision, the 2nd appellant appealed to the High Court on the two narrow grounds, firstly, that the court misdirected itself by ordering that the offer of

the house to the 1st appellant was irregular; and secondly that the court misdirected itself in holding that the deceased died after the Presidential declaration on the sale of Government and Council houses.

In the High Court, the judge agreed with the magistrate's view that the Council should have allowed the 2nd appellant to have bought the house in his capacity as administrator on behalf of the estate. She applied the holding of this court in the case of **Malichupa and Others V. Tanzania Zambia Railway Authority[1],** in which it was said

**"the law is settled that for somebody to be eligible to purchase a house from the Government of the Republic of Zambia and or a parastatal body, that somebody has to be:**

**(a) a sitting tenant and at the same time either he or she is an employee or former employee not paid his or her terminal benefits.**
**(b) Widow or child of the deceased of an employee of the Government of the Republic of Zambia or parastatal who has not yet been paid his or her terminal benefits at the time the scheme was put in place."**

The judge concluded that the magistrate was on firm ground in ordering cancellation of the certificate of title issued to the 1st

appellant and to have a new one issued in the respondent's name on behalf of the beneficiaries.

Regarding the argument at which point the deceased died, the judge found that it was before the Presidential decree announcing the decision to sell Council houses.

The 2nd appellant was still unhappy with the outcome of the appeal in the High court and appealed further to this court setting down five grounds of appeal, namely that

> "1. **The court below erred in law and in fact in holding that the offer of house No. 657 Buchi, Kitwe to the 1st appellant by the Council was irregular without drawing its attention to the provisions of Circular No. 2 of 1996 on the sale of Council houses.**
>
> 2. **The court below erred in applying the procedure and law relating to the sale or purchase of Government houses to the purchase or sale of Council houses. The law, procedure and regulations on sale of Council houses is different from the sale of Government pool houses. The sale of council houses is governed by Circular No. 2 of 1996 on the sale of Council houses, whereas the sale of government houses was governed by the Handbook on sale of Government houses.**
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> 3. **The court below erred in law and fact in holding that the 2nd appellant (Administrator) should have bought the house for the benefit of the deceased's estate. An Administrator of an estate has discretion of whether to purchase the said house for the benefit of the estate or not.**

4. **The court below misdirected itself in failing to appreciate the fact that the deceased having died before the pronouncement of the sale of Council houses was not a tenant at the time of the Presidential announcement on sale of the said houses to sitting tenants and the appellant was thus entitled to apply for regularisation as a tenant in his own name and purchase the subject house which regularisation was approved by the Council.**

5. **The court below erred in holding that the issue of the refund did not arise. It is irrefutable for the Respondent to acquire a property without paying for it.**"(Sic)

On 4th April 2016, the 1st and 2ndAppellants filed their written Heads of Argument. The grounds and Heads of Argument were settled on behalf of the appellant by their now advocates, having gone through the proceedings in the Subordinate and High Courts in person.

Concerning ground one, it was submitted that the Council could not have offered the house to the respondent at the time because at age 15 years he lacked capacity to enter into a tenancy agreement; that the Presidential decree for the sale of Council houses had not yet been made when the deceased died; therefore, that the house was available for allocation to any willing or

interested person as a tenant; that the administrator could not rent the house on behalf of the estate and buy it for the estate after the Presidential decree.

Grounds 2 and 3 were argued as one and it was submitted that the law and procedure pertaining to the sale of Council houses to sitting tenants was different from that pertaining to the sale of Government or parastatal houses to sitting tenants and that in respect of applying the benefits of a deceased employee towards the purchase of the house, the issue did not arise when it came to the sale of Council houses. It was submitted, therefore, that the case of **Malichupa and Others V. Tanzania Zambia Railway Authority**[1] does not apply to the case at hand.

Counsel argued that we should take judicial notice of **Circular No. 2 of 1996** on the sale of Council houses which, according to him, provided that in the event of death, the surviving spouse was to be registered as a tenant and in the absence of a spouse, a child or dependant of the deceased aged 18 years and above; and that the procedure never spoke about applying benefits to the purchase of the house.

