

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

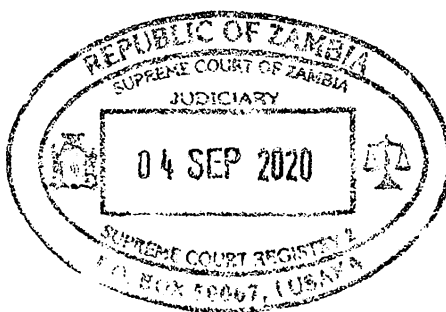
Appeal No. 11/2019
SCZ/8/70/2016

BETWEEN:

BRENDA MUZYAMBA

AND

MARTHA MUZYAMBA SINABBOMBA & 21 OTHERS RESPONDENTS



APPELLANT

Coram: Wood, Kaoma and Mutuna, JJS

On 11th August, 2020 and 4th September, 2020

For the Appellant: Mr. O. Sitimela of Frazer and Associates

For the 18th, 19th and 20th Respondents: Mr. E.M. Mukuka of
E.M. Mukuka and Company

J U D G M E N T

Kaoma, JS, delivered the Judgment of the Court.

Cases referred to:

1. GL Baker Limited v Medway Building and Supplies Limited (1958)
2 All ER 532
2. Stanbic Bank Zambia Limited v Bentley Kumalo & 29 others -
Appeal No. 182 of 2014
3. Seong San Company Limited v Attorney General, Drug
Enforcement Commission (2010) 1 Z.R. 57
4. Mirriam Mbolela v Adam Bota – SCZ Judgment No. 26 of 2017
5. Base Property Development Limited v Neggie Nachilima Chileshe
(As Administratrix of the Estate of the Late Michael Dereck
Chileshe) and others – Appeal No. 211 of 2015
6. Investrust Bank Plc v Hearnies Mining and Trading Limited &
others – Appeal No. 137 of 2015

Legislation and Works referred to:

1. Limitation Act, 1939, sections 19(1), 20 and 31
2. Intestate Succession Act, Cap 59, sections 14, 19, 24 and 35
3. Trustees Act, 1925

4. Halsbury's Laws of England, Volume 27, paragraph 317 and Volume 68, 5th Edition, Lexis Nexis, 2016, paragraphs 1138 and 1139.

1. INTRODUCTION

- 1.1 This is an appeal from a decision of Sharpe-Phiri, J dated 6th November, 2015, whereby she dismissed the appellant's action for being statute barred on ground that it exceeded the twelve-year limitation period prescribed by **section 20** of the **Limitation Act, 1939**, following a preliminary issue raised by the present 18th, 19th and 20th respondents.
- 1.2 The question, which we have to determine, in this appeal, is whether the respondents could rely on **section 20** of the **Limitation Act, 1939** to defeat the appellant's action in view of the provisions of section 19(1) of the said Act.

2. BACKGROUND FACTS

- 2.1 The facts as revealed by the pleadings are long and alarming but for our purposes, we shall give only a short synopsis. The appellant, as plaintiff, brought the action, in which this appeal arises, against the respondents, as defendants, by a writ of summons issued on 20th June, 2013 that she last amended on 6th May, 2015.

- 2.2** Her claim was for an order for possession of farms Nos. 3974 and 3974A, Kabwe and an injunction to restrain the respondents whether by themselves, servants or agents from carrying out farming activities, erecting structures, cutting down trees or interfering with her quiet enjoyment of the farms and/or disposing of any part thereof pending trial.
- 2.3** She also sought a declaration that the subdivision carried out by John Muzyamba was illegal and must be declared null and void; loss of animals, farm equipment; and profits from the animal income; special and general damages; loss of mesne profits; costs; and any other relief the court may deem fit.
- 2.4** The conflict in this case relates to assets that formed part of the estate of one Jacob Muzyamba who died intestate on 11th August, 1989, leaving behind a wife and seven children, including Fleefort Muzyamba and the appellant. He also left behind land in Kabwe District known as Farm No. 3974, in extent 987.1754 hectares and animals and farm equipment. The appellant was one of the beneficiaries of the estate.
- 2.5** The statement of claim disclosed that the Ministry of Lands and Natural Resources allocated the subject farm to Jacob

Muzyamba in 1986. At the time, the latter lived with John Muzyamba his young brother and in 1987 Martha Muzyamba Sinabbomba (alias Malita Sinabbomba), the 1st respondent, who was their sister migrated from Batoka in Southern Province to live with them at the farm. The two lived on the farm with Jacob Muzyamba as his dependants.

