

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

APPEAL № 93/2018

BETWEEN:

**FRED M'TONGA**

**XAVIER M'TONGA**

AND

**TISIYE M'TONGA MATONKA**

1<sup>ST</sup> APPELLANT

2<sup>ND</sup> APPELLANT

RESPONDENT



CORAM: **Chishimba, Lengalenga and Siavwapa, JJA**

On 23<sup>rd</sup> January, 2019 and 1<sup>st</sup> April, 2021.

For the Appellants: Miss M. Mwape – Messrs Lungu, Simwanza & Company

For the Respondent: Mr. A. Simunyola – Messrs Eric Silwamba, Jalasi and Linyama Legal Practitioners

---

**JUDGMENT**

---

**LENGALENGA, JA delivered the Judgment of the Court.**

Cases referred to:

- 1. LINDIWE KATE CHINYATA v DOREEN CHIWELE & ANOR  
(2007) ZR 246**

- 2. BORNIFACE KAFULA & ORS v BILLINGS CHOONGA MUDENDA – SCZ APPEAL № 202 OF 2003**
- 3. SALOMON v SALOMON (1887) AC 22**
- 4. MONICA SIANKONDO v FREDERICK NDENGA (2005) ZR 22**
- 5. WILHEIM ROMAN BUCHMAN v ATTORNEY GENERAL (1993 – 94) ZR 131**
- 6. MUSUSU KALENGA BUILDING LTD & ANOR v RICHMAN'S MONEY-LENDERS ENTERPRISES & ORS (1999) ZR 27**
- 7. WILSON MASAUSO ZULU v AVONDALE HOUSING PROJECT (1982) ZR 172**
- 8. THE ATTORNEY GENERAL v ABOUBACAR TALL & ANOR – SCZ APPEAL № 77 OF 1994**
- 9. THE ATTORNEY GENERAL v MARCUS KAMPUMBA ACHIUME (1983) ZR 1**

Legislation referred to:

- 1. THE INTESTATE SUCCESSION ACT, CHAPTER 59 OF THE LAWS OF ZAMBIA**
- 2. THE LANDS AND DEEDS REGISTRY ACT, CHAPTER 185 OF THE LAWS OF ZAMBIA**
- 3. THE RULES OF THE SUPREME COURT, 1999**

Other works and materials referred to:

- 1. HALSBURY'S LAWS OF ENGLAND, 4<sup>th</sup> Edition, Volume 17.**
- 2. THE OSBORNE CONCISE LAW DICTIONARY, 9<sup>th</sup> Edition.**

## **1.0 INTRODUCTION**

- 1.1 This is an appeal against the judgment of the High Court delivered on 9<sup>th</sup> January, 2018 by Hon. Mrs. Justice P. K. Yangailo in the Respondent's favour.

## **2.0 BACKGROUND**

2.1 The background to this appeal is that the Respondent had commenced an action by way of originating summons against the Appellants in which she sought the following reliefs:

- 1. A declaration that the Applicant (Respondent) is a beneficiary to the estate of the late Costain Muzipasi M'tonga in her capacity as a biological daughter;**
- 2. An order directing the administrators to reveal the full extent of the estate of the late Costain Muzipasi M'tonga;**
- 3. An order directing the administrators to provide full and accurate information on how the estate has been/will be distributed among the beneficiaries and what the Applicant (Respondent) is entitled to;**
- 4. A mandatory order directing the administrators to provide and furnish all documents, including statements of accounts relating to the said estate;**
- 5. An order directing the Respondents (Appellants) that the Applicant be awarded her entitlement out of the deceased's estate as a biological daughter of the deceased;**
- 6. Any other relief the Court may deem fit; and**
- 7. Costs.**

- 2.2 The Respondent's originating summons filed in the Court below was accompanied by an affidavit in support and affidavit in reply that were sworn by the Respondent Tisiye M'tonga Matonka.
- 2.3 In the affidavit in support of the originating summons, the Respondent disclosed that she is one of the thirteen children of the late Costain Muzipasi M'tonga who died intestate in or about August, 2005 and was survived by two spouses and thirteen children named in the said affidavit and left a vast estate comprised of shares, private schools, real estate, motor vehicles and cash money in bank accounts.
- 2.4 The Respondent averred that the Appellants were joint administrators of her father's estate and that they sold most of the property, informally distributed funds from the estate to beneficiaries without any proper documents to show how that estate was being distributed. The Respondent further averred that the Appellants have acquired several properties from the proceeds of the sale of the assets of the estate, including three lodges and a fleet of buses. She also alleged that some of the money realised was used to settle

personal loans for motor vehicles acquired by the Appellants who have failed to render an account of the estate.

