

**IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 35/2021
HOLDEN AT LUSAKA**

(Civil Jurisdiction)

BETWEEN:

LUNGOWE SIYAMBANGO

APPELLANT

AND

ETHEL MUNDIA JOHNSTONE

RESPONDENT

CORAM: Kondolo, Sichinga, Sharpe-Phiri, JJA

On 16th November, 2022 and 16th December, 2022

For the Appellant: Mr. E. Sakala of Messrs J.B. Sakala and Company
agent for Messrs Sambo Kayukwa and Company
For the Respondent: Mr. S. Mweemba of Messrs Mweemba Switz Associates

JUDGMENT

Sichinga, JA delivered the Judgment of the Court.

Cases referred to:

1. *Davison Mkandawire and Others v Julia Malembeka and Another CAZ Appeal No. 47 of 2019*
2. *Seliya Ngoma (Suing through her Attorney Ephraim Ngoma) v Faides Nambela, Lusaka City Council and Regina Mwanza CAZ Appeal No. 110 of 2019*
3. *Chief Chanje v Paul Zulu SCZ Appeal No. 73 Or 2008*

4. *Commonwealth Shipping Representatives v P & O Branch Services* (1923) A.C. 212
5. *Hamalambo v Zambia National Building Society* SCZ Appeal No. 64 of 2013
6. *Nye v Niblett* (1918) 1 K.B. 23
7. *Molosoni Chipabwamba and 12 Others v Yssel Entreprises and Others*
8. *Charity Oparaocha v. Winfrida Murambiwa* (2004) ZR 141
9. *Anti-Corruption Commission vs. Barnnet Development Corporation Limited* SCZ Select Judgment No. 5 of 2008

Legislation referred to:

1. *Intestate Succession Act, Chapter 59 of Laws of Zambia*
2. *The High Court Act, Chapter 27 of the Laws of Zambia*
3. *The Local Court Act, Chapter 29 of the Laws of Zambia*

Other works referred to:

1. *Black's Law Dictionary, Bryan A. Garner, 8th edition, Thomson West*

1.0 Introduction and claim

- 1.1 This is an appeal against the Judgment of the High Court (Maka-Phiri J) delivered on 11th May, 2022. The learned Judge found in favour of the plaintiff (respondent in this appeal) against the defendant (now appellant) and held that she was the legal owner of the disputed property.

1.2 The issue in this appeal is whether the respondent, Ethel Mundia Johnstone, was properly vested with title of Stand No. 1035 Nottie Broad, situate in Livingstone, Southern Province of the Republic of Zambia.

1.3 In the introductory part of this Judgment, we shall refer to the parties as they were in the court below. The plaintiff, Ethel Mundia Johnstone, took out an action against the defendant, Lungowe Siyambango, seeking the following reliefs:

1. An order to compel the defendant to surrender the original title deed relating to Stand No. 1035 Nottie Broad situate in Livingstone, Southern Province;
2. An order to restrain the defendant, servant, agent and whosoever from interfering on Stand No. 1035 Nottie Broad, Livingstone, Southern Province;
3. Any other relief that the court may deem fit; and
4. Costs.

2.0 Background

2.1 The main facts are common cause and may be shortly stated. The subject matter of the tenancy is Stand No. 1035 Nottie Broad, Livingstone. The deceased, Mildred Inonge Siyambango, who died on 3rd March, 2006 was the sole owner of the subject property and lived there up to the time of her demise. Ms Mutelo Mubita, the defendant's mother and the plaintiff's grandmother was granted tenancy of the property by way of an order of appointment of administrator of her late