2.6 Following the death of Jacob Muzyamba, on 10th October, 1989, John Muzyamba was appointed by the Local Court as administrator of his estate. The appellant alleged in paragraph 6 of the statement of claim that, without the consent of the beneficiaries, John Muzyamba, as administrator of the deceased's estate fraudulently changed ownership of the subject farm into his name. She gave particulars of the fraud in sub-paragraphs (a) and (b).

2.7 The appellant also alleged that the biological children were the rightful heirs to the deceased's estate, which comprised land, equipment and animals while John Muzyamba and the 1st respondent as dependants, had minority interest under the Intestate Succession Act.

2.8 The appellant further alleged illegalities in the application for the subdivision and sale of the subdivision to Steven

Mutinta by the administrator; in the sale of portions of the farm to other people by the administrator, Steven Mutinta, the 1st respondent and the 20th respondent; and in the subletting of parts of the farm by the 1st respondent.

2.9 The appellant also alleged that the administrator and the 1st respondent sold all the farming equipment and cattle which formed part of the estate of the deceased and failed to account for these assets to the beneficiaries.

2.10 The respondents in their defences denied knowledge of any fraud committed by the administrator. The respondents represented by Kabesha & Company averred that the appellant was part of a family meeting of 13th February, 2011, which apportioned land to family members, including the 1st respondent.

2.11 On her part, the 1st respondent asserted that she could not account for what the administrator sold; that she only sold cattle which were paid for her and her sister's dowry; and that the administrator sold some land to pay for a loan obtained by the deceased.

2.12 The first group of respondents also averred that they were legally occupying portions of the farms as some were family

members who were entitled to occupy the land, others legally bought the land while others were legally renting.

2.13 The 18th, 19th and 20th respondents asserted in paragraph 6 of their defence that the particulars of fraud referred to in paragraph 6 of the statement of claim even if true could not be attributed to Steven Mutinta who was an innocent purchaser for value. That he bought a portion of the farm after John Muzyamba showed him a title deed in his name, which the Lands and Deeds Registry confirmed.

2.14 The 20th respondent also denied any illegalities in the sale of parts of the farm to other persons or participation in the plunder of the subject farm or being in illegal occupation of the land. She asserted that her father's estate was legally in occupation of the portion of the land sold to him.

2.15 She also counter-claimed for damages for false imprisonment arising from detention by the police following a report made by the appellant and for an order that the appellant subdivides the farm and marks off the respondents' portions. The appellant denied the counter-claim.

2.16 After the close of pleadings, the matter was set down for trial but before trial could commence, on 21st July, 2015 counsel for the 18th, 19th and 20th respondents filed a notice of intention to raise preliminary issues. The question that has brought about this appeal was whether it was lawful to commence an action when the cause of action relating thereto arose over 12 years earlier.

2.17 The argument advanced by counsel for the three respondents was that the pleadings did not disclose any unlawful acts committed by the purchaser who was an innocent purchaser for value without notice of any mischief especially that the Lands Registry did not reflect any covenants or changes on the records. Hence, no fraud could be attributed to the purchaser and his survivors and they were entitled to the benefit of the law.

2.18 It was also the respondents' argument that the cause of action arose on 11th July, 1992 (when John Muzyamba sold part of the farm to Steven Mutinta) while the application to subdivide was made on 16th July, 1992. Therefore, the period exceeded the twelve-year limitation period provided in **section 20** of the **Limitation Act, 1939**.

2.19 The appellant agreed that under section 20, an action must be brought to court within twelve years, but argued that the issue to determine was when the twelve-year period started to run. It was said that the period ought to have started running from 2011, when the appellant obtained the second order of appointment as administratrix and that at the time her father died, she was a minor, aged 14 years.

