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IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 233/2019

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

**MIKE KASANDA MWILA
BRIDGET PULE SHULA**



1ST APPELLANT

2ND APPELLANT

AND

MAVIS KASANDA

RESPONDENT

CORAM: CHASHI, LENGALENGA AND NGULUBE, JJA.

On 25th March, 2021 and 22nd April, 2021.

For the Appellants : Mr. Tambulukani, of Messrs. D T Legal Practitioners.

For the Respondent : Mr. Mr. Twumasi, of Messrs. Kitwe Chambers.

J U D G M E N T

NGULUBE, JA delivered the judgment of the Court.

Cases referred to:

1. *Monica Siankondo (suing in her capacity as administratrix of the estate of the late Edith Siankondo) vs Frederick Ndenga (2005) ZR 22.*
2. *B.P. Zambia Plc vs Zambia Competition Commission, Total Aviation and Export Limited, Total Zambia Limited, SCZ Judgment No. 22 of 2011.*
3. *Anti-Corruption Commission vs. Barnnet Development Corporation Limited (2008) 1 ZR 69.*

4. *Emmanuel Mutale vs Zambia Consolidated Copper Mines Limited (1994) ZR 67.*
5. *Corpus Legal Practitioners vs Mwanandani Holdings Limited, SCZ Judgment No. 50 of 2014.*
6. *Nkumbula Nkwilimba vs Humphrey Salwanja (2014) 1 ZR 135.*
7. *Collet vs Van Zyl Brothers Ltd. (1966) ZR 65.*
8. *Scherer vs Country Investments Limited (1986) 1 WLR 615.*

Legislation referred to:

1. *The Intestate Succession Act, Chapter 59 of the Laws of Zambia.*
2. *The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.*
3. *The Common Leasehold Schemes, Chapter 208 of the Laws of Zambia.*
4. *The High Court Rules, Chapter 27 of the Laws of Zambia*

INTRODUCTION

1. When we heard this appeal on 25th March, 2021, we sat with Honourable Mrs Justice F.M. Lengalenga who has since retired. Therefore, this Judgment is by the Majority.
2. This appeal is against a Judgment of the Honourable Mr. Justice I. Kamwendo of the Kitwe High Court, delivered on 20th September, 2019, in which the court ordered that the certificate of title in respect of Stand No. 6342, Kitwe, issued to Kasanda Mwila Enterprises Limited, be cancelled forthwith. The court was of the view that the property formed part of the estate of the late Kasanda Mwila who died intestate on 13th May, 2008, and that it

be shared by the parties as provided by the ***Intestate Succession Act¹***.

3. We wish to make it clear that when this matter came up for hearing on 25th March, 2021, counsel informed the court that the respondent died after this appeal was filed and it is now being prosecuted by the administrators of her estate. The court then made an order for the substitution of the respondent, but she is still cited as a party in this judgment because counsel did not furnish us with letters of administration containing the names of the administrators of her estate.

BACKGROUND

4. This case involves a dispute among siblings over the distribution of the estate of the late Kasanda Mwila, who breathed his last on 13th May, 2008. The late Kasanda Mwila was survived by the appellants who were born from his late first wife, while the respondent was born of a different mother. Prior to his death, the deceased incorporated a company called Kasanda Mwila Enterprises Limited, in which he was a shareholder together with the appellants, but the respondent was not a shareholder.
5. The dispute in this appeal revolves around two properties which the late Kasanda Mwila left behind. The first property is Stand

No. 6342, Buyantanshi, Kitwe, which is also known as Plot No. 5328, comprising of one properly functioning cold room, a butchery, a boutique, an office, as well as another cold room which was not working. The late Kasanda Mwila commenced the process of purchasing this property but the conveyance had not been completed at the time of his death and the certificate of title was still in the vendor's name. The appellants obtained a certificate of title to this property in the name of the company after the death of their father. The second property is Stand No. 5317, Riverside, Kitwe, comprising twelve flats, a bar, a big shop and a butchery.