- daughter's estate on 15th October, 2012. The deceased neither had children of her own nor was she married. Her mother, the said Mutelo Mubita was the sole beneficiary of her estate.
- 2.2 Mutelo Mubita continued living on the property with her granddaughter, the plaintiff herein. During her lifetime she transferred her interest in the property to the plaintiff by way of a deed of assent, duly executed and registered with the Registrar of Lands on 22nd October, 2012. The plaintiff then became the registered owner of Stand No. 1035 Livingstone as evidenced by Certificate of Title No. 187329 with effect from 22nd October, 2012.
- 2.3 Upon Ms Mubita's demise on 16th September, 2018, and after she was buried, family members including the defendant demanded the title deeds to the property. Initially, the plaintiff did not avail them the Certificate of Title to the property. After the issuance of letters of appointment of administrators of the deceased, she availed the Certificate of Title to her uncle who was one of the administrators. Being the registered title holder she commenced this suit seeking to have the Certificate of Title returned to her. The plaintiff told the learned Judge at trial that the defendant, who is her aunt, wanted her to leave the house.
- 2.4 Under cross examination, she asserted that she was raised by her aunt, the deceased, Mildred Inonge Siyambango. She said her aunt adopted her but she accepted that it was not formally done.

- 2.5 In her defence, the defendant acknowledged that the plaintiff was her niece as she was her half-sister's daughter. She told the trial Judge that the plaintiff was not raised by her younger sister, the deceased Mildred Inonge Siyambango, but that she went to live with her father in Zimbabwe and only returned to Zambia in 2003 when her mother died. She confirmed to the learned Judge that her mother, Mutelo Mubita, was the sole beneficiary to her sister's estate.
- 2.6 She told the learned Judge that she had no claim to the property. However, she believed the plaintiff had no right to the property because her (plaintiff's) mother was not a Siyambango.

3.0 The judgment of the court below

- 3.1 After considering the matter, Maka-Phiri J held that the deed of assent was valid, and duly accepted and acted upon by the Lands and Deeds Registry. She found that it was not in dispute that the property in dispute was registered in the plaintiff's name.
- 3.2 Maka-Phiri J summarised her reasoning thus:

“The late Mutelo Mubita performed her functions in accordance with the law which culminated in the vesting of the property in the plaintiff. There is nothing to show that there was fraud in the manner the vesting of the property was done to invoke the provisions of section 34 of the Lands and Deeds Registry Act. I tend

to agree with the plaintiff's submission that in the absence of evidence as to the value of the estate at the material time and also considering that the order of appointment was never challenged, I find the legal issue raised to be an act of desperation and one without merit. It can therefore not be allowed."

3.3 The learned Judge held that the plaintiff was the rightful owner of the subject property. She held that the neither the defendant nor the administrator of Mutelo Mubita's estate had any legal justification to take the plaintiff's Certificate of Title.

3.4 The learned judge granted the plaintiff an injunction to restrain the defendant, her servants, agents and whomsoever from interfering with Stand No. 1035 Nottie Broad, Livingstone. She held that the plaintiff had proved her case on a balance of probabilities and entered judgment in her favour.

4.0 The appeal

4.1 Dissatisfied with the verdict of the court below, the defendant (hereinafter referred to as the appellant) appealed raising one ground of appeal as follows:

- That the learned trial Judge erred in law and fact when she decided that the respondent herein is the registered legal owner of the property known as Stand no. 1035 Nottie Broad, situate at Livingstone, Southern Province, contrary to the legal fact that the purported assent

vesting the said property in the respondent was based on the authority of an Order of Appointment issued by the Local Court, which Order may not legally be used in the administration of an estate or property of the value of the property.

5.0 The appellant's submissions

- 5.1 The appellant filed heads of argument on 26th February, 2021. Mr. Sakala, learned counsel for the appellant, relied on the heads of argument. The submissions begin with a brief background which we have sufficiently covered under our background head.
- 5.2 In support of the sole ground, it was submitted that the learned Judge ought to have taken judicial notice of the value of property in the prestigious area of Nottie Broad as the value of the property in dispute exceeds the Local Court's jurisdiction. Reliance was placed on ***section 43(2) of the Intestate Succession Act¹*** with regard to the Local Court's jurisdiction.
- 5.3 It was submitted that the deed of assent was not legalised by the fact that it was accepted by the Lands and Deeds Registry. That the learned Judge's decision was against what the High Court stands for as stated in ***section 13 of the High Court Act²*** which provides as follows:

“13. In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or relief whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or relief or equitable defence properly brought forward by them respectively or to which shall appear in such matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matter avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.”

