

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

MAGGIE MWANSA

APPELLANT

AND

JOHN KAFULA MWEYE

*(Administrator and beneficiary of the
Estate of the Late John Chifuta)*

RESPONDENT

GRACE MUBANGA SONGELA

INTERVENER

*Before The Honourable Madam Justice M.C. Mulanda in Open Court
at Ndola.*

FOR THE APPELLANT : Mr. E. Sichone, Legal Aid
Board.

FOR THE RESPONDENT : In Person.

FOR THE INTERVENER : Mrs E.M. Bupe,
National Legal Aid Clinic for
Women

JUDGMENT

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CASES REFERRED TO:

1. **Wachtel Vs. Wachtel (1973) 1 ALL E.R. 829.**
2. **Monica Siankondo (Suing in her Capacity as Administratrix of the Estate of the Late Edith Siankondo) Vs. Frederick Ndenga (2005) Z.R. 22 (S.C.).**
3. **Hussey Vs. Palmer (1972) 3 ALL ER 744.**
4. **Annie Bailes Vs. Charles Antony Stacey and Anierica Simoes (1986) Z.R. 83 (S.C.).**
5. **Alice Phiri Vs. Margret Mulenga (2013) ZR 362 Vol. 3.**
6. **Falconer Vs. Falconer (1970) 3 ALL ER 449.**
7. **Midland Bank Trust Co. Ltd and Another Vs. Green and Another [1981] 1 ALL ER 153 at Page 156.**
8. **Banda and Another Vs. Mudimba (2011) ZR 162 Vol. 3 at Page 183.**
9. **Mwenya and Randee Vs. Kapinga (1998) ZR 17.**
10. **Pilcher Vs. Rawlins (1872) 7 CH 259.**

11. **Halimo Mohamed Jama Vs. The Chief Registrar of Lands and Deeds and Others 2015/HP/A023 (Unreported).**
12. **Hunt Vs. Luck (1902) 1CH. D. 106.**

LEGISLATION REFERRED TO:

The Intestate Succession Act Chapter 59 of the Laws of Zambia, Sections 2(2)(c), 3,5(1), 9(1)(b), 19(1)(2).

OTHER MATERIALS REFERRED TO.

1. **Megarry and Wade, The Law of Real Property, 3rd Edition.**
2. **Black's Law Dictionary 8th Edition, Bryan A. Garner (General Editor)**

This is an appeal against a Judgment of the Subordinate Court of the First Class sitting at Ndola, delivered on 16th July, 2015, in which an Order made by the Local Court to have the matrimonial house sold and the proceeds thereof shared among the beneficiaries, following the death of John Nkole, herein referred to as the deceased, was upheld. The 62 year old Appellant in this matter is the surviving spouse of the late John Nkole, and the

Respondent is her step-son and Administrator of the Estate; while the Intervener is the purchaser of House No. 7165 Kabushi, Ndola, the house in issue, which is the matrimonial home of the deceased and his family.

The deceased died on 2nd May, 2014, and on 9th January, 2015, the Local Court appointed the Respondent as Administrator of his Estate, after the Appellant and the Respondent's two siblings stated that they had no objection to his application for appointment as Administrator. According to the record of proceedings from the Local Court regarding the appointment of the Respondent as Administrator, the deceased was survived by his spouse, the Appellant in this matter, and four children who included the Respondent.

The matter was originally commenced in the Local Court by the Appellant after it became apparent that the Respondent intended to sell the matrimonial house. In her evidence before the Local Court, the Appellant complained over the appointment of the Respondent

as a sole Administrator. She further contended that if the house was sold, she would have nowhere to go. She asked the Court to prevent the Respondent from selling the house. She, in fact, contended that it was her who had purchased the said house in 1996 at a price of K250.00. She told the lower Court that it was her children from her previous marriage who gave her the money to purchase the said house, as the deceased's retirement package had already been spent.

It was her further testimony that she decided that the house should be registered in the names of the deceased as owner, because she had no National Registration Card at the time of purchase of the said house, as she had left it in Chavuma District where they used to live before coming to Ndola.

She told the Local Court that the Respondent had since engaged valuers to value the house in readiness for sale.

In his defence, the Respondent told the Local Court that it was, in fact, the Appellant and her daughter who had taken him to the Administrator-General's office. It was his further testimony that the house in issue was bought by the deceased in 1996 from Brave Chanda, after receiving his retirement package. He said the Appellant's daughter and her husband extended the said house from a one bed-roomed house to a three bed-roomed house. At the Administrator-General's office, the daughter offered to buy off the Respondent's and his siblings' interest in the house. That was how it was agreed that the Valuation Surveyors be engaged to value the house before and after the improvements made to it. A report was, thereafter, made, where the house was valued at K105, 000.00 after being extended to a three bedroomed house and K60,000.00 before extension as a one bedroomed house. The Respondent demanded to be paid a sum of K48, 500.00, as his share, together with his siblings, which the daughter to the Appellant refused, stating that it was on the high side.

