

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
HOLDEN AT KITWE
(CIVIL JURISDICTION)

2011/HK/289

**IN THE MATTER OF: THE INTESTATE SUCCESSION ACT
CHAPTER 59 OF THE LAWS OF ZAMBIA**

AND

**IN THE MATTER OF: THE LANDS AND DEEDS REGISTRY ACT
CAP 185 SECTION 81 SUB SECTION 1 AND 2**

**IN THE MATTER OF: AN APPLICATION FOR DECLARATION OF
OWNERSHIP AND DELIVER VACANT
POSSESSION OF PROPERTY KNOWN AS
HOUSE NO. S/D 561 STAND 7428 KAUNDA
SQUARE, LUSAKA**

B E T W E E N:

BERNARD MWANSA (Suing as an Administrator
of the estate of the late Isobel Jaffray Mwansa)

APPLICANT

AND

FRANCISCO OLIVER PIO (Sued as the relative of
the late Isobel Jaffray Mwansa and the representative
of the Company known as OMNITECH SERVICES
LIMITED)

RESPONDENT

**Before the Honourable Mrs. Justice Judy Z. Mulongoti on the 2nd
day of November, 2012**

For the Applicant : In Person

For the Respondent : Mr. C. Chali of Nkana Chambers

J U D G M E N T

CASES REFERRED TO

1. *R.R. SAMBO, N.N. SAMBO AND THE LUSAKA URBAN DISTRICT COUNCIL VS. PAIKANI MWANZA [SCZ JUDGMENT NO. 16 of 2000]*
2. *SABLEHAND ZAMBIA LIMITED VS. ZAMBIA REVENUE AUTHORITY [SCZ APPEAL NO. 56 OF 2003]*
3. *ROSEMARY PHIRI MADAZA VS. AWADH KAREN COLEEN [SCZ JUDGMENT NO. 2 OF 2008]*

The applicant sued the respondent, his first cousin for an order that he is entitled to vacant possession and control of house No. S/D561 Stand 7428, Kaunda Square, Lusaka. The applicant's allegations are generally stated, that the respondent has taken possession of the house, which belonged to the late Isobel Jaffray Mwansa, without consent or knowledge of the administrator including beneficiaries.

In his affidavit in support, the applicant deponed that he was the appointed administrator of the estate of his late mother Isobel Jaffray Mwansa, the owner of the house in issue and who died intestate in 2002.

The applicant avers in paragraph 4 of his affidavit that his late mother was given the house as a gift by the respondent, who was her nephew.

Unbeknownst to the applicant, the respondent concealed the title deed to the house. He came to discover this in 2009, whilst he was working for the respondent. He found the title deed in his mother's name hidden in

one of the drawers in his office. This led to termination of his employment.

In his affidavit in opposition, the respondent deponed that the contract of sale for the house in issue was executed by his company Omnitech Services Limited and the vendor, a Mr. Lukwesa per exhibit "FOP3". Omnitech Services paid the purchase price. He allowed the late Isobel and her family to stay in the house on humanitarian grounds. The documents filed by the applicant purporting to transfer the title of the house to late Isobel from the vendor were a forgery, a fact acknowledged by the applicant per exhibit "FOP5".

At the hearing, both parties gave oral testimony.

The applicant, hereafter AW1 testified that his late mother Isobel Jaffray Mwansa who died in 2002 was survived by three children and her spouse, Mr. Robby Mwansa, a step father to the children.

After his mother died, the children continued living with their step father until his death in 2004. After the death of their father, the respondent took custody of the house. He told the applicant that title deeds to the house were being processed in the names of the late Isobel's children. However, in 2009 or early 2010, whilst he was in the respondent's employ, the applicant discovered an envelope in one of the drawers in his office. The envelope contained the title deed in late Isobel's name, the sale agreement between Omnitech Services Limited and the vendor a Mr. Lukwesa and a letter to the Lusaka City Council authored by the respondent.

He took custody of the envelope and called for a meeting with his siblings and they agreed to seek legal advice and were advised to appoint an administrator. AW1 was appointed administrator. He then informed the tenant of the house to channel all rentals to him. The tenant in turn informed the respondent who reported to the police that his title deed had been stolen.

According to AW1, the title deed was currently in the names of the children and the respondent has it. He reiterated that the respondent bought the house as a gift to late Isobel who was his aunt being his mother's young sister.

In cross examination, AW1 testified that there was a case at the boma where the respondent had applied for revocation of his (AW1's) appointment as administrator. The case had been stayed pending the outcome of these proceedings which were commenced earlier.

He confirmed being convicted for theft of documents. He said he admitted to the police that the document "BM4" of his affidavit was a forgery because he was beaten up.

AW2 Pride Ntilima Mwansa, the applicant's elder brother, testified that the house in issue was a gift from the respondent to their late mother. He informed the court that the respondent had enticed him to testify against AW1 in the theft of documents' case. The respondent promised him a car, which has never been given to him to date.

In cross examination, AW2 reiterated that the house was a gift and that "BM4" of the affidavit in support was the proof. He confirmed that AW1

was beaten into confession that “BM4” was a forgery. The beating was done in his presence. He admitted witnessing the confession, by signing it.

