

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 14/2019

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:



MRS. MARGARET M. S. MULEMENA

APPELLANT

AND

BENNY CHIHOLYONGA

1<sup>ST</sup> RESPONDENT

GETRUDE MATOKWANI CHIHOLYONGA

2<sup>ND</sup> RESPONDENT

CHILAMBWE TINDYE MAPULANGA

3<sup>RD</sup> RESPONDENT

Coram : Wood, Kaoma and Mutuna, JJS

On 11<sup>th</sup> August 2020 and 23<sup>rd</sup> September 2020

For the Appellant : Mr. R. Musoni of Messrs Iven Mulenga and Company

For the Respondent : Mr. S. Lungu SC and Mr. N. Ngandu of Messrs Shamwana and Company

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## J U D G M E N T

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**MUTUNA JS**, delivered the judgment of the Court.

Cases referred to:

- 1) **Mirrian Mbolela v Adam Bota SCZ judgment No. 146 of 2014**
- 2) **Borniface Kafula and others v Billigs Choonga Mudenda Appeal No. 202 of 2003**
- 3) **National Drug Company Ltd and another v Mary Katongo Appeal No. 79 of 2001**
- 4) **Edith Nawakwi v Lusaka City Council, Appeal No. 26 of 2001**
- 5) **Nora Mwaanga Kayoba and Alizain Banda v Eunice Kumwenda Ngulube and Andrew Ngulube SCZ judgment No. 19 of 2003**
- 6) **Base Properties Development Limited v Neggie Nachilima Chileshe Appeal No. 211 of 2015**
- 7) **Bethel Baptist Church v Evans Ngubai Appeal No. 145 of 2017**
- 8) **Namangandu v Lusaka City Council (1978) ZR 511**
- 9) **Sylvester Musonda Shipolo v Shadreck Maipambe SCZ judgment No. 1 of 2016**
- 10) **Philips v Copping (1935)1 KB 1**
- 11) **Krige and another v Christian Council of Zambia (1975) ZR 152**
- 12) **Ndhlovu and another v Alshams Building Materials Company Ltd SCZ judgment No. 12 of 2002**
- 13) **Barnabas Ngorima and Rosemary Ngorima v ZCCM Limited and Benston Chomba Appeal No. 121 of 2014**
- 14) **Nkhata and others v Attorney General**
- 15) **Galaunia Farms Limited v National Milling Company Limited and National Milling Corporation Limited (2004) ZR 1**

Legislation referred to:

- 1) **Intestate Succession Act, Cap 59**

Works referred to:

**Introduction**

- 1) This appeal emanates from a decision of the Court of Appeal delivered on 1<sup>st</sup> August 2019 in terms of which, the Appellant's appeal from the decision of a High Court Judge was dismissed.
- 2) In the appeal, the Appellant sought an order nullifying the sale of subdivisions B and C of Lot Number 2745/M, Ibex Hill Lusaka, (the properties) from herself to the Third Respondent and First and Second Respondents, respectively.

**Background**

- 3) The Appellant in this matter was approached by the Respondents who indicated to her that they were interested in purchasing properties from her. The parties exchanged moneys and two contracts of a sale were executed.
- 4) The parties also exchanged various documents in pursuance of conclusion of the transactions.



- 5) Subsequently, the Appellant sought to withdraw from the transactions alleging that the portions of the properties the Respondents had contracted to purchase were larger than what she had agreed to sell to them. As a consequence of this, the Respondent took out an action against the Appellant to enforce the contracts of sale by way of specific performance.
- 6) In her defence and counterclaim, the Appellant contended that she did not execute the contracts of sale. According to her, the signatures on the contracts were not hers and the sale was a nullity because the transaction was done by an unqualified person.
- 7) The Appellant also contended that the Respondents had illegally and fraudulently allocated themselves an extra acre of land.

**Consideration by the Learned High Court Judge and decision**

- 8) After the Learned High Court Judge heard the parties, she found as a fact that the receipt evidencing payment of the purchase price to the Appellant was consistent

with the terms of the contracts entered into by the parties. These contracts, she went on to find, were entered into by the Appellant freely and voluntarily. As such, the Respondents were entitled to the relief claimed of specific performance.

- 9) The Learned High Court Judge dismissed the Appellant's contention that she did not sign the contracts of sale and refused to nullify them on that ground. She also dismissed the Appellant's counterclaim for nullification of the contracts on the ground that they were prepared by an unqualified person. In doing so, she interpreted the effect of the restriction under Section 90 of the **Lands and Deeds Registry Act** to mean that an erring person would be fined and not that the act would lead to invalidation of the documents.
- 10) The Learned High Court Judge dismissed the Appellant's claim in its entirety prompting the Appellant to appeal to the Court of Appeal.