- 5.4 It was submitted that *in casu* it was brought to the learned trial Judge’s attention that there was a legal flaw in the use of the Local Court’s Order as authority for an assent on property which was of a higher value than the jurisdiction of the Local Court. It was submitted that the learned Judge refused to perform her function. We were urged to reverse the finding of the court below and allow the appeal with costs.

6.0 The respondent's submissions

- 6.1 In response to the appeal, Mr. Mweemba, learned counsel for the respondent, relied on the respondent's heads of argument filed on 29th March, 2021.
- 6.2 In response to the appellant's submissions on the sole ground of appeal, it was submitted that the trial Judge was on firm ground when she held that the issue of the value of the property was not supported by evidence. The respondent highlighted three points in the first limb of her submissions. The first was that the issue of jurisdiction of the Local Court was not pleaded. Secondly, that there was no evidence of the value and or extent of the property in issue in 2006 when the respondent's aunt passed on. Thirdly, that the administratrix, who was not a party to this action, performed her duties and became discharged, and she is now deceased.
- 6.3 It was submitted that the jurisdiction of the Local Court could not be questioned in the absence of evidence of the value and or extent of the disputed property. That there was no evidence that the disputed property had the value exceeding the jurisdiction of the Local Court under **section 43 of the Intestate Succession Act** *supra*. It was argued that without such evidence, the court below could not have nullified the Local Court Order of Administrator. We were urged to dismiss the appellant's submissions that the court below ought to have

taken judicial notice of the value of the properties in the prestigious area of Nottie Broad as it is not true that it is a prestigious area and it is not a notorious fact that properties in the said area were of high value at the material time. In support of this submission, we were referred to the case of ***Davison Mkandawire and Others v Julia Malembeka and Another***¹ in which we held that:

“The fourth ground of appeal attacks the Tribunal’s failure to hold that a local court Order of appointment could not be used to administer land. Once again, this was not an issue before the Tribunal and neither was any evidence led before the Tribunal as to the value of the Land. We decline to be drawn into this argument which is being raised on appeal for the first time.”

- 6.4 It was submitted that similarly in the instant case, the issue before the court below as found by the lower court was whether the respondent was the rightful and legal owner of Stand No. 1035 Nottie Broad, Livingstone, and not the value of the property and the Local Court Order of Appointment raised on appeal. We were urged to dismiss the appellant’s arguments as the Certificate of Title cannot be cancelled without evidence of fraud on the part of the registered owner. In support of this submission, reliance was placed on the case of ***Seliya Ngoma (Suing through her Attorney Ephraim Ngoma) v Faides Nambela, Lusaka City Council and Regina Mwanza***² in which we stated as follows:

“We however take note that having not sufficiently acquainted itself with or having deliberately ignored the law, the 2nd respondent went ahead to issue a Certificate of Title to the 1st respondent as administratrix;

We are mindful that a Certificate of Title shall not be cancelled unless there is proof of fraud to the requisite standard. We therefore, uphold the learned Judge below on her reliance on sections 33 and 34 of the Lands and Deeds Registry Act to the effect that a Certificate of Title is conclusive evidence of ownership by the person in whose name the Certificate of Title is issued.”

6.5 In like manner, we were urged to uphold the court below and to dismiss the appeal with costs.

7.0 Our considerations and decision

7.1 We have considered the evidence on record, the impugned judgment of the court below, submissions of counsel and the issues raised in the sole ground of appeal.

7.2 We begin with the first point made in the appellant's submissions that the learned Judge ought to have taken judicial notice of the value of property in the prestigious area of Nottie Broad as the value of the property in dispute exceeds the Local Court's jurisdiction. ***Black's Law Dictionary***¹ defines “judicial notice” as follows:

"A court's acceptance, for the purposes of convenience and without requiring a party's proof of a well-known and indisputable fact; the court's power to accept such a fact."

- 7.3 In the case of **Chief Chanje v Paul Zulu**³ the Supreme Court, citing the case of **Commonwealth Shipping Representatives v P & O Branch Services**⁴ stated as follows:

"Judicial notice refers to facts which a judge can be called upon to receive and to act upon, either from the general knowledge of them or from inquiries made by himself, from his own information from sources, or from which it is proper for him to refer."

