

**ROBSON BANDA (Suing as administrator of the estate of the late Rosemary Phiri) v VARISTO MULENGA (Sued as administrator of the estate of the late Steven Kabamba)**

Supreme Court  
Sakala, CJ., Mambilima and Silomba, JJS  
17th August and 11th November, 2003  
(SCZ Judgment No. 16 of 2003.)

**Flynote**

*Family Law - Property - ownership-Proof thereof.  
Evidence - Factual findings by trial court - Grounds for reversal.*

**Headnote**

This is an appeal against the Judgment of the High Court dismissing the appellant's appeal against the decision of the Subordinate court of the First Class holden at Lusaka in which decision the Subordinate Court held that the appellant and the respondent had equal interest in the house number P 300 Chibolya, Lusaka.

**Held:**

1. This is a proper case in which to interfere with the findings of the trial court on the ground that in assessing and evaluating the evidence, the trial magistrate, and subsequently the appellate Judge, failed to take into account the appellants evidence.
2. The property in issue was not a matrimonial property, because there is no evidence of equal contribution toward the purchase of the property.

**Cases referred to:**

1. *Nkhata and Others v The Attorney -General* (1966) ZR 124
2. *Pettitt v Pettitt* (1969) 2 All ER 385.

**Legislation referred to:**

1. Interstate Succession Act Chapter 59 of the Laws of Zambia.
2. Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia Section 4.  
*P.S. Mumbi of the National Legal Aid Clinic for women* for the appellant  
The respondent appeared in person.

## **Judgment**

**SAKALA, CJ**, delivered the judgment of the Court.

This is an appeal against the judgment of the High Court dismissing the appellant's appeal against the decision of the Subordinate Court of the First Class holden at Lusaka, in which decision, the Subordinate had held that the appellant and the respondent had equal interest in house No. P 300 Chibolya, Lusaka.

The history of this appeal commenced from the Local Court, at Lusaka. In that court, the appellant's claim for Plot 300 was dismissed. The appellant appealed to the Subordinate Court at Lusaka. The appeal was dismissed. She appealed to the High Court against the decision of the Subordinate Court. The appeal was again dismissed. She then appealed to this Court against the decision of the High Court. Regrettably, the appellant has since died. The appeal is now being prosecuted by the Administrator of her estate.

The facts of the case are that the deceased appellant, suing through the Administrator of her estate, was married to the deceased, who is being sued through his Administrator. The couple married under customary law in 1991. The couple did not have any children from their marriage together. However, each one of them had children from their respective previous marriages. These children did not stay with them. The deceased husband died in 1999.

At the trial in the Subordinate Court, the matter was heard de novo. The deceased wife testified before that Court that she bought Plot No. 300, New Chibolya, at K260, 000 from a Mr Thomas James Mumba in 1994. She built a house on this plot. She produced, at the trial, documents given to her at the Civic Center. She also produced documents showing change of ownership. The deceased wife also testified that her late husband found her with her own property. She worked for the Ministry of Education. She testified that her husband did not assist her in building the house at Plot 300, New Chibolya.

The Administrator of the estate of the deceased husband also gave evidence in the Subordinate Court. He explained that the late Kabamba was his immediate elder brother. According to him, his late brother sent him money in 1993, to travel to Lusaka to come and construct a house on Plot 300. By then, the deceased appellant was his brother's woman friend. His late brother also showed him money he had at the Zambia National Commercial Bank and at the Post Office. There was K5 million at the Post Office and K12 million at the Zambia National Commercial Bank. His late brother also showed him Plot 300, which he said he bought from a Mr. Thomas James Mumba. He produced, before the Subordinate Court, the proposed residential plan of a house that had to be built on Plot No. 300, Chibolya extension, Lusaka, as evidence that Plot 300 was bought by his late brother. He further testified that he moulded 2,600 blocks. When he finished moulding the blocks, he looked for a bricklayer by the name of Mr. Mtonga. He built the house with Mr. Mtonga. He built four rooms. Lastly, he put up a toilet. He bought timber from ZAFFICO. He fixed the roof with a Mr. Mwape. After fixing the roof, he received a phone call that his wife was sick and had

been flown to Ndola by the Zambia Flying Doctors Services. His late brother allowed him to go, but asked him to come back the following year to continue with the construction of the house.