- 2.5 In the affidavit in reply to the affidavit in opposition to the originating summons, the Respondent maintained her averment that the Appellants had intermeddled with her father's estate to their own benefit through the sale of some of the property and mismanagement of the funds in the bank. She also challenged the Deed of Trust on the basis that it does not cover most of the estate and she averred that a full account of all the motor vehicles and how they were distributed has not been rendered.
- 2.6 The Appellants in their affidavit in opposition that was sworn by Fred M'tonga, the 1<sup>st</sup> Appellant on his own behalf and that of the 2<sup>nd</sup> Appellant in which it was averred that they have not received any payment of dividends from Lafarge Cement Zambia Limited. With regard to the shares in Muzi Transport, Freight and Forwarding Limited, Muzi High School and Zipas High School, it was averred that that was in line with the deceased's wishes in his will. It was further averred that as such, the Appellants are directors for the same properties and that the Respondent is not a beneficiary.

2.7 The Appellants further averred that Muzipasi High School in Chipata is the 1<sup>st</sup> Appellant's personal property that he acquired from his own personal resources whilst the rest of the property either belongs to the 1<sup>st</sup> Appellant acquired from his business ventures or was distributed to other beneficiaries. The 1<sup>st</sup> Appellant denied intermeddling with the deceased's estate as alleged.

### **3.0 CONSIDERATION OF THE EVIDENCE BY THE COURT BELOW AND ITS DECISION**

3.1 After considering the affidavit evidence, submissions and authorities, the trial judge found that the undisputed facts of this case are that the Respondent is a biological child of the deceased, Costain Muzipasi M'tonga and beneficiary of the deceased's estate; and that the deceased was survived by two wives and thirteen children including the parties herein.

3.2 Further undisputed facts were that the deceased left a will with instructions on how part of his estate was to be bequeathed and a Deed of Trust appointing the 1<sup>st</sup> Appellant and one Muzi M'tonga as trustees whilst part of the deceased's estate was not bequeathed in the deceased's will.

- 3.3 She found that the main issues in dispute between the parties are in respect of the properties that were not bequeathed in the deceased's will; the lack of accountability of the estate by the Appellants and the Deed of Trust and whether the Respondent ought to be awarded her entitlement out of the relevant portion of the deceased's estate in accordance with the Intestate Succession Act, Chapter 59 of the Laws of Zambia.
- 3.4 With regard to the Deed of Trust, the learned trial judge found that it was not disputed that the Deed of Trust dated 12<sup>th</sup> March, 2004 was not registered at the Deeds Registry in accordance with section 6 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia. She was therefore, of the considered view that the Deed of Trust is null and void for want of registration.
- 3.5 She further considered whether the Appellants had shown special circumstances which would enable the Court to order and authorise its registration out of the prescribed time. She acknowledged that the evidence on record is that the Deed of Trust relates to Plot № 14788, Lusaka which prior to the late Costain Muzipasi M'tonga's death, vested in Muzi High School which was subsequently placed

under the legal ambit of the Deed of Trust. The deceased, as the proprietor of Muzi High School, appointed his biological sons, Muzi M'tonga and Fred M'tonga, the 1<sup>st</sup> Appellant, as trustees under the said Deed of Trust for the purpose of holding the mentioned property in trust for the beneficiaries until the youngest child attains the age of majority that is, 21 years. The named beneficiaries in the Deed of Trust are Taonga M'tonga, Brian M'tonga and Gimunda M'tonga.

- 3.6 The learned trial judge noted that other than exhibiting the Deed of Trust in their affidavit in opposition, the Appellants neither adduced any evidence of why it was not registered at the Deeds Registry nor advanced reasons why it should warrant registration outside the prescribed time under the law. She, therefore, found that there were no special circumstances that had been canvassed by the Appellants to warrant the Court to order registration of the Deed of Trust out of time. She reaffirmed that the effect of non-registration of a document that is required to be registered in terms of section 4 of the Lands and Deeds Registry Act is that it is rendered null and void.
- 3.7 The Deed of Trust, having been rendered null and void, the learned trial judge directed that the properties held under the said Deed form

part of the deceased's intestate estate and be distributed in accordance with the provisions of the Intestate Succession Act.