- 7.4 Further, in the more recent case of **Hamalambo v Zambia National Building Society**⁵ the Supreme Court stated that the court can take judicial notice of matters of common knowledge which are so notorious that it may be unnecessary to lead evidence to establish their existence. We opine that these ought to be facts which are so commonly known that their existence is not in dispute. A classic illustration is in the old English case of **Nye v Niblett**⁶ where the court took judicial notice of the fact that cats are kept for domestic purposes.

- 7.5 In the present case, the respondent has argued that it is untrue that Nottie Broad is a prestigious area and it is not a notorious fact that properties in the said area were of high

value at the material time. Our quick retort, as an appellate Court, is that we are unable to ascertain the assertion. As we have endeavored to show that matters subject to judicial notice must be well established facts that are familiar to the court and men of ordinary intelligence must be so acquainted with them that it may be unnecessary to lead evidence to establish their facts. We cannot impute that knowledge unto the learned Judge in this case.

7.6 Our reaction to the appellant's submission on **section 13 of the High Court Act** *supra* is that it empowers the court to administer law and equity concurrently in the exercise of the jurisdiction vested in it. The court will call to aid the principles of equity where the law would offer an unjust redress.

7.7 In the case of **Molosoni Chipabwamba and 12 Others v Yssel Entreprises and 7 Others**⁸ we stated that:

"...the administration of law and equity only applies where there is a conflict between the rules of common law and equity. That this action, having been based on statute law and not common law, should not have been determined using the principles of equity pursuant to section 13 of the High Court Act."

7.8 The maxim "*aequitas sequitur legem*" or "*equity follows the law*" means that equity will not allow a remedy that is contrary to the law. This maxim lays down that equity supplements law

and does not supersede it. The considerations in this appeal are on statute law.

7.9 Turning to the legislative framework, **Section 8 of the Local Court Act**³ on the civil jurisdiction of local courts provides as follows:

“8. Subject to the provisions of this Act, a local court shall have and may exercise, within the territorial limits set out in its court warrant such jurisdiction as may be prescribed for the grade of court to which it belongs, over the hearing, trial and determination of any civil cause or matter in which the defendant is ordinarily resident within the area of jurisdiction of such court or in which the cause of action has arisen within such area:

Provided that civil proceedings relating to real property shall be taken in the local court within the area of jurisdiction in which the property is situate.”

7.10 **Section 36 (1)** provides:

“36 (1) Subject to the provisions of section thirty-eight, a local court, may, on the application of any interested person, grant letters of administration of the estate of a person who has died intestate and whose estate fails to be administered and distributed in accordance with the Intestate Succession Act or under customary law.”

7.11 An application for an order relating to intestate estates of administratorship may be transferred to the High Court.

Section 38 (1) provides:

“38 (1) A local court to which application is made for an order under subsection (1) of Section thirty-six relating to the administration or distribution of the estate of any person who had died intestate, shall transfer such application to the High Court if –

(a) the local court is satisfied that a properly interested party has made application to the High Court for an order relating to the administration or distribution of such deceased’s estate; or.....”

7.12 **Section 43 (1) and (2) of the Intestate Succession Act** *supra* provides:

“43 (1) The High Court shall have jurisdiction in matters relating to succession.

(2) A local court shall have and may exercise jurisdiction in matters relating to succession if the value of the estate does not exceed fifty thousand kwacha.”

7.13 In the case of ***Charity Oparaocha v. Winfrida Murambiwa***⁷, the appellant appealed against the High Court’s finding that an order of administration of the deceased’s estate, obtained by the appellant, was null and void *ab initio* and cancelled it *post facto*.

7.14 Mambilima JS (as she then was) stated the following:

“Clearly, the value of the deceased’s estate went beyond the jurisdiction of the Local Court. We agree with Mr. Zulu that probate, in this case, should have been obtained from the High Court. We cannot therefore fault the trial Judge for having found that the appointment of the appellant by the Local Court as administrator of the estate of the deceased was null and void. The consequence of such a finding was cancellation of the order of appointment post facto. The court had power under Section 29 (2) of the Act to remove an administrator where it is satisfied that proper distribution of the estate and the interests of persons beneficially entitled to them so require. It is on record that the appellant, in her administration of the estate of the deceased, did not take into account the interests of the respondent and her children. The second ground of appeal cannot also succeed.”

