

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2016/HP/1515

BETWEEN:

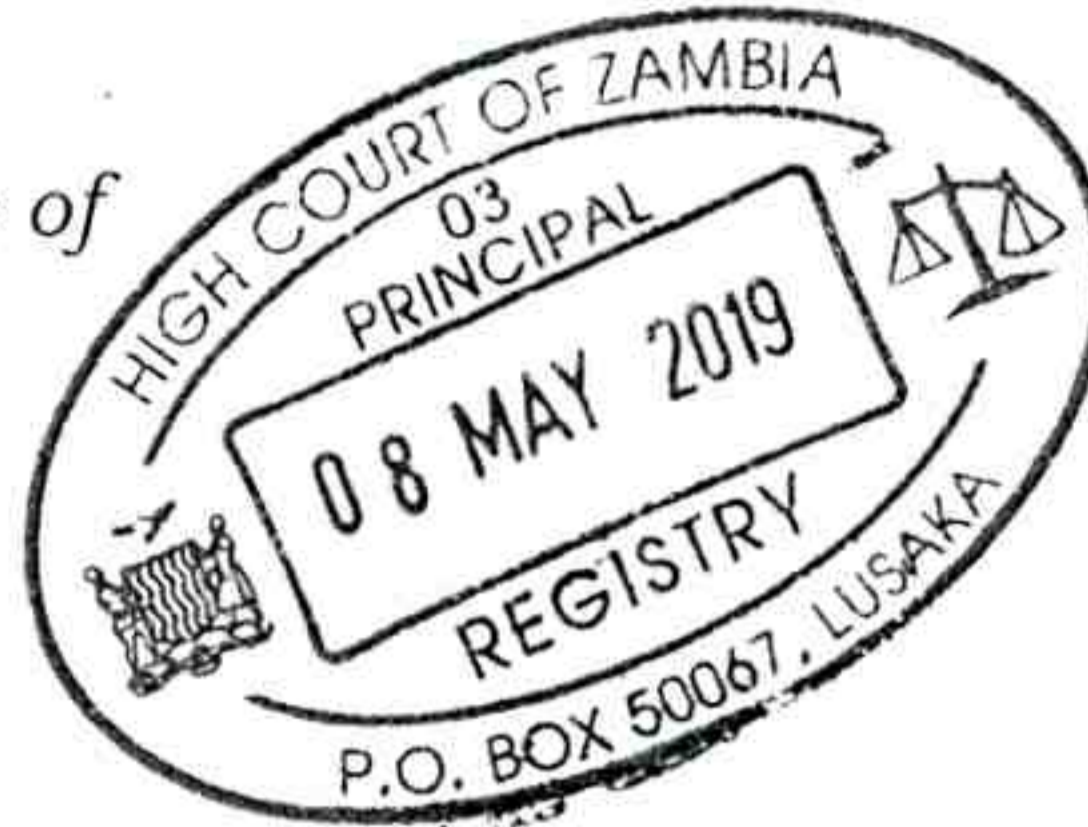
IREEN MWALE

(suing in her capacity as
Administrator of the estate of
Makina Tembo)

PLAINTIFF

AND

MABVUTO TEMBO



DEFENDANT

**BEFORE HON. MRS. JUSTICE G. MILIMO- SALASINI IN CHAMBERS
THE 8TH DAY OF MAY, 2019.**

For the Plaintiff: Mr. S. Zulu Messrs, Zulu & Company

For the Defendant: Mr. Sambo Messrs, Sambo Kayukwa & Company

JUDGMENT

Legislation referred to:

1. Limitation Act, 1939, Sections 2,4 (3), 16 and 26.
2. Housing (statutory Improvement Areas) Act, Cap 194 Section 39.

The action was commenced by Writ of Summons filed on 2nd August, 2016 by **Ireen Mwale** (the Plaintiff) Suing as an Administratrix of the estate of late Makina Mwale, against **Mabvuto Mwale** (the Defendant). The Plaintiff claims for:

- (i) A declaration that the House No. 5 Block 179 George Improvement Area Lusaka is her property as Administratrix of the estate of late Makina Mwale;
- (ii) An Order that the Defendant do give up vacant possession of the House.
- (iii) That Mesne profits be paid by the Defendant.
- (iv) Interest at a bank rate on sums found to be due and payable; and
- (v) Costs

According to the Statement of Claim the late Makina Mwale was the registered owner of House No.5 Block 179 George Compound Improvement Area, Lusaka. That in August, 1991, Lusaka District Council issued a Clearance Certificate of payment that late Makina Mwale had paid a loan and service charges in full for No.5 Block 179, George Compound. That an Occupancy Licence No. 12757 valid from 1st January, 1976 for 30 years and to be extended for a further 30 years was obtained.

The Plaintiff further stated that the late Makina Mwale died intestate in December, 1996, leaving seven (7) beneficiaries namely;

- (1) Mrs. Margaret Mwanza (widow)
- (2) Mr. Lackson Mwale (son)
- (3) Ms. Ireen Mwale (daughter /Plaintiff)
- (4) Ms. Sarah Mwale (daughter)
- (5) Ms. Rachael Mwale (daughter)

(6) Ms. Tasila Mwale (daughter)

(7) Ms. Catherine Mwale (daughter)

The Plaintiff states that she initially obtained letters of Administration for the estate of late Makina Mwale from the Lusaka Local Court in January, 1996 and when the document got misplaced she obtained probate from the High Court on 21st June, 2012. That in the same year, she was approached by one Bonwell Tembo, a young brother of her late father with a demand that she sells the house in dispute so that the extended family could also benefit from the proceeds of the sale. When she refused, the Defendant sued her in the Magistrates Court at Lusaka under Cause No. 2012/CRMP/562, claiming that the plot on which the house was built had belonged to the Late John Tembo, the Defendant's Late father.

In the Magistrate's Court, it was decided that the house belonged to the Defendant, his siblings and his mother, and the Plaintiff was ordered to vacant the said house which the Defendant took possession of.

Being dissatisfied with the judgment of the Magistrates Court, the Plaintiff appealed to the High Court under Appeal No.2015/HP/A006.

On 28th July, 2016 His Lordship Hon. Mr Justice M. Chitabo, State Counsel allowed the appeal, by consent of the parties and ordered that judgment be set aside and the matter be retried in the Subordinate Court or began in the High Court.

The Defendant filed a Memorandum of Appearance and a Defence and Counter Claim on 16th August, 2016. His Defence was that he, his mother and his siblings are the beneficiaries of the estate of late John Tembo who died in 1973.

The Defendants claims that the Plaintiff used her appointment as Administratrix of the estate of her late father to conceal her father's fraud and unlawful transfer of property from late John Tembo to her name.

The Defendant asserts that the Plaintiffs father was not in employment at the time that late John Tembo built as he lived with a father-in-law.

The Defendant maintains that the property was owned and built by late John Tembo and late Makina Mwale forcibly removed the widow and children from the property and occupied it. That the late Makina Mwale fraudulently registered the property as his own.

In his Counter- Claim, the Defendant seeks:

- (i) An Order cancelling the Occupancy Licence held by Ireen Mwale;
- (ii) An Order that ownership be registered in the names of the legal beneficiaries of the late John Tembo;
- (iii) An Order that the Plaintiff pays the Defendant and other beneficiaries all the monies paid as rentals on the property unlawfully collected by the Plaintiff from the time ownership was transferred.

- (iv) An Order of interim injunction restraining the Plaintiff, her agents and other persons from interfering with the Defendant's current possession of the property until determination of the matter.

At trial, which commenced on 28th February, 2017 the Plaintiff gave testimony. She testified that when her late father Makina Mwale died in 1995, she was appointed Administratrix of her late father's estate, at Matero Local Court in 1996.

That she is still the Administratrix of the estate of the late Makina Mwale and is in possession of probate granted on 18th August, 2016. To prove that the property was her late father's the Plaintiff produced an Occupancy Licence issued to Makina Mwale on 1st August, 1991 number 12757.

The Plaintiff testified that all was well and she occupied the property without any problems until 2012. That in that year Bonwell Tembo requested her to sell the property for the benefit of the extended family. That she refused to sell the property and an action was brought against her by the Defendant in the Subordinate Court. That at the Subordinate Court the Defendant was told that the house belonged to his late father. The judgement was on 18th December, 2012 and she was evicted.

She further testified that after she appealed to the High Court, Honourable Justice Chitabo set aside the judgment of the Subordinate

Court and ordered that the matter be retried or begun de novo in the High Court. She testified that the Defendant has refused to give back the house.

She notified the Court that between 1991 to the date of her testimony no-one had gone to claim ownership, including the Defendant. She testified that she had developed the property by extending the house from 3 bedrooms to 9 rooms. She claimed that the Defendant has no proof that the house was his father's.

The Plaintiff was cross-examined on 13th April, 2017 where she testified that she knew that the late John Tembo was an elder brother of her father, although she had never seen him. She notified the Court that the Occupancy Licence had her late father's name. She stated that she knew one Esther Phiri as a sister of her late father and the late John Tembo. When asked about Amake Flaki, the Plaintiff testified that her had told her that she was the wife of the late John Tembo, and the mother of the Defendant. She also notified the Court that property is still in the name of late Makina Mwale. She maintained that the house was not registered under John Tembo, neither was she aware of who the administrator for estate of John Tembo was.

The Defendant also gave his testimony on 13th April, 2017. He testified that he knew the Plaintiff as his cousin and daughter of late Makina Mwale, his late father's young brother. He narrated how he and his mother went to the village after his father died. That he returned to

town ten (10) years later to enquire from his late father's young brother, Makina Mwale, what his father had left. He testified that the meeting with Makina Mwale yielded no positive result for the Defendant and the matter went to the Subordinate Court after Makina Mwale died. He testified that when he sued the Plaintiff in the Subordinate Court, his family was given the house and he took possession.

The Defendant also made a counter - claim that the Occupancy Licence should be cancelled. In cross- examination the Defendant admitted that he was not the administrator of late John Tembo's estate. He also stated that he did not sue Weston Banda whom he believed to be the administrator of the late John Tembo.

The Defendant admitted that he had no documents to prove that his father owned the property save his witnesses.

DW2 was the widow to the late John Tembo. Her testimony was to the effect that she and her husband bought the house in 1965 from a Tumbuka person. She testified that when her husband died in 1973 she was told to leave the house. That the documentation for the house was obtained from a chairman who was in charge of plots. She stated that she did not know what happened to the papers because late Makina Mwale took the house and wardrobe keys from her. In cross-examination she stated that she did not know the name of the Tumbuka person. She recalled that, at that time, the plots were not under the council as they were villages.

DW3, Esther Phiri, was a sister of the late John Phiri and late Makina Mwale. She testified that when John Phiri died, Makina Mwale was not staying at the house in dispute. That Makina Mwale began to occupy the house after the death of John Tembo. She denied knowledge of any documents pertaining to the house.

Wisdom Banda, DW4 testified that he was a cousin of both John Tembo and Makina Mwale. He stated that the house belonged to John Tembo because he was the one who built it and Makina Mwale lived in his elder brother's house. In cross-examination, when asked if he knew if people who occupied property before the Lusaka City Council legalised the area were squatters, DW4 answered that the properties were given by UNIP Chairman who were giving plots. On the issue that John Tembo bought from a Tumbuka man, DW4 recalled that it was a mud house and the land was for government and UNIP and not the council. He stated that he was initially given by UNIP but later by the council when the council gave them papers. He stated that John Tembo had authority to construct from government. He also recalled that the council gave John Tembo a land record card for paying rent to the council. That the Occupancy License was given after John Tembo died.

The last witness, DW5 was Lukas Mwale a brother of the Plaintiff. He testified that the late John Tembo lived at the same house in George Compound. His testimony was to the effect that he is aware that late John Tembo lived there.

The case closed and submissions were filed.

The Plaintiff argued in her submissions filed on 24th May, 2017. Her argument was that the Defendant had no document to substantiate his claim while she was in possession of an Occupancy Licence from the council in her late father's name.

The Plaintiff relies on the Housing (Statutory and Improvement Areas) Act, Chapter 194 of the Laws of Zambia. Particularly Section 39 (1) and Section 39 (5) which provides that:

“(1) No person shall without a licence issued under this Section and except in accordance with the conditions thereof, build, use, let, sell, create a lien or security in any way deal with any dwelling or building erected on any piece or parcel of land.”

Section 39 (5) provides that:

“The holder of an occupancy licence shall have such rights and obligations in respect of the piece or parcel of land to which the licence relates and in respect of any dwelling or other building erected thereon as may be prescribed.

The Plaintiff further points out that the Defendant's counter – claim is statute barred pursuant to Section 2 (3) of the Limitation Act of 1939,

as the Defendant's claim should have been made within 12 years from the time when the cause of action arose Section 2 (3).

Section 2 (3) provides that:

“Limitation of actions of contract and tort, and certain other actions -

(3) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued.”

Further that Section 4 (3) of the Limitation Act bars his counter-claim and his rights to any title is lost.

Section 4 (3) of Limitation Act states:

“4 (3)” No action shall be brought by any other person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

The Plaintiff also argued that the Defendant did not prove the fraud he alleged against the late Makina Mwale.

The Plaintiff prayed for mesne profits at 2,100 per month from the date the Defendant took possession in 2013.

The Defendant also filed submissions on 2nd June, 2017

The Defendant has argued that the testimony of his witnesses showed that the house belonged to the late John Tembo, the father of the Defendant.

The Defendant argues that the late Makina Mwale converted his brother's property and fraudulently registered the property into his name, to the Lusaka City Council as owner.

The Defendant argues that he only discovered the fraud in 2012 and cites Section 26 (a) and (b) of the Limitation Act 1939 which provides for postponement of limitation period in a case of fraud or mistake.

Section 26 (a) and (b) of the Limitation Act provides 526 postponement of limitation period in case of fraud or mistake:

“Where, in the case of any action for which a period of limitation is prescribed by this Act,

(a) The action is based upon the fraud of the Defendant or his agent or of any person through whom he claims or his agent, or

(b) The right of action is concealed by the fraud of any such person.”

The evidence of late John Tembo’s widow Gertrude Mwanza and the Defendant’s mother was that she and the late John Tembo lived in the house in dispute. She testified that at the time the plot upon which the house was bought, the Lusaka City Council were not registered as it was the UNIP party chairman.

Evidence of Esther Mwale Phiri, DW3 also confirmed the testimony of DW2 that late John Tembo owned the house. DW4, Wilson Amos Banda testified that the house belonged to the late John Tembo because he too had obtained a plot in the manner that late John Tembo had acquired his.

The Defendant argues that he was deprived of his inheritance by the Plaintiff’s late father Makina Mwale.

In civil matters the standard of proof is based on the preponderance of the evidence unlike in criminal matters where the standard of proof is beyond reasonable doubt.

What has emerged from the evidence before me is that;

- (1) The Plaintiff, Ireen Mwale, was the Administratrix of the estate of her late father, Makina Mwale upon his death.
- (2) As such she assumed all legal rights and obligations of late Makina Mwale including possession of an Occupancy Licence for house No. 179 Block 5, George Compound.
- (3) The Defendant, Mabvuto Tembo, was not administrator of the estate of his late father, John Tembo.
- (4) He did not have any legal document to support the fact that his late father was owner of the house in George Compound. his witnesses did not show proof apart from their oral testimony.
- (5) The Defendant cited fraud under Section 26 of the Limitation Act, 1939 but did not provide evidence of the said fraud, to warrant a claim outside the twelve year statutory limitation period.
- (6) From the record and in the absence of any document the Defendant has no legal right to the house.

The action therefore succeeds in favour of the Plaintiff who has a legal document to show that the house belonged to the late Makina Mwale.

I further Order that the Defendant yields vacant possession to the Plaintiff Ireen Mwale and the reliefs she seeks are granted. Costs shall also be for the Plaintiff.

Leave to appeal is granted.

Dated this day on the 8th of May, 2019.

Milimo J

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**G. MILIMO- SALASINI
HIGH COURT JUDGE**