2.20 The appellant also argued that the administrator did not own the land and the sale was an abuse of the provisions of **sections 14 and 35 of the Intestate Succession Act, Cap 59 of the Laws of Zambia**. Further, in terms of **section 19(2)** of the said Act, an administrator could only sell property with the authority of the court, which authority the former administrator did not have. That he sold the land fraudulently to the detriment of the beneficiaries of the estate; and so, the sale ought to be declared null and void.

3 DETERMINATION OF THE PRELIMINARY ISSUE

3.1 In determining whether the action was statute barred, the learned judge was alive to the fact that **sections 19 and 20 of the Limitation Act 1939**, deal specifically with actions in

respect of personal estates of deceased persons. She quoted **section 20** which provides:

“Subject to the provisions of subsection (1) of the last foregoing section, no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or an intestacy, shall be brought after the expiration of twelve years, from the date when the right to receive the share or interest accrued...” (Underlining ours for emphasis only)

- 3.2** The judge stated that under this section, the period of limitation of actions in respect of claims to the personal estate of a deceased person must be brought to court within a period of twelve years from the date when the right to receive the share of the estate accrued.
- 3.3** Next, the learned judge considered when the cause of action or the right to receive a share of the estate accrued to the appellant. She considered the sale transaction between the former administrator and Steven Mutinta of 11th July, 1992 and the note titled “To whom it may concern” written by the administrator on 16th July, 1992 and opined that the appellant’s right to receive her share of the estate accrued soon after the date of the sale of the property, in 1992.
- 3.4** The judge applied section 20 and found that the twelve-year period within which the appellant could bring an action in

respect of any claim to the personal estate of the deceased or to any share or interest in such estate lapsed in 2004.

3.5 The learned judge further considered the appellant's argument that she only obtained letters of administration in January 2001 and concluded that the appellant must have or ought to have become aware soon thereafter of the assets of the estate of the deceased and the sale of the property.

3.6 The judge also held that if the appellant was unhappy with the actions of the former administrator, as a beneficiary of the estate, she was at liberty to commence legal action against him and the respondents but she only did so after 21 years. She concluded that the matter was statute barred and dismissed it with costs.

4 APPEAL TO THIS COURT AND THE PARTIES' ARGUMENTS

4.1 Disgruntled by the judgment on assessment, the appellant brought this appeal on two grounds. In ground one, she alleged that the judge erred in both law and fact by failing to satisfy herself with the requirements of section 19(1) of the Limitation Act prior to enforcing the provisions of section 20 seeing that section 20 relied upon by the judge is subject to the provisions of section 19(1).

- 4.2** The appellant's plain submission in support of this ground was that, the learned judge correctly interpreted section 20 of the Limitation Act but erred when she did not satisfy herself with the provisions of section 19(1) before she applied the provisions of section 20.
- 4.3** In ground two, the appellant faulted the learned judge for dismissing the action for being statute barred under the Limitation Act when the Act did not apply to this matter as per the provisions of section 19(1).
- 4.4** The core argument by counsel for the appellant was that since section 20 is subject to section 19(1), the judge should not have dismissed the action due to the twelve-year limitation period, as that period did not apply.
- 4.5** In the course of his argument, counsel for the appellant referred us to some case authorities. The first was **G L Baker Limited v Medway Building and Supplies Limited**¹. In that case, Danckwerts, J held that it seemed no limitation period was applicable as the origin of the proceedings against M., Ltd. was T.'s fraudulent payments and the action was in respect of a fraud or fraudulent

breach of trust to which the trustee was party or privy within s.19(1)(a) of the Limitation Act, 1939.

4.6 The second case was **Stanbic Bank Zambia Limited v Bentley Kumalo & 29 others²** where we affirmed that **section 19(1)(a) of the Limitation Act, 1939** relates to an action in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy.

4.7 The third was **Seong San Company Limited v Attorney General and Drug Enforcement Commission³**, where the High Court held that constructive trust attaches by law to a specific property which is neither expressly subject to any trust nor subject to any trust but which is held by a person in circumstances where it would be inequitable to allow him to assert a full beneficial ownership of the property.

