

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA

2013/HP/0039

(Civil Jurisdiction)

**IN THE MATTER OF THE HOUSING (STATUTORY IMPROVEMENT
AREAS) ACT, CHAPTER 194 OF THE LAWS OF ZAMBIA**

AND

**IN THE MATTER OF SECTION 9 OF THE INTESTATE SUCCESSION ACT,
CHAPTER 59**

AND

IN THE MATTER OF PLOT 222/24 CHAWAMA, LUSAKA

BETWEEN:

GODFREY CHIBWE

APPLICANT

AND

**PRISCILLA CHIBWE
RESPONDENT**

**Before the Hon. Mrs. Justice A. M. Sitali on the 24th day of March,
2014**

***For the Applicant* : *Mrs M. S. Tresha of
Messrs Lusitu Chambers***

***For the Respondent* : *Mr F. Besa of
Messrs Douglas and Partners***

J U D G M E N T

Cases referred to:

- 1. Monica Siakondo (suing in her capacity as administrator of the late Edith Siakondo) v. Fredrick Ndenga (2005) ZR 22**
- 2. Gray Nachalwe Mudenda v. Dorothy Mudenda SCZ Judgment No. 12 of 2006 (unreported)**

Legislation referred to:

- 1. The Intestate Succession Act, Chapter 59 of the Laws of Zambia, sections 3, 4, 5 (1) (b), 9 and 19.**

The Applicant commenced this action against the Respondent by originating summons filed in the Principal Registry on 15th January, 2013, seeking the following reliefs:

1. An order that Plot No. 222/24 Chawama forms part of the estate of the late Golden Milembe Chibwe.
2. A declaration that the Applicant is a beneficiary of the estate of Golden Milembe Chibwe.
3. An order that the Applicant is entitled to 50% rentals so far collected and yet to be collected from Plot 222/24 Chawama in the estate of the late Golden Milembe Chibwe.
4. An order that the Respondent give an account of all rentals collected from Plot No. 222/24 Chawama from 2009 to date.
5. An order that the Applicant be given 50% of the value of rentals so far collected from 2009 to date.
6. Damages for mental stress, pain and suffering.
7. Any other order the court may deem fit.
8. Costs.

The originating summons is supported by an affidavit sworn by the Applicant, Godfrey Chibwe who deposed that he is the son of the late Golden Milembe Chibwe who died intestate on 30th September, 1995 whilst the Respondent is his sister. He stated that after Golden Chibwe died Fraser Chibwe, his grandfather was appointed administrator of his estate and that he lived with him from the year 2006 to the year 2009 when he died. He further deposed that among the properties which the late Golden Chibwe owned is House No.

222/24 Chawama which has been managed by the Respondent since 1999. According to the Applicant the said property is on rent fetching K800.00 and yet the Respondent does not share the said rentals with him or assist him with paying his school fees or buying school uniforms since the year 2011 when he lived with her.

The Respondent Priscilla Chibwe filed an affidavit in opposition on 15th February, 2013, in which she deposed that while it is true that the Applicant is her late father's son she only became aware of his existence after her father's death. She further confirmed that upon her father's death, her Grandfather Fraser Chibwe, was appointed administrator of the estate and that the said estate included House No. 222/24 Chawama and another house that her late grandfather was to distribute to her and the Applicant. The Respondent further stated that her late grandfather held one of the houses in trust for the Applicant as he was and still is a minor and could not hold title in his own name. She went on to state that her late grandfather whilst living with the Applicant nearly denied her a share of her father's estate when he attempted to sell House No. 222/24 Chawama but she intervened and reported the matter to the Victim Support Unit of the Zambia Police Force who assisted her to have the sale of the said house reversed. She further deposed that with the help of the Police she recovered House No. 222/24 Chawama as her entitlement and started using it not as an administrator but as a beneficiary.

The Respondent went on to state that in circumstances she was not privy to, Fraser Chibwe the administrator of the estate on behalf of the Applicant sold the house which he held in trust for the Applicant and that she is not aware how the proceeds of the sale of the house were utilized as that information was known only by the Applicant and the deceased administrator. She contended that the Applicant only started asking for assistance from her after the Administrator of the estate with whom he had sold and squandered his money died leaving him with nothing. She confirmed that she took the

Applicant in as her young brother in the year 2011 and started providing for all his school needs but that regrettably, he proved to be a misfit and stole all sorts of small valuables from her and her neighbours. When she attempted to discipline him he run away from home and efforts to bring him back failed as his mother's relatives shielded him and instead falsely reported to the police that she was the administrator of her late father's estate which position she had never held. She said due to the false report, she was arrested and charged with the criminal offence of "depriving of a beneficiary by an administrator". She contended that after it became apparent at the Subordinate Court that she has never been an administrator of her late father's estate and that House No. 222/24 Chawama which was the subject of the charge was in fact her inheritance from her father, the Applicant having sold his house through the administrator, the Applicant commenced this action knowing well what had transpired before this.