It was his further testimony that at the time the Appellant was getting married to the deceased, she came with five children of her own from her previous marriage and found the deceased with two children of his own who included the Respondent himself. He complained that his step-mother did not take good care of him and his siblings.

In his Judgment dated 11th February, 2015, delivered in the matter, the Local Court Officer found that the Respondent was properly appointed as Administrator of his late father's estate. He further found that the deceased's children together with the surviving spouse were the beneficiaries of the house. He dismissed the Appellant's application for the revocation of the appointment of the Respondent as Administrator of the Estate of the deceased. The Local Court officer recognised that there were serious conflicts between the surviving spouse, who had a life interest in the house in issue, and her step children. He ordered that House No. 7165 Kabushi, Ndola, be sold and the proceeds distributed among the beneficiaries.

Dissatisfied with the order of the Local Court that the house should be sold and the proceeds thereof shared among the beneficiaries, the Appellant appealed to the Subordinate Court. The matter was heard *de novo* before the Subordinate Court. In her testimony before the Court below, the Appellant repeated the evidence she gave before the Local Court. She said she had been married to the deceased for 30 years until his demise in 2014. She further testified that her husband who used to work for the Office of the President, retired in 1995. They were at the time staying in Chavuma District. The deceased and the appellant later migrated to Ndola where they were living in the house of his younger brother. Due to some misunderstandings in that home, the couple decided to live with the Appellant's younger sister. It was her further testimony that in 1996 she was offered House No. 7165, Kabushi, to buy, at a price of K250.00 by the previous occupier. She subsequently paid for the house. In the same year, 1996, when the Government of the late President Chiluba offered Council houses to sitting tenants for sale, she again paid K250.00 towards the purchase price of the said house. The house was, however, registered in the names of the

deceased as she did not have a National Registration Card which had remained with other properties in Chavuma District. She told the trial Court that she learnt that the Respondent had sold the house, after which he offered her a sum of K26, 000.00 as her share, which she refused to collect. She maintained that she did not want the house to be sold.

Her daughter, Esther Mumba, who testified as PW2, told the trial Court that the deceased was her step father and the Respondent her step brother. She said she was brought up together with the Respondent by the deceased and the Appellant. It was her evidence that the deceased and her mother bought House No. 7165 Kabushi, after which PW2 and her husband got a loan of K60, 000.00 and extended it from a one bed-roomed house to a three bed-roomed house. The living room was also extended.

After the death of her father on 2nd May, 2014, the Respondent and the Appellant went to Victim Support Unit at Ndola Central Police Station over the house. They were advised to go and choose an

Administrator. Outside the Police Station, the Respondent beat up the Appellant and he was detained in custody.

In January, 2015, the Respondent was appointed as Administrator by the Local Court. In February, 2015, he informed the Appellant that he intended to sell the house. That was how PW2 and her mother took the matter to the Administrator General's office where it was agreed that the house be sold after being valued by the Valuers. T.P. Chibwe Registered Valuers valued the house at K60,000.00 before improvements and K105,000, after improvements. PW2 suggested buying off the Respondent and his sibling's interest in the house, in the sum of K20,000.00, but the Respondent refused. Instead, he requested to be paid a sum of K54,000.00. She later learnt that the Respondent had sold the house at K75,000.00.

In his defence, the 41 year old Respondent told the trial Court that there were seven children, altogether, living with the deceased and his step mother. In 1996 when the deceased retired, he bought the

house in issue at K250.00. In 1997, the deceased paid the City Council a sum of K1,200.00 for the house following the presidential directive for the sale of Council houses to sitting tenants. He said it was in the same house that the deceased and the rest of the family used to live. He admitted that following the demise of the deceased, there was confusion surrounding the house. Amidst this confusion, he was appointed as Administrator of the estate of his late father. The Appellant offered to pay him a sum of K20,000.00 for his share in the house, which he declined as being too little. It was then agreed that the house be sold. Consequently, the Administrator General engaged a Valuator who valued the house in the manner PW2 had told the trial Court. The Valuator promised to look for a customer to purchase the house, and he waited. On 29th January, 2015, he was sued by the Appellant in the Local Court. After the hearing of the matter, the Local Court ordered that the said house be sold and proceeds shared among the beneficiaries.

Efforts to sell the house were frustrated by the Appellant. She was summoned at the Local Court where the Respondent demanded to

be paid K60, 000.00 for his share. He later consulted Ndola City Council on the value of the house and he was told that it was worth K75, 000.00. That was how he looked for a Customer, Grace Mubanga, the Intervener in this matter, who paid the K75, 000.00 purchase price for the house in the presence of the Appellant. He got K26, 000.00 from the money and gave it to the Appellant who declined to get it. He subsequently deposited the money into his Bank Account. On 24th March, 2015, he served, on the Appellant, an eviction notice requiring her to vacate the house within 90 days from that date.

DW2, the Respondent's younger sister confirmed the appointment of the Respondent as Administrator.

DW3 was the Valuation Surveyor who confirmed having valued the house at K105, 000.00 after improvements and K60,000.00 before improvements.

