

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

2012/HP/0808

(Civil Jurisdiction)

**IN THE MATTER OF: SECTION 9 ON THE INTESTATE
SUCCESSION ACT CAP, 59 OF THE
LAWS OF ZAMBIA**

**IN THE MATTER OF: THE ESTATE OF THE LATE JOHN
MUSUPELO**

BETWEEN:

HUMPHREY MUSUPELO
(SUING AS ADMINISTRATOR OF THE ESTATE
OF THE LATE JOHN MUSUPELO)

1ST APPLICANT

RUTH MUSUPELO

2ND APPLICANT

STEWARD MUSUPELO

3RD APPLICANT

OBBY MUSUPELO

4TH APPLICANT

DORCAS MUSUPELO

5TH

APPLICANT

JOE MUSUPELO (A MINOR SUING
BY HIS MOTHER AND NEXT FRIEND,
RUTH MUSUPELO)

6TH APPLICANT

PRISCA MUSUPELO (A MINOR SUING
BY HIS MOTHER AND NEXT FRIEND,
RUTH MUSUPELO)

7TH APPLICANT

JOSAYA MUSUPELO (A MINOR SUING
BY HIS MOTHER AND NEXT FRIEND,
RUTH MUSUPELO)

8TH APPLICANT

AND

HARDSON MUSUPELO

RESPONDENT

Before the Hon. Mrs. Justice A. M. Sitali on the 28th day of January, 2014

For the Applicant* : *Mr Brigadier Siachitema of Messrs Lusitu Chambers

For the Respondent* : *No Appearance

J U D G M E N T

Cases referred to:

- 1. Fr. Telesphore Tafuna v. Kenneth Sikasote SC Appeal No. 142 of 2000 (unreported).**
- 2. Lindiwe Kate Chinyanta v. Doreen Chiwele and Judith Tembo SCZ Judgment No. 28 of 2007.**
- 3. 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 4, 9 and 19.**

The Applicant commenced this action by originating summons claiming the following:

1. A declaration that plot No. 11A/19/19174 Matero, Lusaka, being the only house left as part of the estate of the late John Musopelo should belong to the surviving spouse Ruth Musopelo who has a life interest in the property and the children of the deceased as tenants in common, according to section 9 of the Intestate Succession Act and are entitled to lawful possession of Plot No. 11A/19/19174, Matero, Lusaka.

2. An order of eviction be made against the Respondent in order to grant possession of plot No. 11A/19/19174 to the lawful beneficiaries of this property.
3. An order that the respondent pay the estate all the money the applicants would have received as rentals from the time the respondent took illegal and unlawful occupation up to the time he will give vacant possession.
4. Damages and loss for the period the respondent illegally occupied Plot No. 11A/19/19174, Matreo, Lusaka.
5. Any other relief as this honourable court may deem fit.
6. That the respondent should bear the costs of this application.

The originating summons are supported by an affidavit sworn by Humphrey, Ruth, Steward, Obby and Dorcas Musopelo the Applicants who deposed as follows: that the said Humphrey Musopelo is the Administrator and the first born son of Mr. John Musopelo now deceased and by virtue of which he swore to this affidavit from the facts within his personal knowledge. Marked "HRDSOM1" is an order of appointment of administration. That the said Ruth Musopelo is the widow, mother and next friend to Joe, Prisca and Jasaya Musopelo, all the minor applicants herein and by virtue of which she swore the affidavit from the facts within her personal knowledge. That the said Obby Musopelo is the son of the late John Musopelo and by virtue of which he swore this affidavit from the facts within his personal knowledge. That he Steward Musopelo is the son of the late John Musopelo and by virtue of which he swore the affidavit from the facts within his personal knowledge; that the said Dorcas Musopelo is the daughter of the late John Musopelo and by virtue of which she swore the affidavit from the facts within her personal knowledge.

They deposed that in 1990, the deceased John Musopelo, purchased House No. 11A/19/19174 Matero, Lusaka from Lusaka City Council. Marked

(HRDSOM2") a letter from Lusaka City Council office to the director of Legal Services confirming that he had purchased the house herein dated 5th November, 1996. That the said John Musopelo died in intestate on the 21st day of September, 2006 in Matero Lusaka and was survived by a spouse, the 2nd applicant herein and seven children. That at the time of his death in 2006, plot 11A/19/19174 Matero was vested in him. That the property was still in the late John Musopelo's name even after his death as the receipt dated 9th January, 2008 marked "HRDSOM" shows. That after John Musopelo's death in September, 2006, his mother and they the children were forcefully and illegally evicted from the only house which forms part of the estate of their later father, the said John Musopelo by the respondent who is neither a beneficiary nor an administrator. That the respondent is still in possession of the house despite having been advised to give vacant possession to the spouse and children of the deceased. That the administrator of the Estate of John Musopelo has not been able to perform his duties well since the respondent is in possession of the title deeds to the property and that the illegal occupation of the house by the respondent has deprived the surviving spouse and children of the use and occupation of the use and occupation of the house in issue and they have suffered damage and anguish

I have considered the affidavit evidence as well as the Applicant's written submissions. The Applicant's first claim is for an order that Plot No. 469 Kabwata Site and Service, Lusaka, is the property of the late Oswald Banda and as such devolves upon the Applicant, who is the surviving spouse of the deceased. The affidavit evidence adduced by the Applicant in support of this claim is that she and the deceased Oswald Banda initially cohabited from 1992 until 1997 when they were married under customary law after the bride price was paid to her uncle Mr. Wilson Kalaba. The Applicant asserts that Oswald Banda owned Plot No. 469 Kabwata Site and Service which he

purchased from Lillian Munsanje in November, 1994, and that they built a house with ten rooms on it. She stated that change of ownership was not effected up to the time of Oswald Banda's death.