4.8 To show that the matter fell within section 19(1), counsel referred to paragraph 6 of the statement of claim, which alleged fraud and paragraphs 9 to 12 that alleged illegal sale of portions of the farm to various respondents. He also quoted **section 31** of the **Limitation Act, 1939** for the definition of ‘trust’ and ‘trustee’ and **paragraph 1140** of **Volume 68, 5th edition** of **Halsbury’s Laws of England**

(actually note 2 at para. 1138), which states that the expressions extend to implied and constructive trusts.

- 4.9** He argued that since John Muzyamba was administrator of the deceased's estate, there was a constructive trust created specifically over the property in issue. He also referred to **paragraph 1141** of the same **Halsbury's Laws of England** (actually para. 1139) and **G L Baker Limited v Medway Building and Supplies Limited**¹, where he said the phrase "*fraud or fraudulent breach of trust*", is defined as follows:

"For the purpose of the provision excluding the operation of limitation period in the case of claims by beneficiaries in respect of fraud or fraudulent breaches of trust to which the trustee was party or privy to, it is necessary that the fraud in question amounts to dishonesty. The provision does not in terms refer to claims against trustees and, it seems, will apply to claims against innocent third parties into whose hands trust property has come as a result of fraud to which the trustee was party or privy."

- 4.10** He concluded that because the action was based on the fraudulent conduct of the administrator, it was excluded from the operation of the limitation period under section 20 and that the judge erred in dismissing the action on ground that it was commenced after the expiration of twelve years.
- 4.11** Counsel for the 18th, 19th and 20th respondents asserted in response to ground one that the learned judge did not err when she concluded that section 19(1) of the Limitation Act

did not apply to this matter. He argued that the respondents had no relationship with the appellant or her father whether as trustees or administrators and that Steven Mutinta was a *bona fide* purchaser for value without notice.

4.12 Counsel also submitted that while counsel for the appellant had tried to show that the matter falls under section 19 and to explain the appellant's relationship with her father and uncle, he had not referred to any document, such as a certificate of title in the deceased's name or an order of appointment of the administrator of his estate.

4.13 Counsel agreed that the appellant alleged fraud and fraudulent transactions, the most outstanding being in paragraph 6 of the statement of claim but contends that without any proof, the remain mere allegations. That when Steven Mutinta bought a portion of the farm, entries at the Ministry of Lands did not show any document in the deceased's name for the matter to fall under section 19(1).

4.14 Counsel questioned what else Steven Mutinta should have done in addition to checking the land register before buying the land. He submitted that **G L Baker Limited v Medway Building and Supplies Limited**¹ does not apply because in

that case, actual evidence of the fraud was given to the court while in this matter; only allegations are made in the pleadings without documents to support them.

4.15 Concerning **Stanbic Bank Zambia Limited v Bentley**

Kumalo & 29 others², he submitted that the case is actually favourable to the respondents. Hence, it was inconceivable that the appellant brought an action against them, when they were not party or privy to anything other than being beneficiaries of an innocent purchaser for value.

4.16 Counsel submitted that the absence of any evidence to show that the deceased owned the subject farm and that the seller was an administrator prompted them to ask the court to terminate the action; and that in the absence of documents it could not be said that John Muzyamba was a trustee or administrator and that the appellant was a beneficiary of land sold over 20 years ago.

4.17 In his oral responses to the questions put to him by the Court, counsel insisted that Steven Mutinta was not part of the fraud and that the land register showed that John Muzyamba was the owner of the land. Counsel invited us to dismiss the appeal with costs.

5 DECISION OF THIS COURT

5.1 We have considered the record of appeal and the written and oral arguments by counsel on both sides. As we have already said, the question in this case is whether the learned judge was right to dismiss the appellant's action for being statute barred, based on **section 20** of the **Limitation Act, 1939**.

5.2 The appellant's first argument was that the judge ought to have satisfied herself with the requirements of section 19(1) before enforcing the provisions of section 20. The position of the 18th, 19th and 20th respondents was that the judge did not err when she concluded that section 19(1) did not apply.

