

IN THE HIGH COURT OF ZAMBIA

2010/HP/0534

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

CHRISTIAN CHANDA *(Suing as Son of the late MARIA KAREN GONDWE and as Beneficiary of her estate)*

1st PLAINTIFF

FELICITY GONDWE *(Suing as Daughter of the late MARIA KAREN GONDWE and as Beneficiary of her estate)*

2nd PLAINTIFF

KWIMA SIAME *(Suing as Daughter of the late MARIA KAREN GONDWE and as Beneficiary of her estate)*

3rd PLAINTIFF

DAMISHAEL CHRISTIAN ACADEMY LIMITED

4th PLAINTIFF

AND

SYDNEY HIGHTON TIYEUKU GONDWE (*Sued as Administrator of the estate of the late MARIA KAREN GONDWE*)

1st DEFENDANT

JOHN CHIBASHE

2ND DEFENDANT

Before Hon. Lady Justice F.M. Chisanga this 21st day of August 2020

For the 1st, 2nd, 3rd & 4th Plaintiff: Dr. O. M. M. Banda of Messrs O. M. M Banda & Company
For the 1st Defendant: N/A
For the 2nd Defendant: Mr. M. Katolo of Messrs Milner and Paul Legal Practitioners

J U D G M E N T

Cases referred to:

1. ***Doe vs Suckermore 5A. & E. 703***

2. ***Base Property Development Limited and Chileshe and Others Appeal No 211 of 2015***
3. ***Charity Oparaocha vs Winfridah Murambiwa (2004) Z.R. 141***
4. ***Investrust Bank Plc vs Hearmes Mining & Tradition Limited and Others Appeal No. 146 of 2014***
5. ***Mirriam Mbolela vs Adam Bota (Selected judgment) No 26 of 2017***

Legislation referred to

1. **Intestate Succession Act Cap 59 of the Laws of Zambia**
2. **Section 33(3) of the Housing (Statutory and Improvement Areas) Act CAP 194**

This action revolves around the estate of Maria Karen Gondwe, deceased. Ms. Gondwe demised on 23rd April 1994. Her estate included 8/D83 of Stand 8646, Libala Stage 1, also known as house number 65 Boli Street, Libala Stage 1, Lusaka. Sydney Highton Tiyeuku Gondwe, Christian Chanda, Felicity Gondwe and Kwima Gondwe were all children of the deceased.

Sydney Gondwe was appointed administrator of the Estate of Maria Karen Gondwe, by the Local Court on 30th March 2010. He thereafter sold S/D 83 of Stand 8646 in that capacity to John Chibashe. Before this, the property had been let to Damishael Christian Academy, and according to the plaintiffs it is entitled to be given first option to purchase the property should the beneficiaries decide to sale it.

The 1st to 3rd plaintiffs who are children of the deceased and beneficiaries of the estate, contend that they were not consulted by Sydney Gondwe as to whether the property should be sold, and have never benefitted from the sale which he effected for consideration in the respective sums of K150,000 and K100,000.

After the purported sale, the 2nd defendant's agent notified Darmishael the tenant of the property that it had adjusted the monthly rental to K2,500. The rentals were to be paid 6 months in advance, by first week of June. The 2nd defendant and his agents allegedly took people to the property to view it, thereby disturbing the peace and privacy of the tenant's employees.

It is contended that the value of the property is beyond the jurisdiction of the Local Court, thus the local court had no power to appoint an administrator of the estate of the deceased. That therefore, the appointment of Sydney Gondwe as such administrator is null and void. The purported sale of the property is also null and void. The plaintiffs thus seek Orders to that effect, as well as an order that the purported assignment of the property is null and void as it was signed by the 2nd defendant alone, contrary to the law. They also seek an order that any mortgage over the property in dispute is also null and void and was at the parties' own risk. They equally seek an account for the estate of the deceased, and an order that the property be owned jointly by all the beneficiaries of the estate of the deceased.