In opposing this claim the 1st Respondent stated that contrary to the Applicant's assertion that she and the late Oswald Banda initially cohabited from 1992, the Applicant and the deceased only started cohabiting in 2001 and there was never a customary marriage between them and that, according to the 1st Respondent's knowledge, none of the deceased's relatives paid the bride price to her uncle Mr. Wilson Kalaba.

In reply the Applicant deposed that it is strange that she and the late Oswald Banda lived with the deceased's siblings Isaac and Matilda and later his niece Loveness joined them in Kabwata and yet the 1st Respondent claimed that the family did not know about the Applicant. She further asserted that people in the neighbourhood and the church at which they congregated knew about them and their marriage. To that effect the Applicant laid before me a copy of a letter written by the parish priest of Good Shepherd Kabwata Catholic Church marked "SC1".

The Applicant's assertion that she was married to Oswald Banda under customary law is supported by a letter from the Parish Priest of Good Shepherd Kabwata Catholic Church, which is the church where the Applicant and the late Oswald Banda congregated. In that letter the parish priest Father Oswald Mallya stated that the Applicant was married to Oswald Banda under customary law and that the couple were preparing to have their marriage blessed in church but the late Oswald Banda died before completing instructions. The Applicant's assertion that she was cohabiting with the late Oswald Banda from 1992 is further supported by the affidavit evidence of Nene Chate contained in the Applicant's supplementary affidavit in reply filed on 20th August, 2007, to the effect that she knew Oswald Banda and the Applicant as husband and wife when they were her tenants in

Matero from 1993 to 1994 and that at that time they lived with Oswald Banda's brother Isaac and his sister Matilda.

From the affidavit evidence, it is clear that the Applicant and the late Oswald Banda cohabited for a number of years and that in the community and at their church they were known to be married. Although the 1st Respondent denies that the Applicant was married to the late Oswald Banda and states that the family did not recognise her as his widow, she has not adduced any evidence to rebut the Applicant's evidence that she and Oswald Banda were married under customary law after the bride price was paid to her uncle Wilson Kalaba and that prior to getting married, the couple cohabited from the year 1992. The Applicant's further evidence is that the family were aware that she was cohabiting with Oswald Banda before she married him under customary law because they lived with his brother Isaac and his sister Matilda. Further, from the evidence on record, it is not in dispute that Plot 469, Kabwata Site and Service, belonged to the late Oswald Banda who died intestate in April 2003. As Oswald Banda died intestate, his estate should be administered in accordance with the provisions of the Intestate Succession Act, Cap. 59 of the Laws of Zambia. Section 9 (1) of that Act provides that:

“9. (1) Notwithstanding section five, where the estate includes a house, the surviving spouse or child or both shall be entitled to that house:

Provided that -

- (a) where there is more than one surviving spouse or child or both, they shall hold the house as tenants in common; and***
- (b) the surviving spouse shall have a life interest in that house which shall determine upon that spouse's remarriage.”***

In the absence of evidence rebutting the Applicant's claim that she was married to the late Oswald Banda under customary law, I find that the Applicant has proved on a balance of probabilities that Plot No. 469 Kabwata Site and Service, Lusaka, which was the property of the late Oswald Banda devolves upon her as the surviving spouse of the late Oswald Banda. The Applicant as surviving spouse of the late Oswald Banda has a life interest in the house on Plot No. 469 Kabwata Site and Service. In terms of the provisions of section 9 (1) (b), the Applicant's interest in the house shall come to an end if the Applicant remarries. As there are no children born to the Applicant and the late Oswald Banda, I accordingly order that Plot 469 Kabwata Site and Service devolves upon the Applicant as prayed.

As the Applicant is entitled to the house which was owned by the late Oswald Banda and has a life interest in it which will determine if she remarries, I order that the ownership of the house should be transferred to the said Applicant and that the caveat placed on the property by the 1st Respondent should be removed and that the 1st Respondent should immediately surrender to the Applicant the documents relating to the said Plot 469, Kabwata site and Service, Lusaka, which are in the 1st Respondent's possession. Further, the 2nd Respondent and any other relatives of the late Oswald Banda should immediately vacate the house on Plot 469 Kabwata Site and Service which should be occupied by the Applicant for life unless she marries someone else. The Application's action is, therefore, successful.

I order that the 1st Respondent pays the Applicant's costs for this action as it is she who caused the Applicant to commence this action. The costs are to be agreed and taxed in default of agreement.

Leave to appeal is granted.

Dated the 27th day of March, 2013.

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A. M. SITALI
JUDGE