

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

2011/HP/A.18

BETWEEN:

DORICA CHISOLA



APPELLANT

AND

GLORIA KUMA SONDASHI (*Administrator of the
estate of the late Robert Sondashi*)

RESPONDENT

LUNZA MUKUMBUTA

INTERESTED PARTY

BEFORE HON. MR. JUSTICE E.L MUSONA

For the Appellant

Mr. K. Mwale : Messrs Mwack Associates

For the Respondent:

In Person

For the Interested Party:

In Person

JUDGMENT

DATE: 27TH JUNE, 2019.

Cases referred to:

- 1. Anti-Corruption Commission v Barnnet Development Corporation Limited (2008) Z.R. 69 Vol. 1 (SC)**
- 2. Tijem Enterprises Limited v Children International Zambia Limited 2011 ZR Vol.1 75**

3. Violet Tembo v David Tembo 2004 ZR 79

This is an appeal from the judgment of the Subordinate Court of the First Class at Lusaka. The history of this matter is that the Appellant and Mr. Robert Sondashi (deceased) got married under customary law in 1999 and together they had 3 children of the family.

The Marriage between the two parties was dissolved by the Local Court sometime in 2002 and somewhere around 2007, the parties attempted a reconciliation but their problems continued and they decided to go their separate ways. When the Local Court dissolved the marriage, the appellant was dissatisfied and appealed to the Subordinate Court of the Second Class at Lusaka which ordered that the matter be heard *denovo*.

The subordinate Court delivered a judgment on 28th August, 2008 and observed that the house in dispute was acquired by the deceased before he married the Appellant and that the deceased was the beneficial owner of the house in question. The Court further held that the Appellant should occupy the matrimonial house until she no longer needs the security of the house to bring up the children.

The record shows that the deceased is alleged to have suffered physical abuse at the hands of his step children and following the judgment of the Subordinate Court, the deceased made an

application to review the said judgment as he was not comfortable with the Appellant occupying the said house to raise the children and he felt that contrary to the evidence given by the Appellant, the children of the family were old enough and that he was capable of taking care of them without the Appellant.

By order of the Subordinate Court dated 28th March, 2010, the deceased was granted custody of the Children of the family and by a further order of the Court in the same year, the Appellant and her biological children were ordered to vacate the said disputed house because according to the Court, they continued to harass the deceased. The Court further granted a writ of possession of house number 1735/1 Kajema, Chilenje (disputed house) in favour of the deceased in June, 2010.

The Appellant was aggrieved with the decision of the lower Court and she launched the present appeal which is now anchored on one ground of appeal, the rest having being abandoned following the demise of Mr. Robert Sondashi. The sole ground of appeal before this Court is in ground 4 which seeks to set aside the decision of the learned trial Court which granted the matrimonial house to the deceased.

When the matter came on appeal, I ordered that the interested party be joined to the proceedings because it was discovered that she is the one in occupation of the disputed house and she has a certificate of title having purchased the said house from Sally Itwi Nosiku who is also said to have purchased it from the deceased.

Parties filed their written Heads of Arguments and the Appellant has submitted that she has been in occupation of the said house since her marriage to the deceased sometime in 1999 until she was evicted sometime in 2010 by a writ of possession issued at the instance of the deceased. It is the Appellant's contention that the property was a council house which fact is confirmed by a letter issued by the Lusaka Urban District Council dated 20th January 2000 depicting Robert Sondashi as the tenant and the Appellant as the wife.

It is the Appellant's submission that during the subsistence of the marriage, the deceased and other tenants at Kajeema Chilenje, applied for the purchase of the houses they were occupying pursuant to a letter dated 5th February, 2001. After the Application, the property was offered to the deceased on 26th December, 2001.

The Appellant has submitted that the houses in question was paid for in 2005 by the deceased and that the parties were first divorced in 2002 and the property was to be shared between the Appellant and the Respondent.

The Appellant has submitted that According to the letter dated 9th April, 2002, It was agreed that the Appellant be given the matrimonial house, which agreement was signed by the deceased as property settlement

The Appellant has further submitted that following reconciliation between herself and the deceased, on 28th September, 2006, the

deceased agreed to remarry her for the bride piece of K3,000 which agreement was between the Appellant and the deceased and the deceased moved back into the house with the Appellant.

It is the Appellant's submission that during the subsistence of the second marriage, she placed a caveat on the property in 2007 and that she lived together with the deceased as husband and wife until the second divorce was granted by the Local Court which vested the disputed house into the deceased.

The Appellant has referred to the case of ***Violet Tembo v David Tembo 2004 ZR 79*** in which the Supreme Court of Zambia stated that:

“the court examines the intention of the parties and their contributions to the acquisition of the matrimonial property. if their intentions cannot be ascertained by way of agreement, then the court must make a finding as to what was intended at the time of the acquisition”.

The Appellant has submitted that the deceased willingly and unequivocally gave her the matrimonial house during the property settlement negotiations following the divorce and she has referred to the case of ***Tijem Enterprises Limited v Children International Zambia Limited 2011 ZR Vol.1 75*** in which the Court held that:

“if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntary shall be enforced by Courts of justice”.

The Respondent did not file Heads of Arguments but the Interested Party filed Heads of Arguments in which she argued that she purchased the property in question after executing a contract of sale between herself and Sally Itwi Nosiku who was selling as vendor for a consideration sum of K90,000.00. The said Sally Itwi Nosiku purchased the house from the deceased. Following the purchase of the said property, Sally Itwi Nosiku executed an assignment and title was transferred to the intended party.

According to the interested party, she was issued with certificate of title after she purchased the said property and she is a bonafide purchaser for value without notice.

I have looked at the Record of Appeal and considered the submissions by the parties. What is clear from the record is that the Appellant and the deceased were married in 1999 under customary law and the deceased had been in occupation of the house in dispute from the time of his marriage with his previous wife with whom he had 2 children. After marrying the Appellant, the couple lived in the disputed house and had 3 children together

although the Appellant had 3 other children from her previous marriage.

As a result of numerous disputes, the parties were granted divorce in 2002 by the Local Court but they attempted to reconcile thereafter but in 2007, the said reconciliation had failed.

On the Appellants' appeal to the Subordinate Court against the divorce, the Court heard the matter *denovo* and found that the parties had divorced and ordered that the deceased was the legal owner of the disputed property and the Appellant was evicted from of the house.

The sole question for my determination is the ownership of the disputed property. A review of the record shows that the said house belonged to the Lusaka City Council and the first title was issued to the deceased in 2009 and this is after the marriage between the deceased and the Appellant had been dissolved. At the time of the marriage between the Appellant and the deceased, the couple was merely renting the house from the City Council and as such, the said house cannot be said to have formed part of the matrimonial property.

The Appellant has argued that there was an agreement for property settlement in 2002 in which the deceased agreed to give her the said house.

I find that it is not possible for said deceased to have given that which he did not own. I have looked at the record and in an

affidavit in opposition to the summons for joinder dated 9th August, 2018 deposed to by the deceased, he exhibited a certificate of title for S/D 1735D/20 of stand 4586 New Chilenje (disputed house). The said certificate of title was issued on 1st April, 2009 to the deceased and there was no any other title in existence prior to the one issued to the deceased.

It is trite that a certificate of title is proof of ownership and in the case of ***Anti-Corruption Commission V Barnnet Development Corporation Limited (2008) Z.R. 69 Vol. 1 (SC)***, the Supreme Court of Zambia clearly held that:

“ a certificate of title is conclusive evidence of ownership of land by a holder of a certificate of title ”

I find that the Appellant has never been the owner of the disputed property and the sole ground of appeal is dismissed.

Coming to the Interested party and the Respondent, the Respondent has not filed any Heads of Arguments and in essence has not challenged the interested parties' claim to the disputed property.

I have looked at the evidence in the Interested Partie's bundle of documents and she has exhibited a contract of sale between herself and Sally Itwi Nosiku who was selling as beneficial owner and I have also looked at the assignment registered at the Lusaka City Council on 6th May, 2013, executed between Sally Nosiku Itwi and the Interested Party.

I have also looked at certificate of title number 20202 in respect of the same disputed property and the memorials show the history of the land.

From the said memorials it is clear that the property was first assigned to the deceased in 2009 as I have already indicated above and thereafter, the deceased assigned the property to Sally Nosiku Itwi on 2nd April, 2012. The said Sally Nosiku Itwi assigned the disputed property to the Interested Party on 6th June, 2013. The Interested Party is now the holder of a certificate of title to the disputed property.

I have seen no evidence from the record that there was impropriety in the manner the Interested Party obtained the said certificate of title and I hold that she is indeed a bonafide purchaser for value without notice of any encumbrances on the said land. I further find that from the evidence on record she is the owner of the disputed property and I so order.

I order that each party should bear their costs.

Leave to Appeal is granted.

DELIVERED AT LUSAKA THIS 27TH DAY OF JUNE, 2019

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E. L. Musona
HIGH COURT JUDGE

