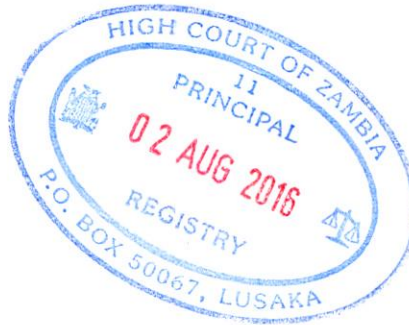


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**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
AT LUSAKA**

2015/HP/1187

(Civil Jurisdiction)



**BETWEEN:**

**SHADRECK NYANGU CHIKOLESYA** (Suing in his capacity **PLAINTIFF**  
as administrator of the estate of the late Cedreck Chikolesya Deceased)

**AND**

**RUTH CEDRECK CHIKOLESYA**

**DEFENDANT**

Before the Hon. Mrs. Justice A. M. Banda-Bobo on the .....<sup>2<sup>nd</sup></sup> of  
*Auegnon*....., 2016

**FOR THE PLAINTIFF** : **Mr. K. M. Simbao, SC of  
Mulungushi Chambers**

**FOR THE DEFENDANT:** **N/A**

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

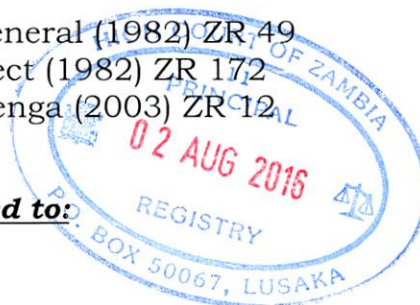
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**Cases referred to:**

1. Khalid Mohamed vs. Attorney General (1982) ZR 49
2. Zulu vs. Avondale Housing Project (1982) ZR 172
3. Robson Banda vs. Evaristo Mulenga (2003) ZR 12

**Legislation and other Works referred to:**

- Rules of the High Court Act
- Local Court Act
- The Intestate Succession Act, Cap 59 of the Laws of Zambia



The plaintiff commenced this action by way of Writ of Summons accompanied by Statement of Claim, where he claims the following reliefs:

(a) A Court Order for the defendant to sign the required transfer documents relating to stand No. 25/10/45586, House No. 470 New Chilenge to the purchaser's name;

Or in the alternative

(b) A Court Order that the Deputy Registrar sign the required transfer documents relating to the aforementioned property to the purchaser's name.

In the Statement of Claim, the plaintiff deposed that he was an administrator of his late father's estate. From what I could glean from the Statement of Claim, the gist of the dispute between the parties herein, who happen to be siblings, is over the house their father left after his demise. It appears he had been a tenant in the house at the centre of the controversy, but when the government made a decision to sell the house, he could not qualify to buy it in his name as he was a foreigner. He then gave money to the defendant herein to buy the house on behalf of the family. This was done but the defendant did not hand over the papers to her father.

After his demise, she started claiming ownership, and indeed started collecting rentals from the extensions built to the house and refused to share the rentals. Further, she wanted the widow, who had lived in the same house for thirty-five (35) years during

the subsistence of her marriage to their father to vacate the said house. It appears that the parties ended up at the Local Court where it was determined that in fact the house belonged to the widow, and where they agreed that the same be sold and the proceeds be shared among the beneficiaries. However, all efforts to make the defendant sign papers for the sale or to obtain title at the Council failed. The plaintiff, it must be mentioned was appointed administrator of his father's estate.

This standoff is what prompted the parties to resort to this litigation and seek the reliefs set out above herein.

Despite proof of service, the defendant did not file appearance nor defence. That being the case, I proceeded to hear the plaintiff's case under Order XX rule 2 of the Rules of the High Court Cap. 27 of the Laws of the Zambia as this is a matter concerning a probate action.

Learned State Counsel Mr. Simbao, called three witnesses in aid of his case.