As for the 4th Plaintiff Damishael, it seeks an injunction restraining the defendants and their agents from trespassing on the property, an order that the 1st defendant breached the tenancy agreement by selling the property to the 2nd defendants, and that it be paid damages for breach of the tenancy agreement. It also seeks an order that it is entitled to be given first option to purchase the property in dispute should the beneficiaries decide to sell it.

The second defendant, John Chibashe's defence is that this action is statute barred, as it was commenced 16 years after the death of the deceased. That he is a bonafide purchaser for value without notice, having made sufficient enquiries about the 1st defendant's right and power to sell house number 35 Boli Street, Libala Stage 1. The 2nd defendant also contends that by a letter dated 21st January 2010 and addressed "*to whom it may concern*" and duly signed by the 1st and 2nd plaintiffs, they expressly stated that they offered no objection to house No. 35 Boli Street Libala Stage 1 being sold or rented out, and the 2nd defendant relied on the aforesaid letter in deciding to purchase the property.

In addition to this, by a Notice dated 10th February 2010, and published in the Zambia Daily mail issue of 11th and 12th February 2010, the 1st defendant advertised his intention to apply for a certified copy of a lost Certificate of title and no objection was received from any of the plaintiffs or at all. Moreover, the assignment was drawn in compliance with **Section 33(3) of the Housing**

(Statutory and Improvement Areas) Act CAP 194, and was compliant with form 3 and Regulation 7 of the said Act.

The 2nd defendant contends that only his wife went to view the house on 6th June 2010 when she was falsely imprisoned.

He also avers that the Tenancy Agreement purportedly executed between the 4th plaintiff and 1st defendant contains no clause on the right to be given the first option to purchase the property as alleged. It is his argument that if the appointment of the 1st defendant as administrator is null and void, then the Tenancy Agreement entered into between the 4th plaintiff and 1st defendant is similarly affected.

The 1st defendant did not file a defence.

At the trial, the 1st plaintiff, Christian Chanda testified as averred, that his late mother had four children, that is, the three plaintiffs, and the 1st defendant. Sydney Gondwe was appointed Administrator of the estate in 2010. He however was not authorised to sell the property in issue. The 1st plaintiff did not remember signing the letter at page 14 of the plaintiff's documents. Though his name appears on it, the signature is not his. Sydney Gondwe should have obtained the consent of his siblings before he sold the house. He did not do so. The court should reverse the sale, so that the property reverts to the beneficiaries.

When cross examined, he testified that there was no document authorizing Sydney Gondwe to enter into the lease agreement. He conceded that he had seen the document at page 2 of the plaintiff's bundle of documents, and there was nothing to show that all of them as beneficiaries authorised Sydney Gondwe to go through with it. The witness said he was unaware that his mother's title deed went missing at one time. The duplicate Certificate of Title was there. It was kept by Sydney Gondwe. He said he did not see the advertisement, but first saw it when preparing for the case, five years later. He did not do anything about it, since the matter was in the courts of law.

The witness testified that he had not provided his sample signatures to the court in the matter. His signature also appears on the affidavit. He went on to state that they had a surviving uncle, a Mr. Humphrey Gondwe. They never held a meeting with Humphrey Gondwe and Chibashe over the sale of the property.

The witness confirmed that they all agreed that Sydney Gondwe be the administrator. He had not been removed nor had the plaintiffs claimed that he be removed. The beneficiaries never placed a caveat on the property as beneficiaries. The witness testified that a family meeting was held to decide whether or not to lease the property.

In further cross examination, the witness testified that he made no effort to see the Registrar at the council concerning the assignment. He said it was possible that Mr. Chibashe relied on Sydney Gondwe's word, just like Damishael did.

In re-examination, he reiterated that Sydney Gondwe did not inform them that he was selling the house. They only learnt from Damishael that the property had been sold.