After hearing this evidence, the trial Court found that the value of the improvements made to the house by PW2 was K45, 000.00. He, however, stated that it would be an injustice for her to be paid the sum of K45,000.00 when the house was sold for K80, 000. He ordered that she be paid one quarter ($\frac{1}{4}$) of the purchase price for the improvements she made, before the surplus could be distributed to the beneficiaries in accordance with the provisions of Section 5 (1) (a) of the Intestate Succession Act, Chapter 59 of the Laws of Zambia. The trial Court considered the children who were not children of the deceased as dependants, after citing the definition of 'dependant' in section 3 of the Intestate Succession Act, Cap. 59. The Order of the Court on the distribution of the money realised after the sale of the house was couched as follows:

“PW2 to be paid $\frac{1}{4}$ of the value of the sale price, and then the rest to be distributed as outlined- 20% Spouse, 50% children, 20% parents and 10% dependants.”

Dissatisfied with the decision of the Subordinate Court, the Appellant has now appealed to this Court and filed the following three grounds of appeal:

- 1. The Learned Magistrate erred in law and fact when he failed to recognise that the appellant has life interest in the property.**
- 2. The Learned Magistrate erred in law and fact when he proceeded to apportion the proceeds from the sale of the house in proportions of 20% spouse, 50% children, 20% parents and 10% dependants knowing fully well that the widow has a life interest in the house and it should not have been sold.**
- 3. The Learned Magistrate erred in law and fact when he proceeded to validate the sale of the house which was contrary to the law as the Respondent never got authority from the court as required by law.**

In his submissions, Learned Counsel for the Appellant in arguing the first ground of appeal submitted that, the learned trial Magistrate erred when he failed to recognise the appellant's life interest in the house as provided for by Section 9 (1) (b) of the

Intestate Succession Act, Chapter 59 of the Laws of Zambia.

Counsel contended that the trial Court should have considered that

the Appellant, as a surviving spouse who had a life interest, needed to be in the house until she remarried. He submitted that the lower Court erred in law and fact when it failed to recognise the Appellant's life interest in the house in issue by ordering its sale.

In ground two, Counsel submitted that the lower Court erred when it purported to distribute the proceeds of the sale of the house in accordance with Section 5 (1) of the Intestate Succession Act, Cap. 59 of the Laws of Zambia. Counsel contended that the said Section 5 (1) relied upon by the trial Magistrate was subject to Section 9 of the same Act. According to Counsel, Section 9 of the Act is superior to Section 5 and, therefore, the trial Court should have considered its provisions, that the life interest of the Appellant superseded any other interest.

In ground three, Counsel submitted that the Subordinate Court's validation of the Local Court's order to sell the house was contrary to the provisions of Section 19 (2) of the Intestate Succession Act, Chapter 59 of the Laws of Zambia, as the Respondent, as Administrator, did not obtain the authority from the Court to sell the house. He contended that, what can be gleaned from the foregoing provision was that, the Administrator can only sell the property if it was necessary or desirable to do so. He further contended that in order to determine whether it is necessary or desirable to sell a property, a court should be guided by the provisions of Section 19 (1) of the Intestate Succession Act which provides for the duties of the Administrator; that is; to pay debts, funeral expenses of the deceased and distribute the remainder of the estate in accordance with the rights of the persons interested in the estate.

In the present case, Counsel argued that the record from the lower Court does not indicate that there were debts or funeral expenses to

be paid. He submitted that, as guided by Section 9 (1) (b) of the Intestate Succession Act, the house needed not to be sold as the Appellant had a life interest in the said house.

In conclusion, Counsel urged the Court to overturn the decision of the lower Court and take into consideration the life interest of the appellant in the property, as she needed to be in occupation until when she remarries or dies.

The gist of the Respondent's response to the three grounds of appeal was that, the lower Court was on firm ground when it ordered the sale of the house following the wrangles that engulfed the family. He submitted that the lower Court was right to order such sale as it would ensure that both the children and the appellant benefited from the house, considering that the appellant was his stepmother.

On behalf of the Intervener, Mrs. Bupe argued grounds 1 and 2 together. She submitted that from the perusal of the record, it was

not in dispute that the property in question was a matrimonial property, as it was the only house that was bought by the deceased, and that it was the one that he resided in together with his wife and children. She contended that, considering the circumstances of this matter, the trial magistrate did not err in law and fact when he ignored the life interest of the Appellant and proceeded to apportion the proceeds of the sale of the house in accordance with Section 5 (1) of the Intestate Succession Act, Cap. 59 of the Laws of Zambia. It was her further submission that, following the wrangles that ensued, surrounding the house in question, it was in the interest of justice for the trial Court to have ordered the sale of the house and subsequent sharing of the proceeds among the beneficiaries.

Counsel contended that the life interest of a surviving spouse in a matrimonial house was not absolute and, therefore, was inferior to that of the interest of the children. In support of this submission, Counsel argued that the life interest is determinable at any time by law in that when the surviving spouse remarries or dies, the

interest expires. On the other hand, the interest of the children in the same property does not expire upon the death or remarriage of the children, but it is absolute as it continues and may be transferrable to their beneficiaries.