The Respondent stated that she has always been willing to assist the Applicant in her capacity as his half-sister but that his mother's relatives are using him to force her to sell the house and share the proceeds with them through the Applicant who is a minor. She contended that she cannot be asked to render an account for the rentals obtained from the lease of House No. 222/24 Chawama or to give 50% of the said rentals to the Applicant as the property is her inheritance and that the Applicant has misappropriated his own inheritance. She further contended that this matter is incompetent and ought to be dismissed as the Applicant is a minor and has no capacity to sue in his own name.

In the affidavit in reply filed on 25th February, 2013, Godfrey Chibwe, inter alia, disputed that the two houses were to be distributed between him and the Respondent as he was advised by his advocates that one house was to be given to him and his sister while the other house formed part of the estate which was to be shared amongst the children, the parents, dependants and spouse. The Applicant stated that the Respondent's claim

that the house which the administrator sold was held by the administrator in trust for him is unfounded and is an after-thought which is meant to deprive him of benefiting from the only property left in the estate of the his late father.

The Applicant alleged that the Respondent who was much older than he was at the time the other house in the estate was sold could have connived with the Administrator and shared the proceeds of the sale with him. The Applicant claimed that the Respondent intends to continue depriving him of a share in the only house remaining.

When the matter came up for hearing I ordered the parties to file written submissions in support of their respective cases. The Applicant filed written submissions on 12th November, 2013 in which learned Counsel for the Applicant submitted that the issues for determination in this matter are -

- (a) whether the Applicant is entitled to benefit from House No. 222/24 Chawama which forms part of the estate of the late Golden Milembe Chibwe; and
- (b) whether the Respondent has the lawful right to possess the property to the exclusion of the Applicant.

With regard to the issue whether the Applicant is entitled to benefit from House No. 222/24 Chawama which forms part of the estate of the late Golden Milembe Chibwe, learned counsel submitted that it is not in dispute that the late Golden Milembe Chibwe died intestate in 1995, and that section 4 (1) and (2) of the Intestate Succession Act, Chapter 59 of the Laws of Zambia (hereinafter referred to as the Act) states which estates qualify to be administered in accordance with the provisions of the Act. Section 4 (1) and (2) of the Act provides that:

“4. (1) A person dies intestate under the Act if at the time of his death, he has not made a will disposing of his estate.

(2) Any person who dies leaving a will disposing of part of his estate has died intestate under this Act in respect of that part of his estate which is not disposed of in the will.”

Learned counsel went on to submit that in the case of Monica Siakondo (suing in her capacity as administrator of the late Edith Siakondo) v Fredrick Ndenga (2005) ZR 22, the court decided that when the deceased dies intestate, his estate ought to be administered under the provisions of the Intestate Succession Act, Chapter 59 of the Laws of Zambia.

It was learned counsel's further submission that it is not disputed that at the time of his death, the late Golden Milembe Chibwe was the registered owner of Plot No. 222/24, Chawama, Lusaka and that the property is still registered in his name. Learned Counsel submitted that according to section 9 (2) of the Act, where an estate has more than one house, and where there is no surviving spouse, the children of the deceased are supposed to choose one house from which they will benefit as tenants in common while the other house or houses form part of the estate to be distributed among the beneficiaries. Learned counsel contended that since in the present case the estate had two houses and the administrator disposed of one of the houses, the remaining house should be held by the children as tenants in common.

With regard to the second issue, it was counsel's submission that the Respondent has no right to have possession of the house to the exclusion of the Applicant as she is not the only child of the late Golden Milembe Chibwe. Learned Counsel argued that the Respondent's contention that the administrator of the estate held the house which was disposed of in trust for the Applicant and that the Applicant participated in the sale of the house is not supported by any evidence. She pointed out that the Applicant was a

minor and lacked the capacity to enter into any such agreement with the Administrator.

