SCZ. JUDGMENT NO. 23/2013

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IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 123/2007
HOLDEN AT NDOLA SCZ/8/319/2005
(Civil Jurisdiction)

BETWEEN:
ALICE PHIRI APPLICANT

AND

MARGRET MULENGA

RESPONDENT

Coram: Chibesakunda, Ag. CJ, Mwanamwambwa and Muyovwe, JJS,

On 5th June, 2012 and 26th December, 2013

For the Appellant: Mr. N. M. Chomba, Ag. Director- Legal Aid Board
For the Respondent: No Appearance

J U D G M E N T

Chibesakunda, Acting CJ., delivered the Judgment of the Court.

Cases referred to:

1. ***Annie Bailes v. Charles Antony Stacey and Anierica Simoes (1986) ZR 83;***
2. ***Dorcus Chilufya v. Mable K. Zimba, Cause No. 1999/HP/1208 (Unreported);***
3. ***Pettitt v. Pettitt (1969) 2 All ER 385; and***
4. ***Falconer v. Falconer (1970) 3 All ER 449.***

Legislation referred to:

1. ***The Intestate Succession Act, Chapter 59 of the Laws of Zambia.***

This is an appeal against a judgment of the High Court delivered on 26th October, 2005. This matter started in the Local

Court sometime in 1998, when the Respondent sued the Appellant seeking an order that she vacates a house, which was left by the Respondent's late husband (hereinafter referred to as "the deceased").

The evidence, which was not in dispute both before the Local Court as well as the Subordinate Court, was that the Respondent married the deceased in 1980. The deceased already had six children of his own before he married the Respondent. The Appellant was one of these six children. The Respondent also went into this marriage, with the deceased, with four children of her own. At the time he married the Respondent, the deceased was in some form of employment. However, during the subsistence of the marriage, he lost his employment. Consequently, he failed to raise enough money to pay for a Council house, which he had been offered by the Council. He only

managed to pay K200, 000.00, towards the said purchase, leaving a balance of K271, 000.00. He asked the Appellant to settle the said outstanding balance but she equally did not have that amount. Consequently, the Respondent, who was working at the time, paid off the said balance.

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After the deceased's death in 1997, the Respondent went to her home village. When she returned from the village, she found that the Appellant had rented out the house in question. The Respondent requested the Appellant to evict the tenant. The Appellant refused to evict the tenant arguing that the Respondent had no right to live in that house. Consequently, a dispute arose regarding ownership of the house. This prompted the Respondent to institute legal action, in the Local Court, against the Appellant. By that action, the Respondent prayed for an order to compel the Appellant to vacate the house.

The Local Court decided the matter in favour of the Respondent. It held that the Respondent was entitled to stay in the house until her death or remarriage. It also ordered that title to the house should be changed into the Respondent's name.

However, on review, the Provincial Local Courts Officer overturned the aforesaid judgment of the Local Court. The Provincial Local Court Officer decided that the house should be jointly owned by the Respondent, on the one hand, and the

Appellant and her five siblings, on the other hand. That the Appellant should pay half of the sum of K471, 000.00, to the Respondent, as a refund of the money she had contributed towards the purchase of the house.

The Appellant appealed against the decision of the Provincial Local Court Officer, to the Subordinate Court. The Subordinate Court heard the matter *de novo*. A study of the record, however, shows that both parties substantially maintained their respective pieces of evidence and arguments as adduced before the Local Court.

The trial Magistrate decided that the Appellant and her siblings should be allowed to continue staying in the house. That the Appellant should, however, refund to the Respondent K271, 000.00, which she contributed towards the purchase of the house.

The Respondent was accordingly ordered to surrender the title deeds to the Appellant.

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The Magistrate Court’s decision prompted the Respondent to appeal to the High Court. After considering the evidence adduced both before the Local Court and the Subordinate Court, as well as submissions from both parties, the Court below held that the Respondent’s contribution towards the purchase of the house could not be ignored. It decided that the Respondent had an interest in the house, of at least fifty percent. The High Court, accordingly, pronounced that the house should be valued and the Appellant and her siblings should pay half of that value to the Respondent and then be entitled to keep the house. That in default, the house should be sold and the parties should share the proceeds as follows: fifty percent should go to the Respondent and the remaining fifty percent should be shared equally among the deceased’s children.