It was submitted further that the role of an administrator is to wind up the estate of the deceased and not to enhance it as decided by this court in the case of **Gray Nachandwe Mudenda v. Dorothy Chileshe Mudenda**[2] where it was said, and which we reiterate, that the duty of an administrator is not to enhance the estate, but to collect the deceased's estate, distribute it to the beneficiaries and render an account. It was submitted, therefore, that the holding that the administrator should have bought the house for the benefit of the respondent is wrong at law.

In ground four it was contended that the Council did not err in registering the 1st appellant as tenant and subsequently allowing him to buy the house on the basis that the respondent lacked capacity due to his age.

In respect of ground 5, it was contended simply that it is inequitable that the respondent could acquire property without paying for it.

There was neither a response nor heads of argument filed by the respondent against the appeal. The respondent did not also attend the hearing of the appeal. We heard the appeal after being

satisfied that the appellant was duly notified of the appeal hearing but deliberately refused to acknowledge service. This appeal will, therefore, be determined on the basis of the proceedings in the courts below and counsel's arguments before us as permitted under rule 71(1)(b) of the **Supreme Court Rules**[2].

We have considered the grounds of appeal, the evidence before the lower court and the submissions by Counsel. It is obvious that grounds 1 to 4, in essence, all address the issue whether the decision to sell the house to the 1st appellant was properly arrived at. We will, therefore, address these grounds of appeal together. The 5th ground of appeal shall be addressed alone.

The uncontested facts in this case are that at the time of the offer and sale of the house to the 1st appellant, the people living in the house were the deceased's child named Kaluba, the 1st appellant himself and his brother, Albert. The respondent was living elsewhere at the time. It was not stated where the deceased's child named Evans was living. The deceased's wife had long passed away in 1991. Further uncontested evidence is that the house had been historically occupied by the parties' extended family; that the

two brothers, the 1st appellant and Albert were the first to join their uncle, the late Mr. Kapyatila. The deceased then came to live with them. The 2nd appellant played a role in ensuring that the house continued to be occupied by members of the extended family and particularly that after the demise of Mr. Kapyatila, the deceased took over as the registered tenant while the 1st appellant and Albert continued to live in the house. Up until his death, the deceased was the registered tenant. In 1994/1995, the council offered him to purchase the house but he declined. Shortly after his death, the Presidential decree for the sale of council houses was promulgated. The 2nd appellant vied to be sold the house allegedly on behalf of the estate and for the benefit of the deceased's children and the two brothers. He was not allowed to do so. The house was instead sold to the 1st appellant. These are the uncontested facts.

We have been urged to uphold the appeal on the grounds that at the time when the 1st appellant was offered to buy and he bought the house, the respondent was still a minor; that the house was available for allocation to any willing or interested person; that the administrator could not rent and buy the house for the estate after

the Presidential decree as deplored in the case of **Gray Nachandwe Mudenda**[2]; that the law and procedure for the sale of Council houses is different from that pertaining to the sale of government pool houses, the premise, according to counsel, on which the decision in the **Malichupa**[1] case was made; that we should uphold the sale of the house to the 1st appellant and in any event that it is inequitable that the respondent should acquire the house without paying for it. We will consider the issues.

We begin with the argument that after the Presidential decree for the sale of Council houses, the house was available for allocation to any willing or interested person because the respondent or any of the deceased's children were minors and that the 2nd appellant could not rent or buy the house after the Presidential decree on the sale of Council houses. In our considered view the issue raises the further question whether the demise of the deceased determined the tenancy relationship that existed between him and the Council pursuant to which he used to pay rent for the house.

Our understanding of the law is that the death of a tenant does not bring the tenancy to an end. What follows depends on the circumstances of the case. Obviously, if the tenancy is in joint names, which it was not in this case, the surviving tenant will acquire the deceased tenant's interest by virtue of what is referred to as the *jus accrescendi* or '**right of survivorship'.** Thus where two persons rent a property jointly and one of them dies, the tenancy will wholly devolve upon the surviving joint tenant unless s/he elects to determine the tenancy. Where there is, however, a sole tenant the preferred view should be that if the tenancy is still within the term, the remainder of the term is a property right, the ownership of which will pass to the deceased's estate to be administered by the personal representative. The rationale for this view is that in the event that there were rent arrears owing to the landlord, the personal representative would have to clear them from monies available to the estate. Similarly, the estate would have to continue paying rent for the duration of the rest of the term unless sooner notice to quit the tenancy is given or it is lawfully determined by the landlord.