Learned counsel drew my attention to the case of Gray Nachalwe Mudenda v. Dorothy Mudenda SCZ Judgment No. 12 of 2006 (unreported), where the court found that the actions of an administrator who enhanced the house and started living in it with his children, thus depriving the rightful beneficiaries (deceased's widow) from occupying the house, were illegal. She submitted that in the present case it is the Respondent's decision to benefit from the house to the exclusion of the Applicant which is illegal. She prayed that the Respondent should be ordered to account for the rentals previously realised from the lease of House No. 222/24, Chawama, Lusaka and that she should be ordered to share the rentals to be collected in future from the lease of the said house and that the Applicant's other claims should be upheld.

Learned counsel also referred to the provisions of sections 13, 16 and 39 (1) of the Housing (Statutory Improvement Areas) Act, Cap. 194. However, in my view the said provisions do not apply in this case.

The Respondents filed written submissions on 15th January, 2014 in which Learned counsel for the Respondent submitted that the Applicant is not entitled to benefit from House No. 222/24, Chawama, Lusaka although it was part of the late Golden Milembe Chibwe's estate because the intestate left two houses one of which was distributed to the Applicant and was held in trust for the Applicant by the Administrator while the other house was distributed to the Respondent. It was contended that the Administrator sold the house which he held in trust for the Applicant in circumstances which the Respondent was not privy to and that only the Applicant and the deceased administrator knew how the proceeds of the sale of the house were utilised.

Learned counsel further submitted that the Respondent has the right to possession of the house in dispute to the exclusion of the Applicant because

she is the lawful owner of the property after she got it away from the administrator who nearly sold it. Learned counsel contended that the Respondent is the rightful beneficiary of the said house since the administrator held the other house in trust for the Applicant. It was learned counsel's further submission that the case of Gray Nachalwe v. Dorothy Mudenda which was cited by counsel for the Applicant is distinguishable from the instant case because in that case the Respondent was the administrator of the estate who enhanced the house and started living in it with his children thus depriving the rightful beneficiary from occupying it while in the present case the Respondent is the rightful beneficiary and has never been the administrator of the estate of her late father. Learned counsel contended that the house for that reason should not be held by the Applicant and the Respondent as tenants in common.

Learned counsel went on to submit that even if the court should find that the Applicant should benefit from the Respondent's house, the Respondent should not be ordered to share the rentals she received prior to the court order because at that time she received the rentals as sole beneficiary of the house as the Applicant had the other house as his share of the estate which was subsequently sold by the administrator. Learned counsel urged that the Applicant's claims should be dismissed for lack of merit.

I am indebted to both learned counsel for their submissions.

I have considered the affidavit evidence as well as the submissions by both learned counsel for the respective parties. From the evidence on record it is common cause that the Applicant, Godfrey Chibwe and the Respondent, Priscilla Chibwe are both children of the late Golden Milembe Chibwe who died intestate on 30th September, 1995. As such both parties are beneficiaries of the intestate's estate. It is further common cause that Fraser Chibwe was appointed administrator of the estate of the late Golden Chibwe and that he too is now deceased. From the evidence on record the estate of

the late Golden Milembe Chibwe comprised, among other properties, two houses. One house it would appear was disposed of by the administrator Fraser Chibwe in unknown circumstances leaving only House No. 222/24 Chawama which is the subject of this action.

The Applicant's first claim is for an order that Plot No. 222/24 Chawama forms part of the estate of the late Golden Milembe Chibwe. He also seeks a declaration that he is a beneficiary of the estate of Golden Milembe Chibwe. The affidavit evidence adduced by the Applicant in support of this claim is that the late Golden Milembe Chibwe left, among other assets, House No. 222/24 Chawama and that the said house has been managed by the Respondent since the year 2009.

In her response the Respondent confirmed that the Applicant is a son of the late Golden Milembe Chibwe and also that the late Golden Milembe Chibwe left behind two houses one of which is House No. 222/24 Chawama which is the subject of these proceedings. Thus it is not disputed that House No. 222/24, Chawama is part of Golden Milembe Chibwe's estate.

As Golden Milembe Chibwe died intestate his estate is supposed to be administered in accordance with the provisions of the Intestate Succession Act, Chapter 59 of the Laws of Zambia (hereinafter referred to as the Act). Section 4(1) of the Act provides that a person dies intestate under the Act if he has not made a will disposing off his estate at the time of his death. According to section 3 of the said Act, an estate comprises all the assets and liabilities of the deceased person and includes his personal chattels for purposes of administration under the Act. The mode of distributing the estate of an intestate is specified in sections 5 to 11 of the Act.