5.3 The wording of section 20 of the Limitation Act (quoted in paragraph 3.1), which the learned judge relied upon to dismiss the action, is such that, at first sight at least, the appellant's argument is attractive because the section is 'subject to' the provisions of section 19(1), which provides:

"19 (1). No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action –

- (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or**
- (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use." (Underlining for emphasis)**

- 5.4** We hasten to mention that, the learned judge did not, as claimed by counsel for the respondents conclude that section 19(1) did not apply, apart from recognising that sections 19 and 20 deal specifically with actions in respect of personal estates of deceased persons. It is plain, that the learned judge did not apply her mind to the provisions of section 19(1) before enforcing the provisions of section 20.
- 5.5** The appellant's second argument is, to our minds, the most significant and perhaps the most difficult. It is whether the Limitation Act at all applied given the provisions of section 19(1) and the fact that the action was based on the alleged fraudulent conduct of the administrator. If section 19(1) applied, then the respondents could not rely on any period of limitation at all to defeat the appellant's action.
- 5.6** We acknowledge that the aim of a statute of limitation is to prevent the public from being oppressed by stale claims, to protect settled interests from being disturbed and to bring certainty and finality to disputes. While these are laudable aims, they can conflict with the need to do justice in individual cases where an otherwise unmeritorious

defendant can play the limitation trump card and escape liability.

5.7 We also realise that the argument the appellant is making now that the Act does not at all apply was not the viewpoint advanced in the High Court; the argument had centred on when the time started to run. However, the appellant has raised an important point of law based on a statutory provision, which is applicable to our jurisdiction and it trite that there can be no estoppel against a statute.

5.8 We agree with counsel for the appellant that **section 19** of the **Limitation Act, 1939** simplifies the law of limitation of actions in respect of trust property and that all constructive trustees are now subject to the same restrictions when claiming the protection of the statute as express trustees.

5.9 We are also aware that by **section 20** of the **Limitation Act, 1939** personal representatives are subjected to the same restrictions in claiming the protection of the statute, which formerly applied to express trustees and now under section 19(1) and section 31(1), to all trustees. We are also alive to the fact that actions claiming personal estate are only barred after 12 years.

5.10 In the present appeal, the 18th, 19th and 20th respondents contended that there were no documents at the Ministry of Lands at the time of the sale of the land to Steven Mutinta to show that the deceased owned the subject farm or evidence that the seller was an administrator. Therefore, the appellant could not say that John Muzyamba was a trustee and administrator or that she was a beneficiary.

5.11 We are satisfied from the pleadings and the documents on record, as the learned judge found, that the Ministry of Lands allocated the subject farm to the deceased in 1986 and at the time of his death, the land was not yet on title. It is also clear that after the deceased's death, the local court appointed John Muzyamba as administrator of his estate. Thereafter, he applied to the Commissioner of Lands to have the lease for the subject farm prepared in his name.

5.12 It seems to us that approval was granted, a lease was executed in John Muzyamba's name on 15th July, 1992 and on the same date, a certificate of title was issued also in his name for the unexpired residue of a term of 99 years from the 1st day of October, 1985.

5.13 As the learned judge found the former administrator and Steven Mutinta executed the contract of sale on 11th July, 1992. On 16th July, 1992, he wrote the note “To whom it may concern”, declaring that as owner of the farm he wished to sell a subdivision of 355 hectares to S. Mutinta because the children of the deceased, Jacob Muzyamba should get their share as an inheritance from the property.

5.14 On the same date, John Muzyamba applied to the Natural Resources Board, under the Town and Country Planning Act for permission to subdivide agricultural land for agricultural purposes and to the Commissioner of Lands for consent to subdivide, sell, transfer and assign part of the subject farm. The application did not mention any animals, crops or farming equipment on the land.

5.15 A letter to the Commissioner of Lands dated 28th April, 1993 shows that in actual fact John Muzyamba intended to assign the whole farm to Steven Mutinta and had requested that the earlier application for subdivision be processed as an application for assignment of the whole farm. The record also shows that as at 23rd February, 1993, John Muzyamba

had mortgaged the whole farm to Lima Bank to secure a loan of K2,000,000.