**PW1** was the plaintiff whose evidence was largely in tandem with what he had stated in his statement of claim, vis, that his father and step mother had occupied the house in issue in this matter for a period of thirty-five (35) years during their marriage until his demise in 2010. Before that, the Zambian Government had made a deliberate policy to empower sitting tenants to buy houses. However, due to the fact that his father was a foreign national and therefore could not procure the house in his own

name, he gave money to the defendant to buy the house on behalf of the family. However, once she bought the house, she did not hand over the papers to her father. After his demise, the plaintiff was appointed administrator of their father's estate as per document at page 2 of his bundles. It appeared from the testimony that the defendant started claiming ownership of the house and started collecting rentals from the cabins, which were extensions built onto the house by the parents. The rentals so collected were not shared with the other siblings and the widow. The matter was taken to the Local Court, which directed that the house be sold and the proceeds be shared. However, that order was not obeyed as the plaintiff has been adamant in her refusal to sign the papers at the Council for the Certificate of title to be issued; and so the sale could not go through. It was his evidence that there had been no appeal to the Local Courts' Order.

**PW2** was **Hildah Chikolesya**, a sibling to both parties herein and a beneficiary. Her evidence mirrored that of PW1. She only added that the money for purchasing the house came from their father and so the defendant could not claim ownership of the house as she never spent any money on its purchase. She referred the Court to page 7 of the plaintiff's additional bundle of documents on the Local Court proceedings and said the Order was not appealed against, and neither was it obeyed.

**PW3** was **Emma Lufino Chikolesya**, the widow and step mother to the parties herein, she indicated that she had lived with her husband in the said house for thirty-five (35) years before he died, and that she was the surviving widow who still resides in

the said house. Her testimony tallied with that of the previous witnesses. She added that the defendant, after buying the house refused to hand over the papers and while the issue was still being pursued, her husband fell ill and died. Further, that upon their retirement, her and the later used their retirement money to make extensions to the house and put those rooms on rent, which rentals the defendant was now collecting and using exclusively for herself to the detriment of other beneficiaries. She confirmed that the matter went to the Local Court and they were ordered to sell the house, which order has not been obeyed. She said that the Court had said she was the owner of the house as a widow.

Upon close of the case, counsel opted to file written submissions. Counsel went over the evidence adduced by the three witnesses herein, which evidence he deemed straight forward. He then referred to Order 20 Rule 2 of the High Court Act, which allows a matter involving probate to proceed to trial in the absence of appearance and defence by the defendant. He also brought the Court's attention to the case of **Khalid Mohamed vs. Attorney General**<sup>1</sup> for the proposition that even if a defendant does not file a defence, the plaintiff still has to prove his or her case; as mere failure of the opponents defence does not entitle him to judgment. I was also referred to the case of **Zulu vs. Avondale Housing Project**<sup>2</sup> for the same issue of the burden of proof being adduced by the plaintiff.

Reverting to the case at hand, it was his submission that the plaintiff alleged that the house in dispute is a family house,

which ended up in the defendant's name because their father was foreigner and could not be offered the house. Further, that the plaintiff is the administrator and the family decided to sell the house and share the proceeds as beneficiaries.

Counsel submitted that the plaintiff has proved his case even beyond the balance of probabilities. He said the evidence of PW3 that she lived at the house for thirty-five (35) years, and still lives there, and had made extensions thereto with her late husband was not challenged. He said even the evidence of PW2 was not challenged. Further that infact the defendant herself as appear at page 7 of the plaintiff's additional bundle of documents confirms having bought the house for her father and that the widow is staying in it, and that if the widow wanted the house to be sold, she did not have any objection. Counsel said that whatever can be said about the jurisdiction of the Local Court, the fact that the testimony was so recorded has not been disputed.

The Court was asked to find for the plaintiff and direct that the house be sold and the Council issue a Certificate of title in the name of the defendant to be given to the plaintiff and if necessary conveyance papers be signed in terms of Section 14 of the High court Act. He asked for costs.

I have carefully considered the evidence before me, including the submission by State Counsel and the authorities to which I was referred.

As already noted, the defendant did not enter appearance nor defence in this matter. The matter therefore proceeded in terms of Order 20 rule 2 of the Rules of the High Court Act; Cap 27 of the Laws of Zambia, as it is a probate matter. Be that as it may, I am also guided by the holding in the cited case of **Khalid Mohamed** (supra).