The Appellant has appealed, to this Court, against the said High Court Judgment. She has raised the following grounds:

1. **That the learned trial Judge erred in Law when he held that section 5 of the Intestate Succession Act Cap 59 of**

the Laws of Zambia applied to this matter to the effect that the contribution of the widow is a factor that may be taken into account thereby awarding fifty percent of the estate to the respondent.

2. **That the learned trial Judge erred in Law and fact when he ordered that the Respondent be paid half the price of the total value of the house.**

3. **That the learned trial Judge erred in Law and fact when he ordered that the house be sold in default of payment of half the total value of the house.**

In support of the above grounds of appeal, Mr. Chomba, Counsel for the Appellant, relied entirely on his filed written heads of argument. On ground one, Counsel contended that the learned trial Judge misdirected himself when he relied on section 5 of the Intestate Succession Act, Cap 59 of the Laws of Zambia. Counsel submitted that the contribution envisaged by section 5(1)(a) of

the Intestate Succession Act only applies to instances where there is more than one surviving spouse. That it is only in such cases that the contribution of each spouse is taken into consideration to determine what each one of them is entitled to.

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Coming to ground two, Counsel contended that the learned trial Judge misdirected himself when he ordered that the Respondent be paid half of the value of the house. Counsel submitted that according to section 5 of the Intestate Succession Act, a surviving spouse is only entitled to twenty percent of the intestate’s estate.

With regard to ground three, Counsel argued that the learned trial Judge fell into err when he ordered that the house should be sold if the Appellant failed to pay half of the total value of the said house to the Respondent. Counsel relied on section 9 of the Intestate Succession Act to advance an argument that a surviving spouse is only entitled to a life interest in a matrimonial house. That the said interest terminates upon the death or remarriage of the spouse. According to Counsel, selling the

disputed house and giving the Respondent half of the amount realized from the sale, would amount to unjust enrichment on the part of the Respondent in an event that she decides to remarry.

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When the matter came up for hearing before us, on 5th June, 2012, neither the Respondent nor her Counsel appeared. Consequently, we directed that the Respondent should file her written heads of argument within 14 days. That in default, we would proceed to deliver our judgment in the absence of her arguments. The Respondent complied with our directive. Through her Advocates, National Legal Aid Clinic for Women, she filed written heads of argument on 18th June, 2012.

In their written heads of argument, Counsel for the Respondent contended that they would respond to the three grounds of appeal as one because they are interlinked. Counsel argued that the learned trial Judge was on firm ground when he ordered that the deceased's children should pay the Respondent half of the value of the house and, in default, that the said house

should be sold and the proceeds thereof shared equally between the Respondent and the deceased's children. According to Counsel, the facts of this case are such that the Respondent was not an ordinary beneficiary under the Intestate Succession Act. Counsel has

spiritedly argued that since the Respondent made a significant contribution towards the purchase of the house in question, she is entitled to get half of the value of the house.

With regard to Counsel for the Appellant's arguments relating to section 5(1)(a) of the Intestate Succession Act, Counsel for the Respondent submitted that the learned trial Judge referred to that section simply to stress the fact that the contribution that the Respondent made, towards the purchase of the house, could be used to determine the extent of her benefit.

Counsel went on to submit that it is trite law that a constructive trust is established where there is evidence to prove that a property was acquired to provide a home for a couple living together in a stable relationship and that the claimant made a

substantial contribution towards the acquisition of the property. Counsel contended that there was a constructive trust, in the instant case, which entitled the Respondent to get a share of the house in issue. Counsel referred us to the case of ***Annie Bailes v.***

Charles Antony Stacey and Anierica Simoes[1], as authority for the foregoing arguments.