6. When their father died, the parties held a meeting at which they agreed that there would be no need to appoint an administrator to administer the estate, but that the parties would as a family run the businesses left behind by their late father. They agreed that the first appellant would run the business at Stand No. 6342, Buyantanshi, Kitwe while the respondent would run the business at Stand No. 5317, Riverside, Kitwe. The second appellant was at the time working abroad in Cote'd Ivoire.
7. The parties later differed over the management of the estate and their relationship deteriorated. The respondent took out an

action in the High Court, whose outcome is now being contested in this Court. Thereafter, the parties had ex-curia discussions and the matter was taken for mediation at which they entered into a consent settlement order on 13th January, 2013. The interim solution intended to be in force for twenty-four months from the 1st of February, 2013. The parties went back to court for the determination of the dispute in respect of the two properties.

8. By amended originating notice of motion, the respondent sought the following reliefs, among others:

- (i) an order that Stand No. 6342 Kitwe, forms part of the estate of the late Mwila Kasanda and therefore must be shared in accordance with the Act;**
- (ii) further or in the alternative, that the shares of the late Mwila Kasanda in the company Kasanda Mwila Enterprises Limited which owns Stand No. 6342, Kitwe, be valued and that the respondent's entitlement be paid to her;**
- (iii) an order that property known as Stand No. 5317, Kitwe, be shared in accordance with the Act and the same be shared using a common leasehold scheme; and**
- (iv) an order that the costs incidental to these proceedings be paid by the estate;**

9. The respondent's action was opposed by the appellants who contended that Stand No. 6342, Buyantanshi, Kitwe belonged to

Kasanda Mwila Enterprises Limited and did not form part of the estate. The appellants' position was that the respondent was only entitled to one third of the value of the shares which their late father owned in the company.

10. The appellants further opposed the respondent's claim that Stand No. 5317, Riverside, Kitwe should be shared using a common leasehold. It was argued that the relationship between the parties had broken down irretrievably and sharing the property using a common leasehold would have been a recipe for continued conflict and animosity between the parties. This is because the property has common facilities which the parties were expected to share.

DECISION OF THE HIGH COURT

11. The court below considered the evidence that was laid before it and found that the late Kasanda Mwila died intestate and the *Intestate Succession Act*¹ applied to his estate. It dismissed the appellants' contention that the respondent was only entitled to the shareholding of the company but not entitled to benefit from Stand No. 6342, Buyantanshi, Kitwe, because the property belongs to the company. The court observed that the certificate of title to the property had not changed into the company's name

at the death of the late Kasanda Mwila on 13th May, 2008. The court further expressed the view that the appellants' actions to register the property in the company name were clearly meant to prevent the respondent from benefiting from property which she was lawfully entitled.

12. The lower court further reasoned that if it was to grant the respondent the shareholding only, the property would obviously fall in the control of the appellants to the detriment of the respondent. The property would only be for the benefit of the appellants contrary to the spirit of the ***Intestate Succession Act***¹ which was enacted to curb the prevalent vice of property grabbing. The court ordered that the certificate of title issued in respect of Stand No. 6342, Kitwe, to Kasanda Mwila Enterprises Limited, be cancelled forthwith. It ordered that the property formed part of the estate and must be shared in accordance with the ***Intestate Succession Act***¹.
13. The lower court ordered for the valuation of the respondent's shares in the company and that they be given to her.
14. The court further ordered the parties to share Stand No. 5317, Riverside, Kitwe, using a common leasehold, as provided for in

the *Intestate Succession Act*¹. It ordered that the costs incidental to the proceedings be paid by the estate.

THE APPEAL BEFORE THIS COURT AND THE GROUNDS THEREOF

15. The appellants were not satisfied with the pronouncements and orders of the court below as embodied in the judgment. They have now appealed to this Court on three grounds of appeal as follows—

1. *That the learned trial judge in the court below erred both in law and fact when he held that the certificate of title issued in respect of Stand No. 6342, Kitwe, be cancelled forthwith and that the property was available for distribution;*
2. *That the learned trial judge in the court below erred in both law and fact when he ordered that Stand No. 5317, Kitwe, be shared in accordance with the Act and the same be shared using common leaseholds in total disregard of the evidence on record; and*
3. *That the learned judge in the court below erred in law and fact when he ordered that costs to the proceedings will be paid by the estate.*

16. Counsel for the parties filed heads of argument in support of their respective clients' positions, which they relied on at the hearing of the appeal and augmented with oral submissions.

