

**IN THE COURT OF APPEAL OF ZAMBIA**

**APPEAL NO. 40/2021**

**HOLDEN AT NDOLA**

*(Civil Jurisdiction)*

**BETWEEN:**

**ALEXANDER ZIMBA**

**APPELLANT**

**AND**

**GERALDINE NAMWAKA LUKONGA**

**1<sup>ST</sup> RESPONDENT**

**KAREN LUKONGA** *(beneficiary of the estate  
of the late Edwin Wamulwa Lukonga)*

**2<sup>ND</sup> RESPONDENT**



**CORAM: MAKUNGU, NGULUBE AND BANDA - BOBO, JJA.**

***On 17<sup>th</sup> November, 2022 and 29<sup>th</sup> December, 2022.***

***For the Appellant:*** Messrs Nganga Yalenga and Associates

***For the Respondents:*** Messrs K. Mwale and Company

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## **J U D G M E N T**

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**NGULUBE, JA** delivered the Judgment of the Court.

**Cases referred to:**

1. *Mbilishi and another vs Tyre King Enterprises, SCZ Appeal No. 132/2003*
2. *Mudenda vs Mudenda, SCZ Judgment Number 12 of 2006*
3. *Wilson Masauso Zulu vs Avondale Housing Project Limited, (1982) ZR 172*
4. *Lindiwe Kate Chinyanta vs Doreen Chiwele and Judith Tembo, SCZ Judgment No. 28 of 2007*
5. *Mwenya and Kapinga vs Randee, (1998) Z.R. 12*
6. *Hunt vs Luck (1902)1CH 428*

7. *Investrust Bank Plc vs Hearmes Milling and Trading Limited and Others*, Appeal 137 of 2015
8. *Kingsnorth Finance Co. vs Tizard* (1986) 1 WLR 783
9. *Edith Nawakwi vs Lusaka City Council*, SCZ Appeal No. 26 of 2001 (unreported)

**Legislation referred to:**

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*
2. *The Intestate Succession Act, Chapter 59 of the Laws of Zambia*
3. *Halsbury's Laws of England, Volume 17, 4<sup>th</sup> Edition at para 704*
4. *Administration of Estates Act, 1925 of England*
5. *The Rules of the Supreme Court, 1999 Edition*

**Other work referred to:**

1. *Principles of Succession, Wills and Probate*, Caroline Sawyer, Routledge – Cavendish, 2<sup>nd</sup> Edition, 1998

## **1.0 INTRODUCTION**

- 1.1 On 17<sup>th</sup> April, 2020, M.D. Bowa, J of the High Court delivered a Judgment in which he dismissed the appellant's originating summons for lack of merit.

## **2.0 BACKGROUND**

- 2.1 On 15<sup>th</sup> March, 2018, the appellant, who was the applicant in the court below commenced an action by way of originating summons pursuant to **Order 30 rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia** seeking the following reliefs-



- (i) Payment of the sum of ZMW122,000.00 secured by a memorandum of deposit of title;
- (ii) Delivery of possession to the mortgagee by the mortgagor or person having the property subject to the charge or by any other person in or alleged to be in possession of the property;
- (iii) Foreclosure;
- (iv) Sale of house number 33, Tutwa Road, Lusaka, being Stand Number 1689/7417;
- (v) Costs.

2.2 In the affidavit in support deposed to by the appellant on 15<sup>th</sup> March, 2018, it was stated that the 1<sup>st</sup> respondent, was the administrator of the estate of the late Edwin Wamulwa Lukonga who owned Stand Number 1689/7417. The appellant exhibited letters of administration and a Certificate of Title relating to the property in issue and deposed that he lent ZMW80,000.00 to the 1<sup>st</sup> respondent, which was secured by a memorandum of deposit of title, dated 19<sup>th</sup> October, 2017.

2.3 The first respondent wrote a letter dated 7<sup>th</sup> December, 2017, authorizing the appellant to sell the same property, to recover the debt.