In ground three, Counsel submitted that the lower Court's validation of the sale of the house was not contrary to the law. She argued that when the Respondent sold the house in issue, he had the legal authority to sell as Administrator. In support of this submission, Counsel cited the opinion of the learned authors of Megarry and Wade, *The Law of Real Property*, 3rd Edition at page 42 where they opined as follows:

“The general rule today is that all property first vests in the personal representative of the deceased who in due course transfers to the beneficiaries any of the property not required in the due administration of the estate e.g. for payment of debts.”

Counsel submitted that, at the time the Respondent was selling the house, the said property was vested in him as Administrator. It was her further submission that the Respondent also had a Judgment of the Local Court which ordered the sale of the house and the sharing of the proceeds thereof. She contended that, in the circumstances, the Respondent had authority to sell the house as provided by the law. She further relied on the affidavit in support of *ex-parte* summons for an order to be joined as Intervener, filed on 5th May, 2016. Further reliance was made on the provisions of Section 19 (1) (2) of the Intestate Succession Act, chapter 59 of the Laws of Zambia. She submitted that the Respondent formed an opinion that it was necessary and desirable to sell the house in order to carry out his duties and was given the authority by the Local Court to do so.

It was her further submission that the Intervener bought the house as a *bona fide* purchaser for value pursuant to the Local Court Order. Counsel submitted that the Intervener entered into a Contract of Sale with the Respondent, concerning the disputed

property, on 2nd March, 2015, as shown on the exhibit marked 'GMS4' in her affidavit. Further that, she paid a purchase price of K75, 000.00. She further submitted that no prejudice will be occasioned to the Appellant if this Court upholds the Judgment of the Court below as the Appellant owns another house where she could stay. In support of this submission, Counsel referred to the record of proceedings at page 3, paragraph 2.

Counsel further submitted that the Intervener bought the house in issue with the knowledge that the dispute over the house had been settled by the Court and pursuant to a court order. She urged the Court to consider that the Intervener entered into a Contract of Sale to her detriment wherein she gave out her hard earned cash of K75, 000.00; money which could not possibly be recoverable at this time. She further implored this Court to uphold the Judgment of the lower Court, as the Intervener would be highly prejudiced if that Judgment was overturned.

n response to the submissions by the Respondent and the Intervener, Mr. Sichone on behalf of the Appellant, reiterated his earlier submissions that the Respondent sold the house without a Court Order authorising him to do so. Further that, the lower Court failed to take into consideration the life interest of the Appellant in the house. On the submission by Mrs. Bupe that the life interest of the surviving spouse was not absolute, Mr. Sichone submitted that, on the contrary, the life interest was absolute as long as she remained unmarried and alive. Further that such interest supersedes all interests of the other beneficiaries.

It was his further submission that Section 19 (2) cited by Mrs. Bupe should not be looked at in isolation, but must be read in the light of Section 9 (1) (b) of the Intestate Succession Act, Cap. 59 of the Laws of Zambia. He contended that the distribution of the estate cannot, therefore, be done where the surviving spouse has a life interest in the property.

Mr. Sichone further contended that the Intervener cannot be said to have been a *bona fide* purchaser for value without notice as she was aware of the issues surrounding the property in question, but opted to purchase it amidst all the confusion.

Mr. Sichone dispelled the assertion by Mrs. Bupe that the Appellant would not suffer prejudice, as she owns another house where she would shift to. He submitted that Mrs. Bupe misapprehended the evidence on record from the lower Court as the house referred to was the same house in issue. He urged the Court to overturn the decision of the lower Court as failure to do so would prejudice the Appellant because she had no other house to go to.

I have carefully analysed and considered the evidence on record and submissions by Counsel, and the Respondent, for which I am indebted.

It is not in dispute that the deceased died intestate, having not left a will disposing of his estate. It is further not in dispute that House No. 7165 Kabushi, Ndola, was a matrimonial property as it was the house in which the deceased and his family lived. The evidence on the record of proceedings show that, following the demise of the deceased, there have been wrangles over the matrimonial house between the Appellant, as the surviving spouse, and the Respondent, her stepson. Further that, the Respondent was duly appointed as Administrator of the deceased's estate. It is not in dispute that the relationship between the Appellant and the Respondent, has not been cordial. It is further not in dispute that following the Local Court's order to sell the matrimonial house, the Respondent, as Administrator of the estate of the deceased, sold the said house to the Intervener. Further that, the Appellant did not support such sale as she refused to receive what was termed as her share in the house in question.

Counsel for both parties spiritedly argued on their understanding of the life interest of the surviving spouse versus the interest of the

children in the house left by the deceased as guaranteed by Section 9 (1) (b) of the Intestate Succession Act, Chapter 59 of the Laws of Zambia. Mrs. Bupe contended that the life interest of the surviving spouse was not absolute and was, therefore, inferior to that of the children as it is determinable upon that spouse's remarriage or death. On the other hand, Mr. Sichone argued that as long as the surviving spouse remained unmarried, her life interest in the property was absolute and superior to that of the children. He argued that the trial Court should not have validated the Local Court's order to sell the house and distribute the proceeds to the beneficiaries in accordance with the provisions of Section 5 (1) of the Intestate Succession Act, Chapter 59, when the Appellant's life interest in the property still subsisted. However, Mrs. Bupe argued that the sale of the matrimonial property by the Administrator to the Intervener was legally done following the Local Court's order to have the house sold. Further that, it was within the powers of the Respondent, as provided in Section 19 (2) of the Intestate Succession Act, to sell the house. According to Mrs. Bupe, the Intervener was a *bona fide* purchaser for value without notice.