**Grounds of appeal to the Court of Appeal and arguments by counsel**

- 11) The Appellant advanced two grounds of appeal to the Court of Appeal crafted as follows:

11.1 The learned trial judge erred both in law and fact when she held that the transaction between the parties was not null and void at law, notwithstanding that the contracts of sale and assignments were prepared by unqualified persons as required by Section 90 of the **Lands and Deeds Registry Act** and also for failing to consider that there was need for leave of Court in accordance with Section 19(2) of the **Intestate Succession Act**, before an administrator can sell the property forming part of an estate, failure to which renders the sale null and void;

11.2 The learned trial judge erred in law when she ordered specific performance of the contracts of sale between the Appellant and the Respondents the transaction between the Appellant and Respondents being null and void at law.

- 12) The thrust of the arguments in support of the appeal were that pursuant to Section 19(2) of the **Intestate Succession Act**, an administrator of an estate cannot



sell property which is part of the estate of a deceased person without leave of the Court. That the properties sold to the Respondents formed part of an estate and as such, the Appellant was obliged to obtain leave of the Court before selling them.

- 13) In advancing the foregoing argument, the Appellant relied on our decisions in the cases of **Mirrian Mbolela v Adam Bola<sup>1</sup>** and **Borniface Kafula and others v Billings Choonga Mudenda<sup>2</sup>**. Counsel's argument was that the Learned High Court Judge failed to consider all matters in contention before her as was expected of her as an adjudicator by ignoring the provisions of Section 19 of the **Intestate Succession Act**.
- 14) The Appellant went on to argue that the contracts were tainted with illegality because the Appellant did not obtain leave of the Court before executing them. As such, the remedy of specific performance was not available to the Respondents. She concluded by arguing that the illegality was compounded by the fact that she did not append her signature to the contracts.

- 15) In response, the Respondents contended that the Appellant did not lead any evidence in the Court below in respect of Section 19 of the **Intestate Succession Act**. There was, according to the Respondents, no evidence led to show that the properties in dispute were the subject of an estate or that the Appellant as administratrix was selling them as such. For this reason, it was submitted, Section 19 of the **Intestate Succession Act** was wrongly referred to.
- 16) The Respondents argued further that the contention by the Appellant that she did not sign the contracts could not be sustained because she did not lead sufficient evidence to prove fraud. They also argued that the Appellant cannot rely on Section 19 to fraudulently deny the Respondents their right to the properties they purchased. That equity does not allow statute to be used as an engine of fraud.
- 17) The Respondents concluded by arguing that, since the parties had freely entered into the contracts, the Learned High Court Judge was compelled to enforce it upon



breach. Regard was had to our decision in the case of ***National Drug Company Ltd and another v Mary Katongo***<sup>3</sup>.

### **Decision of the Court of Appeal**

- 18) The Court of Appeal found both grounds of appeal lacking in merit. In respect of ground 1, it held that Section 90 of the ***Lands and Deed Registry Act*** which prohibits unqualified persons from transacting in conveyancing business, does not nullify a contract of sale which arises from such conduct.
- 19) The Court held further that the provisions of Section 19(2) of the ***Intestate Succession Act*** are intended to protect the interest of the beneficiaries, hence the need for an administrator to obtain consent of the Court before disposing of property which is part of an estate. The obligation to obtain such consent, the Court held further, is upon the administrator and not a purchaser like the Respondents. To the extent that the Appellant sought to impose the duty on the Respondents, in her quest to

nullify the contract, she was using a statute as an engine of fraud. This, in the Court's view, is not permitted in equity.

- 20) Last of all, the Court held that since the evidence revealed that the Appellant had received payment in respect of the properties, she was estopped from claiming that she did not execute the contracts of sale. Her evidence, fell far short of the standard required by law to prove fraud. The Court accordingly dismissed the appeal with costs.