THE APPELLANTS' CONTENTIONS

17. On the first ground of appeal, the gist of the argument by counsel for the appellant, Mr. Tambulukani, was that the court had no power to order the distribution of property belonging to someone else and does not form part of the estate. He argued that Stand No. 6342, Kitwe did not form part of the estate of the late Kasanda Mwila as it was still in the name of the vendor at the time of his death. He submitted that the property was bought in the name of Kasanda Mwila Enterprises Limited and the conveyance started even before the death of Mr. Kasanda Mwila, though the certificate of title to the property was issued after his death. This was confirmed by the appellants' evidence which the court ignored.
18. Mr. Tambulukani submitted that the appellants' evidence was that the vendor had disappeared and was only located in 2014 when the conveyance resumed and was concluded. The appellants' further evidence was that title to the property was obtained in the name of the company in accordance with the late Kasanda Mwila's wish. He submitted that the appellants produced a letter which the late Kasanda Mwila wrote on the company letterhead, requesting the vendor to change title into

the name of the company. Our attention was also drawn to the letter of sale which the vendor addressed to the company, and the caveat that was entered on the property.

19. He submitted that the evidence clearly showed that the property did not belong to the late Kasanda Mwila at the time of his death but was still in the name of the vendor and was in the process of being conveyed to the company. The appellant's counsel therefore argued that the property did not form part of the estate.
20. He submitted that it is trite law that a company is a separate legal entity from its shareholders and directors and therefore the respondent was not entitled to benefit directly from the property of the company. We were referred to, among other authorities, the case of *Monica Siankondo (suing in her capacity as administratrix of the estate of the late Edith Siankondo) vs Frederick Ndenga*¹, in which the court held that the *Intestate Succession Act*¹ did not apply to a house because it did not form part of the estate as the deceased never purchased it.
21. Counsel went on to cite *Section 33 of the Lands and Deeds Registry Act*², which provides that:

“A certificate of title shall be conclusive as from the date of its issue and upon and after the issue thereof,

notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise, except in case of fraud.”

22. Mr. Tambulukani argued that there was no evidence that the certificate of title was fraudulently obtained in the name of the company, but there was evidence that title was obtained in accordance with the desire and wishes of the late Kasanda Mwila. Therefore, the court below ought not to have cancelled the title.
23. Counsel further submitted that the lower court should not have granted the respondent's claims for an order that the property formed part of the estate and must be shared, as well as, an order that the shares of their late father in the company be valued and the respondent be paid her entitlement. Mr. Tambulukani contended that the court below erred when it awarded both claims because they were made in the alternative.
24. It was his submission that if the company owned the property, the court should not have cancelled the certificate of title but should have only granted the respondent's claim for shares. The gist of counsel's argument was that the respondent is not entitled to a share of the property owned by the company,

but is entitled to the shares which their late father held were held in the company. He urged us to uphold the first ground of appeal.

25. On the second ground of appeal, Mr. Tambulukani on behalf the appellants contested the decision of the court below to order that Stand No. 5317, Kitwe be shared using a common leasehold. This was because there was evidence that the relationship between the parties had broken down irretrievably. He submitted that there was evidence that the parties had explored the possibility of sharing the property using a common leasehold but they had failed to agree due to the animosity and broken relationship. Our attention was drawn to affidavit evidence and correspondences from both sides which show that their relationship had broken down beyond repair.

26. Counsel submitted that the reasons the appellant opposed sharing the property using a common leasehold was that property built was on a single certificate of title and the structure in its current form cannot support a common leasehold unless major works were undertaken. The property has one electricity meter box despite having thirteen flats, a butchery, shops and bars, and there are also a number of other common facilities

such as toilets, balcony, store rooms, passages and entrances. He submitted that the estate has no funds to convert the property into a common leasehold.