The facts not in dispute are that the plaintiff and defendant are siblings, together with others, born of their late father, who also left a widow, their stepmother. It is not in dispute that the plaintiff was appointed administrator of their late father's intestate estate. The bone of contention relates to a house that their father left after his demise. The evidence on record, which appears not to be disputed is that their father, who was a foreigner, and had lived in the house in contention for many years, asked his daughter the defendant herein to buy the house on behalf of the family since he could not do so.

According to the evidence on record, this was done, and a letter of offer was generated in the defendant's name, but it appears the defendant did not give her father the documents and claimed the house as her own to the exclusion of the other siblings and their stepmother. It appears that the defendant was taken to the Local Court, where she agreed to have the house sold so that the proceeds could then be shared among the beneficiaries. However she later refused to sign the documents for the sale of the house, hence this action.

In his submissions, the plaintiff's counsel quoted what the defendant said in the Local Court, where she said:

**"... my late father authorized me to register the house in my name. Defendant (1) is our step mother and she is the spouse. I bought the house for my father and defendant is staying in the house. If the spouse want the house to be sold, I do not have any objection".**

He then went on to state that whatever can be said about the jurisdiction of the Local Court in the matter, the fact that the defendant's testimony was so recorded has not been disputed.

Section 5(1) of the Local Court Act, Cap 29 of the Laws of Zambia provides for the establishment of Local Courts. In the proviso thereto, the Local Court is competent to deal with matters of inheritance. Hence even though its jurisdiction is limited, the limit does not extend to matters of inheritance.

Section 16(1) of the Local Court Act, restricts any person, as of right to any records or documents forming part of the papers in any case before a Local Court or of any other record kept by any Local Court. However, subsection 2 of the same section goes on to state that:

**"A party to any proceedings before a Local Court shall, on payment of such fee as may be prescribed be entitled to a copy of any record of those proceedings made by or on behalf of such Court."**

In this case the plaintiff was party to the case in the Local Court and was therefore entitled to a copy of the record for whatever purpose he may have wanted to use it after the case. It is trite that a decision of the Local Court is appealable to the



Subordinate Court until the entire Court hierarchy is exhausted. The case of **Robson Banda vs. Evaristo Mulenga**<sup>3</sup> is a case in point in that that matter started in the Local Court, went to the Subordinate Court and eventually there was an appeal to the High Court against the decision of the Subordinate Court; and eventually it went to the Supreme Court. At page 126 of the same case it was held that:

**“this case has gone through the whole hierarchy of the Judicature”**

The point here is that the Local Court made a valid determination of the matter that was before it, and this is evidenced by the records submitted before Court in casu. It is apparent from these records that the defendant did admit that their father had authorized her to buy the house, put it in her name, though it was meant to be a family house. She admitted too that if the widow wanted to sell the house she would not object. Based on that evidence the Local Court ordered that the same be sold. This evidence was not controverted. The decision of the Local Court was not challenged by way of appeal either.

The father to the plaintiff and the defendant herein died intestate and therefore his estate should be distributed according to the provisions of the Intestate Succession Act, Cap 59 of the Laws of Zambia. Section 5 states how the distribution should be handled. Section 7 is also relevant. Section 9 of the same Act is particularly relevant to this matter as it provides that where the estate includes a house, the surviving spouse or child or both shall be entitled to that house. In casu, the plaintiff and his

siblings are beneficiaries of the estate, including the defendant. The surviving spouse has a life interest in the house, which can only be determined if she should remarry. However, she has opted to have the house sold so that the proceeds can be shared among all the beneficiaries. This indeed is her choice to make.

In the circumstances and considering the evidence adduced by the plaintiff during trial, I believe the plaintiff has proved his case on a balance of probabilities and is entitled to the reliefs he seeks.

I therefore order that the house be sold, and that the Deputy Registrar sign the required transfer documents relating to the aforementioned property to the purchaser's name.

Counsel asked for the costs, but looking at how the matter proceeded, I believe it would be in the interest of justice that costs be in the cause.

**DELIVERED AT LUSAKA THIS 2nd DAY OF August 2016**



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**MRS. JUSTICE A. M. BANDA-BOBO  
HIGH COURT**