- 3.8 With regard to the Respondent's claim that the Appellants render a full and accurate account of the deceased's estate, she found that the Appellants had not produced a statement of account of the estate but had merely asserted in their affidavit in opposition what they did with part of the deceased's estate. Consequently, she found that there was no evidence on record to show an accurate representation of the deceased's estate.
- 3.9 She pointed out that section 19(1) of the Intestate Succession Act imposes a duty on an administrator of an estate to render an account of the administration of a deceased's estate. She fortified that position with reliance on the case of **LINDIWE KATE CHINYATA v DOREEN CHIWELE & ANOR**<sup>1</sup> where the Supreme Court reaffirmed this position. The learned trial judge, accordingly, directed the Appellants to render a full account of the administration of the deceased's estate within three months from the date of the judgment.

3.10 On the question of whether the Respondent should be awarded her entitlement out of the deceased's estate, the learned trial judge considered the provisions of section 5 and 19 of the Intestate Succession Act and concluded that the beneficiaries of the deceased Costain Muzipasi M'tonga's estate include the two surviving spouses and his thirteen children who include the Respondent and that, therefore, the Respondent as a child of the deceased, is a beneficiary under his estate.

3.11 In light of the evidence that the 1<sup>st</sup> Appellant had received a cheque of K39 000.00 from Lafarge Cement Zambia Plc, collected a loan for Fremto Transport, his personal business, under Muzi High School, admitted having distributed four houses to himself, built Muzipasi High School in Chipata and ten shops at the garage opposite Musa Kasonka Stadium from the deceased company funds and the apparent lack of full disclosure by the Appellants, the learned trial judge found that the beneficiaries have not fairly benefitted in terms of the law as section 34(1) of the Act provides that an administrator or guardian shall not derive any pecuniary benefit from his office.

- 3.12 Whilst she acknowledged that the Court is empowered to remove or suspend an administrator from his appointment where it is satisfied that the interests of the estate so require, she declined to do so. Instead she ordered the Appellants to produce a full inventory of the deceased's estate and to render an account of the administration thereof as earlier stated; and to distribute the estate in accordance with the law.
- 3.13 On the issue of the sale of the deceased's real properties by the Appellants without the Court's authority as prescribed under section 19(2) of the Act, she found that the Appellants had not produced any evidence that such authority was sought and granted on the real properties sold by the Appellants. In the absence of proof of such authority, she was compelled to declare all the sales null and void for want of Court authority under section 19(2) of the Intestate Succession Act. She further directed any person affected by the Court's decision to pursue the Appellants for any loss likely to be suffered. She fortified her decision with reliance on the case of **BORNIFACE KAFULA & ORS v BILLINGS CHOONGA MUDENDA<sup>2</sup>.**

3.14 In conclusion, the learned trial judge found that the Respondent had proved her claims on a balance of probabilities and she entered judgment in her favour with costs to be borne by the deceased's estate and same to be taxed in default of agreement.

#### **4.0 APPELLANTS' GROUNDS OF APPEAL**

4.1 The Appellants being dissatisfied with the judgment of Hon Mrs. Justice P. K. Yangailo has appealed to this Court and advanced the following grounds of appeal:

- 1. The learned judge erred in law and fact when she held that the Deed of Trust creating Muzi High School Registered Trustees was null and void for want of registration without taking into account that the Trust was established by the late Costain Muzipasi M'tonga before his demise and that Muzi High School Registered Trustees owned Stand № 14788, Lusaka long before the demise of the late Costain Muzipasi M'tonga. Further that Stand № 14788, Lusaka was on title issued in favour of Muzi High School Registered Trustees. Therefore, raising the presumption that all formalities pertaining to its registration were complied with.**
- 2. The learned judge erred in law and fact by holding that Stand № 14788, Lusaka was vested in Muzi High School when there is no body corporate incorporated going by that name but rather Muzi High School Registered Trustees who have continued to own various properties, using the same Deed of Trust which was a body corporate registered under Lands (Perpetual Succession) Act.**

3. The learned judge erred in law and fact by stating that properties held under the Deed of Trust should form part of the deceased's intestate estate and be distributed in accordance with the provisions of the Intestate Succession Act, without taking into account the reliefs sought by the Respondent in the originating summons and further thereby re-writing the wishes of the late Costain Muzipasi M'tonga expressed in the Deed of Trust and the Will.
4. The learned Judge erred in law and fact when she held that the deceased's Will did not specify which of his children should take over his accounts and business accounts when the same was stated in the Will.
5. The learned judge erred in law and fact when she failed to take into account that the Respondent had along with other beneficiaries obtained their share of the deceased's estate some 12 years ago and that the Respondent was attempting to get a second bite at the cherry.
6. The learned judge erred in law and fact by making a determination which nullified the sale of properties which belonged to the Trust and a company without taking into account reliefs sought by the Respondent in her originating process and invoking section 19(2) of the Intestate Succession Act.