- 2.4 It was further deposed that the first respondent borrowed an additional sum of ZMW42,000.00 from the appellant who stated that the first respondent owed him a total sum of ZMW122,000.00, which remained unpaid.
- 2.5 The first respondent filed an affidavit in opposition on 8<sup>th</sup> May, 2018, in which she deposed that she borrowed the sum of ZMW42,000.00 from the appellant on the understanding that the loan would attract interest in the sum of ZMW38,000.00, and that she would therefore repay a total sum of ZMW80,000.00.
- 2.6 The first respondent stated that she deposited the title deed for Stand Number 1687/7417 with the appellant to secure the debt and further that she did not obtain consent from her younger sisters, Melanie Lukonga and Karen Lukonga, who are also beneficiaries of the estate of their late father, Edwin Wamulwa Lukonga.
- 2.7 According to the first appellant, she did not borrow an additional sum of ZMW38,000.00, but the said amount was interest which the appellant demanded from her for the repayment of the loan of ZMW42,000.00. That the appellant would have easily

discovered the second respondent's interest if he had made reasonable and proper inquiries before he lent her the money.

- 2.8 That since the appellant was dealing with the administrator of an estate of a deceased person, he was under a legal obligation to ensure that there were no prior ancillary rights of third parties.

### **3.0 DECISION OF THE LOWER COURT**

- 3.1 The lower court made a findings of fact that the first respondent obtained a loan of K40,000.00 from the appellant and that there were different versions regarding what the appellant owed the respondent, with the appellant claiming the sum of K122,000.00 as what was due to him. The first respondent on the other hand contended that she owed the appellant the sum of ZMW80,000.00.

- 3.2 The court stated that it needed to determine whether the first respondent, as administrator of the estate of her late father had the capacity to mortgage the property in issue. The lower court referred to the case of *Mbilishi and another vs Tyre King Enterprises*<sup>1</sup> where it was stated that the deposit of title deeds creates an equitable mortgage.



3.3 The lower court went on to refer to **section 19 of the Intestate Succession Act**, which outlines the duties and powers of an administrator as follows-

- 19. (1) The duties and powers of an administrator shall be**
- (a) To pay the debt and funeral expenses of the deceased and pay estate duty where it is payable;**
  - (b) To effect distribution of the estate in accordance with the rights of the persons interested in the estate under this Act;**
  - (c) When required to do so by the court, either on the application of an interested party or on its own motion-**
    - (i) to produce on oath in court the full inventory of the estate of the deceased; and**
    - (ii) to render to the court an account of the administration of the estate.**
- (2) When an administrator considers that a sale of any of the property forming part of the estate of the deceased person is necessary or desirable, in order to carry out his duties, the administrator may, with the authority of the court, sell the property in such manner as appears to him likely to secure receipt of the best price available for the property.**

3.4 The lower court expressed the view that section 34 of the said Act precludes an administrator of an estate from deriving any pecuniary benefit from the estate by virtue of the administrator's office. The court stated that the equitable mortgage that the first

respondent purported to create for her own benefit was not within what the Intestate Succession Act permitted an administrator to do in carrying out his or her duties.

3.5 The court noted that no consent was obtained from the other beneficiaries of the estate and then referred to the case of *Mudenda vs Mudenda*<sup>2</sup>, where the Supreme Court guided that the duties of an administrator of an estate do not include the enhancing of the estate. The court found that the first respondent mortgaged the property for her own benefit and that she had no capacity to do so as she had no authority.

3.6 The court held that the transaction between the appellant and the first respondent was that of a borrower and a lender and could not be enforced against the interests of third parties. That transactions relating to the purchase of land need to be carried out with caution and due diligence. On this basis, the court dismissed the appellant's originating summons, with costs to the respondents.

#### **4.0 GROUNDS OF APPEAL**

4.1 The appellant was dissatisfied with the decision of the lower court and has appealed to this court, advancing three grounds of appeal, couched as follows-



1. *The learned trial Judge erred in law and fact when he held that the 1<sup>st</sup> respondent as administrator of the estate of late Edwin Wamulwa Lukonga had no power to create an equitable mortgage over the estate property.*
2. *The learned trial Judge in the court below erred in law and fact when he held that the appellant ought to have undertaken a due diligence to determine the interest of the 2<sup>nd</sup> respondent and that as a result thereof, the appellant obtained no greater interest than that of the 2<sup>nd</sup> respondent who was in possession of the property.*
3. *The learned trial Judge erred in law and fact when he held that the debt incurred by the 1<sup>st</sup> respondent was a personal debt which could not be charged to the estate.*