27. Mr. Tambulukani took us on an exploratory voyage of the **Common Leasehold Schemes Act³** to make the point that a common leasehold scheme is an arrangement which requires unit holders to work together for the benefit of the leasehold. It was his submission that a common leasehold could only work where there is harmony among the unit holders. He argued that the relationship between the parties had broken down irretrievably and sharing property under a common leasehold would be a recipe for continued animosity and conflict. This is because the animosity extended to the relationship between the appellants and the administrators of the respondent's estate, who died on 6th August, 2019.

28. Therefore, in light of the broken relationship which had been by the appellants and the respondent, Mr. Tambulukani urged to overturn the decision of the court below and order that the appellants be at liberty to buy out the interest of the respondent. In the alternative, counsel implored us to order that the property

be sold to a third party and that the proceeds should be shared in accordance with the ***Intestate Succession Act***¹.

29. In respect of ground three, counsel for the appellant contends that the court below was wrong to have ordered costs against the estate because there were no funds which accumulated in the estate to meet the order for costs as the parties had already shared the proceeds from the estate. It was counsel's submission that the parties agreed not to appoint an administrator after the death of their father but chose to run the businesses he left behind. They had also entered into a consent settlement order on 13th January, 2013, in which they agreed on how to manage and share the estate. Counsel further submitted that although the consent settlement order was expressed to last not more than twenty-four months, it continued to subsist up to the time the respondent died.

30. Mr. Tambulukani went on to cite the case of ***B.P. Zambia Plc vs Zambia Competition Commission, Total Aviation and Export Limited, Total Zambia Limited***², in which the court held that-

“Under order 62(3) of the Rules of the Supreme Court, the award of costs is in the discretion of the court and it is also trite law that this discretion should be exercised judiciously.”

31. He further submitted that although under **Order 40 Rule 6 of the High Court Rules⁴**, costs are in the discretion of the court, the court below should have exercised this discretion judiciously and with caution. According to him, the court should have ordered each party to bear their own costs as there was no administrator who had been appointed to administer the estate from the time the late Kasanda Mwila died. The parties had agreed to share the estate from which each party was deriving a separate and distinct benefit and there were no funds that were in a common pool out of which the costs could be paid. We were urged to set aside the lower court's decision and uphold the appeal with costs to the appellants.

THE RESPONDENT'S CONTENTIONS

32. The first ground of appeal was opposed by counsel for the respondent. Mr. Twumasi, submitted that this court should ignore the argument by the appellants the court below erred in awarding the respondent's claims that Stand No. 6342, Kitwe was part of the estate as well as the further or alternative claim for her share of their late father's shares in the company. This was because that argument had been advanced as a ground of appeal. He nevertheless argued that the court below was at

liberty to award both claims since the respondent's claim for her share of their late father's shares was a further or alternative relief.

33. Counsel referred to the case of ***Anti-Corruption Commission vs. Barnnet Development Corporation Limited***³, where the Supreme Court held that:

“Under Section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of land by a holder of a certificate of title. However, under section 34 of the same Act, a certificate of title can be challenged and cancelled for fraud or reasons of impropriety in its acquisition.”

34. He argued that the judgment of the lower court did not cancel the certificate of title for fraud or reasons of impropriety. It was because the court expressed the view that if the applicant was only granted shares in the company, the property would fall in the control of the appellants to the respondent's detriment.
35. Mr. Twumasi further submitted that the court below ordered that the respondent's shares in the company be valued and given to her, which order was not challenged by the appellants. The appellants were therefore in agreement with the judgment of the court below. It was his further contention that the valuation of

the respondent's shares in the company includes Stand No. 6342, Kitwe. He submitted that it followed that the court below was on firm ground when it ordered that the property formed part of the estate and must be shared in accordance with the ***Intestate Succession Act***¹.