The respondent maintained that he was the one who constructed the house at Plot 300. According to him, he knows nothing about the change of ownership at the council. In cross-examination, the respondent told the Subordinate court that the plan was evidence that they wanted to build on the Plot. He told the court that he did not finish building the house, but his brother finished it because he had money at the bank.

The trial magistrate considered this evidence. She found that on the evidence on record, both the deceased wife and deceased husband contributed financially and materially towards the construction of the house in issue. She pointed out that she had no reason to disbelieve the respondent that his late brother had money at the bank before the construction of the house started. According to her, since both parties contributed towards the construction of the house, they both intended that the house be their matrimonial home. According to the trial Magistrate, it was immaterial whether the document pertaining to the house was in the name of the deceased wife. According to her, the only reason why the Local Court decided that the house be shared, is because five of the children belonging to the previous wives of the deceased husband, had an interest in the house as well. The Court noted that it was only fair that part of the house goes to the children and part of it goes to the widow. The Court pointed out that it was immaterial that the children never stayed with the widow.

On appeal to the High Court, the High Court considered the provisions of the Intestate Succession Act, Cap 59 of the laws of Zambia and agreed with the finding of the Subordinate Court that the deceased husband and now the deceased wife made equal contributions towards the construction of the house. The Court observed that the deceased wife's sole desire was to toast out those, including the five children, who were likely to benefit from the demise of the deceased husband. The appeal failed before the High Court. The Court ordered that the parties would either rent the house and share the proceeds equally or sell it and share the proceeds equally. The Administrator of the estate of the deceased wife appealed to this Court against the decision of the High Court. Counsel for the appellant filed a memorandum of appeal containing two grounds, namely; that the High Court misdirected itself in law and fact in finding that Plot P300 Chibolya Compound forms part of the estate of the late Steven Kabamba; and that the Court misdirected itself in finding that the appellant wife, now deceased and her deceased husband, made equal contributions towards the construction of the house at Plot No. P300, Chibolya Compound.

Counsel for the appellant filed written heads of arguments based on the two grounds of appeal. Both in the written heads of arguments and in the oral arguments in Court, the two grounds were argued together. In the arguments, Counsel pointed out that the learned Judge found no reason to disturb the finding of the Subordinate Court that the deceased appellant and her late husband made equal contributions in the acquisition of Plot No. 300; and that as such, the parties either rented the house or sold it and share the proceeds equally.

Counsel argued that the appellate Judge having conceded that the property was not matrimonial property; the finding of equal contributions in the acquisition of the property was a contradiction and not supported by any evidence that was before the Subordinate Court. Mrs. Mumbi pointed out that the late appellant gave sworn testimony in the Subordinate Court and tendered documentary evidence all in support of her claim that Plot

300 was acquired solely by herself. Counsel pointed out that the respondent, who also gave sworn testimony before the Subordinate Court, only produced a house plan of a three bed roomed house as evidence that he built the house on behalf of his late brother on Plot No. 300. According to Counsel, a visit to Plot 300, before judgment was passed, revealed no three bed roomed house. This, she submitted, was a contradiction to the respondent's evidence that he built a three bed roomed house at the Plot 300.