The second witness was Felicity Gondwe, the 2nd plaintiff. She reiterated PW1's testimony, adding that she was not consulted over the sale of the property.

When cross examined, this witness testified that when the property was leased to Damishael, no meeting was held. The decision was made by Sydney Gondwe. He just informed her about it. She had no problem with that, and benefitted from the rentals. She clarified that they sat as a family to decide whether to lease the property, but did not sit regarding whether or not to lease to Damishael.

She went on to testify that she had nothing to show the court that they did not agree to sell the property. She discovered that the property had been sold through a text message from Mrs. Alice Yumba, who asked her about the sale. When she asked Sydney about it, he denied selling the house. She did not recall signing a document allowing Sydney Gondwe to sell the property.

When re-examined, she said they agreed to rent the property out, but not to sell the property.

PW3 was Humphrey Gondwe. He testified that the 1st, 2nd and 3rd plaintiffs, as well as Sydney Gondwe were his late sister's children. He informed the court that Sydney was appointed administrator of the estate. The deceased left a house in Libala. He stated that he never met with Mr. John Chibashe to agree on the sale of the property. He also said he wouldn't have agreed to sell the house as it was for the beneficiaries to live in, and not to sell. They were also not allowed to rent the property out.

When cross examined, the witness said that when he found out that the property had been rented out, he was very disappointed and spoke to Sydney, to tell him that as soon as the lease ended, he and his siblings should occupy the house. In further cross examination, he said he was involved in going to the local court to obtain the order of appointment. He denied meeting Mr. Chibashe, or talking to him on the phone. He denied calling the beneficiaries to the house for a meeting. He testified that Sydney lived with him, and when he asked him about the sale, Sydney did not give him a concrete answer which made the witness doubt that anything of the sort had happened. He denied asking that the money be shared. He said Sydney explained in a roundabout way that there were intentions to sell, but it never came to fruition. The witness

denied seeing the documents at pages 20-21 of the plaintiff's bundle of documents.

In re-examination, he said he did not want the property sold, as it belonged to his sister and had sentimental value.

PW4 was Mrs. Namukulwa Banda, Managing Director of Damishael Christian Academy. She testified that Damishael entered into a tenancy agreement with Sydney Gondwe, and she signed on behalf of the Academy. She learnt of the sale on 23rd April 2010, from a letter stating that the rentals had been increased. The letter was from the new landlord. The witness later met the author of the letter who demanded vacant possession or the rentals. She informed the witness that Sydney had sold the house to her, and that he had lost the title deeds and she had assisted him to get a replacement. PW4 called Sydney and put the phone on loud speaker. She asked Sydney if he had sold the house. He denied the sale, saying those claiming to have purchased the house should not have gone to PW4. When she asked Christian about the sale, his response was that he was not aware that the house had been sold. PW4 also asked her younger sister, who is Sydney's distant aunt, Mrs. Dora Phiri. The latter said she was not aware, and would ask his aunt in Ndola, Mrs. Alice Gondwe Siame, as well as Sydney. All of them said they were not aware.

When cross examined, the witness said they would not have managed to pay (The purchase price) had they been offered the property for sale. She said Damishael was not in the matter on that account, but because of the tenancy agreement. She was referred to the documents of sale and conceded that all these documents, in the absence of fraud would signify a valid sale.

When re-examined, the witness testified that Christian and his uncle wrote a letter on 3rd May asking Damishael to continue occupying the house. They were allowed to stay in the house until the matter was resolved.

PW5 was David Chiko. He testified that he worked for Damishael Christian Academy around 2010. He lived at house No. 35 Boli Street Libala Stage 1 as an employee of Damishael Christian Academy. At some point during his stay there, a person went there, who introduced himself as the new landlord, and asked the witness if he was aware that the house he occupied had been sold. He responded that he wasn't and referred the person to his employers, as he was just occupying the house, and not the tenant. Sydney Gondwe did not introduce the new landlord to the witness.