## **5.0 APPELLANT'S HEADS OF ARGUMENT**

5.1 The appellant relied on the heads of argument that were filed on 4<sup>th</sup> March, 2021. He however abandoned the 3<sup>rd</sup> ground of appeal. In arguing ground one, the learned Counsel for the appellant attacked the lower court for holding that the first respondent, as administration of the estate of the late Edwin Wamulwa Lukonga had no power to create an equitable mortgage over the estate property.

5.2 Counsel referred to the learned author Caroline Sawyer in her book ***Principles of Succession, Wills and Probate*** where at page 257 it was stated that-



***“Personal representatives are the people who administer the estate left by the deceased. They are sometimes described as stepping into the deceased person’s shoes. They stand in relation to the property in his estate very much as he did when he was alive.”***

5.3 The court’s attention was further drawn to ***Halsbury’s Laws of England, Volume 17, 4<sup>th</sup> Edition at para 704***, where it was stated that-

***“The personal representative represents the deceased both in regard to his real and personal estate and are deemed in law to be the heirs and assigns within the meaning of all trusts and powers.”***

5.4 According to Counsel, the personal representative until such a time as he disposes of the assets of the estate is under the law deemed to be the owner of the assets. It was further submitted that by virtue of being the owner of the property, the personal representative has power to deal with the asset where disposal is concerned. It was contended that the lower court fell into grave error when it failed to distinguish between the administrator’s power and his duty.

5.5 Counsel argued that ***section 19 of the Intestate Succession Act***, only outlines the duties of an administrator and makes no mention about the powers of an administrator. For that reason, counsel

- submitted that he had no option but to borrow from the English Law in the form of **Administration of Estates Act, 1925** and the common law regarding the powers of a personal representative.
- 5.6 We were referred to **section 39 of the Administration of Estate Acts, 1925 of England**, and counsel submitted that a personal representative has power to mortgage the property of the estate. It was counsel's further contention that the lower court's conclusion that the first respondent had no capacity to mortgage the property in issue as it was outside her legal authority was made per incuriam, as the court did not consider the provisions of the **Administration of Estate Act, 1925**.
- 5.7 Counsel submitted that the money that the first respondent borrowed was not for enhancing the estate of her deceased father. It was further argued that the first respondent, in her affidavit, did not depose that she did not consult the other beneficiaries of the estate, her siblings, for the court to conclude that the money was borrowed solely for the benefit of the first respondent.
- 5.8 Learned counsel for the appellant urged the court to find that the first respondent, as administrator of the estate had power to



mortgage the house and that she could do so without consulting her siblings who were also beneficiaries of the estate.

5.9 The second ground of appeal attacks the lower court for holding that the appellant ought to have undertaken due diligence to determine the interest of the second respondent and that as a result, the appellant obtained no greater title than that of the second respondent who was in possession of the property.

5.10 According to counsel for the appellant, the transaction between the appellant and the first respondent was that of lender and borrower. It was argued that the second respondent, was put on notice regarding the proceedings in the High Court for delivery up of possession and sale on grounds that her sister had mortgaged the property and that the second respondent's denial that she did not know anything about these proceedings was a lie.

5.11 This court was referred to the case of ***Wilson Masauso Zulu vs Avondale Housing Project Limited***<sup>3</sup> and was asked to reverse the lower court's findings of fact as they were made in the absence of any relevant evidence. Counsel maintained that the appellant had satisfied the provisions of ***Order 88 Rule 5 of the Rules of the Supreme Court, 1999 Edition*** regarding the notification of third

parties in occupation of a property that is subject to a mortgage action, by notifying the second respondent of the mortgage action between the appellant and the first respondent. We were urged to allow the appeal for the aforesaid reasons.