Counsel further contended that section 9(1)(a) of the Intestate Succession Act entitles the Respondent to hold the house as a tenant in common with the deceased's children. That, consequently, the Respondent has a share in the property which cannot be superseded by the deceased's children. To buttress this argument, Counsel referred us to the decision of the High Court in ***Dorcus Chilufya v. Mable K. Zimba***[2]***.***

We have considered the evidence on record, the judgment appealed against and the arguments by both Counsel for the Appellant and the Respondent. We will deal with the Appellant's three grounds of appeal together because they are related.

With regard to the arguments grounded on the Intestate Succession Act, we hold the view that the said Act is not applicable to the facts of the instant case. It is our firm opinion that the claim by the Respondent that she is entitled to a portion of the house in

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dispute is not based on intestacy law. A review of the Respondent's claim, starting from the Local Court up to this Court, shows that she is not claiming a share of the house on the mere basis of her being the surviving spouse of her deceased husband. Instead, she is claiming her share of the house on the ground that while they were living together as husband and wife, with the deceased, she contributed to the purchase of the house in dispute.

So the question, as we see it, is not whether or not the Respondent is entitled to a share of the house under the Intestate Succession Act but whether or not, on the basis of her contribution towards the purchase of the house, she acquired a beneficiary interest in the said house.

It is not in dispute that the deceased only paid K200, 000.00 towards the purchase of the house. The balance of K271, 000.00 was paid by the Respondent. There is nothing on the record to make us think that the Respondent and the deceased intended the said K271, 000.00 to be a loan to the deceased. In our view, the deceased asked the Respondent to pay the said amount because

she was his wife who would benefit from the two owning a matrimonial home of their own.

From the foregoing, it is our considered view that the Respondent is entitled to a share of the house. The percentage of that share should be determined by taking into account the respective contributions the deceased and the Respondent made towards the purchase of the house. Since the Respondent contributed K271, 000.00 and the deceased contributed K200, 000.00, in our opinion, the decision of the learned trial Judge, to award the Respondent a fifty percent share in the house, was very equitable. Although clearly the deceased contributed less

than the Respondent did, we do not think that we can apportion a lesser share to his estate. This is so because the fact that the house was offered to him by the Council is a factor, which we think we should equally take into account. So, in our view, a fifty percent share each, for the Respondent and the deceased's children is, in the circumstances of this case, the most equitable apportionment of the house.

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Our holding that the Respondent should get a share of the house is well founded on a number of authorities. According to the said authorities, where a spouse contributes towards the purchase of a matrimonial house, a constructive trust is created, in favour of that spouse, entitling him or her to a share in the house. This Court had occasion to pronounce itself on this principle when we decided the ***Annie Bailes Case***[(1)]. Although that case involved an unmarried couple, it is our view that the principles we established therein apply with equal force to married couples.

In brief, the facts of the ***Annie Bailes Case***[1] were that in 1956 Annie Bailes (the Plaintiff) met Domingos Assuncao (the deceased). At the time, the Plaintiff had six children from a previous marriage and was living in her own house. Unknown to her, the deceased had left a wife and children in Portugal. He was living alone in an apparently temporary structure on a property known as S/D D6 of S/D Y4 of Farm 748 "Njo" in Ndola, the subject of the suit. The deceased borrowed £500 from a Building Society to enable him to complete the construction of the said property. When the

house was completed, the deceased invited the Plaintiff to cohabit with him. She moved in with her children and the two parties henceforth lived together as an unmarried couple but otherwise, to all intents and purposes, as man and wife. They so lived together until the deceased died in 1978. The deceased left a Will in which he bequeathed everything he had to his lawful wife.

Sometime after and during the time of cohabitation, the Plaintiff sold her own house. She gave the deceased £500 to pay off the mortgage but this amount did not discharge that debt. For five years in alternate months, she helped the deceased service the mortgage by paying a total sum of about £450. Eventually she gave the deceased a sum of £200 to finally discharge the mortgage.