The next person to visit the witness was Mrs. Chibashe, who delivered a letter that indicated that the rentals would be K2,500.00 then. The witness observed that the letter was not signed, was not dated, nor did it indicate the full name of the author. He delivered the letter to his employer, Mrs. Susan Banda.

This witness closed the case for the plaintiffs.

The 2nd defendant, John Chibashe Kapepula testified as DW1. His testimony was that he first met Sydney Gondwe in 2009. Then in January 2010, Sydney went to DW1's office, and informed him that he was selling his late mother's property. When asked who was in charge of the property, he disclosed that they were three, that is Sydney Gondwe, Christian Chanda and a woman, whose name was Felicity. The witness asked him how he could believe that he had authority to sell the property in the absence of his brothers and sister. The witness went on to add that he would confirm that he had the right to sell if Sydney brought his siblings.

The following day, Sydney went to the witness with a letter which was signed by the three of them, signifying that they had agreed to sell the property. The witness informed him that the letter was not enough, unless the National Registration Card was produced. Sydney then waited for his young brother Chanda, who went with the NRC to permanent house. It was photocopied in the witness' office. The witness now believed that they had both agreed to sell the property. He went to view the house with Sydney, and they found a tenant, a woman. She allowed them to see the house at Sydney's request. When DW1 asked the woman where she would stay if he purchased the property, her response was that there was no problem and that as a tenant, she would

continue renting the property if the witness accepted that it be so. She informed him that two families were renting the property.

Afterwards, the witness and Sydney negotiated the purchase price to K150,000.000. He asked for the documents for the house, and the agreement was reduced into writing. Four people signed the document. These were Sydney Gondwe, Christian Gondwe, the witness and Pamela Chilupula. Sydney informed DW1 that the title deed was lost, and that he was ready to obtain a duplicate once the witness had confirmed his interest.

Sydney had reported the matter to the police, and they had given him the letter for starting the process. He applied for the new title deed, was advised to advertise, and was given 40 days. DW1 saw an advert and was convinced by Sydney's story. Sydney was to wait for 30 days and indicated that he would in the meantime obtain an order of appointment so that he could commence the process of obtaining a new title deed. DW1 suggested that he goes with two of DW1's witnesses when obtaining the letter of administration. So DW1's wife and young brother went with Sydney.

When they returned, DW1's wife informed him that Sydney was advised (asked) to go with another witness, a brother or sister. They went back the following day, and returned with a copy of the order for appointment of Sydney Gondwe

as administrator of the estate of Maria Karen Gondwe. DW1 was confident to agree on the mode of payment.

DW1 made a down payment and when later the assignment was drawn, it indicated K100,000.000 instead of K150,00.000. He called Sydney, and remonstrated with him over the difference. Sydney's response was that he was the one who was doing everything. Being interested in getting the title deed, DW1 was not unduly worried. Thereafter, the title deed was issued, and DW1 settled the balance.

DW1 explained that he met Christian Chanda when he brought the NCR, but never received any complaint from Felicity or Christian after the advertisement.

He also informed the court that they went to the house and found two individuals. They were informed that DW1 was now the owner of the house and not Sydney Gondwe. DW1 was later surprised to learn that his wife was locked up inside the yard by the tenants. She called him to go there and find out what was happening as she did not understand it. When he got there, he found the gate closed. He knocked, but the tenants refused to open for him. He had to go and report the matter at Kabwata Police Station. The police escorted him, and this time, the gate was opened. The police advised them to understand one another. DW1 received the summons the follow day.

When cross examined DW1 testified that Sydney Gondwe explained that he was selling the house because he had problems to sort out. He needed to pay his children's school fees. Chanda was marrying and had to find money for the wedding. The other one had need of school fees. The agreement they had signed indicated the problems. The document at page 14 was already signed when taken to him. He said he would be surprised to hear that Christian never signed the document because he took the NRC to the witness. He noted that his signature was not on pages 21 to 22. He didn't ask because Gondwe was doing the process as the person appointed as administrator.

