

**IN THE SUPREME COURT OF ZAMBIA**  
**HOLDEN AT LUSAKA.**  
**(Civil jurisdiction)**

**SCZ APPEAL NO. 51 OF 1992**

**HELEN P. MWALONGO  
JOSEPH MWALONGO**

**1st Appellant  
2nd Appellant**

**Vs**

**MIKE ALICK MUCHINDU  
MATHEW NDUUNDA**

**1st Respondent  
2nd Respondent**

**Coram: Gardner, Sakala and Muzyamba JJJ.S.**

**1st July and 18 Nov...1993**

**H.H. Ndhlovu of Ndhlovu and Company, for the appellants.**

**Mr. M.S. Mwanamwambwa of Lisulo and Company, for the respondents**

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**J U D G M E N T**

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**Sakala, JS., delivered the judgment of the court.**

**Cases referred to: (1) Bailes V. Stacey (Executor) and Simoes  
SCZ Judgment No. 21 of 1986.  
(2) Re-Njobvu 1971 ZR 187**

**This is an appeal against a judgment of the High Court entered in  
favour of the first respondent in relation to Farm No. 3178,  
Livingstone, of the late Patterson Robert Mwalongo for the  
following claims:-**

- "1. A declaration that the plaintiff has validly and  
effectively bought the said farm and he is entitled  
to possession and/or occupation thereof.**
- 2. A declaration that given (1) above, the Defendant's  
refusal to surrender or deliver possession of the  
said Farm to the Plaintiff and her conduct in  
subletting the farm to some other person is wrong.**
- 3. (a) An Order that the Defendant refunds the unutilised**

**2/...**

portion of the K36,000.00 annual rent to the "Tenants" or third parties she put on the farm, removes them from there and delivers its possession to the plaintiff.

(b) In the alternative, for an Order that she pays to the plaintiff, the said annual rent, with effect from 21st March, 1989.

4. An Order that the Defendant pays mesne profits to the plaintiff, from the date the plaintiff ought to have taken occupation of the farm under the contract of sale, to its standard or economic rent, to be assessed by an approved valuer.
5. Damages:-
  - (a) for loss of use of the farm, directly arising from wrongful deprivation of the farm, with particular regard to the plaintiff's Loan interest with the Lima Bank Limited.
6. Interest.
7. Further or other relief that the court may deem fit.
8. Costs and statutory tax thereon.

The second appellant was not party to the proceedings in the court below; he was only made party by way of an application for intervention at Supreme Court level. The record of appeal incorrectly referred to Mathew Nduunda as the first respondent and Mike Muchindu as the second respondent, which was the reverse of the order in the court below.

The facts and the history of the case accepted and not rejected by the learned trial judge were that, before the late Patterson Robert Mwalongo died, he was the sole registered owner of Farm No. 3178, Livingstone. This Farm was mortgaged to the Zambia National Building Society and the Zambia National Commercial Bank Limited. The first appellant (hereinafter referred to as the widow) is the widow of the

late Mwalongo while the second appellant is the first born son of the deceased. Before the deceased died, he made an attempt to make the widow party to a second mortgage with the Zambia National Building Society but the attempt was unsuccessful. After the deceased's death the second respondent was appointed the administrator of the deceased's estate.

The first respondent sued the widow as the purchaser of the farm in question. There is evidence not seriously disputed that after the deceased's death there were threats from the creditors to repossess the farm. There is also documentary evidence that as a result of these threats the Administrator of the estate was concerned.

Consequently by letter dated the 29th of December, 1987 addressed to the lawyers the Administrator informed them that he was unable to pay the creditors and expressed his opinion that the best thing in the circumstances was to sell the Farm. In January 1988, the Administrator informed the widow that it was not possible to pay for the Farm and that it was unwise to keep a Farm which was unproductive while the interest was increasing. The Administrator further told the widow that the rest of the relatives had no objection to the sale of the Farm and that he was at that point in time seeking the widow's opinion as to the means she had to redeem the Farm in order to keep it. After various correspondence, the widow by a letter dated 1st August 1988 wrote her lawyers, who turned out to be the lawyers of the first and second respondents as well, as follows:-

M/S Dindi & Co.,  
P.O. Box 60964,  
Livingstone.