## **6.0 RESPONDENT'S CONTENTIONS**

- 6.1 On behalf of the respondents, counsel filed heads of argument in response to the appellant's heads of argument.
- 6.2 Responding to ground one, it was submitted that the lower court was on firm ground when it held that the first respondent as administrator of the estate of the late Edwin Wamulwa Lukonga had no power to create an equitable mortgage with the estate property. Her role was limited to collecting all the assets of the deceased and paying all debts and distributing the surplus to beneficiaries.
- 6.3 It was contended that there is no lacuna in our Intestate Succession Act for the application of the **English Administrator of Estate Act of 1925**, which was repealed and replaced by the **Intestate Succession Act of 1989**. Our attention was drawn to **section 19 of the Intestate Succession Act**, which is quoted herein under paragraph 3.3.



6.4 It was submitted that as per **section 19 of the Intestate Succession Act**, an administrator has authority to settle all debts, funeral expenses of the deceased and distribute the surplus to all the beneficiaries according to intestacy laws. The case of **Lindiwe Kate Chinyanta vs Doreen Chiwele and Judith Tembo<sup>4</sup>** was referred to, where the Supreme Court held that-

**“In keeping with the provisions of section 19 of the Intestate Succession Act, the duty of the administrator is not to inherit the estate but to collect the deceased assets and distribute them to all the beneficiaries and render an account.”**

6.5 In the light of the foregoing authorities, counsel submitted that an administrator is not permitted to enhance the estate and furthermore, an administrator is not permitted to derive any benefit from the estate by virtue of the office. Further reference was made to **section 34(1) of the Intestate Succession Act** which provides that-

**“34. (1) An administrator or guardian shall not derive any pecuniary benefit from his office.”**

6.6 The respondents’ counsel further argued that the lower court was on firm ground when it held that the first respondent purported to create an equitable mortgage over the property for

her own benefit and further found that the administrator be held personally liable for the mortgage action.

6.7 Responding to ground two, it was submitted that the appellant as a third party ought to have had constructive notice of the rights of the 2<sup>nd</sup> respondent. We were referred to ***Halsbury's Laws of England, paragraph 322 at page 887, Vol 16***, where the learned authors stated that-

***“Notice may be actual or constructive and where the said notice is imputed on the subsequent purchaser then the plea of purchaser without notice is defeated.”***

6.8 The respondent's counsel cited the case of ***Mwenya and Kapinga vs Randee***<sup>5</sup> where the Supreme Court stated that-

***“A tenant's occupation is notice of all the tenant's rights. This means that if the purchaser has notice that the vendor is not in possession of the property, he must make inquiries of the person in possession and find out from him what his rights are and if he does not choose to do that, then whatever title he acquires as purchaser will be subject to the title or rights of the tenant in possession.”***

6.9 The case of ***Hunt vs Luck***<sup>6</sup> was also referred to, where the court stated that-

***“In that case, the occupation of land by a tenant affects a purchaser of land with constructive notice of all that***



***tenant's rights including an agreement for sale to him by the vendor."***

6.10 It was submitted that the appellant would have discovered the interest of the second respondent if he had conducted due diligence before issuing the loan to the first respondent. We were urged to dismiss the appeal for lack of merit, with costs to the first respondent.

## **7.0 DECISION OF THIS COURT**

7.1 We have considered the arguments by Counsel on behalf of the parties. Flowing from the two grounds of appeal and the heads of arguments, the cardinal issue the appeal raises is, whether the first respondent, as administrator of the estate of Edwin Wamulwa Lukonga, had power to create an equitable mortgage over the estate property. The second issue that this appeal raises is whether the appellant ought to have undertaken due diligence to determine the interest of the second respondent who was in occupation of the property.

7.2 In our view, ground one of the appeal attacks the lower court's interpretation of ***section 19(2) of the Intestate Succession Act***. Specifically, the appellant is of the view that the lower court

misdirected itself when it found that the first respondent had no power to create an equitable mortgage over the estate property.

7.3 We will start by outlining the duties of an administrator as provided for in section 19(1) of the Act:-

- (a) To pay the debts and funeral expenses of the deceased and pay estate duty where payable;**
- (b) To effect distribution of the estate in accordance with the rights of the person interested in the estate under this Act;**
- (c) When required to do so by the court, either in the application of an interested party or of its motion:-**
  - (i) To produce on oath in court the full inventory of the estate of the deceased and;**
  - (ii) Render to the court an account of the administration of the estate.**

7.4 Section 19(2) of the Act proscribes the sale of property forming part of the estate of a deceased person without prior authority of the Court. As earlier stated, the issue under ground one is whether the first respondent had the authority to mortgage the estate property in the manner that she did.