5.16 The record further shows that Steven Mutinta sold portions of the 355 hectares to some of the respondents who also sold to others. On 6th July, 2000 Steven Mutinta died and on 25th July, 2000 his daughter, Bridget Mutinta, the 20th respondent was appointed administratrix of his estate, after which, she also sold part of the land to various other people.

5.17 Because of the controversy surrounding the sale of the land, the appellant reported the matter to the Victim Support Unit of the Zambia Police and on 5th January, 2001 she also obtained an order of appointment as administratrix of the estate of her late father. However, it is not clear whether the appointment of John Muzyamba was revoked or whether the appellant took over the administration of the estate.

5.18 On 25th June, 2009, John Muzyamba also died and on 9th July, 2009 the 1st respondent was appointed administratrix of his estate. On 3rd November, 2009 a certificate of title was issued in John Muzyamba's name for the subdivision of 355 hectares. Later on 27th April, 2011 the 1st respondent released the 355 hectares to the 20th respondent.

5.19 On 9th June, 2011 the appellant also obtained an order of appointment from the local court as administratrix of the estate of John Muzyamba. This is what she refers to as the second order of appointment as administratrix.

5.20 Subsequently, on 11th March, 2013 the appellant and Fleefort Muzyamba obtained two certificates of title in their joint names, one for the subdivision of 355.2601 hectares and the other for the remaining extent 631.9153 hectares of the subject farm. Armed with the certificates of title the appellant commenced the legal action on 28th June, 2013 as registered owner of the subject farms.

5.21 From what we have explained above, there can be no doubt whatsoever that the subject farm was allocated to the deceased, Jacob Muzyamba or that the late John Muzyamba was appointed administrator of the deceased's estate. There can be no doubt also that John Muzyamba acquired title to the subject farm in his capacity as administrator of the deceased's estate or that the appellant was one of the beneficiaries of the estate of the deceased.

5.22 Now, we wish to make it very clear at this point, that since the deceased died intestate, on his appointment as

administrator of the deceased's estate, John Muzyamba assumed the duties and powers of an administrator under **section 19** of the **Intestate Succession Act, Cap 59**, which had come into effect on 19th May, 1989.

5.23 It was the administrator's responsibility, primarily, to take control of all assets comprising the estate, to protect and secure the assets, including real estate and any business interests as soon as possible. He was also required to pay the debts and funeral expenses of the deceased and estate duty, if payable and eventually to distribute the estate property in accordance with the rights of the beneficiaries or persons interested in the estate under the Act.

5.24 Section 19(2) of the **Intestate Succession Act** proscribes the sale of any asset belonging to the estate of a deceased person, without the authority of the court. We have affirmed this provision in a number of cases such as **Mirriam Mbolela v Adam Bota⁴** and **Base Property Development Limited v Neggie Nachilima Chileshe (administratrix of the estate of the late Derreck Chileshe) and two others⁵**.

5.25 We held in those cases that section 19(2) was intended to prevent administrators of estates of deceased persons from

abusing their fiduciary responsibilities by selling property forming part of such estate, without due regard to the interests of the beneficiaries, and that prior authority of the court is a *sine qua non* of a valid sale of such property.

5.26 In **Mirriam Mbolela v Adam Bota**⁴ we also pointed out that the administrator's powers and duties are limited to those required to manage and preserve the deceased's assets during the period of administration. He or she has no duty or authority to carry on a business owned by the deceased.

5.27 Therefore, if the appellant were to prove, at the trial of the action, that the administrator did not obtain the authority of the Court before selling any portion of the subject farm or disposing off any other assets of the intestate, the transactions would be an absolute nullity. Counsel for the appellant had made this fundamental point in the lower court but the learned judge, did not reflect on it.

5.28 We also wish to restate that an administrator serves as a fiduciary of the beneficiaries of the estate. He or she has the duties of loyalty, honesty, and good faith, including the duty not to self-deal, that is to say, taking advantage of his or her

position in a transaction and acting in his or her own interest rather than in the interests of the beneficiaries.

5.29 If the administrator has not acted reasonably and in the best interests of the estate and beneficiaries, he or she could be held personally liable for any losses resulting from actions taken in bad faith, for mismanagement, and undue mistakes made in the administration of the deceased's estate or for breach of fiduciary duty.