Mrs. Mumbi further submitted that it would appear that the respondent did not even know what was on the ground at the premises and yet he claimed to have built the house at the Plot. She contended that there was no basis in fact and in law for the learned Judge to have ignored the evidence of the respondent that he had built a three bed roomed house at the Plot when the said house was non-existent. Mrs. Mumbi urged the Court to interfere with the findings of the trial Judge on the authority of the case of *Nkhata and Others v The Attorney - General (1)*, on the ground that the lower Court failed to take into account the fact that the plan tendered by the respondent was not corresponding with what was actually on the ground. Counsel submitted that the documents tendered by the late appellant were issued from the Lusaka City Council Registry, which in terms of Section 4 of the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia, were prima facie evidence of ownership as opposed to the claim by the respondent, which is not supported by any documentary evidence. She submitted that on the appellant's evidence, it was wrong to share the property in issue upon the demise of the late husband. Counsel urged the Court to find that if the late husband had made any contributions at all, the same be considered to have been a gift to the late wife. In support of this submission, she referred to the case of *Pettitt v Pettitt (2)*, in which the Court held, among others, that a husband was not entitled to an interest in his wife's property merely because he had done in his leisure time jobs which husbands normally did. Counsel further submitted that the property should not have been ordered to be shared at all because the owner was at that time still alive.

She agreed with the finding of the learned Judge that the Intestate Succession Act did not apply, as that Act dealt only with a deceased's property and further more in the instant case, the property was not and is not the deceased husband's property, to be shared according to the Intestate Succession Act.

According to Counsel, the issue for determination was whether Plot 300 Chibolya, be subject to distribution upon the demise of the late husband, and not so much whether the house was a matrimonial property. Counsel pointed out that the evidence on record was that neither party to the marriage lived on the premises though each party had children from previous marriages. None of them lived with them. The couple had no children together.

Mrs. Mumbi finally pointed out that the implications of the lower court's findings would be that had late Rosemary Phiri, lived, she would have been entitled to the said property until she remarried. But now that she is deceased, her interest in the said property would have ended and her children, who are not the children of her late husband, would not benefit, while the children of her husband, who are not her children would benefit. Counsel concluded that the learned Judge erred in law and fact by ordering that both parties share equally in the property which finding implies that the property was jointly owned when this was not the case.

In his short submissions, the respondent repeated his evidence that Plot No. 300, belonged to his late brother. He conceded that he had no documentary evidence to show that the Plot

belonged to his late brother. At this juncture, we wish to observe that the decisions made by all the three Courts below reflect the traditional belief that married women cannot own property on their own.

We have anxiously examined the judgments of the Subordinate Court and of the High Court. We have also considered the evidence on record as well as the submissions on behalf of the deceased appellant and on behalf of the deceased respondent. On the evidence on record, both the learned trial Magistrate and the appellate High Court Judge were correct that the property in issue was not a matrimonial property. But the learned trial Magistrate found that both the deceased wife and the deceased husband made equal contributions to the construction of this property. The appellate High Court Judge totally agreed with this finding. We have combed the evidence on record. We find no evidence supporting this finding. The material and relevant evidence in this case was adduced by the deceased appellant. Her oral and documentary evidence conclusively established that she bought the Plot from a Mr Mumba. There were receipts produced. She produced documentary evidence showing change of ownership into her name. There was no evidence adduced by the respondent which challenged the appellant's case. The drawing showing the house to be constructed did not help the case for the respondent. We agree with Counsel for the appellant that in producing the drawing, the respondent did not even know what was on the ground at the Plot.

On the authority of Nkhata and others, we have no hesitation in holding that this is a proper case in which to interfere with the findings of the trial court on the ground that in assessing and evaluating the evidence, the trial magistrate, subsequently the appellate judge, failed to take into account the appellant's documentary evidence. There is above all, no evidence of equal contribution towards the purchase of Plot 300. This appeal is, therefore, allowed. The judgments of the lower courts are set aside. Judgment is entered in favour of the deceased appellant.

This case has gone through the whole hierarchy of the Courts of the Judicature. For this reason, we do not therefore propose to order costs in this court. No order as to costs in this court is made.

*Appeal allowed*