Dear Sir,

Re: M. Nduunda, the Administrator of estate of P.R. Mwalongo, deceased.

I am writing this letter in connection with the said sale of the Farm Plot. No. 3178 Livingstone. I am surprised that you continued allowing my late husband's relatives to issue instructions to you over the Farm, without my

4/...

knowledge, I feel I have been betrayed.

As far as I am concerned, I have the full right over this farm. My late husband never used to go behind me the time he wanted to buy the farm. This is why he decided that the Farm should be on joint mortgage. Mr. Nduunda is keeping all the papers on the same issue.

Remember, on 10th May 1988, you sent surveyors to the farm without my knowledge. Kind people informed me what you had done. When I asked you, you said it did not mean anything, what I needed was to put the farm into full production, of which I have done so. Thereafter I invited you personally to come to the farm and see for yourself. I am surprised that you told Nduunda that the farm was still dormant.

The latest story I got was that, you got instructions from Mr. Nduunda to get the farm advertised for sale. Mr. Dindi Sir, why should you embarrass me? You have been telling me that the farm would only be sold if I, Mrs. Helen Mwalongo gave you green light to get it sold.

I am now telling you that the farm should not be advertised on the papers.

Since the relatives want the farm sold, I am now informing you that a Mr. Muchindu of Hamungwe Limited is prepared to buy the farm cash. In short, I am selling the farm to a Mr. Muchindu who is prepared to get into partnership.

Having said so, I think you can start processing the papers to get that sold.

Yours faithfully,

Helen P. Mwalongo(Wdow)

This letter was copied to the prospective purchaser and the Administrator of the estate of the deceased. On 19th September, 1988 the Law Association



of Zambia Contract and Conditions of sale was signed between the first respondent as the Administrator of the estate of Patterson Robert Mwalongo and A.M. Muchindu as the purchaser. This contract was signed in the presence of Mr. Noah Kapanda Dindi then advocate for both the Administrator and the purchaser. According to the evidence the widow consented to the sale and was present when the contract was signed although she was not herself a party.

It is common cause that the widow and her son, were not parties to the contract of sale. To complete the long story, there is unchallenged evidence that the first respondent obtained valuations for the farm and that he paid the purchase price for the farm in the sum of K200,000. There is correspondence from the Administrator congratulating the purchaser on buying the farm. The correspondence was copied to the widow as well as the lawyers.

It is common ground that part of the purchase price money was paid to the creditors. It is not in serious dispute that all the correspondence either from the Administrator to the lawyers or from the lawyers to the Administrator and to <sup>the</sup> purchaser was copied to the widow. It is common ground that shortly before the contract of sale was signed by the Administrator and the purchaser, there were discussions for the sale of the farm that took place in the office of the advocates. It is significant to observe that the purchaser of the farm, the first respondent, was introduced to the Administrator by the widow after travelling with him all the way from Livingstone to Kafue. But long after the contract of sale had been signed, the widow, wrote the purchaser on the 2nd February 1989 as follows:-

Mr. Muchindu, P.O. Box 50712, Livingstone.

Dear Sir,

Re: SALE of Farm No. 3178 - Livingstone.

I refer to the above matter.



The summary of the oral evidence was that, according to the first respondent, he knew the widow before her husband died. He testified that the widow had told him that she had financial problems and that the bankers were threatening to repossess the farm for non payment of the mortgage. According to the first respondent, the widow showed him the documents. He suggested to her to rent the farm. According to the first respondent, the widow indicated that she was only prepared to do so if it was a joint venture. There was evidence that the joint venture of growing vegetables between the first appellant and the first respondent was clinched on the basis of equal partnership. Subsequently the vegetable growing partnership collapsed and the pressure from the bankers increased and the widow was reluctant to have the farm sold. According to the first respondent, the widow only agreed to the sale of the farm on the third request. The first respondent explained that in their arrangement of the sale of the farm the issue of partnership was not discussed. The sale of the farm was to be wholly and outright. The first respondent explained that the growing of vegetable partnership was in the old arrangement. He said that he had a valuation of the property at £100,000.00, that the purchase price was reduced from £100,000. by bargaining and the £20,000 reduction was not in respect of any interest of the appellant.