### **Grounds of appeal to this Court and arguments**

- 21) The Appellant is aggrieved with the decision of the Court of Appeal and has launched this appeal advancing three grounds crafted as follows:

21.1 The Court below erred in law and in fact by failing to properly apply and follow the Supreme Court's decision of **Mirrian Mbolela v Adam Bota** judgment number 26 of 2017 and **Borniface Kafula and others v Billings Choonga Mudenda** Appeal No. 2002 to 2003 to the present case on the need for the Administrator to obtain prior authority

of the Court before selling real estate property forming part of an estate in accordance with Section 19(2) of the **Intestate Succession Act**, Chapter 59 of the Laws of Zambia by impliedly imposing a qualification that if the Administrator is the only beneficiary, there is no requirement to seek prior authority from the Court without, in any event, proof that the Appellant is the only beneficiary;

21.2 The Court below erred in law and in fact when it held that by the Appellant's own acknowledgement the Appellant is both the administratrix and sole beneficiary of the deceased Mulemena's estate in the absence of the evidence on record of such acknowledgment of being the sole beneficiary on the part of the Appellant;

21.3 The Court below erred in law and in fact when it held that, *"the Appellant's attempt to invoke a statutory provision so as to have the respective contracts of sale entered into with the Respondents nullified or invalidated, amounts to the Appellant trying to use a statute as an engine of fraud, which is precluded by equity"* in the absence of elements or evidence of "fraud" on the part of the Appellant and that the said fraud was not even pleaded by the Respondents and also contrary to the settled



principle of law to the effect that: " *there can be not estoppel against the statute*" which can be raised at any point or stage.

- 22) In respect of ground 1 of the appeal, counsel for the Appellant, Mr. Musoni, advanced lengthy arguments which are a repetition of the ground of appeal. The relevant portion of his arguments contests the holding by the Court of Appeal that where the administrator is the sole beneficiary there is no need for prior authority from the court to dispose of property which is part of the estate of a deceased person. This, counsel argued, was a departure from our decisions in the **Mbolela<sup>1</sup>** and **Kafula<sup>2</sup>** cases which specifically insist on the need for leave of the court before disposal of such property.
- 23) To reinforce his argument, counsel drew our attention to portions of the record of appeal which show that title in the properties sold was in the name of the deceased. As such, the Appellant could not sell them as a beneficial owner. He went on to explain the rationale for the provisions of Section 19 as being to protect beneficiaries

of the estate of a deceased person and to ensure that the best price is secured for the property sold in the interest of the estate. Further, a breach of Section 19 nullifies any sale transaction arising therefrom. He argued that the failure by the Court of Appeal to follow our decision in the **Mbolela**<sup>1</sup> and **Kafula**<sup>2</sup> cases offends the principle of *stare decisis* which provides for decisions of superior Courts to be binding on lower Courts.

- 24) The other limb of counsel's argument contended that both the administrator and potential purchaser have the responsibility of ensuing compliance with Section 19 of the **Intestate Succession Act**. To this end, he argued that the Respondents were obliged to investigate and ensure that the Appellant had obtained prior authority from the court before contracting to purchase the properties. Counsel drew our attention to a plethora of authorities which speak to the need for persons purchasing real property to approach such transactions with caution and inquiry to establish true ownership. These cases were **Edith Nawakwi v Lusaka City**

**Council<sup>4</sup>, Nora Mwaanga Kayoba and Alizani Banda v Eunice Kumwenda Ngulube and Andrew Ngulube<sup>5</sup> and Base Properties Development Limited v Neggie Nachilima Chileshe<sup>6</sup>.**

- 25) Counsel went on to submit that the remedy of specific performance is not available to the Respondents and that they are only entitled to a refund of the moneys paid. This, he argued, is in line with the alternative argument advanced by the Respondents. He argued further that the Respondents are equally not entitled to be compensated for the illegal structures they erected on the property because they erected them during the subsistence of the case and before title to the properties was transferred to them.
- 26) In advancing the later argument in the preceding paragraph, counsel relied on the decision of the Court of Appeal in the case of **Bethel Baptist Church v Evans Ngubai<sup>7</sup>** which cited with approval the pronouncement in the case of **Namangandu v Lusaka City Council<sup>8</sup>.**