He said he did not talk to the other children since he had evidence that Sydney Gondwe was in charge. When referred to page 19, he did not bring the documents. He saw it before the title deed was issued. He said he saw the said documents at page 17 and page 18. It was not his handwriting, and that he did not sign it.

DW2 was Pamela Chilupula Lubushe. She testified that the role she played concerning the house was that she went to court at the Boma where she witnessed the appointment of Sydney Gondwe as administrator of the estate. They went once to court. Sydney Gondwe, Felicity Gondwe and Christian Chanda Gondwe were at court. After the order of administrator had been given, DW2 was given a copy of the order, which she took to her husband. Sydney Gondwe introduced her to Felicity and Chanda. He informed his siblings that

she was Mrs. Chibashe, one of the intending purchasers of the house. Felicity and Chanda did not say much, they just said "ooh".

DW2 testified that she was also present when Chanda took his NRC to Permanent House. Christian Chanda's NRC supported an agreement which Sydney, Chanda and Felicity had written. The witness explained that she went to Damishael and met Mrs. Banda. Sydney Gondwe introduced her to the tenants who occupied the house. The witness went on to testify that she explained to Mrs. Banda that she had gone to introduce herself as the new landlord as explained to her by Sydney. Mrs. Banda said Sydney had to pay off the debt he owed in school fees, for her workers to vacate the house.

The next time she went to the house with her son, the occupants of the house locked the gate. Mrs. Banda came with police from Chilenje station just at the time her husband also arrived with police from Kabwata Police Station. Later, police advised them to sit down and discuss the matter. DW2 said she wrote a letter increasing the rentals. She did not sign it as her name was indicated on the document.

When DW2 had completed his testimony, Mr. Katolo applied for leave to issue a subpoena directed to Sydney Highton Tiyeku Gondwe the 1st defendant, to come and give evidence with regard to his involvement in the transaction in question so that justice is better served, by giving the court all the factual

evidence, to assist the court to ascertain the truth, and whether or not he had any authority to transact the application.

I accordingly granted the application, ordering that a subpoena *duces adtestificandum* be issued out to Highton Tiyeku Sydney Gondwe as prayed, and adjourned the matter.

The subpoena was accordingly issued. However after several notices of hearing had been issued, the parties filed a consent order dispensing with the attendance of the 1st defendant as a witness in the proceedings, and to deem the matter as closed by the defence. The parties were to file their submissions within 28 days from the date of the consent order which was signed on 4th February 2020, and that the judgment would be rendered thereafter. I have not seen any submissions on the record, but will nonetheless proceed with determination of the plaintiffs' claims.

I have considered the evidence led by the parties. The issues that arise are whether or not:

- (i) The 1st defendant was validly appointed as administrator of the Estate of Maria Gondwe.
- (ii) He could, and did validly dispose of sub division 83 of Stand No. 8646 Libala Stage 1, without the consent of the beneficiaries;

- (iii) He breached the tenancy agreement by disposing of the property during the subsistency of the Tenancy;
- (iv) The 4th plaintiff is entitled to damages as a result;
- (v) The 4th defendant is entitled to be given first option to purchase the property.

The fact of Maria Gondwe's demise, and ownership of subdivision 83 of Stand No. 8646 is common cause. It is also borne out by the order of appointment issued by the local court. I take judicial notice that that order could only have been issued on proof of Maria Karen Gondwe's death, as the court was so satisfied. Also, the Certificate of Title issued by the Lusaka City Council indicates that Maria Karen Mwiza Gondwe became title holder on 2nd November 1984. On record is an affidavit, in which Sydney Gondwe reported the loss of the title deed for the property. Consequent to this report, the Zambia Police Service, on 1st February 2010 certified that Sydney Gondwe had indeed lost the title deed.