The evidence of the second respondent was to the effect that he was surprised to receive the letter dated 2nd February 1963 raising the issue of joint ownership and maintaining that the issue of partnership was not a condition of sale and that if it were, it should have been included in the contract of sale. According to the second respondent, the vegetable growing partnership with the widow was dissolved in August 1963. According to him the vegetable growing partnership having failed and the threats by the creditors having persisted, the alternative arrangement was to have the farm sold to redeem the mortgage. He insisted that the sale of the farm was to redeem the mortgage. He explained that when they discussed the

terms of the contract in the office of the lawyers, the widow participated in the discussions and that she contributed to the special conditions contained in the contract of sale.

The evidence of the Administrator confirmed that the first respondent, the widow and himself had the same lawyer. He maintained that he briefed the widow at every stage and that the buyer was brought to him in Kafue by the widow. He further confirmed that the conditions of sale were discussed in the lawyer's office in the presence of himself, the widow and the buyer. He maintained that the special conditions in the contract of sale were discussed and that the widow participated. He pointed out that everything was agreed and subsequently, he signed the agreement. The widow, according to the Administrator, was quite happy. According to the Administrator, after the signing of the Contract of Sale, the widow gave him K50.00 for transport back home. The Administrator contended that it was very untrue to suggest that she was conned and cheated by the first respondent to enter into an agreement with him. He maintained that on his appointment as an Administrator, his responsibility was to ensure the interest of the family. According to him, there was no way that the farm would have been saved. He pointed out that they were compelled by circumstances and that it was not true to allege that she did not agree to the sale of the whole farm. The Administrator informed the court in cross examination that he had nothing to do with the partnership. His reason for selling the farm was as a result of pressure from creditors and that what had to happen after the farm had been sold between the purchaser and the widow was not his business. He pointed out that upon receipt of the letter dated 2nd February, 1989, he was annoyed. He said he had a valuation of the property carried out and his valuer had valued it at K290,000. He conceded that he was told by the widow of the partnership in the presence of the lawyer and that she had agreed to reduce the purchase price by K90,000 as she was to be in partnership with the purchaser. According to the Administrator, he understood that the K90,000 was to be treated as a contribution towards the partnership.

He denied excluding the partnership issue in the contract of sale conceding that it came after the farm had already been sold and debts paid. When being re-examined, this witness told the court that the widow began talking about partnership after the contract of sale had been signed and money paid.

The evidence of the widow substantially confirmed the vegetable growing partnership. She however pointed out that she was led into the vegetable growing partnership by Peter Nduunda the Administrator's son. The widow admitted, in her evidence, writing a letter authorising the lawyer to sell the farm. She also pointed out that the lawyer asked her to call at their office to discuss the issue of partnership with the purchaser. The widow also explained that she apologised to the lawyers for the strong language she used in the letter of 1st August, 1988 instructing the lawyers to sell the farm. According to the widow, she did not want to sell the farm. She conceded in cross examination to having been consulted by the Administrator on the sale of the farm. She further admitted in cross examination that she consented to the sale of the farm. She recalled a meeting in the lawyer's office to discuss the terms of the contract of sale. She admitted taking part in the discussions. She however denied that the bankers wanted to repossess the farm. She conceded in her evidence that there was no written partnership agreement. The widow called three other witnesses who included the second appellant who informed the court that he was aware of the partnership arrangement but that it was not put in writing.

After reviewing the documentary and oral evidence, the learned trial judge had this to say:

"The main contention is that Mrs. Mwalongo as a beneficiary did agree to the sale of the said property by the Administrator. She disputes this and claims though in contradiction that she only agreed to the sale of half of the estate with a view of entering into a partnership with the plaintiff."

The learned trial judge after summarising the evidence observed that the contentious issue was whether the partnership was part of the conditions of sale of the farm. The learned trial judge indicated that he was only going to consider the arrangement in writing as the binding authority unless there was proof of fraud or other evidence to the contrary. The court found that the late Patterson Robert Mwalongo was the sole registered owner of the farm in question and that the mortgage deed in particular the second mortgage excluded the widow to be part of it. The court noted that she was not party to the assignment. The court also found that the widow took part in the discussions relating to the sale of the farm. The court found that her letter which suggested that she was selling the farm to Mr. Muchindu who was accepting to enter into partnership did not help her case but weakened it. The court found that the widow lied on two issues namely joint ownership of the farm and on partnership. The court concluded that on account of the lies on those two issues it was difficult to believe her evidence. The learned trial judge disregarded her evidence as unreliable. He accepted in total the evidence of the first and second respondents. He declined to discuss the legality or the entitlement of the widow to the estate because according to him the Administrator acted properly without contravening the Local Courts Act or the Administrator General's Act. He observed that the sale transaction having been completed all that was needed was to register the property. Judgment was accordingly entered in favour of the respondents with costs.