- 27) Concluding arguments under ground 1 of the appeal, counsel contended that in its interpretation of the **Mbolela** case, the Court of Appeal should have ended at its finding that there was need to obtain leave of Court before the Appellant disposed of the properties and nullified the sale transactions on that ground. The Court, he argued, misdirected itself by qualifying our decision in that case by considering fraud and equity which were not pleaded.
- 28) In regard to ground 2 of the appeal, counsel argued it from two limbs. The first was that the determination of whether or not the Appellant as administratrix was also sole beneficiary should have been made at the point where the court is being asked to grant leave pursuant to Section 19(2) of the **Intestate Succession Act**. It was, therefore, a misdirection on the part of the Court of Appeal to consider it in the manner and at the stage that it did.
- 29) Secondly, the finding by the Court of Appeal that the Appellant was the sole beneficiary is a misdirection

because it is not supported by the evidence. Counsel argued further that for the same reason, the arguments by counsel for the Respondents to that effect were also misplaced. He went on to refer to our decision in the case of ***Sylvester Musonda Shipolo v Shadreck Maipambe***<sup>9</sup> where we reiterated that judgments must be anchored on evidence adduced before the Court. Counsel then referred to portions of the Appellant's evidence in cross examination which revealed that she confirmed that her late husband left the property in dispute for her and argued that this evidence does not confirm her to be the sole beneficiary.

- 30) Mr. Musoni recited our holding in the ***Base Properties***<sup>6</sup> case and argued that the Respondents should not have assumed that the Appellant was the owner of the property and had authority to dispose of it. That the Appellant's responsibility as administratrix was to keep the property for the benefit of interested parties.
- 31) Counsel concluded by addressing the challenge by the Respondents that the issue of application of Section 19(2)

of the **Intestate Succession Act** could not be raised on appeal because it was not raised in the High Court. He argued that an appellate court can consider a legal issue even if it was not considered by a trial Court and that questions of illegality can be entertained at any stage of proceedings whether or not they are pleaded. He referred to the **Mbolela** case in which we cited a passage from the English case of **Philips v Copping**<sup>10</sup> that illegality once brought to the attention of the court overrides all questions of pleadings including any admission made therein.

- 32) Under ground 3 of the appeal, counsel for the appellant questioned the holding by the Court of Appeal that the Appellant's attempt at nullifying the contracts of sale based on Section 19(2) of the **Intestate Succession Act** amounted to an attempt at using a statute as an engine to perpetrate a fraud which is not allowed in equity. The thrust of the argument by counsel was that the finding was perverse and made in the absence of any supporting



evidence because fraud was neither pleaded nor was evidence led on it.

- 33) Counsel referred to a plethora of authorities which speak to the fact that not only should fraud be pleaded, but evidence should also be led to prove it at a higher standard than the civil standard of balance of probabilities because of the criminal element in it.
- 34) Counsel also took issue with the decision by the Court of Appeal denying the Appellant the opportunity to avail herself of the remedy under Section 19(2) of the **Intestate Succession Act**. He argued that there can be no estoppel against statute in the absence of fraud and illegality where there has been failure to comply with mandatory provisions of the statute. Resort to a statute can be at any stage of the proceedings and once illegality is asserted it overrides all pleadings. Our attention was once again drawn to the cases of **Philips v Copping**<sup>10</sup>, the case of **Krige and another v Christian Council of Zambia**<sup>11</sup> and **Ndhlovu and another v Alshams Building Materials Company Limited**<sup>12</sup>.

- 35) The final argument raised by counsel challenged the consideration of equity by the Court of Appeal in view of the fact that it had not been raised in the Court below. Counsel drew our attention to our decision in the case of ***Barnabas Ngorima and Rosemary Ngorima v ZCCM Limited and Beston Chomba***<sup>13</sup> where we refused to consider the issue of equity because it was not raised in the Court below.
- 36) We were urged to allow the appeal.
- 37) In his response to the argument in ground 1 of the appeal, counsel for the Respondent, Mr. S. Lungu SC and Mr. N. Ngandu quoted passages from the judgment of the Court of Appeal in which it considered our decision in the ***Mbolela***<sup>1</sup> and ***Kafula***<sup>2</sup> cases. They argued that since the Court did consider and correctly interpret these two decisions, ground 1 is lacking in merit.
- 38) Counsel argued further that after the Court determined that the purpose of Section 19(2) is to protect beneficiaries of estates from unscrupulous administrators, it went on to identify the Appellant as

such beneficiary and held her to be the sole beneficiary and administratrix of the estate. That since she was such sole administratrix, she is taken to have protected her interests when she entered into the contracts to sell the properties, thereby negating the need to obtain leave of the Court. They went on to distinguish this case from the **Mbolela<sup>1</sup>** case that in the latter evidence was led which revealed that the administratrix was not the sole beneficiary while in this case the Appellant is the sole beneficiary.