36. Counsel went on to submit that the mediation settlement order which the parties entered into clearly shows that the property in dispute formed part of the estate. He stated that the mediation settlement order stipulated the interim solution which was to be in force for twenty-four months from 1st February, 2013. It was his submission that the only outstanding issue which need to be settled was the sharing and distribution of the estate.
37. Mr. Twumasi further submitted that the late Kasanda Mwila was a shareholder of the company which is the registered proprietor of the property in dispute. Despite the company having a separate legal personality, its shareholders were the beneficiaries of the property which is in the name of the company. Counsel conceded that the relationship between the parties had indeed broken down irretrievably and it would be impossible for them to manage the property in the name of company. He supported the

decision of the court below and submitted that this appeal should be dismissed.

38. On the second ground of appeal, Mr. Twumasi contended that this ground is against a finding of fact and not law, or mixed law and fact, which is not permitted. It was his contention that the appellants clearly did not want the respondent to keep her share of the property. Counsel referred us to **Section 9(1)(a) of the Intestate Succession Act¹**, which 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;”

39. Counsel for the appellants submitted that the parties being the only beneficiaries of the estate were entitled to the property as tenants in common. He opposed the appellant's offer to either buyout the respondent's share of the property or to sell the property to a third party. It was argued that the appellants should rather be the ones to sell their respective shares of the property to the respondent or a third party based on an independent valuation report. Counsel submitted that the

appellants should not force the respondent to sell her share of the property to them, because she is entitled to keep and deal with her share as she pleases.

40. Mr. Twumasi argued that a common leasehold is provided for under the **Common Leasehold Schemes Act⁴** and it is attainable. He submitted that the appellants were more concerned about the relationship of the parties and the expenses associated with the registration of a common leasehold, but the issues they had raised cannot assail the judgment of the court below. He argued that the fact that there will be challenges in actualizing a common leasehold should not be the basis for setting aside the decision of the court below. He submitted that even if this court were to order the sale of the property to third party or a buyout of either party's shares of the property, there would still be challenges.

41. Counsel submitted the estate has funds to undertake the conversion of the single title premises into multi shared premises. It was his contention that the second ground of appeal was advanced to further the interest of the appellants only. He supported the decision of the lower court should accordingly be dismissed.

42. At the hearing of the appeal, Mr. Twumasi told us that he had instructions from the administrators of the respondent's estate that since the respondent who had sentimental attachment to the property had died, they were not averse to having the property valued and sold so that the proceeds are shared.

43. The appellants' counsel further opposed ground three of this appeal. He cited **Order XL Rule 6 of the High Court Rules⁴** and submitted that it is settled law that costs are in the discretion of the court. Counsel argued that the respondent was successful in the court below and the costs ought to abide the event of the suit. He relied on the case of **Emmanuel Mutale vs Zambia Consolidated Copper Mines Limited⁴**, where it was held that:

"... the general rule is that a successful party should not be deprived of his costs unless his conduct in the course of the proceedings merits the court's displeasure or unless his success is more apparent than real, for instance where only nominal damages are awarded."

44. It was counsel's contention that the respondent should not have to bear her own costs for the expenses she was been put to by the appellants when she was the successful party. Mr. Twumasi argued that the court below judiciously exercised its discretion when it ordered that the estate should bear the costs. He urged

47. On the second ground, Mr. Tambulukani maintained that it was impractical for the parties to share the property under a common leasehold with the respondent's relatives. This was because of the bad relationship that they have with the appellants. Counsel therefore urged us to order that the appellants be at liberty to buy out the respondent's interest, failing which the property should be sold and the proceeds must be shared.
48. As regards the ground three, Mr. Tambulukani again rehashed his contentions that the estate does not have any unallocated revenue to pay costs and it was in the interest of justice that the court below should have ordered the parties to bear their own costs.

CONSIDERATION OF THE MATTER BY THIS COURT AND VERDICT

49. We have considered the evidence on record, the heads of argument filed by Counsel for the parties, their oral submissions and the authorities to which we were referred. The issue we have to resolve under ground one is whether Stand No. 6342, Buyantanshi, Kitwe formed part of the estate or it belonged to the company. The appellants' counsel contends that the property belongs to the company and he has relied on a number of documents, including a letter which the deceased wrote to the

vendor requesting that title to the property be changed into the company's name.