At the outset we wish to mention that on the evidence on record, we are satisfied that there was ample evidence supporting the widow that before the sale transaction there existed a vegetable growing partnership between herself and the first respondent. We are also satisfied that on the evidence on record the partnership of the farm was not a condition in the contract of sale; but the finding that she lied on the issue of partnership was a misdirection. We accept however that when the conditions of the contract of sale were discussed all the relevant parties were present.

On behalf of the appellants, Mr. Ndhlovu filed six inter related grounds of appeal; but, we agree with the observations by Mr. Mwanamwambwa that the first ground of appeal as contained in the memorandum of appeal is different from the first ground of appeal as set out in the appellant's heads of argument. In the memorandum of appeal the first ground was that the learned trial judge erred in law and fact when he held that the appellant was not a party to the mortgage, as such, she could not have been a party to the assignment. In the heads of argument, the first ground reads that the learned trial judge misdirected himself when he held that the matter would have been dealt with differently if the appellant was married in accordance with the Common Law or under the Act. We note however that the submissions before this court covered the two grounds.

The summary of the written arguments on the combined ground one was that since the evidence showed that the deceased wanted the first appellant to be a party to the mortgage to afford mortgage repayments and since parties in the transaction always contacted the widow her decision was important in the whole transaction which the court ignored as the widow did not want to loose control of the whole farm. Counsel submitted that the court misdirected itself in holding that the widow had no right as she was not married under Common Law when the court failed to show the customary law used to deprive her of the beneficial right as a spouse. Mr. Ndhlovu further argued before us that when it comes to distribution of assets the type of marriage does not matter as the widow and children were the major beneficiaries. In this case he pointed out that the widow started paying the mortgage before the deceased died showing the appellant's interest in the farm. Counsel cited the case of Bailes V. Stacey (as Executor) and Sin<sup>Z</sup>oes (1) as establishing the principle that a widow who contributed to the purchase of the property is entitled to the proceeds. He argued that this was moreso where the property was legally sold but that where the sale is being challenged the court must take into account the interests of the widow and the children.



The summary of Mr. Mwanamwambwa's reply to the arguments and submissions on the combined first ground was that the learned trial judge found as a fact that the widow was a beneficiary being the widow of the deceased and that the second respondent also treated the widow as a beneficiary. Counsel submitted that the finding and treatment of the widow as a beneficiary did not amount to evidence that she was a co-owner of the farm nor that the farm was her sole responsibility. Counsel further submitted that the final authority was the second respondent who was duly appointed Administrator.

We have very carefully considered the arguments and the submissions by both learned counsel. In our view the issue before the learned trial court was not the type of marriage between the widow and the deceased. We agree with counsel for the respondents that the learned trial judge acknowledged the interest of the widow but that on the evidence he correctly found that she was not a party to the mortgage. The Bailes case indeed dealt with the type of marriage but the issue was whether the widow was entitled to the proceeds of the sale of the house by an executor to which house she had contributed substantial sums of money. In this case the appellant is claiming entitlement to the land on two grounds. The first, that while her husband was alive she contributed to the repayment of the mortgages, and, the second, that as the widow and principal beneficiary she is entitled to the land for herself and the children of the deceased. It may well be that under the principle in the Bailes case she is entitled to a share in the land as a person who contributed to the mortgage repayments. In fact this is probably so because there is clear evidence that the deceased wanted to include her in the mortgage deed to show that very entitlement and responsibility. However, in view of the fact that the appellant is also entitled to an interest as the principal beneficiary her interest before the sale is immaterial. The sole question concerning the land is whether the agreement with the first respondent gave her an equitable interest



The second ground of appeal was that the learned trial judge erred in law and fact when he found that the estate was administered in accordance with african customary law without establishing which customary law was used and whether or not the same was repugnant to natural justice and whether or not that customary law entitled the second respondent to deal with the property which was not subject to african customary law. The gist of the arguments and submissions in support of the second ground was that while the Local Court has power to appoint an Administrator such Administrator can only administer an estate according to african customary law and that the estate to be administered should also be a customary estate. In the instant case it was submitted that the Administrator had no power to sell the farm as it was not governed by customary law. It was further submitted that the sale was null and void. For these very powerful and perhaps persuasive arguments. counsel did not cite any authority.