- 39) Counsel argued further that the **Mbolela<sup>1</sup>**, **Kafula<sup>2</sup>** and **Base Property Development<sup>6</sup>** cases did not address the issue before us of whether or not leave of court under Section 19(2) of the **Intestate Succession Act** is still required where the administrator is the sole beneficiary of the estate. According to counsel, the Court below correctly answered the question.
- 40) In regard to ground 2 of the appeal, Mr. Lungu SC and Mr. Ngandu began by restating the position of the law regarding the setting aside of findings of fact by an



appellate Court in accordance with the decision in the case of *Nkhata and others v Attorney General*<sup>14</sup>. They contended that the issue regarding the existence of other beneficiaries of the estate of the deceased did not arise in the High Court but that it arose in the Court of Appeal in the Appellant's arguments. Counsel proceeded to quote the passage as follows:

**"My Lords and Ladies we submit that the alleged sale of the property by the Appellant to the Respondents was not in the interest of the beneficiaries. Further, that the sale did not secure the best price available for the property as the Court should take judicial notice that in accordance with the market price either in 2011 and now, it is not possible to secure the price of K150,000.00 for 1.5 acres of land in the high cost residential area of Ibex Hill in Lusaka. Had the Court exercised its mind on the sale it is highly likely that in the interests of the beneficiaries and the best price for the property, would have been considered."**

- 41) According to counsel, this argument, advanced in the Court of Appeal, fell short of proving the contention by the Appellant that there are other beneficiaries to the estate apart from herself. That in accordance with our

decision in the case of ***Galaunia Farms Limited v National Milling Company Limited and National Corporation Limited***<sup>15</sup> the burden of proving the contention regarding existence of other beneficiaries lies with the Appellant and she has not discharged the burden. Further, a review of the evidence led in the High Court by the Appellant shows that she did not make reference to any other beneficiaries. It was rather late for her to raise the issue in the Court of Appeal and this Court by way of arguments. Counsel concluded that, the Court of Appeal was on firm ground when it found that the Appellant was the sole beneficiary.

- 42) The thrust of the argument by the Respondent under ground 3 of the appeal was that it would be unconscionable for the Appellant to avoid the contracts of sale by applying Section 19(2) of the Act. In justifying this argument counsel quoted passages from the judgment of the High Court Judge justifying her order for specific performance. They concluded by stating that the

Appellant's resort to Section 19(2) of the Act was clearly intended to defeat the ends of justice.

- 43) We were urged to dismiss the appeal.

**Consideration by this Court and decision**

- 44) In our consideration of this appeal, we have had occasion to peruse the record of appeal and arguments by counsel. Ground 1 of the appeal challenges the interpretation given to our decisions in the cases of **Mbolela<sup>1</sup>** and **Kafula<sup>2</sup>** by the Court of Appeal. The thrust being that, the Court of Appeal misdirected itself in its interpretation of Section 19(2) of the **Intestate Succession Act**.
- 45) The Court of Appeal, while acknowledging that Section 19(2) of the **Intestate Succession Act** compels an administrator of an estate to obtain leave of the Court before disposing of property forming part of a deceased's estate, stated that such leave is not necessary where the administrator is the sole beneficiary of the estate. For that reason it held that, since the Appellant was the sole beneficiary of the deceased's estate, she had not



contravened that section of the Act when she sold the two properties to the Respondents without leave of Court.

- 46) This ground of appeal calls into question the interpretation to be given to section 19(2) of the Act. For completeness we have reproduced the section which states as follows:

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

The Court of Appeal acknowledged our decision in the **Mbolela<sup>1</sup>** case in interpreting Section 19(2) of the Act, that it proscribes the sale of property forming part of the estate of a deceased person without prior authority of the Court. Further, the rationale for the section was to prevent administrators of estates of the deceased persons from abusing their fiduciary responsibility by disposing of assets of an estate without having regard to the interests of the beneficiaries.

- 47) The Court of Appeal went on to observe that the Appellant, along with being the administratrix, was the sole beneficiary of the estate of the deceased. It is clear this is what informed the Court in holding that it was not necessary for the Appellant to obtain leave of Court before selling the properties.
- 48) Before we restate our decision in the **Mbolela**<sup>1</sup> case it is important that we set out the duties of the administrator in accordance with Section 19(1) of the Act. The reason for this is that the Court of Appeal appeared to hold the view that the duties of the administrator end at securing the interests of the beneficiaries of the estate.
- 49) Section 19(1) of the Act sets out the duties of the administrator as being, *inter alia*, "... (a) to pay the debts and funeral expenses of the deceased and pay estate duty if payable ...". This duty compels an administrator to have regard of the debts and taxes owed by the estate of the deceased. For this reason, the authority of the Court prior to disposal of assets of an estate is necessary so that the administrator informs or convinces the Court

that he/she has undertaken the responsibility in Section 19(1)(a) of the Act. The other duties are listed as follows:

"...