It is my considered view that there are two issues that the Court needs to resolve in this matter. The first is; whether on the evidence on record, the provisions of the Intestate Succession Act, Chapter 59 of the Laws of Zambia, are applicable to this case. The Second issue is, whether the Intervener as the purchaser of House No. 7165, Kabushi, was a bona fide purchaser for value without notice.

Section 4 of the Intestate Succession Act provides that:

“A person dies intestate under this Act if at the time of his death he has not made a will disposing of his estate.”

I have already stated that the deceased died intestate. However, that is not the end of the story, as Section 2 (2) of the same Act lists instances when the Intestate Succession Act would not be applicable. Section 2 (2) (c) of the said Act provides as follows:

“(2) This Act shall not apply to-
(c) Family property.

Section 3 of the Intestate Succession Act defines 'family property' as follows:

"Family property" means any property, whether movable or immovable, which belongs to the members collectively of a particular family or is held for the benefit of such members and any receipts or proceeds from such property."

In the case of **WACHTEL vs. WACHTEL** ⁽¹⁾, the term 'family assets' was said to refer to property acquired by a husband or wife or both:

"....with the intention that they should be continuing provision for them and their children during their joint lives and used for the benefit of the family as a whole. Family assets include (a) capital assets, such as the matrimonial home and furniture in it, and (b) revenue-producing assets, such as the earning power of husband and wife."

The question I need to ask myself is whether House No. 7165 Kabushi, the subject of this litigation, can be deemed as "family property" so as to exclude the application of the Intestate Succession Act to this matter. It is not in dispute, as already alluded to above, that the house in question was acquired as a matrimonial home for the benefit of the deceased and his family. Both Mr. Sichone and Mrs. Bupe admitted that it was a matrimonial home which was bought by the deceased as a residence for himself and his family. Even the Respondent in his evidence before the Subordinate Court said the whole family lived in the house in question. I find that the said matrimonial home did not form part of the deceased's estate for it to qualify to be subject of the provisions of the Intestate Succession Act. A matrimonial home has been held by the Supreme Court not to form part of the estate of the deceased. This position was taken by the Supreme Court in the case of **MONICA SIANKONDO (Suing in her capacity as Administratrix of the Estate of the late Edith Siankondo) vs. FREDERICK NDENGA** ⁽²⁾ where Sakala, CJ, as he then was, delivering the Judgment of the Court, stated as follows:

“The facts clearly established that at the time of the death of the appellant's husband, Zambia Railways had not offered the house to him for sale. The house, therefore, could not have formed part of the deceased husband's estate. Above all, even if the deceased husband had been offered and purchased the house, it would not have been part of his estate, but a matrimonial home to which the appellant would still have been entitled.”

(Emphasis by underlining supplied)

Black's Law Dictionary 8th Edition at page 524 defines “matrimonial home” as follows:

“A domicile that a husband and wife, as a couple, have established as their home.”

In the light of the foregoing authorities, I find that, House No. 7165, Kabushi, as a matrimonial home, having not formed part of the deceased's estate, the provisions of the Intestate Succession Act,

Chapter 59 of the Laws of Zambia, were not applicable to this matter. What is subject to sharing, according to Section 5 (1) and Section 9 (1) of the Intestate Succession Act, is the estate of the deceased and nothing else. Section 9 (1) provides as follows:

**“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.(Underlined for emphasis only).**

The Court below, therefore, erred in applying the provisions of the Intestate Succession Act, Chapter 59 of the laws of Zambia to this matter, because the property in issue did not form part of the deceased's estate.

What the facts established, however, is a constructive trust in which the Appellant has a beneficial interest. In the case of **HUSSEY vs. PALMER** ⁽³⁾, Lord Denning, commenting on the meaning of a constructive trust, stated as follows:

“By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it..... it is an equitable remedy where the Court can enable an aggrieved party to obtain restitution.”

The guidelines on how a constructive trust is established were eloquently put by Ngulube, DCJ, as he then was, in the case of

ANNIE BAILES v CHARLES ANTONY STACEY AND ANIERICA

SIMOES ⁽⁴⁾, when he said that:

“On the authorities, it is clear that the principles to be applied in ascertaining the existence or otherwise of any alleged resulting or constructive trust in a case of this nature are the same which would apply to any relationship be it man and wife, man and mistress or even friends or brothers. That the actual relationship is a factor to be taken into account cannot be disputed. The nature of a constructive trust is such that

every ascertainable circumstance and every relevant fact should be taken into account if, by imputation of equity, a transaction which the parties may have entered into without thought or realisation of legal consequences becomes the subject of a claim against the party in whom the legal title to property is

vested by the other who asserts that he has acquired a beneficial interest. The constructive trust is a creature of equity and may be imposed in order to satisfy the demands of justice and good conscience.....