50. The view we take is that the property formed part of the estate of the deceased as the property was not registered in the company's name at the time of his death. It is our considered view that the property fell into the estate when the deceased died. We are of the view that it was improper for the appellants to obtain a certificate of title in the company's name after the demise of their father. In the case of ***Corpus Legal Practitioners v Mwanandani Holdings Limited***⁵, the Supreme Court held that:

“In Anti-Corruption Commission vs. Barnet Development Corporation Limited⁴, we held that, under Section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of land by the holder thereof although it can be challenged and cancelled, for fraud or other reasons relating to impropriety, in its acquisition.

We further take the view that a person alleging fraud or any other impropriety, with regard to the issuance of a Certificate of Title, must challenge the same through a Court action and prove the allegations of fraud or other impropriety, as the case may be, to obtain a Court order for the cancellation of the affected Certificate of Title by the Registrar of Lands and Deeds.”

“The Act was intended to provide a uniform intestate succession law to make adequate financial and other provision for the surviving spouse, children, dependants and relatives of an intestate.”

53. Therefore, the appellants’ argument finds no support at law and this court cannot provide succor to them.
54. We are of the further opinion that the court below was on firm ground when it awarded both the claim for an order that Stand No. 6342, Buyantanshi, Kitwe, formed part of the estate and must be shared; as well as the claim for the valuation of their late father’s shares and that the respondent be paid her entitlement. The respondent’s claim for shares was made *“further or in the alternative”* and as such the court below was not wrong in granting both reliefs. The lower court opined that if it had only granted shares to the respondent, the property would have obviously effectively fallen in the control of the appellants to her detriment.
55. We accordingly uphold the decision of the court below to order that the certificate of title be cancelled and that the property formed part of the estate. We will make the necessary orders at the end of this judgment on how the property must be shared

51. The respondent in this case did not plead fraud, but it is clear from the evidence that there was impropriety in the manner the appellants acquired title for the company. The property belonged to the estate but the appellants obtained title for the property in the company's name when there were proceedings pending over the property. We agree with the court below that the appellants' actions were meant to prevent the respondent from benefitting from the property, particularly that the appellants were originally the shareholders of the company together with their late father and the respondent was not. Clearly, there was impropriety in the acquisition of title to justify its cancellation by the court below.
52. We cannot accept the argument that the appellants registered the property in the company's name to fulfil their late father's wish, the wishes of a deceased person can only be fulfilled where he leaves a will. Otherwise, the intentions and wishes of a person who dies without leaving a will die with him. The **Intestate Succession Act** is not meant to give effect to the wishes of persons who die intestate. In the case of **Nkumbula Nkwilimba vs Humphrey Salwanja**⁶, it was held that:

“The Act was intended to provide a uniform intestate succession law to make adequate financial and other provision for the surviving spouse, children, dependants and relatives of an intestate.”

53. Therefore, the appellants’ argument finds no support at law and this court cannot provide succor to them.
54. We are of the further opinion that the court below was on firm ground when it awarded both the claim for an order that Stand No. 6342, Buyantanshi, Kitwe, formed part of the estate and must be shared; as well as the claim for the valuation of their late father’s shares and that the respondent be paid her entitlement. The respondent’s claim for shares was made *“further or in the alternative”* and as such the court below was not wrong in granting both reliefs. The lower court opined that if it had only granted shares to the respondent, the property would have obviously effectively fallen in the control of the appellants to her detriment.
55. We accordingly uphold the decision of the court below to order that the certificate of title be cancelled and that the property formed part of the estate. We will make the necessary orders at the end of this judgment on how the property must be shared

and distributed. We hereby dismiss the first ground of appeal, for lack of merit.

56. Coming to the second ground of appeal, we have considered the issues raised on this ground. The question we have to determine is whether the court below was wrong to have ordered the parties to share Stand No. 6342, Buyantashi, Kitwe using a common leasehold. Mr. Tambulukani made spirited arguments that the court below misdirected itself when it ordered the parties to share the property using a common leasehold despite the overwhelming evidence that was before it that the relationship between the parties had broken down irretrievably. The evidence on record clearly shows that the relationship between the parties was characterized by animosity, conflict and disunity. This was even conceded by counsel for the respondent.