In his reply Mr. Mwanamwambwa referred the court to a High Court case of Re Njobvu (2). The facts of that case were as follows:-

The applicant was appointed an Administrator of the estate of the deceased, which included leasehold land, by an order of the Lusaka Urban Local Court. He applied to the Registrar of Lands and Deeds to register the order of the Local Court, on the ground that he had been appointed personal representative. The Registrar refused on the ground that such appointment was only as an agent of the Local Court."

On an application for an order of mandamus requiring the Registrar to register the appointment, Doyle C.J. (as he then was) had this to say:-

"I am satisfied that the order of appointment of an Administrator by the Local Court constitutes him the personal representative of the deceased estate. In the ordinary way at common law the chattels real of a deceased person devolve on his personal

representative. In this case the lease would devolve by reason of the fact that the order of the Local Court was made. It follows that unless other considerations apply, the effect of the order transferred an interest in land as in similar fashion would an order of the High Court appointing an Administrator".

Mr. Mwanamwambwa submitted that this ruling is good law and urged us to affirm it. We affirm the case of Njobvu without any hesitation and hold that the Administrator in the instant appeal had power to sell the farm in issue and that the sale was not therefore null and void. Both grounds one and two are therefore unsuccessful.

The third ground of appeal was that the learned trial judge erred in law and fact when he decided the case without taking into consideration the interests of the children who were at the time of the trial not present. The argument on this ground was that the evidence at the trial showed that the deceased and the widow had children and that children had an interest in the property. Counsel submitted that in this case the interests of the children were not taken into account. Our short answer to ground three is that, the Administrator who constituted the personal representative of the deceased estate also represented the interests of the widow and the children. This is supported by the evidence of the numerous correspondence some of which was addressed to the grand children by the Administrator himself. This ground overlooked the role of an Administrator which is to represent the interests of the estate, the widow and the children. This ground also fails.

The fourth ground was that the learned trial judge erred in law and fact in finding for the respondent when it was clear that the appellant's instructions to her lawyer were not followed regarding the sale. The brief submission was that the letter of instructions had a condition of partnership and therefore this made the sale impossible as the

widow wanted the farm to be owned in partnership with the respondent. Counsel pointed out that the widow's lawyer ignored her instructions completely. Counsel submitted that the trial judge ought to have held that the contract of sale was null and void.

The reaction of counsel for the respondents to the submissions in support of ground four was that the decision to sell the farm was made by the Administrator for the reasons of the threats of repossession of the farm. Counsel pointed out in his arguments that the widow as beneficiary was consulted. She consented to the sale of the farm and even chose the first respondent as the buyer, and the Administrator ratified the choice. Subsequently, a meeting in the lawyer's chambers attended by the three parties to discuss the terms of the contract of sale was held. Counsel for the respondents contends that ground four admits the sale and that it is a fallacy to argue that the widow's position on the sale transaction was completely ignored by her then lawyers. On partnership counsel argued that the issue was one of credibility.

We have anxiously considered the submissions on ground four by both counsel. The crucial and relevant portion of the letter of instructions which we have already set out in full somewhere in this judgment reads:-

"Since the relatives want the farm sold, I am now informing you that a Mr. A.M. Muchindu of Hamungwe Limited is prepared to buy the farm cash. In short, I am selling the farm to a Mr. Muchindu who is prepared to get into partnership."

We have already observed that the existence of a vegetable growing partnership before the contract of sale of the farm was signed was common cause and therefore the learned trial judge's finding that the widow was a liar on the point was a misdirection. However the difficult question is whether the issue of partnership was discussed and agreed as part of the contract of sale. The Administrator and the purchaser testified that the vegetable growing partnership was dissolved in August 1988 and