Thus, quite apart from cases where there was obvious agreement, there must be evidence of an intention that the property acquired is so acquired for the purpose of providing a home for the unmarried couple who intend to live together in a stable relationship which has all the commitment of a marriage. There must also be evidence of a joint effort in the acquisition, that is to say, evidence that the claimant has made a

substantial contribution whether in cash or, as in some of the cases reviewed, in personal exertion and toil. All the surrounding circumstances should be considered as well if the claimant is to be granted a share by presumption of equity and the imputation of

any common intention which results in the imposition of the constructive trust.”

The Supreme Court in the case of **ALICE PHIRI vs. MARGRET MULENGA** ⁽⁵⁾ extended the application of the principle in the **ANNIE BAILES CASE** which dealt with an unmarried couple, to married couples, when it held that:

“Although that case involved an unmarried couple, it is our view that the principles we established therein apply with equal force to married couples”.

Further, the issue of the establishment of the constructive trust between a husband and wife was concisely put by Lord Denning in the case of **FALCONER vs. FALCONER** ⁽⁶⁾ when he stated as follows:

“It [the House of Lords] stated the principles on which a matrimonial home, which stands in the name of husband or wife alone, is nevertheless held to belong to them both jointly (in equal or unequal shares). It is done, not so much by virtue of an agreement, express or implied, but rather by virtue of a trust which is imposed by law. The law imputes to husband and wife an intention to create a trust, the one for the other. It does so by way of any inference from their conduct and the surrounding circumstances, even though the parties themselves made no agreement on it. This inference of a trust, the one for the other, is readily drawn when each has made a financial contribution to the purchase price or to the mortgage instalments.”

My understanding of the foregoing authorities is that a constructive trust is established if there is evidence that both a husband and

wife substantially contributed to the acquisition of the matrimonial house. This contribution, in my view, may either be a financial contribution or personal exertion and toil as was held in the **ANNIE BAILES CASE**. The contribution need not be in monetary terms, as the law, for example, recognises the contribution made by a wife who looks after a home and the family, in the acquisition of the family assets. I am fortified by the decision in the case of **WACHTEL vs. WACHTEL** ⁽¹⁾, where it was held that:

“...we may take it that parliament recognised that the wife who looks after the home and family contributes as much to the family assets as the wife who goes out to work. The one contributes in kind. The other in money or money’s worth. If the court comes to the conclusion that the home has been acquired and maintained by the joint efforts of both, then, when the marriage breaks down, it should be regarded as the

joint property of both of them, no matter in whose name it stands. Just as the wife who makes substantial money contributions usually gets a share, so should the wife who looks after the home and cares for the family for 20 years or more.”

The issue of who purchased House No. 7165, Kabushi, the subject of this appeal, arose both in the Local Court and the Subordinate Court. Throughout her evidence, the Appellant maintained that the house was offered to her by the former occupier and that she paid a sum of K250.00. Later, when there was a Government directive to sell Council houses to sitting tenants, she again paid the purchase price of K250.00. She explained that she could not have the documents relating to the house registered in her names, because she had no National Registration Card as she had left the same in Chavuma. She told the trial Court that at the time she was buying the house, the deceased's retirement money had since been exhausted. On the other hand, the Respondent contended that it

was actually the deceased who bought the house from his retirement package. This issue was, nevertheless, not determined by the lower Court. There is, however, evidence on record that after the retirement of the deceased, the Appellant was contributing to the sustenance of the family through her business which she was doing.

Assuming that the house was bought by the deceased using his retirement money, the Appellant would still have a beneficial interest in the house. I say so, because there is evidence on record which was not disputed that the deceased and the Appellant were married for a period of 30 years until death separated them. It is my considered view that her contribution towards the family within this period cannot be ignored.

After considering the circumstances surrounding this matter, I find that a constructive trust was established as regards House No.

7165, Kabushi, between the deceased and the appellant. She has, therefore, a beneficial interest in the said property.

Before I delve in what should now happen to House No. 7165, Kabushi, I note that the evidence on record shows that the said house was sold to the Intervener. Mrs. Bupe on behalf of the Intervener submitted that the Intervener bought the house as a *bona fide* purchaser for value without notice. She argued that the Respondent, as Administrator, derived his authority from the Local Court's Order that the house in question should be sold and proceeds shared among the beneficiaries. She further argued that the property of the deceased vested in his personal representative, the Respondent, and therefore, he had the requisite authority to sell it.

It was Mrs. Bupe's further submission that the Intervener bought the house with the knowledge that the dispute over the house had been settled by the Court's Order to sell. She urged the Court to consider that the Intervener entered into a Contract of Sale to her

own detriment, wherein she gave out her hard earned cash of K75,000.00; the money she contended could not possibly be recoverable at this time.