## **5.0 APPELLANTS' ARGUMENTS IN SUPPORT OF THE APPEAL**

- 5.1 Appellants' heads of argument on which the Appellants relied, were filed into Court on behalf of the Appellant.

5.2 Grounds one and two were argued together and the Appellants contend that there is evidence on record to indicate that the Trust Deed was executed before the demise of the late Costain Muzipasi M'tonga and that it is not disputed that he died in August, 2005. It was submitted that Muzi High School Registered Trustees was created by the late Costain Muzipasi M'tonga and that a certificate of title in respect of Stand № 14788, Lusaka was issued in 2003 in the names of Muzi High School Registered Trustees, a body corporate incorporated under the Lands (Perpetual Succession) Act.

5.3 In this regard, it is contended that the certificate of title, having been issued during the late Costain Muzipasi M'tonga's life time, entails that all formalities were followed before its issuance. To support this position, the Appellants relied on **HALSBURY'S LAWS OF ENGLAND**, 4<sup>th</sup> Edition, Volume 17, paragraph 118 where the learned authors state that in accordance with the maxim:

***"Omnia praesumuntur rite esse acta formal requisites to judicial official or public acts or to titles to property which are good in substance will be presumed. Thus a lawful origin will be presumed for proprietary rights which have been exercised for a long time where the exercise of such right might have been prevented by the person against whom the right is claimed ..... there is a presumption in favour of good faith and***

**validity of transactions which have stood long unchallenged."**

- 5.4 The Appellants contend that based on the foregoing, the certificate of title was good in substance and should be presumed to have been properly and legally issued.
- 5.5 It is further contended that it is unfair and unjustifiable for the Court below to find that Stand № 14788, Lusaka formed part of the late Costain Muzipasi M'tonga's estate when the said property did not belong to him but to the Trust registered under the Lands (Perpetual Succession) Act during his life time.
- 5.6 The Appellants further challenged the finding of the Court below that Stand № 14788, Lusaka was vested in Muzi High School when there is no body corporate in that name but only Muzi High School Registered Trustees. They submitted that the error could be attributed to the Lands Register printout produced by the Respondent which does not show the first entry.
- 5.7 Grounds three and six were also argued together. The Appellants contend that the Court below did not take into account the reliefs sought by the Respondent in the originating summons and thus

rewrote the Will when it ordered that the properties held under the Deed of Trust should form part of the deceased's estate to be distributed in accordance with the Intestate Succession Act.

- 5.8 It was argued that the Respondent did not seek any relief concerning a determination of what was trust property or company property but the deceased's estate. Hence the Appellants in their affidavit in support of originating summons demonstrated to the Court below how the said estate was distributed.
- 5.9 This Court was urged to find that the Court below ought not to have made an order concerning the Trust and company property as the same did not belong to the deceased so as to form part of his estate. It is contended that consequently the Court below proceeded to make orders on issues that were neither pleaded by the Respondent nor supported by evidence to substantiate its finding.
- 5.10 The Appellants submitted that the finding by the Court below offended Order 18, Rule 10 of the Rules of the Supreme Court, 1999 which provides that:

**"A party shall not in any pleading make any allegation of fact or raise a new ground or claim inconsistent with a previous pleading of his. The effect of this rule is that a party's second pleading must not contradict his first**

**and the effect of this rule is to prevent a plaintiff from setting up in his reply a new claim, which is inconsistent with the cause of action alleged in the statement of claim."**

- 5.11 The Appellants further argued that in ordering that the properties under the Deed of Trust should form part of the deceased's estate, the Court below went against the wishes of deceased expressed in the Deed of Trust and the Will.
- 5.12 In ground six the Court below is faulted by the Appellants for making a determination which nullifies the sale of properties which belonged to the Trust and company. It was submitted that the affidavit evidence shows that Stand № 14788, Lusaka belonged to Muzi High School Registered Trustees and that as such a court order was not needed to sell the property as required under section 19(2) of Intestate Succession Act.
- 5.13 It was further submitted that similarly Stand № 8325, Ndola and Plot № 744 Ndola belonged to Muzi Transport Freight and Forwarding Limited.
- 5.14 It was thus submitted that the Appellants having been appointed directors and left in charge of transport business, made decisions as

directors of the company without having recourse to a court order to deal with company property that did not belong to the deceased. To fortify that position reliance was placed on the celebrated **SALOMON v SALOMON**<sup>3</sup> case where it was held that a company is a distinct legal entity that is capable of owning property, suing and being sued.