(b) to effect distribution of the estate in accordance with the rights of the persons interested in the estate under this Act;

(c) when required to do so by the court, either on the application of an interested party or on its own motion-

(i) to produce on oath in Court the full inventory of the estate of the deceased; and

(ii) to render to the Court an account of the administration of the estate ..."

50) What becomes apparent from a reading of the portion of the section we have reproduced is that the intention of the Act is not limited to ensuring that the administrator considers the interests of all the beneficiaries only. It extends to ensuring that an administrator settles the debts owed by the estate and meets its statutory duty to pay tax on the assets of the estate where applicable.

51) While we agree that in the **Mbolela** case we said the import of Section 19(2) of the Act is to protect beneficiaries of the estate we would go further as we did in the **Kafula** case and state that it is also intended to



ensure that the administrator conducts his duties as enshrined in Section 19(1) of the Act. Further, the fact in and of itself, that the Court of Appeal acknowledged our holding in the **Mbolela**<sup>1</sup> case, does not mean that ground 1 is lacking in merit as argued by Mr. S. Lungu SC and Mr. N. Ngandu. The Court went further and misinterpreted our holding by qualifying it that where there is a sole beneficiary there is no need for leave of Court prior to the sale of the properties. It went on to hold that the Appellant was the sole beneficiary, as such, no leave of court was required.

- 52) It is only by insistence on leave of Court before the disposal of assets forming part of an estate that a Court can ensure that the administrator will carry out his/her duties by directing the funds realized from the disposal of the property to the obligations of the estate. Further, in our interpretation of section 19(2) of the Act, in the **Mbolela** case we categorically pronounced that the section proscribes the sale of property forming part of the estate of a deceased person without prior authority of the

Court. In so doing, we did not distinguish between estates with one beneficiary from those with several beneficiaries. To this extent, the Court of Appeal misdirected itself when it based its decision that leave of Court was not required on the alleged fact that the Appellant was the sole beneficiary. Ground 1 of the appeal must, therefore, succeed.

53) Ground 2 of the appeal questions the holding by the Court of appeal that the Appellant acknowledged that she was the sole beneficiary and administratrix of the estate of the deceased. The Appellant's major complaint here is that, not only was there no evidence led to justify such a holding but also, it was the wrong premise upon which to hold that the leave of Court was not required prior to disposal of the two properties.

54) We have perused the record of appeal, in particular the evidence led by the Appellant. At page 389 of the record of appeal, the Appellant testified under cross-examination that she was the owner of the properties which were the subject of the sale, subdivided from the

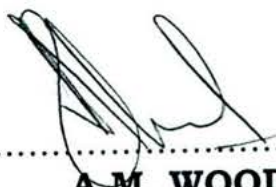
property left to her by her late husband. This is all the Appellant said and she did not allege that she is the sole beneficiary of the estate neither was evidence to that effect led by any of the other witnesses. Consequently, it was a misdirection on the part of the Court of Appeal when it held the Appellant to be sole beneficiary and we accordingly set aside the holding.

- 55) Coming to ground 3 of the appeal, we are of the firm view that in view of the fact that grounds 1 and 2 have succeeded, its consideration is otiose because the success of the two grounds have the effect of allowing the appeal in its entirety. Suffice to say that we have difficulty comprehending why the Court of Appeal considered the issue of fraud in view of the fact that it was not pleaded. In any event, the nature of the dispute was such that it hinged on the interpretation to be given to Section 19(2) of the Act and the case law around the section. This is what the Court of Appeal should have focused on.

## **Conclusion**



- 56) By way of conclusion, we allow the appeal and set aside the judgment of the Court of Appeal in its entirety. In doing so, we nullify sale of the two properties to the Respondents and order that they revert back to the estate of the deceased. The Appellant is also ordered to refund the purchase price paid for the properties in line with our decision in the **Kafula** case. This she should do within 30 days of the date of this judgment. As for the costs, the nature of this case is such that we are compelled to order that they lie where they fall and we so order.



.....  
**A.M. WOOD**  
**SUPREME COURT JUDGE**



.....  
**R.M.C. KAOMA**  
**SUPREME COURT JUDGE**



.....  
**N.K. MUTUNA**  
**SUPREME COURT JUDGE**