Mr. Sichone on the other hand, submitted that the Intervener was not a *bona fide* purchaser for value without notice, as she was fully aware of the confusion surrounding the house in question, but ignored it and proceeded to purchase it.

The doctrine of *bona fide* purchaser for value without notice was the creation of equity. Lord Wilberforce in the case of **MIDLAND BANK TRUST Co. LTD AND ANOTHER vs. GREEN AND ANOTHER** ⁽⁷⁾, traced the roots of this doctrine as follows:

“My Lords, the character in the law known as the bona fide (good faith) purchaser for value without notice was the creation of equity. In order to affect a purchaser for value of a legal estate with some equity or equitable interest, equity fastened upon his conscience and the

composite expression was used to epitomise the circumstances in which equity would or rather would not do so. I think that it would generally be true to say that the words "in good faith" related to the existence of notice. Equity, in other words, required not only absence of notice, but genuine and honest absence of notice." (Emphasis by underlining supplied).

A person, who wants to rely on the doctrine of *bona fide* purchaser for value without notice, should according to Matibini, J, in the case of **BANDA AND ANOTHER vs. MUDIMBA** ⁽⁸⁾ fulfil the following requirements:

- "a. A Purchaser must act in good faith;**
- b. A Purchaser is a person who acquires an interest in property by grant rather than operation of the law. The purchaser must also have given value for the property;**

- c. The Purchaser must generally have obtained the legal interest in the property;
and
- d. The Purchaser must have had no notice of the equitable interest at the time he gave his consideration for the conveyance. A Purchaser is affected by notice of an equity in three cases:
 - i. actual notice; where the equity is within his own knowledge;
 - ii. constructive notice; where the equity would have come to his own knowledge if proper inquiries had been made; and
 - iii. imputed notice; where his agent as such in the course of the transaction has actual, or constructive notice of equity.”

Further, in the case of **MWENYA AND RANDEE vs. KAPINGA** ⁽⁹⁾, the Supreme Court quoted Halsbury's Laws of England Vol. 4, 16th

Edition, paragraph 1322 on page 887 where the learned author stated that:

“Notice may be actual or constructive and where the said notice is imputed on the subsequent purchaser then the plea of purchaser without notice is defeated.”

Mungeni Mulenga, J, as she then was, citing the old English case of **PILCHER vs. RAWLINS** ⁽¹⁰⁾, in the case of **HALIMO MOHAMED JAMA vs. THE CHIEF REGISTRAR OF LANDS AND DEEDS AND OTHERS** ⁽¹¹⁾ pointed out that in matters where one relies on the basic doctrine of *bona fide* purchaser for value without notice:

“The burden of proof lies on the person who would wish to rely on the defence.”

It is not in dispute that the Intervener gave value to the property in question. The Respondent in his evidence before the Subordinate Court confirmed that the Intervener paid a sum of K75, 000.00 as

purchase price for the house. The only issue to determine is whether she had no notice of the equitable interest of the Appellant in the house in question at the time she gave her consideration for the conveyance. Her affidavit evidence on the issue was that, she purchased the house following the Local Court's Order that the house be sold and proceeds shared among the beneficiaries. According to the Intervener, she bought the house from the Administrator of the estate of the deceased who was duly appointed as such. In her submissions on behalf of the Intervener, Mrs. Bupe submitted that the Intervener bought the house in issue with the knowledge that the dispute over the house had been settled by the Court, and pursuant to a Court Order.

From the foregoing submission, it is clear that the Intervener had notice of the Appellant's equitable interest in the house. The Respondent in his testimony before the trial Court on the subject was that, at the time the Intervener was paying him the money, the Appellant was there. Further that, she refused to receive the K26, 000.00 she was given as her share. This should have put the

Intervener on alert, that the house she was intending to purchase had some encumbrances. In the case of **HUNT vs. LUCK** ⁽¹²⁾ which was quoted by our Supreme Court in the **MWENYA VS. KAPINGA CASE** ⁽⁹⁾, held as follows:

“It means that if a purchaser has notice that the vendor is not in possession of the property he must make inquiries of the person in possession, of the tenant who is in possession, and find out from him what his rights are and, if he does not choose to do that then whatever title he acquires as purchaser will be subject to the title or rights of the tenant in possession.”

There is evidence on record from the Respondent that when the Intervener visited the property in issue, she found the Appellant in possession of the property. There is no evidence, however, that she made inquiries from the Appellant on her rights to the property.

From the evidence on record, I find that the Intervener had notice that there were wrangles surrounding the house. She, however, still went ahead to purchase the house on the understanding that there was a Court order authorising the Respondent to sell the house. She, in the process, ignored the equitable interest which the Appellant had in the property.