Although, in the case before us, the evidence points to the fact that several members of the deceased's extended family had historically been in occupation of the house, it is clear that it was always registered in the name of one tenant. At the time of the deceased's tenure the tenancy was registered in his name. In the circumstances, the issue of a joint tenancy between the registered tenant and the other extended family members does not arise. In fact it is clear, further, that the registered tenant always paid rent to the Council and there is no evidence of any contribution towards the rent payments by any other extended family member so as to suggest the probable existence of a joint tenancy. The deceased was a sole tenant. Therefore, when he died, the property right in the tenancy moved to his estate to be perpetuated or lawfully ended as the law permitted. Barely one month or so after the deceased's death the decree to sell Council houses was made. The deceased's son, Kaluba, besides the 1st appellant and Albert, was in occupation of the house. In terms of the law on intestate succession the deceased's children had a superior claim to the father's estate including in this case assuming the property right in the tenancy now reposing in the estate. With regard to the children's minority

age, it is notable that section 5(2) of the **Intestate Succession Act**[3] provides that-

> **"In respect of a minor, the mother, father or guardian shall hold his share of the estate in trust until he ceases to be a minor."**

"**Minor**" is defined in section 2 of the **Act**[3] as a person who has not attained the age of eighteen years. The deceased's eldest son, Kaluba was 17 years of age, as the evidence has shown, while the respondent was 15 years of age at the time of their father's death. They could not claim the property right on their own. In the absence of their mother, they could only do so through a guardian who would hold their property right in the tenancy in trust for them. There is presently, however, no evidence as to who between the 1st and 2nd appellants, or anybody else for that matter, stood in the stead of a guardian to the deceased's minor children after his death.

It cannot be in contest though that when the decree to sell Council houses was promulgated the property right in the tenancy reposed in the estate. The guideline in Circular No. 2, which we

were availed by the learned advocate for the appellant and which we have taken judicial notice of, was seemingly inserted in the circular with this position in mind. It was stated in the Circular:

> "**N.B: Where a tenant dies, in this case a husband/wife, the surviving spouse or son/daughter of 18 years and above shall automatically be deemed as the legal tenant of the said house and council shall automatically register him/her as the legal tenant.**"

There can be no doubt that when the decree to sell Council houses was made, the deceased's estate was in pole position for consideration for the offer to purchase the house for the benefit of the deceased's children, who were the beneficiaries. This did not happen. It was instead offered to the 1st appellant. In the light of the law that we have outlined, this was irregular. The Council should have sought a guardian for purposes of preserving the property right in the tenancy and ultimately to have sold the house to him/her to hold in trust for the minor children and register the house in their names upon attaining majority age.

When Kaluba attained majority age he could have exercised the right to claim the house. He did not. The respondent did that and rightly so. We, therefore, see nothing wrong in the magistrate's

decision that the house be registered in the name of the respondent for his and other siblings' benefit. The case of **Malichupa** which dealt with the sale of parastatal (TAZARA) houses does not apply in this case. We re-endorse what this court said in the case of **Gray Nachandwe** as to the limitations of an administrator of a deceased's estate.

In upholding the decision of the two courts below we would, in fact, go further and direct that the council proceeds to cancel the certificate of title registered in the name of the 1st appellant and a new one be issued in the joint names of the deceased's children who, we believe, have by now attained the watershed age of 18 years of age and have thus the capacity to own property in their own right. In the light of this view it must go without saying that there is no merit in grounds 1 through to 4.

The last (5th) ground of appeal highlighted the question whether the house was paid for from the deceased's terminal benefits. The balance of the evidence shows that the 1st appellant paid for the house. We will not belabour the issue. The respondent Council should refund the K21,008 paid by the 1st appellant to him.

The respondent and his fellow siblings should then pay the Council the purchase price of K21,008 after which the house will be registered in the joint names of the deceased's children. To the foregoing extent, ground 5 of the appeal is successful. The success in the last ground notwithstanding, the appeal in this case has altogether failed on the basis that four of the five grounds are not successful. The appeal is accordingly dismissed with costs to the respondent.

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**M.S. MWANAMWAMBWA**
**DEPUTY CHIEF JUSTICE**

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**N.K. MUTUNA**
**SUPREME COURT JUDGE**

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**J. CHINYAMA**
**SUPREME COURT JUDGE**