5.15 Ground four was argued alone and it is contended by the Appellants that the Court below erred when it held that the Will did not specify which of the deceased's children should take over the deceased's accounts and business accounts. The Appellants submitted that the Will in fact states that Fred M'tonga and Muzi M'tonga should take charge of the estate for business and be signatories to the accounts and that the same was to be effected by the lawyer.

5.16 In this regard, they submitted that the Will effectively put them in charge of the business and deceased's personal finances and that in the business, they made decisions through the Deed of Trust and the Company. It was further submitted that the Trust property did not form part of the deceased's estate and not property owned by the company.

5.17 To support this argument, the Appellant's relied on the case of **MONICA SIANKONDO v FREDERICK NDENGA**<sup>4</sup> where the Supreme Court held that:

**"The Intestate Succession Act could not apply to a house (property) that did not form part of deceased's estate, as the deceased had not purchased the property in issue."**

5.18 In ground five the Court below is faulted for failing to take into account that the Respondent, along with other beneficiaries, had obtained their share of the estate some twelve years ago. The Appellants contend that the Respondent was attempting to get a second bite at the cherry.

5.19 It was submitted by the Appellants that their affidavit evidence show that the deceased's personal estate was distributed. It was further submitted that the Appellants were raising a defence or a plea of *plene administravit* which in the **OSBORNE CONCISE LAW DICTIONARY**, 9<sup>th</sup> Edition at page 290 is defined as:

**"The defence set up by an executor or administrator when sued stating that he has fully distributed the estate and, therefore, has no assets to satisfy the claim."**

5.20 Further reliance was placed on **HALSBURY'S LAWS OF ENGLAND,** **4<sup>th</sup> Edition, Volume 17 at page 801,** paragraph 1580 where the learned authors state that:

***"If the defence of *plene administravit* or *plene administravit praeter* is pleaded, the burden of proving assets rests upon the Plaintiff and the personal representative is only answerable to the amount of assets proved."***

5.21 In view of the foregoing, it was submitted on behalf of the Appellants that the burden to prove the extent of the estate still lay on the Respondent and not the Appellants. It is contended that by this action, the Respondent who had earlier received a car and money, was attempting to get a second bite at the cherry.

5.22 This Court was urged to take note that if the Respondent was dissatisfied with her share, she could have declined to receive what she was given. This Court's attention was further drawn to the Appellant's affidavit evidence that they had finished distributing the estate and that, therefore, the defence of *plene administravit praetor* was available to the Appellants.

5.23 It was further submitted that the Court order for distribution of the estate was an attempt to distribute property that did not form part of the deceased's estate.

5.24 The Appellants concluded by submitting that they had demonstrated that the estate has been fully distributed and they prayed that the appeal be allowed with costs.

## **6.0 RESPONDENT'S ARGUMENTS IN OPPOSITION TO THE APPEAL**

6.1 Respondent's heads of argument on which the Respondent relied were filed into Court.

6.2 In response to grounds one and two, Respondent's Counsel submitted that the arguments in two grounds raise the following issues:

- (i) The Deed of Trust creating Muzi High School Registered Trustees was valid.**
- (ii) The properties that purportedly belonged to the Trust Muzi High School Registered Trustees should not form part of the estate.**

6.3 It is the Respondent's contention that there was no evidence that was adduced by the Appellants to show that the Deed of Trust was

properly registered as the record will show. Respondent's Counsel submitted that this is even indicated in the Appellants' argument where they refer to a presumption that all formalities pertaining to registration were complied with.