7.5 In her affidavit in opposition before the lower court, the first respondent admitted depositing the title deeds to Stand Number 1689/74/7 with the appellant to secure the loan that she obtained from the appellant. She further admitted that she



pledged the property without the authority of her younger sisters, the second respondent and Karen Lukonga, who are also beneficiaries of the said estate.

7.6 Clearly, the first respondent had no authority to deposit the title deeds with the appellant. Notably, section 19 of the Intestate Act is very clear regarding what an administrator is permitted to do with estate property. An administrator is not permitted to mortgage estate property under any circumstances and for that reason, we are of the view that the lower court was on firm ground when it found that the first respondent had no capacity to mortgage the property in issue as it was outside her legal authority. We do not find merit in the first ground of appeal and it accordingly fails.

7.7 We now turn to ground two where the appellant attacks the finding by the court below that the appellant ought to have undertaken due diligence to determine the interest of the second respondent and that the appellant obtained no greater interest than the second respondent who was in possession of the property.

7.8 The appellant submitted that in his affidavit in support of summons for leave to enter judgment in default of defence he

stated that he gave notice to the person in occupation of the house that there were proceedings in the High Court and a letter of acknowledgement signed by the 2<sup>nd</sup> respondent was exhibited.

7.9 The appellant focused on the assertion that the second respondent was aware that the first respondent had mortgaged the property as administrator of the estate. We have considered the lower court's finding of fact in relation to ground two, which is that the appellant should have conducted due diligence to determine the interest of the second respondent.

7.10 We note from the evidence on record that the appellant was aware that the first respondent was an administrator of the estate of her late father as the title deed which the first respondent deposited with the appellant to secure the loan she obtained were in her late father's names.

7.11 We take the view that this should have prompted the appellant to inquire as to whether the appellant was the sole beneficiary of her late father's estate and whether she had the authority to deal with the property as she desired. In the case of ***Investrust Bank Plc vs Hearmes Milling and Trading Limited and Others***<sup>7</sup>, the Supreme Court stated that the appellant, in conducting due diligence should have been alive to the limits placed upon the



powers of an administrator of an estate in Zambia and should not have proceeded on the understanding that the first respondent as administrator had absolute power to deal with the properties as she deemed fit.

7.12 We are further of the view that had the appellant conducted due diligence, he would have found that the second respondent had a beneficial interest in the property and by the appellant's failure to make further inquiries regarding the first respondent's interest in the property, he failed to fulfil his duty of taking reasonable steps to discover, any beneficial interests in the property and ought to be bound with constructive notice.

7.13 The case in point is that of ***Kingsnorth Finance Co. vs Tizard***<sup>8</sup>. As was held by the Supreme Court in the case of ***Nawakwi vs Lusaka City Council***<sup>8</sup>, dealings in land are not to be treated like purchase of household goods and that parties should exercise due diligence in this regard.

7.14 The appellant, in his submissions stated that the second respondent who was in occupation of the property was aware of the proceedings in the High Court regarding the first respondent's mortgage of the property. We are of the view that by the fact of the second respondent's occupation of the property,

the appellant had constructive notice and should have been aware of the possibility of her having an interest in the property if he had taken reasonable steps, especially that the title deeds were not in the first respondent's names, he would have confirmed her interest as a beneficiary as well. In light of the foregoing, we do not find merit in the second ground of appeal and it accordingly fails.

7.15 The appellant cannot escape blame for lending money to an administrator without ascertaining the interests of other beneficiaries in the property in issue.

## **8.0 CONCLUSION**

8.1 Grounds one and two having failed, this appeal accordingly fails in its entirety. We award costs to the second respondent, which shall be taxed in default of agreement.



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C. K. MAKUNGU  
**COURT OF APPEAL JUDGE**



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P. C. M. NGULUBE  
**COURT OF APPEAL JUDGE**



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A. M. BANDA-BOBO  
**COURT OF APPEAL JUDGE**