A perusal of the record of proceedings from the Court below clearly discloses that the Appellant had persistently refused to have the matrimonial home sold. She told the trial Court that she had nowhere to go if the house was sold. In fact, she suggested buying off the Respondent and his siblings' interest in the house. What they did not agree, however, was only the amount to be paid to them. It is my considered view that, the fact that the Intervener was comfortable to transact with the Respondent based on the Local Court's order to sell the house cannot absolve her from the notice she had that the house had some encumbrances. This is so, because a plea of *bona fide* purchaser for value without notice is an equitable doctrine which is defeated when a purchaser has notice,

be it actual or constructive, of another person's equitable interest in the property. Notice, as was held in the **MWENYA AND ANOTHER VS. KAPINGA CASE** ⁽⁹⁾, defeats the plea of *bona fide* purchaser for value without notice. I find that this plea of *bona fide* purchaser without notice is not available to the Intervener in this matter. In the circumstances, I order that the sale of House No. 7165, Kabushi, Ndola, be reversed and the certificate of title issued in respect thereof be cancelled. The Chief Registrar, Lands and Deeds should accordingly be notified. The certificate of title should revert to the deceased.

On the purchase price paid, the Respondent told the trial Court that after the Appellant had refused to receive her share of the money, he deposited it into his Bank Account. There is no evidence on record that the money was used. I order that the Respondent refunds the Intervener the K75,000.00 he received as purchase price.

Having reversed the sale of the said house, the next issue to determine is what should now happen to the house. In resolving this issue, I will draw guidance from the decision of the Supreme Court in the **ALICE PHIRI vs. MARGRET MULENGA CASE** ⁽⁵⁾ cited above.

In a nutshell, the facts of the **ALICE PHIRI VS. MARGRET MULENGA CASE** ⁽⁵⁾ were that, the Respondent married the deceased in 1980. At the time they were getting married the deceased had six children of his own who included the Appellant. The Respondent also had four children of her own from a previous relationship. During the subsistence of their marriage, they bought a house after the deceased contributed a sum of K200,000.00 while the Respondent paid off the shortfall of K271,000.00 when the deceased failed to pay the full purchase price.

After the death of the deceased, a dispute arose regarding ownership of the house. The Respondent commenced an action in

the Local Court against the Appellant. The Provincial Local Courts Officer, on review of the Local Court decision which guaranteed the Respondent's life interest in the house, decided that the house should be jointly owned by the Respondent, on one hand, and the Appellant and her five siblings, on the other hand. The Court further ordered that the Appellant should pay half of the purchase price of K471,000.00 to the Respondent as a refund of the money she contributed. On appeal by the Appellant to the Subordinate Court, the Court ordered that the Respondent should be refunded the sum of K271,000.00 which she contributed towards the purchase price. Dissatisfied with the decision of the Subordinate Court, the Appellant appealed further to the High Court. The High Court ordered a valuation of the house and that the Appellant should pay the Respondent half of that value and then be entitled to keep the house. The High Court further ordered that, in default, the house should be sold and the parties should share the proceeds as follows: fifty percent should go to the Respondent and the remaining fifty percent be shared equally among the deceased's

children. The Appellant was again not satisfied with this decision and she, therefore, appealed to the Supreme Court.

The Supreme Court came to the conclusion that the provisions of the Intestate Succession Act, Chapter 59 of the Laws of Zambia were not applicable to this set of facts, but that a constructive trust had been established, in which the Respondent had a beneficial interest. Chibesakunda, Ag. CJ, delivering the Judgment of the Court, guided as follows:

“We, therefore, hold that the house in question should be shared equally between the Respondent, on the one hand, and the Appellant and her siblings, on the other. If the Appellant and her siblings would like to keep the house, then its value should be assessed. The Appellant and her siblings should pay to the Respondent half of that value. If, however, the Appellant and her siblings cannot afford to pay the Respondent half of the value of the house, then the house should be sold

and the Respondent should get fifty percent of the amount realized from the sale. The other fifty percent should be shared equally by the Appellant and her siblings.”

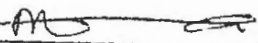
Proceeding on the premise of the foregoing Supreme Court guidance, I note that the Appellant has been desirous to keep the house. It is not in dispute that the Appellant's daughter made improvements to the house; extending it from a one bed-roomed house to a three bed-roomed house. Such improvements should not be ignored, but ought to be taken into consideration. I note that this house was assessed and valuated by a Firm of valuers in 2015 and gave the values as follows: valued at K105,000.00 after improvements and K60,000.00 before improvements. To ascertain the current market value of the house; both before and after the improvements, I order that the value of the house should be reassessed by a registered valuator. Since there is hostility between the Appellant and the Respondent, the value of the house before improvements should be shared equally between the Appellant on one hand, and the Respondent and his siblings, on the other hand.

As the Appellant is desirous to keep the house, she should pay the Respondent and his siblings half the value of the house before the improvements. If she fails to pay, then the house should be sold, from which the value of the improvements should be paid to the daughter to the Appellant, Esther Mumba, for the improvements she made to House No. 7165, Kabushi, Ndola. The value of the house before improvements should then be shared as follows: fifty percent for the Appellant and the other fifty percent should be shared equally between the Respondent and his siblings.

For the foregoing reasons, this appeal succeeds. Due to the nature of this matter, I order that each party will bear their own costs.

Leave to appeal to the Court of Appeal is hereby granted.

DELIVERED AT NDOLA THIS.....^{14th} DAY OF.....*July*..... 2017.


M.C. MULANDA
JUDGE