Sydney Gondwe approached the Council for a Certified True Copy of the Lost Title Deed. The Lusaka City Council issued a Notice to the effect that Sydney Gondwe intended to Apply for a Certified True Copy of a lost Certificate of Title 141 dated 26th April 1983, granted to Maria Karen Mwiza Gondwe. All persons who had any objections to the issue of such Certified True Copy were required

to lodge the same in writing with the Council Registrar within 30 days from the date of publication of the Notice.

This Notice was published in the Zambia Daily Mail on the 11th, but the month is unclear.

There is on record Consent to Assign the Property, issued to Highton Tiyeuku Sydney Gondwe, dated 7th April 2010, by the Council Registrar. In addition to this, a form, for purposes of paying Property Transfer Tax, and a Tax Clearance Certificate dated 8th April 2010, were issued by the Zambia Revenue Authority, signifying that Property Transfer Tax had been paid on a value of K100,000,000.00 at 3% tax rate.

An assignment was executed by Highton Tiyeuku Sydney Gondwe as administrator, assigning the property to John Chibashe. The letter of sale at page 14 of the plaintiff's bundle of document was executed by Sydney Gondwe as seller, while Christian C. Gondwe purportedly signed as witness. DW1 informed me that when the document was brought by Sydney Gondwe, it was already signed. The import of this is that he did not see Christian Chanda signing the letter of sale.

DW1 testified that Sydney Gondwe produced a letter that had been signed by three siblings stating that they had agreed to sell the property. DW1 indicated

that the letter was not enough, unless Sydney brought the NRC. Sydney called his young brother Christian Chanda to take the NRC to the office. Christian Chanda took his NRC to DW1's office at Permanent House and it was photocopied in DW1's office.

My difficulty with this evidence is that it was not put to Christian Chanda in cross examination that he had actually taken his National Registration Card to DW1's office. Nor was it pleaded that he had done so. In cross examination, learned counsel for the 2nd defendant asked Christian Chanda whether he had provided his sample signatures to the court. Christian informed the court that his signature appeared on the affidavit. I have looked at these affidavits. They are; an affidavit in support of an application to amend the statement of claim, an affidavit in opposition to summons for order to strike out 2nd and 4th plaintiffs, and 2nd defendants, and for failure to disclose cause of action, and lastly, an affidavit in opposition to affidavit in support of an application to dismiss action on a preliminary point of law. My observation is that the signatures on these affidavits appear similar, while the signature on the letter of sale does not have a slant, and the 'd' looks different.

It will be recalled that the onus to prove a fact lies on the party who asserted the affirmative of that fact. It is equally trite that the handwriting of a person may be proved by the following methods.

1. By the party who wrote or signed the document in question

2. By a witness who actually saw the party write or sign the document
3. By a witness who has seen the party write on other occasions
4. By a witness who has seen documents purporting to be written by the party, which, by subsequent communications with such party, he has reason to believe to be written by him
5. By a witness who has formed his opinion as to the authenticity of a disputed document by comparing its handwriting with that of any document which has been admitted or proved, to the satisfaction of the judge, to be the genuine writing of the party. The witness must be skilled in comparing handwritings but he need not be a professional expert. The judge may compare the documents and form their own opinion without the assistance of any expert. See **Powell's Principles and Practice of The Law of Evidence Tenth Edition By William Blake Odgers and Walter Blake Odgers London 1921, Butterworth & Co, Page 45.**

Patten J, in *Doe vs Suckermore*¹ articulated the foregoing modes of proof as follows:

"All evidence of handwriting, except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from previous knowledge. That knowledge may have been acquired either by seeing the party write, in which case it will be stronger or weaker according to the number of times and the periods and other circumstances under which the

witness has seen the party write; but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases) even if he has seen him write but once, and then merely signing his

surname (g); or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards personally communicated with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers producing further correspondence or acquiescence by the party in some matter to which they relate, or by any other mode of communication between the party and the witness, which, in the ordinary course of transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party; evidence of the identity of the party being of course added aliunde, if the witness be not personally acquainted with him. These are the only modes of acquiring knowledge of handwriting which have hitherto, as far as I have been able to discover in our law, been considered sufficient to entitle a witness to speak as to his belief in a question of handwriting. In both the witness acquires his knowledge by his own observation upon facts coming under his own eye, and as to which he does not rely on the information of others; and the knowledge is usually, and especially in the latter mode, acquired incidentally, and if I may say so, unintentionally, without reference to any particular object, person, or document.”