In the present case although no documentary evidence has been produced by the Applicant to support the assertion that Plot 222/24 Chawama improvement Area, Lusaka belonged to the late Golden Milembe Chibwe

both the Applicant and the Respondent stated in their affidavit evidence that the said house belonged to the said Golden Milembe Chibwe. It is, therefore, not disputed that House No. 222/24 Chawama was the property of Golden Milembe Chibwe prior to his death. That being the case house number 222/24 Chawama improvement Area Lusaka does form part of the estate of the late Golden Milembe Chibwe and I hold accordingly.

As regards the Applicant's claim for a declaration that he is a beneficiary of the estate of the late Golden Milembe Chibwe, I find on the evidence adduced by both parties to this action that the fact that the Applicant was Golden Milembe Chibwe's son is not disputed. The Respondent confirms in her affidavit evidence that the Applicant is the late Golden Milembe Chibwe's son. Although she says she only became aware of his existence after her father's death, she does not dispute his paternal parentage. Whether the Applicant was born within or outside wedlock does not change his status as a beneficiary of the estate of the late Golden Milembe Chibwe because section 3 of the Act recognises a child born in or outside marriage. As the Applicant was the son of the late Golden Milembe Chibwe he is a beneficiary of the estate of the late Golden Milembe Chibwe and I, therefore, grant him the declaration as prayed.

The Applicant further seeks an order that he is entitled to 50% of the rentals previously collected and those yet to be collected from the lease of Plot No. 222/24 Chawama which forms part of the estate of the late Golden Milembe Chibwe. It is the Applicant's contention that the Respondent has managed the subject property since the year 2009. He further states that the rent for the said property is K800.00 and that the Respondent does not share the rentals with him. The Applicant does not say whether this rent is paid per month or to what period it relates. In addressing the Applicant's claim for 50% of the rentals received from the lease of House No. 222/24 Chawama it is necessary for me to refer to the provisions of the Act regarding the

distribution of the estate of a person who dies intestate. Section 5 (1) (b) of the Act provides that:

“5 (1) Subject to sections eight, nine, ten and eleven, the estate of an intestate shall be distributed as follows:

(b) fifty per cent of the estate shall devolve upon the children in such proportions as are commensurate with a child’s age or educational needs or both;”

Further, section 9 (2) of the Act provides that:

“(2) Where the estate includes more than one house the surviving spouse or child or both shall determine which of the houses shall devolve upon them and the remainder shall form part of the estate.”

From the provisions of section 9 (2) of the Act it is clear that since the estate of Golden Milembe Chibwe included two houses the administrator of the estate, Fraser Chibwe, should have given the Applicant and the Respondent an opportunity to chose which house would devolve upon them and the remaining house should have formed part of the estate to be distributed. However, this did not happen as the Respondent’s evidence which is not disputed by the Applicant is to the effect that the administrator sold the one house which he purportedly held in trust for the Applicant and was in the process of selling House No. 222/24 Chawama before the Respondent intervened and halted the sale of the said house. The Respondent claims that the remaining house is her inheritance from her father.

Further, there is clear evidence that the Applicant was a minor when his father died and was under the care of the appointed administrator of the estate in issue, namely Fraser Chibwe. Section 5 (2) of the Act provides that the mother, father or guardian shall hold the minor’s share of the estate in

trust until he ceases to be a minor. As the Applicant was a minor at the time his father died the Respondent's contention that he connived with the administrator to sell the other house which was part of the estate and so should not be given any share of House No. 222/24 Chawama is untenable as the Applicant cannot be held accountable for the administrator's actions. It will be noted that section 19 (2) of the Act requires that an administrator who wishes to sell any property which forms part of the estate of a deceased person in order to carry out his duties should obtain authority from the court to do so. To that effect section 19 (2) of the Act provides as follows:

“(2) Where an administrator considers that a sale of any of the property forming part of the estate of a 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.”

There is no evidence on record to show that Fraser Chibwe obtained the authority of the court to sell one of the houses that formed part of the estate of the late Golden Milembe Chibwe. Had the administrator been alive he would have been required to give an account of how he administered the estate and to explain the circumstances in which he disposed of the house. The Applicant cannot be required to give the explanation.