In re-examination, he testified that both him and AW1 were detained for a week. They were told they would not be released until the confession was signed. He said he knew the house was a gift because his late mother had told him so.

That was the close of the applicant’s case.

The respondent, hereafter RW1, informed the court that he was the Managing Director of Omnitech Services Limited. He testified that the late Isobel had difficulties in her marriage and often asked him for assistance. These difficulties included failure to pay rentals. She and her family kept on moving and sometimes stayed with relatives. She asked RW1 to help. He agreed to buy a house to relieve them of the burden of rentals. When a house was found, RW1 paid for it after a contract of sale was executed per exhibit “BM5” of the supporting affidavit. The seller was a Mr. Lukwesa and the buyer Omnitech Services.

According to RW1, his aunt asked to have the title deed in her name because she and her husband had intended to buy it off Omnitech Services Limited. RW1 accepted on condition that he kept the title deed until the purchase price was fully paid. Unfortunately, this agreement was verbal. He had kept the title deed for 15 years until the applicant stole it. The aunt and her husband never paid any penny.

The court heard that there was no title deed issued in the name of Omnitech Services. Title was issued in the late Isobel's name.

It was RW1's testimony that he did not know how title was issued in her name. He said he agreed to have title changed into her name after payment of the purchase price. It was his testimony that the whole family was aware of the agreement between himself and the late aunt including the applicant. The aunt was supposed to pay him back the purchase price. He denied issuing the assent to have title in his late aunt's name.

In cross examination, RW1, testified that the late was supposed to pay back the purchase price using monies they were going to save from rentals.

RW2 Estela Kabanga, a cousin to the parties' mothers testified that RW1 bought a house for the late Isobel because she had no where to stay. It was RW2's testimony that the family met and it was agreed that the late and her husband should pay back the purchase price in instalments. Unfortunately, nothing had been paid at time of their their death.

RW3 was Micheal Kabimba Jaffray, an uncle to both parties the herein. He testified that RW1 had asked the late Isobel to find a house for purchase. Isobel asked RW3 to help and found a house in Kaunda Square which was being sold by a friend of his, a Mr. Lukwesa. RW3 informed Isobel who in turn informed RW1. RW1 then paid for the house and asked Isobel and her husband to pay back the purchase price by instalments within five years. At time of the couple's deaths, nothing had been paid.

In cross examination, RW3 testified that he did not know how much the house cost, although he was tasked and did find it. He said the purchase price was open for discussion between RW1, Isobel and the seller.

In a nutshell, that was the case for the respondent.

The applicant verbally submitted that his late mother was the owner of the house in question. She kept the title deed till her death when her late husband handed it over to the respondent. According to the applicant, her late father had no authority to do so as only the administrator, who was not yet appointed at that time should have done so. Further, that the seller was paid K14 Million only and if there is need to compensate the respondent, that should be the amount he should get.

The learned counsel for the respondent has submitted that the house belongs to the respondent and the late Isobel obtained the title deed irregularly or fraudulently. There was no Contract of Sale, Assignment or a Deed of Gift to transfer ownership to the late Isobel Jaffray.

It is counsel's submission that the applicant conceded to forging exhibit "BM4" of his affidavit in support which he used to obtain the title deed. He has urged the court to cancel the title deed pursuant to section 33 of the Lands And Deeds Registry Act.

It is common cause that there was a verbal agreement between the respondent and the late Isobel Jaffray over the purchase of house No. S/D 561 Stand 7428, Kaunda Square, Lusaka. The respondent paid for

the purchase price but Isobel Jaffray and her family took possession of the house.

Subsequently, title was issued in the name of Isobel Jaffray. Upon her demise, in 2002, the respondent collected the title deed. However, her husband and children continued being in possession until his death in 2004.

Before me, the applicant, who is one of late Isobel's children contended that the respondent has taken possession of the house to the detriment of Isobel's children. According to the applicant, the respondent bought the house as a gift for his late mother.

The respondent has denied buying the house as a gift and put the applicant to strict proof thereof. According to the respondent, he had a verbal agreement with the late Isobel and her husband, that they would repay him the purchase price of the house in instalments. However, at time of both their deaths, nothing had been repaid.

The issue I have to resolve, therefore, is whether the house was purchased as a gift from the respondent to his late aunt Isobel Jaffray and thus belongs to her estate or was the purchase price a loan as alleged by the respondent?

I wish to state outrightly that I shall rely heavily on the documents before me, since the other parties are not here to speak for themselves. The document "BM4" has been rejected by the respondent on grounds that it was fraudulently issued by the applicant. The applicant testified that the document was genuine and that he only admitted to say it was forged due to torture by the police.

As already noted, it is common cause that an agreement existed between the applicant and late Isobel Jaffray. The issue to determine is what the terms of the agreement were. All the witnesses agreed that there was an agreement that the respondent should and indeed purchased a house for his aunt Isobel Jaffray Mwansa.

The documentary evidence before me reveals that the contract of sale was between Leonard Mwila Lukwesa and Omnitech Services Limited. It was signed by Leonard Mwila Lukwesa and F.O. Pio, the respondent herein. It was witnessed by Elvis Lukwesa, Isobel Jaffray Mwansa and G.C. Pio. This was on 22nd December, 1997.

The certificate of title, dated 9th April, 1998 was issued in the name of Isobel Jaffray. Then on 1st December, 1998, the exhibit "BM4" of the affidavit in support which is "FOP5" of the affidavit in opposition was issued by the respondent to the Lusaka City Council, advising that Omnitech Services relinquished any and all claims to the house in question and that all documents relating to the house be transferred in the name of Isobel Jaffray.

It is noteworthy that at the time this letter "BM4/FOP5" was issued, title had already been issued in the name of Isobel. I have to decide whether the evidence led by the applicant shows, on a balance of probability, that the house was bought as a gift and belongs to the estate of Isobel Jaffray Mwansa.

During the hearing, I observed that the applicant was consistent though emotional and gave a clear and acceptable account of how he

discovered the certificate of title plus other documents in the respondent's office. How the respondent collected the certificate of title after his mother's death. A fact acknowledged by the respondent. The respondent, on the other hand was evasive and sometimes concerted when answering questions. I found the applicant to be more credible.

Thus, I am inclined to find that the house was a gift. I am so inclined because the respondent knew about the Certificate of Title in the name of the late and kept quiet. Even after collecting it after her funeral, he did not make any effort to have it cancelled or changed in his names or challenge it as he is doing now. The evidence on record is clear that the respondent was aware of the late Isobel's possession of the house and that there was a certificate of title issued in her name in 1998.

It is my considered view that the respondent failed to adduce evidence to prove that the title was fraudulently obtained as he alleged. The evidence before me does not reveal any fraud on the part of the late Isobel nor her husband.

In the case of **R.R. SAMBO, N.N. SAMBO AND THE LUSAKA URBAN DISTRICT COUNCIL VS. PAIKANI MWANZA [1]**, the Supreme Court upheld the Lower Court's decision ordering cancellation of the Certificate of Title. It was held that the title was not genuinely obtained as the 1st appellant had fraudulently obtained title by misleading the council that no one was in occupation of the land and yet his friend the respondent had left him there as a caretaker. The 1st appellant had also lied that he bought the property from a Mr. Musonda who could not be traced.

In **SABLEHAND ZAMBIA LIMITED VS. ZAMBIA REVENUE AUTHORITY [2]** which was followed in **ROSEMARY PHIRI MADAZA VS. AWADH KAREN COLEEN [3]**. The Supreme Court held that, a defendant wishing to rely on the defence of fraud or forgery must ensure that it is clearly and distinctly alleged. When it comes to trial, the defendant must lead evidence so that the allegation is clearly and distinctly proved. It was observed that no handwriting expert was called to prove the signature was forged.

In casu, the respondent did not adduce any evidence that his late aunt had fraudulently obtained the certificate of title. Apart from the exhibit "BM4" or "FOP5" which as noted, though the applicant admitted was a forgery, was written many months after the issuance of the certificate of title. In any event, I am inclined to accept the applicant's testimony that he was beaten by the police, and forced to state that the document was forged.

I find the testimony of the respondent and his witnesses that there was an agreement between the late and the respondent to repay the purchase price, to be unsupported by the available evidence. As noted, this agreement was supposedly made in 1997 at time of purchase. The late passed on in 2002 and her husband in 2004, the respondent did nothing to enforce this agreement. He thus slept on his rights.

It also defies belief that the respondent who testified that he bought the house on humanitarian grounds because the aunt and her family were suffering. They moved from house to house and were always asking for assistance, would then expect them to pay back the purchase price.

Furthermore, both RW2 and RW3 were not present at the time of signing the contract of sale, other family members signed as witnesses. The contradictions in their testimony is equally noteworthy. RW1 and RW2 simply stated that the purchase price was to be repaid while RW3 added a time frame of five years. Being employees of the respondent the two could have been persuaded to state as they did like AW2's uncontroverted testimony that he was promised a car in order to testify against his brother. I do concur with the applicant that there was no such agreement and as noted the certificate of title was issued in favour of the late. The respondent was aware of this and has failed to prove that it was fraudulently obtained as he alleged.

In fact, he too contradicted himself when he testified that he kept the title deed for fifteen years until AW1 stole it. In cross examination, he admitted collecting the title deed from his uncle in 2002, after his aunt's funeral.

Regarding the issue of rentals which the respondent has been receiving from 2004 to-date, I order that the respondent should pay back the same to the applicant and other beneficiaries of the estate of the late Isobel. I am fortified by the case of **R.R. SAMBO**, supra.

In sum, I find that the applicant has proved on a balance of probability, that the house in question belonged to his late mother, having been purchased as a gift by the respondent. Further, that the respondent's actions of repossessing the house in 2004 following the death of the applicant's parents was wrong. He must pay back the rentals to the late's estate.

It is trite law that costs follow the event. I therefore order the respondent to pay costs of and incidental to this action, to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Kitwe this **2nd** day of **November**, 2012

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Judy Z. Mulongoti
HIGH COURT JUDGE