As stated earlier, the onus of proof lies upon the party who in his pleading, has maintained the affirmative of an issue. See *Powell's supra, page 135.*

Take for instance A and B as parties to a case. A asserts that B did something, and B denies it. It is A, who is alleging that B did something, who must so prove. This is because he is maintaining the affirmative, while B is denying it.

Once it is realized that a negative is usually incapable of proof, it becomes transparent that the onus lies on a defendant, as a rule, to prove all facts which he has specially pleaded, such as fraud, performance, release, rescission, accord and satisfaction, etc. The burden will shift once a prima facie case has been established.

In the instant case, the 2nd defendant asserted, in paragraph 5 of his defence that a letter dated 21st January 2010 and addressed "*to whom it may concern*" was duly signed by the 1st and 2nd plaintiffs, as well as the 2nd defendant. That they stated that they offered no objections to house number 35 Boli Street Libala Stage 1 Lusaka being sold or rented out.

The said letter has not been tendered as evidence, and more importantly, it has not been proved that the named plaintiffs signed it. The modes of proof, as articulated above, were not employed to prove that the plaintiffs signed the letter. In addition to this, it has not been proved by the defendant that Christian Chanda signed the letter of sale as a witness. I therefore find that the 2nd defendant has not discharged the onus on him to so prove.

The facts reveal that the 2nd defendant seems to have been put on enquiry. Unfortunately, the purported assurances, having not been shown to have originated from the 1st to 3rd plaintiffs, cannot avail him. The advertisement that it was proposed to issue a duplicate Certificate of Title to the 1st defendant

does not render the purported sale valid. This is because an advertisement for a duplicate Certificate of Title is not confirmation that the beneficiaries of an estate have consented that a property be sold.

It is established that Maria Wafwa Gondwe died intestate. Therefore, the **Intestate Succession Act Cap 59 of the Laws of Zambia** is applicable. The property in question devolved upon the children of the deceased, as tenants in common in terms of Section 9 of the Act.

Section 19 of the Act, stipulates as follows, in subsection 2.

“(2) Where an administrator considers that a sale of any of the property forming part of the estate of the deceased is necessary or desirable in order to carry out his duties, the administrator may, with the authority of the Court, sell the property in such manner as appears to him likely to secure receipt of the best price available for the property.”

The import of this provision was considered by the Supreme Court not too long ago in **Base Property Development Limited and Neggie Nachilima Chileshe**². In that case, an administrator purportedly sold a portion of a farm that formed part of an estate he was administering. The beneficiaries claimed that the sale was done without their knowledge or consent. The administrator's defence was that the land he sold was equivalent to his share as a beneficiary, and he did not need the consent of the other beneficiaries to sell his portion.

The purchaser of the land that had been sold by the administrator pleaded that it was a bonafide purchaser for value without notice, having signed a contract in respect of the land, been availed with consent to assign, and property transfer receipt and clearance. The purchaser claimed for a declaration that it was the lawful owner of the property.

On appeal, the Supreme Court held that as the value of the estate exceeded K16,000,000.00 the appointment of the administrator by the Local Court was null and void, meaning that the administrator had no authority to deal with the estate of the deceased, and that any sale of a portion of the farm to the appellant was invalid.

The Supreme Court referred to ***Charity Oparaocha vs Winfridah Murambiwa***¹³, where the limits of the Local Court's jurisdiction to appoint administrator of an estate was considered and stated.