Since the administrator disposed of the other house the only house remaining as part of the estate is House No. 222/24 Chawama which the Respondent salvaged from the estate. The Respondent's assertion that the Applicant connived with the administrator and should not be allowed to claim a share in House No. 222/24 Chawama has no basis because the Applicant does have a share in the said house as he too is a beneficiary of the said property as the son of the late Golden Milembe Chibwe. I order that in terms of section 9 (2) of the Act, House No. 222/24 Chawama Improvement Area

Lusaka devolves upon the Applicant and the Respondent as children of the late Golden Milembe Chibwe. I order that title to the said property shall be jointly held by the Applicant who is no longer a minor in terms of section 3 of the Act having attained the age of 18 years and the Respondent.

The Applicant's next claim is that he should be awarded 50% of the rentals so far collected for House No. 222/24 Chawama and the rentals yet to be collected. On the evidence before me, I find that to make such an order would be inequitable for the Respondent who managed the house albeit under the mistaken impression that she was the sole beneficiary of the house, the other house purportedly having been held in trust for the Applicant by the deceased administrator. Thus, although I have found that the Applicant is entitled to a share of House No. 222/24 Chawama, Lusaka, the sharing of the rentals received from the lease of the house cannot be made to take effect retrospectively. I order that the sharing of the rentals shall take effect from 1st April, 2014 going forward and that the rentals shall be shared in equal shares by the Applicant and the Respondent.

The Applicant also seeks that the Respondent be ordered to give an account of all the rentals collected from the lease of House No. 222/24 Chawama from the year 2009 to date. The Applicant's evidence under this claim is that the said property is part of the estate of the late Golden Milembe Chibwe, that it has been managed by the Respondent since the year 2009 and that the property has been leased to a tenant and that the rentals are collected by the Respondent. On the other hand, the evidence adduced by the Respondent is that she was a child of the late Golden Milembe Chibwe and is a beneficiary of the estate. The Applicant is her brother. According to the Respondent's testimony which has not been rebutted by the Applicant, she has never been appointed as administrator of her late father's estate. Whereas the Applicant contends that the Respondent has managed House No. 222/24 Chawama Lusaka since the year 2009, her testimony is that the property in question is her share of the estate of her late father and that she

took possession of it with the help of the police after Fraser Chibwe the appointed administrator of the estate of the late Golden Milembe Chibwe attempted to sell it in unexplained circumstances.

It is clear from the evidence adduced by the parties in this action that Fraser Chibwe who was appointed to administer the estate of the late Golden Milembe Chibwe took certain actions which neither the Applicant nor the Respondent can explain and since he is now deceased which fact has been stated by both parties in their affidavit evidence, he cannot be ordered to render an account of his administration of the said estate as required by the law in such cases. Suffice it to state that neither the Applicant nor the Respondent, as beneficiaries of the estate of the late Golden Milembe Chibwe, is accountable for his actions. Therefore, the Applicant's claim that the Respondent should account for her management of House No. 222/24 Chawama Lusaka which formed part of the estate, is untenable as the Respondent is not the administrator of the estate of the late Golden Milembe Chibwe. The duty to account for the administration of an intestate's estate is imposed on the administrator of the estate and not on any beneficiary of the estate. To that effect section 19 (1) of the Act provides that:

- "19. (1) The duties and powers of an administrator shall be -*
- a) to pay the debts and funeral expenses of the deceased and pay estate duty if estate duty 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."*

It will be seen from the provisions of section 19 (1) (b) and (c) of the Act which are set out above that the Respondent as a beneficiary of her late father's estate cannot be held accountable for the administrator's failure to distribute the estate properly to the beneficiaries as that is not her obligation or duty under the Act. As such I find that the Respondent cannot be ordered to account for the rentals collected from the lease of House No. 222/24 Chawama Lusaka since the year 2009 because she is not the administrator of the estate and only collected the rentals under the belief that she was the sole beneficiary of the said property. The Applicant's claim to that effect therefore fails and is dismissed.

The Applicant also claims for damages for mental stress, pain and suffering. This claim against the Respondent cannot stand because as I have observed earlier in this judgment, she is not the administrator of the estate of the late Golden Milembe Chibwe and as a beneficiary of the said estate, she is not accountable for the actions of the said administrator who clearly failed to properly discharge his duties as administrator of the estate under the Act. The claim is therefore dismissed.

As neither the Applicant nor the Respondent has caused this action which has resulted from the actions of Fraser Chibwe who is now deceased in his capacity as administrator of the estate of Golden Milembe Chibwe, I order that each party will bear their own costs.

Leave to appeal is hereby granted.

Dated this 24th day of March, 2014.

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**A. M. SITALI
JUDGE**