7.15 In the present case, notwithstanding that the estate of late Mildred Inonge Siyambango comprised the real estate in dispute, its value was not an issue for the learned trial Judge’s consideration. We have combed through the record of appeal and we note that the pleadings of the parties were not included. Further, from the lower court’s proceedings at trial from pages 51 to 88 of the record of appeal, it is clear that the value of the estate was not an issue as it was not raised by either party in examination-in-chief and cross-examination of the witnesses.

7.16 Whilst it is the law, that an estate whose value exceeds the jurisdiction of the Local Court, ought to obtain probate from

the High Court, we are unable to ascertain, from the record that the learned Judge was called upon to declare the appointment of Mutelo Mubita as administratrix of the estate of late Mildred Inonge Siyambango null and void since the pleadings are not part of the record.

7.17 Further, it is not in dispute that the administratrix of the late Mildred Inonge Siyambango's estate was her mother, Mubita Mutelo, who is since deceased. According to appellant's own testimony at page 73 of the record of appeal, it was suggested that her mother, Mubita Mutelo be appointed as the administrator since she was the only beneficiary of her daughter's estate.

7.18 Being the sole beneficiary of the said estate, she by Deed of Assent on 22nd October, 2012 transferred her legal interest to the respondent.

7.19 From the evidence on record, the appellant appears to have no interest in the estate of her sister, Mildred Inonge Siyambango. At page 75 of the record of appeal, she was asked in examination in chief:

"Q. The question here is, have you ever claimed from the plaintiff to say the property is yours?"

A. Not at any time."

7.20 What is on record is that Mubita Mutelo was the sole beneficiary of her daughter's estate and prior to her demise she transferred her interest in Stand No. 1035 Nottie Broad, Livingstone to the respondent.

7.21 It is curious to note that at the heart of the appellant's argument, in this appeal, is the proposition that the transfer of the subject property was based on the authority of a defective Order of Appointment of Administrator as issued by the Local Court because it lacked jurisdiction. Yet at page 50 of the record of appeal, she produced in her defendant's bundle of documents, an Order of Appointment of Administrator equally issued by the Local Court by which authority it was designed the subject property would be administered under the estate of Mutelo Mubita.

7.22 In the case of the case of ***Anti-Corruption Commission vs. Barnnet Development Corporation Limited***⁸ the Supreme Court held as follows:


"We agree 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 of the certificate, in this case the respondent. But we also know that under the same section or Section 34, a certificate of title can be challenged and cancelled for fraud or for reasons of impropriety in its acquisition. So the statement that a certificate of title is conclusive evidence of ownership of land is only true when there is no challenge based on fraud."

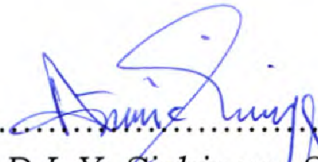
7.23 In the present case, the respondent is the holder of a Certificate of Title which is not tainted by any of the grounds set out under **section 34(1) of the Lands and Deeds Registry Act** that can merit the cancellation of her title, whereas the appellant's claim is anchored on an alleged defective Order of Appointment of Administrator on account of the Local Court's want of jurisdiction, which was neither pleaded nor proved at trial.

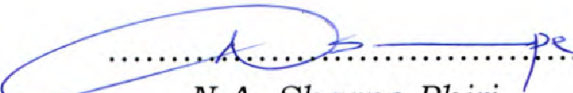
7.24 We accept the respondent's submissions in this appeal. Accordingly, we uphold the lower court's judgment.

8.0 Conclusion

8.1 The disputed property is the subject of a Certificate of Title to which the respondent is the legal owner of the property. The sole ground of appeal is without merit. It is accordingly dismissed with costs to the respondent, to be taxed in default of agreement.


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M.M. Kondolo, SC
COURT OF APPEAL JUDGE


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D.L.Y. Sichinga, SC
COURT OF APPEAL JUDGE


.....
N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE