I.T.

IN THE HIGH COURT FOR ZAMBIA **2004/HP/0724**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

DAVID VWAPA	**1ST PLAINTIFF**
MIRRIAM VWAPA	**2ND PLAINTIFF**
BENITA VWAPA	**3RD PLAINTIFF**
ALFRED VWAPA	**4TH PLAINTIFF**
FLORENTIA VWAPA	**5TH PLAINTIFF**
FELISTAS VWAPA	**6TH PLAINTIFF**
MODESTER VWAPA	**7TH PLAINTIFF**
ENESI VWAPA	**8TH PLAINTIFF**
LLOYD VWAPA	**9TH PLAINTIFF**

AND

MACDONALD VWAPA **1ST DEFENDANT**
(Sued as the Administrator of the estate
Of the late Elijah Vwapa)

JIMMY MAXON MOONGA **2ND DEFENDANT**
(Sued as Joint Administrator of the Estate
Of the Late Elijah Vwapa)

Before Hon. Mr. Justice Mathew L. Zulu, at Lusaka the...11th...day of March 2020

For the Plaintiff: *Mr. M. Mutemwa, Messrs. Mutemwa Chambers*

For the 1st Defendant: *Mr. M. Ndhlovu, Messrs. MRN Legal Practitioners.*

JUDGMENT

Cases referred to:

1. ***Zulu v. Avondale Housing Project Ltd(1982) Z.R.172***
2. ***Leigh and another v. Dickenson (1884) 15 QBD. 60.***
3. ***Re Pavlou (a bankrupt)[1993]1 ALL ER 956***

Other material referred to:

1. ***The Halsbury's Laws of England, Volume 39(4th Edition) 1982***

This action was originally commenced by the plaintiffs against Macdonald Vwapa by way of originating summons on 11th August, 2004. They sought *inter alia* an order that the 1st defendant be removed as the administrator of the estate of the late Elijah Vwapa, that Farm No. 505 and 506 Monze (the Farms) be sold and the proceeds distributed to the beneficiaries or that title be transferred to all the beneficiaries. The summons was opposed by the 1st defendant by way of an affidavit dated 9th November, 2004 and a further affidavit dated 30th June, 2006.

On 6th July, 2006, by consent of the parties, the plaintiff's amended their originating summons and restricted the relief sought to an order that the Farms be sub divided and distributed evenly among all the beneficiaries and that the 1st defendant retains the portion on which his residential house lay. In another consent order dated

17th July, 2006 the parties agreed to have the Farm valuated by the Surveyor General after which they would file into court their submissions and judgment would be rendered thereafter. On 21st December, 2007, by consent of the parties, Maynard Maxon Moonga was added to the proceedings as the 2nd defendant, being the joint administrator of the estate of the late Elijah Vwapa.

On 29th May, 2008, there was an indication by counsel for the 1st defendant that they were objecting to the valuation report. The court by consent of the parties therefore, ordered that the matter proceed by the plaintiffs filing into court a statement of claim and the defendants a defence. The plaintiffs filed into court their statement of claim on 3rd June, 2008 seeking an order that Farms 505 and 506, Monze be subdivided and distributed among Elijah Vwapa's children. In their statement of claim, the plaintiffs' claimed that they and the 1st defendant were the children of the late Elijah Vwapa who died intestate on 8th March, 1986. They stated that since the death of the late Elijah Vwapa, his estate which included the Farms had not been distributed in accordance with the law.

The 2nd defendant filed into court his defence on 1st July, 2008. He asserts that the 4th and 9th plaintiff are not the children of the late Elijah Vwapa. He denies that the estate was not distributed in accordance with the law. The 2nd defendant asserts that the 1st defendant had to mobilize funds to pay off debts before embarking on the distribution. He asserts that the 5th plaintiff made the administration of the estate difficult as she on two occasions sold portions of the Farm that forms part of the estate. He denies that the 1st defendant has been using the Farm for his sole benefit.

The 1st defendant filed into court his defence and counter claim on 11th June, 2008. The 1st defendant asserted that the 4th and 9th defendant's were not the children of their late father. He stated that he was appointed as the administrator for the sole purpose of applying for certified copies of title deeds in respect of the Farms which had been misplaced. He admitted that the estate had not been distributed and that he is in possession of the farm.

The 1st defendant states that since the death of their father, only the 5th 7th and 8th plaintiff have lived on the Farms while the rest have never lived there prior and post the demise of their father. He

asserts that the 5th plaintiff moved out of the Farms on his own volition in 2004 and he still has unrestricted access to the Farm while the 7th plaintiff moved out in 1991 when she got married and the 8th plaintiff when she got a job. The 1st defendant asserts that from 1988 to date, he has developed the Farms and that the value is not what it was 20 years ago. He therefore states that an order to subdivide the land will be prejudicial to the 1st defendant. He states that the 5th defendant attempted to subdivide and sell part of the land which transactions he stopped. He asserts that he has effected the following developments:

1) **Erected Electricity pole lines;**
2) **Sunk 2 boreholes;**
3) **Construction of dam;**
4) **Construction of 2 three bed roomed;**
5) **Has fenced the entire 1500 hectares of Farm number 505 and 506 with barbed wire;**
6) **Has 300 dairy cattle, 600 beef cattle, 130 sheep and 100 goats;**

The 1st defendant Counter claims for the following:

i. **There be an independent valuation of the effect of his developments on the value of the said Farm 505 and 506 Monze;**

ii. **That the court orders that the 1st defendant has the right to buy out the interest of the plaintiff in Farms number 505 and 506 and that the said Farms 505 and 506 be assigned to the 1st defendant;**

iii. **That the 5th plaintiff compensates the 1st defendant in respect of the costs incurred in redeeming the 750 hectares sold to Mr. Gevar Nsanzya and the 202.4 hectare sold to MR. Somabhai Valand respectively;**

iv. **Costs;**

v. **Any other relief the court deems fit.**

On 29th October, 2012 by consent of the parties, the 2nd defendant was substituted with Jimmy Maxon Moonga. When the matter came up on 12th January, 2017, counsel for the plaintiffs informed this court that the plaintiffs had been granted the reliefs they sought and what remained to be determined was the 1st defendant's Counter claim. This court was referred to the consent order dated 27th June, 2008 as proof of this fact. On a perusal of the said consent order, I am of the considered view that the same merely limited the reliefs the plaintiffs were seeking to one relief and not that judgment was entered on those terms.

However, counsel for the 1st defendant confirmed the position given by counsel for the plaintiffs that the only issue pending was the 1st defendant's Counter claim. This being the case, I will restrict my judgment to the 1st defendant's Counter claim. However, note that there is no defence to the said Counter claim on the record.

When the matter came up for a status conference on 12th August, 2019, there was an indication that all but four of the plaintiffs had reached an agreement with the 1st defendant. On 27th August, 2019, counsel for the 1st defendant informed the court that the 2nd defendant was no longer pursuing the matter. There was however, no consent order filed with respect to the plaintiffs that had reached a settlement with the 1st defendant or an order in respect of the 2nd defendant.

The above notwithstanding, the 1st defendant proceeded with his Counter claim and he was the only witness. I will refer to him as DW1. DW1 testified that the plaintiffs want to share Farms 560 and 506 equally. It was his evidence that he had a counter claim against sharing the Farms equally because he had developed the Farms

from the time their father died in 1988. He testified that at the commencement of the proceedings, there were 2 bore holes but that there were now 4, a dam, electric lines and new houses. He testified that he has extended the 2 and 3 bed roomed houses and he has been responsible for paying the ground rates. It was also his evidence that he has fenced the Farms.

DW1 testified that he keeps 900 beef cattle, 425 daily cattle, 180 sheep and 130 goats. He supplies milk and sales cattle. It was his evidence that he had reached a settlement on the Farms with the 1st 2nd 3rd 4th and 8th plaintiff's. DW1 testified that the 5th plaintiff had attempted to sell portions of the farm twice and he had to refund the first buyer on condition that the land would be his. He testified that he was also the one that removed the second buyer from the farm. DW1 prayed that he should be allowed to buy the shares of those not in good terms with him after a valuation of what he has done on the farm.

During cross examination, DW1 confirmed that he is conducting business at the Farms. He confirmed that he got a loan amounting to K800, 000 from Zanaco in 1990 which money he used to develop

the Farms but he had no receipts for the loan. He confirmed that his father is the one who authorised him to invest in the Farm. He confirmed that he had no receipts for sinking the borehole, the dam and fencing the Farms. He confirmed that power was connected to the Farms in 1972. He confirmed that he did not know that his actions of developing the Farms after the death of his father were unlawful and meddling. He confirmed that his father left animals but he didn't mix them with his.

This was the close of the 1st defendant's case.

Both counsel for the plaintiffs and the 1st defendant expressed the desire to file into court written submissions and I accordingly ordered them to file into court their submissions on specified dates. However, none of the parties complied with my order. By consent order dated 18th November, 2019, the parties agreed to extend the time within which the 1st defendant was to file into court his submissions. However, none of the parties have filed into court their submissions.

I have considered the pleadings and the 1st defendant's oral evidence. The first issue for determination is whether the 1st defendant should be reimbursed for the improvements made to the property. In a civil case, he who asserts a claim bears the burden of proof. The Supreme Court in the case of **Zulu v. Avondale Housing**[1] stated the following:

> ***I think that it is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed any other case where he makes any allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case.***

The respondent in this case claims that he has developed the Farms and that as such, the land cannot be shared equally with his siblings. I am persuaded by the English case of **Leigh and another v. Dickenson**[2]. In that case, the plaintiff and the defendant were tenants in common. The plaintiff sued the defendant claiming a sum for occupation and use and the defendant by his counter claim sought to recover a sum expended in substantial and other proper

repairs and improvements upon the premises. Brett M.R in that case held that:

> ***Tenants in common are not partners .... The cost of repairs to the house was a voluntary payment by the defendant, partly for the benefit of himself and partly for the benefit of his co-owner but the co-owner cannot reject the benefit of the repairs and if she is held to be liable for a proportionate share of the costs, the defendant will get the benefit of the repairs without allowing his co-owner any liberty to decide whether she will refuse or adopt them. The defendant cannot recover at common law; he cannot recover for money paid in equity, for that is a legal remedy: there is no remedy in this case for money paid. But it is said that there is a remedy in a court of equity: in a suit in the Chancery Division expenditure between tenants in common would be taken into account....therefore the rights of tenants in common went into Chancery, where a suit for partition might be maintained. That is the only remedy which exists either at law or in equity... if the law were otherwise a part owner might be compelled to incur expenses against his will...the refusal of a tenant in common to bear any part of the costs of proper repairs may be unreasonable: nevertheless, the law allows him to refuse, and no action will lie against him...***

The above case was applied in the case of **Re Pavlou (a Bankrupt)**[3] where the following was stated-

...In my judgment there is no distinction between a beneficial tenancy in common and a beneficial joint tenancy. In neither case could a co-owner obtain contribution from his or her co-owner; any reimbursement had to wait a suit for partition or an order by the court for sale of property. On a partition suit or an order for sale, adjustments could be made between the co-owners, the guiding principle being that neither party could take the benefit of an increase in the value of the property without making an allowance for what had been expended by the other in order to obtain it...(the underlining is for emphasis only)

Coming to this case, the 1st defendant asserts that he has developed the Farms and he has listed the developments he has put up. However, during cross examination, he confirmed that he has not produced receipts to show that he has expended money to put up those developments. As the matter stands, there is no evidence that the 1st defendant has put up those developments and has incurred any expense. I therefore, find that the 1st defendant's claim for a valuation and that the alleged developments he has put up should be taken into account cannot stand.

The 1st defendant further claims that this court should order the plaintiffs with whom he does not have a good relation to sell their

land to him. The learned authors the **Halsbury's Laws of England at para 458, Volume 39(4th edition) 1982** state that when the devolution of the legal estate to personal representatives has been ascertained, the personal representatives will subject to the land being required for payment of capital transfer tax or other purposes of administration, vest it in the persons who are entitled to hold it whether beneficiary or as trustees by an assent or conveyance.

In this case, going by the position counsel for both the plaintiffs and the defendants have given by reference to the consent order dated 27th June, 2006, the parties agreed to sub divide and share the Farms equally. It was also agreed that the 1st respondent would retain the portion on which his house lies. I am therefore, taken aback by the 1st defendant's claim refusing to have the Farm sub divided and distributed equally with the other beneficiaries. Further, the **Halsbury's Laws of England at paragraph 556, Volume 39 (4th edition) 1982** espouse that the court under the Partition Acts of 1868 and 1876 had jurisdiction to order a sale of property and distribution of the proceeds in lieu of making an order for partition if any party whatever might be the amount of his

interest requested a sale and distribution of the estate. The said power was however, discretionary and it could order a sale despite dissent by any other party if it appeared to the court that it would be more beneficial for the parties interested by reason of the nature of the property, number of parties interested or by any other circumstances in disregard of any sentiments.

Coming to this case, the only reason the 1st defendant seeks an order that the other plaintiff's should sale their land to him is because of the strained relationship with him and not that it is beneficial for the parties interested. In this case, there is no evidence that any of the plaintiffs want the property to be sold and as the matter stands as confirmed by counsel for the plaintiffs and the 1st defendant, the parties have agreed that the land should be sub divided or partitioned. I therefore, see no reason to order that the other plaintiffs who do not have a good relationship with the 1st defendant should sell their properties to the 1st defendant as the 1st defendant's property rights cannot take priority over the rights of the siblings. The parties are however, at liberty to negotiate for a sale.

In the third claim, the 1st defendant claims for compensation from the 5th defendant in respect of the costs incurred in redeeming the 750 hectares and the 202.4 hectares sold by the 5th defendant to a Gevar Nsanzya and Sombhai Valand respectively. The 1st defendant referred to the documents exhibited in his affidavit in opposition to the originating summons dated 30th June, 2006. A perusal of the exhibit marked **"MV1"** shows that the defendant refunded Gevar Nsanzya K2, 500,000.00. This was definitely for the preservation of the Farms and the benefit of the 5th defendant too. The 5th defendant can therefore, not take this benefit for nothing. However, as a reimbursement had to await a sale or partition, seeing that the parties agreed to a partition, the 1st defendant would be entitled to have his portion adjusted to reimburse him for this amount. However, this would be against the consent order which the parties claim they executed to share the Farms equally. I therefore, direct that the 1st Defendant recovers the money spent as evidenced by **"MV1"** from the 5th Defendant directly.

In conclusion I find that the 1st defendant's claims fail. Because of the nature of the matter, I make no order for costs and leave to appeal is granted.

Delivered at Lusaka the 11th day of March, 2020.

MATHEW. L. ZULU
HIGH COURT JUDGE