- 6.4 It is further contended by Respondent's Counsel that this Court cannot be moved by submissions that are solely based on assumptions not supported by evidence.
- 6.5 With regard to the Appellants' citation of the Latin maxim that invites the presumption of good faith, it was submitted that it was not applicable as it is not the case herein.
- 6.6 It was submitted that for the said presumption to stand, it is incumbent on the Appellants to produce a document to suggest that there was a form of registration, such as a reflection in the Lands and Deeds and Registry. It was submitted that therefore, the Appellants' failure to produce the Lands Register is fatal to their reliance on the outlined presumptions.
- 6.7 It is further contended that whilst it is not disputed that the late Costain Muzipasi M'tonga executed a Deed of Trust in relation to Stand № 14788, Lusaka and named the Appellants as Trustees, what

is disputed is its purported or presumed registration. Section 4 of the Lands and Deeds Registry Act provides that:

**"4(1)Every document purporting to grant, convey or transfer or any interest in land, or to be a lease or agreement for lease or permit of occupation of land, whether by way of mortgage or otherwise, or which evidences the satisfaction of any mortgage or charge, and all bills of sale of personal property whereof the grantor remains in apparent possession, unless already registered pursuant to the provisions of "the North-Eastern Rhodesia Lands and Deeds Registration Regulations, 1905" or the North-Western Rhodesia Lands and Deeds Registration Proclamation, 1910, must be registered within the times hereinafter specified in the Registry or in a District Registry if eligible for registration in such District Registry."**

- 6.8 It was further submitted that sections 5 and 6 of the Act also provide for the time within which to register documents and the effect of non-registration of documents within the prescribed time.
- 6.9 Respondent's Counsel submitted that based on the foregoing, the learned trial judge was on firm ground when she held that the Deed of Trust is nullity for want of registration and that the property subject of the Deed of Trust should be administered in accordance with the provisions of the Intestate Succession Act.

- 6.10 It was submitted that the Will exhibited in the record of appeal does not state how other assets of the estate which were not listed are supposed to be distributed, therefore the executors appointed by the deceased in the said Will must distribute the portion not provided for under the will in accordance with the provisions of the Intestate Succession Act.
- 6.11 Respondent's Counsel alternatively argued that even if the Deed of Trust was to be accepted, the Trustees still breached the said Deed of Trust by settling the property before the conditions precedent were satisfied. He submitted that the non-implementation of the deceased's wishes was actually applicable to the Appellants and not to the Court below as alleged.
- 6.12 With regard to ground two, Respondent's noted that the appellants in their submission faulted the trial judge for holding that Stand № 14788, Lusaka was vested in Muzi High School when there is no corporate body by that name, only Muzi High School Registered Trustees.
- 6.13 In response to the Appellant's argument, Respondent's Counsel submitted that a perusal of evidence advanced in the Court below at

page 67 of the record shows that the Lands Register indicates that Muzi High School is possessed with the requisite legal capacity. He based this on the fact that entry no. 1 indicates that Muzi High School executed a lease agreement on 1<sup>st</sup> October, 2003 for 99 years and on the same date was granted a Certificate of Title number 22491. Additionally, entry no. 3 reveals a mortgage registration between Muzi High School and Zambia National Commercial Bank Plc. He further referred to the Appellants' affidavit wherein the deponent Fred M'tonga averred that Muzi High School possesses a bank account and he submitted that, therefore, it is totally misleading and inaccurate for the Appellants to allege that Muzi High School lacks legal capacity.

- 6.14 Further in response to the Appellants' contention that the Court below erred by holding that Stand № 14788, Lusaka is registered in Muzi High School's name, he submitted that the trial Court merely based its conclusion on the evidence adduced before it as earlier indicated in the Lands Register where Muzi High School is indicated as an entity. An example of such is the entry no. 9 which indicates an assignment between Muzi High School and Gold Crest Properties

Limited. He argued that, therefore, it is inconceivable for the Appellants to claim or allege that Muzi High School is a non-existent entity.

6.15 With regard to the issue of whether Muzi High School is registered or not, it was submitted that it was not raised in the Court below and that it is incompetent for the Appellants to raise the issue of Muzi High School being a non-existent entity for the first time on appeal. It was further submitted that this Court lacks jurisdiction to deal with that issue. To fortify the Respondent's argument, reliance was placed on a plethora of cases such as **WILHEIM ROMAN BUCHMAN v ATTORNEY GENERAL**<sup>5</sup> where the Supreme Court held *inter alia* that:

**"This matter was not raised before the Commissioner; it cannot be raised in this Court as ground of appeal before this Court."**

6.16 In **MUSUSU KALENGA BUILDING LTD & ANOR v RICHMAN'S MONEY-ENDERS ENTERPRISES & ORS**<sup>6</sup> the Supreme Court reaffirmed their earlier decision by stating that:

**"We have said before and we wish to reiterate here that where an issue was not raised in the Court below, it is not competent for any part to raise it in this Court."**

6.17 In this case, it was submitted that from the foregoing, grounds one and two lack merit and the Respondent prayed that they be dismissed with costs.