57. We therefore agree with Mr. Tambulukani that sharing the property using a common leasehold would be a recipe for continued conflict and animosity between the parties. This is because the parties would be expected to share common facilities on the property. There is no dispute that the property has a number of common facilities such as one electricity meter box, bar toilets, balcony, store-rooms, passages and communal

entrances. Sharing the property using a common leasehold was not the proper course to take since there is evidence the estate did not have any more funds to convert the property into common leasehold scheme.

58. For these reasons, we hold that the lower court misdirected itself and we set aside its order that the property be shared by the parties using a common leasehold. We shall in the circumstances make the necessary orders at the end of this judgment, regarding the appropriate manner in which the parties should share the two properties which we have held to be part of the estate. We find merit in ground two and it accordingly succeeds.

59. We now move to the third ground of appeal in which the appellants have appealed against the order of the court below that costs should be paid by the estate. We first wish to agree that costs are in the discretion of the Court and that as a general rule, costs follow the event. These principles were espoused in the case of **Collet vs Van Zyl Brothers Ltd**⁷, in which the erstwhile Court of Appeal of this country held that:

“The award of costs in an action is at the discretion of a trial judge, such discretion must be exercised judicially. A trial judge, in exercise of his discretion,

should, as a matter of principle, view the litigation as a whole and see what was the substantial result, where he does not do so, the court of appeal is entitled to review the exercise of his discretion.”

60. The principles to which the court must conform in exercising its discretion to award costs were espoused by Dudley LJ in the case of ***Scherer vs Country Investments Limited***⁸, in which his Lordship had the following to say about the award of costs:

“The normal rule is that costs follow the event. The party who seems to have unjustifiably brought another party before the court or given another party cause to obtain his rights, is required to recompense that other party in costs, but; the judge has unlimited discretion to make what order as to costs he considers that the justice of the case requires, consequently, a successful party has a reasonable expectation of obtaining an order to be paid the costs by the opposing party but has no right to such an order for it depends upon the exercise of the court’s discretion.”

61. On the authorities we have cited, we take the view that the lower court ought to have viewed the litigation as a whole and considered the justice of the case. If it had done so, the court would have come to the conclusion that the estate has no funds as the estate was already shared by the appellants and the respondent. The only outstanding issue when this case was in

the court below was the impasse over the properties subject of this appeal. Therefore, the award of costs against the estate by the court below was wrong in principle. We set aside the lower court's award of costs and order the parties to bear their respective costs in the court below. We find merit in the third ground of appeal and it is hereby allowed.

62. Coming back to how the parties should share the two properties, Mr. Tambulukani implored us to order that the appellants be given the opportunity to buy out the interest of the respondent, failing which the property should be sold to a third party and the proceeds be shared. We take the view that ordering the appellants to buy out the interest of the respondent would not be in the interest of justice considering the sour relationship that the parties have. We think that it will be difficult for them to agree on the purchase price. This particular option is therefore not tenable in this case.

63. We have nevertheless considered what Mr. Twumasi told us at the hearing of this appeal, that the respondent who had sentimental attachment to the property has since died and the administrators of her estate are not averse to having the property valued and sold. We in the circumstances order that both Stand

No. 6342, Buyantashi, Kitwe and Stand No. 5317, Riverside, Kitwe, should be valued by an independent valuation surveyor to be agreed upon by the lawyers representing the parties to determine their current value. Thereafter, the two properties must be sold to a third party and the proceeds should be shared in accordance with the ***Intestate Succession Act***¹.

64. The second and third grounds of appeal having succeeded, this appeal is hereby allowed. We order the parties to bear their respective costs here and the court below.

A handwritten signature in black ink, consisting of a large, stylized loop followed by a smaller loop and a final flourish.

J. CHASHI
COURT OF APPEAL JUDGE

A handwritten signature in blue ink, appearing to be 'P.C.M. Ngulube' written in a cursive style.

P.C.M. NGULUBE
COURT OF APPEAL JUDGE