5.30 It is also important to state that there are two types of ownership of land: the legal ownership and beneficial ownership. The legal owner is the person who owns the legal title of the land or the person registered at the Land Registry on the title deeds. The legal interest gives the owner a right of control over the property; they can decide to sell or transfer the property. However, the registered owner will not necessarily be the same as the beneficial owner.

5.31 The beneficial owner is the person entitled to the benefits or financial value of the property, regardless of the title entries at the Land Registry. Beneficial interest gives a right, for example, to the income from the property or a share in it,

and to the proceeds of sale of the property or part of the proceeds.

5.32 We should mention that under **section 24** of the **Intestate Succession Act**, subject to any limitations and exceptions contained in a grant of letters of administration, the grant entitles the administrator to all the rights belonging to the deceased as if the administration had been granted at the moment of his death. However, this does not give the administrator the right to convert the property to his own use or to deal with the property in a manner detrimental to the rights or interests of the beneficiaries under the Act.

5.33 Furthermore, as argued by counsel for the appellant, there was a constructive trust created in this case given that John Muzyamba acquired title to the subject farm in his capacity as administrator. It is quite clear that a constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of the legal title to assert his own beneficial interest and deny the beneficial interest of another person in the asset. We confirm the High Court decision in the **Seong San Company Limited**³ case.

5.34 It is also clear to us that a constructive trust arises where one holds an asset that he has obtained by means of fraud or dishonesty, or where the trustee has a beneficial interest in the trust property and to the duties incident to the office of a personal representative. **Paragraph 1148 of Halsbury's Laws of England** (*supra*) confirms that for the purpose of the Limitation Act, personal representatives are trustees.

5.35 Under a trust, the legal owner, whose name is registered in the Lands Register, equally holds the beneficial interest in the property 'on trust' for the beneficial owner, who holds the beneficial interest in the trust property and is compelled in equity to administer the trust property for the benefit of the beneficiaries and has strict fiduciary obligations.

5.36 In the current case, as we have said, the respondents acknowledged that the appellant pleaded fraud on the part of the administrator and gave particulars of the fraud and other alleged illegalities in the sale transactions relating to the subject farm. However, they averred that the fraud could not be attributed to them or to Steven Mutinta who was an innocent purchaser for value without notice.

5.37 We appreciate that beneficial owners are not registered on the title deeds in the Lands Register, and that, therefore, it is difficult for anyone who is neither a legal owner nor a beneficial owner to find out who the beneficial owners might be and what benefits they have. Nonetheless, only a *bona fide* purchaser for value without notice may defeat a beneficial or equitable interest in land.

5.38 In **Investrust Bank Plc v Hearnés Mining and Trading Limited and others**⁶, we held that the appellant, in conducting 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.

5.39 We admit that in this case, apart from the allegation of fraud on the part of the administrator, no allegation was made against the 18th, 19th and 20th respondents that they had knowledge of the fraud. However, the learned judge was dealing with a defence under **section 20** of the **Limitation Act**, which as we have said, is subject to the provisions of

section 19, and the appellant had pleaded fraud. Therefore, the judge had a duty to consider the plea of fraud, and to determine whether section 19(1) applied in light of the allegations of fraud and fraudulent breach of trust.

5.40 From the documents on record, it seems that the administrator may have breached the duty not to self-deal. He sold the land to Steven Mutinta, allegedly without authority of the court, he applied for the assignment of the entire farm and mortgaged the farm. The appellant also alleged that he illegally disposed of animals and farm equipment belonging to the estate of the deceased.

5.41 There are also allegations of illegality and complicity on the part of the 1st respondent, who later became the administratrix of the estate of the late John Muzyamba. She surrendered the 355 hectares to the 20th respondent, she admitted to selling some cattle and letting portions of the subject farm to some of the respondents.

5.42 As explained in the **G L Baker Limited**¹ case, section **19(1)(a) of the Limitation Act** does not in terms refer to an action against a trustee, or a trustee who has been guilty of fraud; it also applies to a person who was not the original

trustee, but who has acquired trust property, which was fraudulently made out of the trust property.