6.18 In response to ground three in which the Appellants contend that it was wrong for the trial Court to hold that properties held under the Deed of Trust should form part of the estate and be distributed in accordance with the Intestate Succession Act without taking into account the reliefs sought in the Originating Summons, it was submitted that the Court has jurisdiction to award a remedy to a successful party as it deems fit. To support this argument, reference was made to the reliefs sought in the Originating Summons and they were reproduced as follows:

- (i) A declaration that the Applicant is a beneficiary to the estate of the late Costain Muzipasi M'tonga in her capacity as a biological daughter;**
- (ii) An order directing the administrators to reveal the full extent of the estate of the late Costain Muzipasi M'tonga;**
- (iii) An order directing the administration to provide full and accurate information on how the estate has been/will be distributed among the beneficiaries and what the Applicant is entitled to;**

- (iv) A mandatory order directing the administrators to provide and furnish all documents including statements of accounts relating to the said estate;**
- (v) An order directing the Respondents that the Applicant be awarded her entitlement out of the deceased's estate as a biological daughter of the deceased;**
- (vi) Any other relief the Court may deem fit, and**
- (vii) Costs.**

6.19 In view of the foregoing, it was submitted that it is incorrect and misleading for the Appellants to fault the trial Court for holding as it did, as it was not re-writing the wishes of the late Costain Muzipasi M'tonga as expressed in the Deed of Trust and his Will.

6.20 It was further submitted that the trial Court's holding was in line with the reliefs sought in the Originating Summons and that as such, the reliefs were properly pleaded by the Respondent.

6.21 To fortify his argument, Respondent's Counsel further placed reliance on section 13 of the High Court Act, Chapter 27 of the Laws of Zambia which in the relevant parts provides that:

**"In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the**

**exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the parties may be completely and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.”**

6.22 Based on the foregoing, it was submitted that the Court below was on firm ground in holding that the Deed of Trust is a nullity as it was the only way reliefs (iii), (iv) and (v) could be actualized. It is the Respondent’s contention that the Appellants have deployed the Deed of Trust as a tool to evade their statutory obligations of rendering an account and that it was incumbent upon the Court below to lift that veil to facilitate the attainment of justice. It was submitted that the Court’s jurisdiction to mete out justice cannot be ignored especially when the Appellants failed to demonstrate that the Deed of Trust was registered. It was further submitted that a trial Court has a duty to adjudicate over all matters in controversy and that in this case, the

learned trial judge in holding that the Deed of Trust was not enforceable went further to conclude that the property under the Deed of Trust invariably forms part of the property of the estate not covered by the Will. To fortify this position, Respondent's Counsel relied on the case of **WILSON MASAUSO ZULU v AVONDALE HOUSING PROJECT**<sup>7</sup> where the Supreme Court observed that:

**"All these matters called for adjudication but, unfortunately, were left undetermined. I would express the hope that trial courts will always bear in mind that it is their duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality."**

6.23 Further reliance was placed on the later case of **THE ATTORNEY GENERAL v ABOUBACAR TALL & ANOR**<sup>8</sup> where the Supreme Court expressed the same view.

6.24 With respect to ground six in which the Appellants fault the Court below for nullifying the sale of properties that belonged to the Trust and Company, Respondent's Counsel submitted that all the properties purportedly owned by Muzi High School Registered Trustees form part of the late Costain Muzipasi M'tonga's estate and must, therefore, be distributed in accordance with the Intestate Succession

Act as directed by the Court below as the Deed of Trust is null and void.

6.25 It is the Respondent's contention that it is a complete misdirection for the Appellants to argue that the company property did not form part of the estate. It was submitted that the late Costain Muzipasi M'tonga shares in the companies which are personal assets that are subject to distribution according to the Intestate Succession Act.

6.26 It was further submitted that grounds three and six lack merit and should be dismissed with costs.

6.27 In response to ground five wherein the Appellants fault the Court below for not taking into consideration that the Respondent with other beneficiaries obtained their share of the estate twelve years prior to this suit, it was submitted that the appellants should give a full inventory of the estate and render an account as it is their legal duty to do so. Respondent's Counsel relied on section 19 of the Intestate Succession Act which provides that:

**"19(1)The duties and powers of an administrator shall be**

- (a) to pay the debts and funeral expenses of the deceased and pay estate duty if estate duty is payable;**

- (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.”