When the deceased died, the Plaintiff, realising that she had been excluded from having a share in, *inter alia*, the house in question, commenced legal action in the High Court. The learned trial Judge dismissed the Plaintiff's claim. On appeal to this Court, we held that the Plaintiff's contributions towards the discharge of

the mortgage had established a constructive trust in her favour, in the house. We went on to say, at page 87 of that judgment, that-

> **On the authorities, it is clear that the principles to be applied in ascertaining the existence or otherwise of any alleged resulting or constructive trust in a case of**

this nature are the same which would apply to any relationship be it man and wife, man and mistress or even friends or brothers….The nature of a constructive trust is such that every ascertainable circumstance and every relevant fact should be taken into account if, by imputation of equity, a transaction which the parties may have entered into without thought or realisation of legal consequences becomes the subject of a claim against the party in whom the legal title to property is vested by the other who asserts that he has acquired a beneficial interest. The constructive trust is a creature of equity and may be imposed in order to satisfy the demands of justice and good conscience….Thus, quite apart from cases where there was obvious agreement, there must be evidence of an intention that the property acquired is so acquired for the purpose of providing a home for the unmarried couple who intend to live together in a stable relationship which has all the commitment of a marriage. There must also be

evidence of a joint effort in the acquisition, that is to say, evidence that the claimant has made a substantial contribution whether in cash or, as in some of the cases reviewed, in personal exertion and toil."

A plethora of English cases support the aforesaid equitable principle that where a spouse contributes to the purchase of a matrimonial house, that spouse acquires a beneficial interest in the house. In ***Pettitt v. Pettitt*** [3], Lord Reid said, at page 388, that-

> **"I can now come to the main question of how the law does or should deal with cases where the title to property is in one of the spouses and contributions towards its purchase price have been made or subsequent improvements have been provided by the other. As regards contributions, the traditional view is that, in the absence of evidence to the contrary effect, a contributor to the purchase price will acquire a beneficial interest in the property…."**

Lord Denning, MR, made a similar pronouncement in ***Falconer v. Falconer*** [4], at page 452, when he said the following:

> **"It [the House of Lords] stated the principles on which a matrimonial home, which stands in the name of husband or wife alone, is nevertheless held to belong to them both**

jointly (in equal or unequal shares). It is done, not so much by virtue of an agreement, express or implied, but rather by virtue of a trust which is imposed by law. The law imputes to husband and wife an intention to create a trust, the one for the other. It does so by way of any inference from their conduct and the surrounding circumstances, even though the parties themselves made no agreement on it. This inference of a trust, the one for the other, is readily drawn when each has made a financial contribution to the purchase price or to the mortgage installments."

On the basis of the foregoing authorities, it is our view that the Respondent, in the instant case, has a beneficial interest in the house in dispute.

We, therefore, hold that the house in question should be shared equally between the Respondent, on the one hand, and the Appellant and her siblings, on the other. If the Appellant and her siblings would like to keep the house, then its value should be assessed. The Appellant and her siblings should pay to the Respondent half of that value. If, however, the Appellant and her siblings cannot afford to pay the Respondent half of the value of the

house, then the house should be sold and the Respondent should get fifty percent of the amount realized from the sale. The other fifty percent should be shared equally by the Appellant and her siblings.

Counsel for the Appellant has argued that giving a fifty percent share in the house, to the Respondent, would lead to unjust enrichment in an event that she remarries. We hold the view that this argument is untenable. This is so because Counsel's submission is premised on section 9 of the Intestate Succession Act which, as we have already adjudged in this judgment, is not applicable to this case. The Respondent's entitlement, in the instant case, is not to a life interest envisaged in section 9 of the said Act. Instead, as we have already pronounced elsewhere in this Judgment, her entitlement to a share in the disputed house, emanates from the fact that she has a beneficial interest in the house. The said beneficial interest was created as a result of her contribution towards the purchase of the house.

For the foregoing reasons, we do not see merit in this appeal. We dismiss the appeal. In view of the subject matter of this case, we make no order as to costs.

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L. P. Chibesakunda
ACTING CHIEF JUSTICE

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M. S. Mwanamwambwa
SUPREME COURT JUDGE

E. N. C. Muyovwe
SUPREME COURT JUDGE