5.43 Therefore, section 19(1) will apply to claims against innocent third parties, into whose hands trust property has come, because of fraud to which the trustee was party or privy. We affirmed in **Stanbic Bank Zambia Limited v Bentley Kumalo & 29 others**², that **section 19(1)(a) of the Limitation Act** relates to an action in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy.

5.44 In that case, we found that section 19(1) did not apply and that the action was statute barred because the appellant was not a trustee and the respondents did not plead fraud. In contrast, in the present case, there was a constructive trust and the appellant had pleaded fraud.

5.45 The 18th, 19th and 20th respondents also argued that there was no evidence or proof in the statement of claim of the allegations of fraud and that for that reason; **G L Baker Limited**¹ is distinguishable. We have held in various cases, including **Stanbic Bank Zambia Limited v Bentley Kumalo & 29 others**², that where fraud is in issue in the

proceedings, a party wishing to rely on it must ensure that it is clearly and distinctly alleged and at the trial of the cause, equally lead evidence, so that the allegation is clearly and distinctly proved.

5.46 The only way the appellant could prove the allegations of fraud and illegalities in the sale transactions relating to the subject farm and the disposal of other assets forming part of the estate of the deceased was to lead evidence at the trial and not to assert evidence or prove the allegations in the pleadings as suggested by the respondents.

5.47 As regards the respondents' argument that Steven Mutinta was a bona fide purchaser for value without notice, the learned judge accepted that the contract of sale between the former administrator and Steven Mutinta was executed on 11th July, 1992. This was five days before the certificate of title was issued in the administrator's name. That being the case, the lease and certificate of title for the subject farm could not have been in the administrator's name at the time of contract as claimed by the respondents.

5.48 Moreover, as the judge further found, following the sale of the land to Steven Mutinta, the former administrator

authored a letter, which was shown in the 18th, 19th and 20th respondents' bundle of documents, from which it was clear that the purpose of the sale was to enable the beneficiaries of the estate receive their share.

5.49 From the said letter, the judge concluded that the appellant's right to receive her share of the estate accrued soon after the date of the sale of the property in 1992. However, it is not clear whether the administrator consulted or informed the beneficiaries about the sale of the land for us to be certain that she was aware of the transaction.

5.50 It is also clear that the administrator who was selling the land as the owner of the farm, by the said letter put the buyer on notice that there were beneficial interests involved, in that children of the late Jacob Muzyamba ought to get their share as an inheritance from the property. This might defeat the respondents' plea that Steven Mutinta was an innocent purchaser for value without notice.

5.51 We find and hold that the respondents could not rely on the Limitation Act to defeat the appellant's action and that the learned judge erred when she dismissed the action based on section 20 when section 19(1) excludes the operation of any

limitation period in the case of a claim by a beneficiary in respect of fraud or fraudulent breaches of trust to which the trustee was party or privy.

5.52 As the learned judge said if the appellant was unhappy with the actions of the former administrator, as a beneficiary of the estate, she was at liberty to commence legal action against him and the respondents. For the reasons we have given, her action was not stale.


6 CONCLUSION

6.1 In all, we allow this appeal and reverse the dismissal of the action by the learned judge. Real justice in this case resides in hearing the parties in full. We send the matter back to the High Court for trial before a different judge.

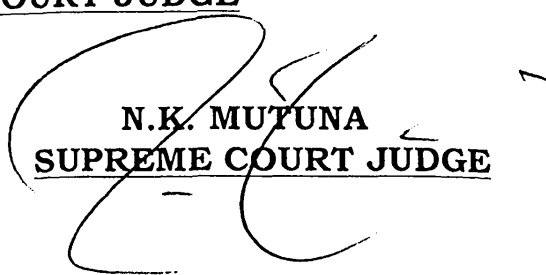
6.2 Costs of this appeal are for the appellant as against the 18th, 19th and 20th respondents to be taxed in default of agreement.



A.M. WOOD
SUPREME COURT JUDGE



R.M.C. KAOMA
SUPREME COURT JUDGE



N.K. MUTUNA
SUPREME COURT JUDGE