The Supreme Court went on to state that the purchaser, being aware of other beneficial interests did not make enquiries of the occupants as to their interests in the property. No enquiries were made by his lawyers or estate agents regarding the interests of other beneficiaries or the authority of the administrator to sell a portion of the land. Therefore, the purchaser was not a bonafide purchaser for value without notice.

In another case, ***Investrust Bank Plc vs Hearmes Mining & Tradition Limited and Others⁴***, the Supreme Court held that the appellant, in conducting the due diligence should have been alive to the limits placed upon the powers of an administrator of an estate in Zambia and should not have proceeded on its erroneous understanding that the 2nd respondent, as administrator had absolute power to deal with the properties as she deemed fit.

The Supreme Court had equally held to similar effect in ***Miriam Molalla vs Adam Bota⁵*** that section 19(2) proscribes the sale of property (including real property) forming part of the estate of a deceased person without prior authority of the court and that this statutory provision was intended to prevent administrators of estates of deceased persons from abusing their fiduciary responsibilities by selling property forming part of such estates, without due regard to the interest of the beneficiaries, and that prior authority of the Court is a *sine qua non* of a valid sale of such property.

Turning to the case with which I am concerned, there are three beneficiaries of the estate of Maria Gondwe, in addition to Sydney Gondwe. Kwima Gondwe has not even been mentioned as having acceded to the proposed sale of the property. The Order of Appointment of administrator was made by the Local Court. The value of the estate was way beyond the jurisdiction of the Local Court in such matters. This rendered the Order of Appointment of Administrator invalid. Moreover, the purported sale was without the sanction of

the Court, as required by Section 19(2) of the Intestate Succession Act. This rendered the purported sale a nullity.

In addition to this, the fact that the 2nd defendant did not enquire from the other beneficiaries whether they wished to dispose of the property and ascertain that the Order of Appointment was issued by a court of competent jurisdiction, renders the sale null and void. I have seen no evidence that the purchase was financed through a mortgage. Consideration of a mortgage's position does not therefore arise, and no order can be made as requested. The sale having been held to be invalid, an account of the purchase monies cannot be ordered against the 2nd defendant. I however order the 2nd defendant to render an account of the estate within 30 days of this judgment. The beneficiaries are at liberty to take necessary steps to culminate in the vesting of the property in them as tenants in common pursuant to section 9 of the intestate Succession Act.

The cause of action against the defendants arose in 2010 when the 1st defendant purportedly sold the property to the 2nd defendant. This action was commenced in the same year. The averment that it is statute barred is unsustainable as a result.

It follows that the 2nd defendant cannot evict the 4th defendant from the premises in issue. Having determined that the sale was invalid, it is

unnecessary to grant an injunction against the defendants, as there is no legal basis on which they can evict the plaintiffs.

I have not seen a clause in the tenancy agreement, giving the 4th defendant an option to purchase the property should the plaintiffs decide to dispose of it.

In the absence of such a provision, this court cannot impose terms in the agreement, and order the plaintiffs to offer the 4th plaintiff the property for sale. There is no law that a mere sitting tenant, without more, is entitled to purchase a property that they rent, in the event the owner decides to dispose of it. The right to purchase, or right of first refusal must arise from the agreement, or from other circumstances as was the case in the sale of Council houses, government houses, and such like. The two claims by the 4th defendant are devoid of merit and unsustainable.

I now turn to the issue of costs. Sydney Gondwe purported to sell the property to the 2nd defendant after hoodwinking him into believing that he had the consent of the other beneficiaries. There would have been no sale had he acted truthfully. Therefore, he should bear the costs of these proceedings. I thus award the costs of these proceedings to the 1st, 2nd and 3rd plaintiffs to be paid by Sydney Gondwe, the 1st defendant.

Dated the 21st day of August 2020



F. M. CHISANGA
HIGH COURT JUDGE