6.28 The Respondent further relied on section 45 of the Wills and Administration of Testate Estate Act, Chapter 60 of the Laws of Zambia which provides that:

**“45(1) The duties and powers of a personal representative shall include**

- (a) the payment of the debts and funeral expenses of the deceased;
- (b) if the deceased a valid will, the distribution of the property disposed of by the will in accordance with its provisions or an order of court made under section twenty;

- (c) **when required to do so by the court, either on the applications of an interested party or on its own motion –**
  - (i) **the production on oath in court of the full inventory of the estate of the deceased; and**
  - (ii) **the rendering to the court of an account of the administration of the estate.”**

6.29 It was submitted that based on the foregoing provisions, it is the Respondent's contention that the Appellants have failed to administer the affairs of the estate and have not carried out their solemn duty as provided by the law. It was further submitted that it is the Respondent's prayer that this Court upholds the order by the Court below for the Appellants to produce a full inventory of the estate and render an account of the administration thereof, including the proceeds of the sale of any of the deceased's assets within the time prescribed by the Court below.

6.30 It was, therefore, submitted that ground five lacks merit and should be dismissed.

- 6.31 In ground four the learned trial judge is faulted for holding that the Will did not specify which of the deceased's children should take over his accounts and business accounts when the same was stated in the Will. In response, Respondent's Counsel submitted that the Will did not grant ownership to the Appellants despite the fact that they were named as signatories and tasked with running the affairs of the business.
- 6.32 It was further submitted that the Appellants have failed to show how the money for the business was spent and, therefore, they reiterated the Respondent's prayer in ground five that the Appellants render an account of administration of the deceased's estate, including the proceeds of the sale of any of the deceased assets within the next three months and produce a full inventory of the estate.
- 6.33 Based on the foregoing, it was submitted that ground four also lacks merit and should be dismissed with costs.
- 6.34 In conclusion, it was submitted that the appeal rests on a prayer for this Court to interfere with findings of fact but that the Appellants had failed to demonstrate and satisfy the conditions that warrant this

Court to interfere with the same, on grounds that they are perverse or that they are not supported by evidence on record.

6.35 Reliance was placed on a plethora of authorities, such as the case of

### **THE ATTORNEY GENERAL v MARCUS KAMPUMBA ACHIUME<sup>9</sup>**

where the Supreme Court held that:

**"The Appeal Court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make."**

6.36 Respondent's Counsel finally submitted that this appeal lacks merit and must be dismissed with costs to the Respondent.

## **7.0 THIS COURT'S CONSIDERATION OF THE APPEAL AND ITS DECISION**

7.1 We have considered the grounds of appeal, respective arguments by the parties, authorities cited, evidence on record and the judgment appealed against.

7.2 As we earlier stated, grounds one and two were argued together. Ground one challenges the judgment by the Court wherein it declared the Deed of Trust *null* and void for want of registration.

Whereas ground two challenges that Court's finding that Stand № 14788, Lusaka was vested in Muzi High School which is not a body corporate and it is contended that Muzi High School Registered Trustees, a body corporate owns various properties using the Deed of Trust.

- 7.3 From the evidence on record, we find that there is no dispute that the Deed of Trust was executed before the death of the late Costain Muzipasi M'tonga who died in August, 2005. We, however, agree with the Respondent that there is no evidence on record to show that the Deed of Trust was registered even though it was argued that it was registered under the provisions of Lands (Perpetual Succession) Act. We noted that the Deed of Trust exhibited at page 90 of the record of appeal indicates that it was created on 12<sup>th</sup> March, 2004. The Certificate of Title № 22491 in respect of Stand № 14788, Lusaka in respect of Muzi High School is dated 1<sup>st</sup> October, 2003 as indicated in exhibit "**TMM1,**" a copy of the Lands Register at page 67 of the record of appeal. We, therefore, noticed that the Deed of Trust was created after the said certificate of title was issued. We further observed from the entries in the Lands Register at page 69

and entry no. 10 that Muzi High School Registered Trustees was only introduced in the entries of the Lands Register on 17<sup>th</sup> December, 2014.

- 7.4 Upon perusal of the record of appeal and particularly at pages 142 and 143, where there is a copy of Certificate of Title № 22491 issued to Muzi High School Registered Trustees a body incorporated under the Lands (Perpetual Succession) Act, Cap. 186 of the Laws of Zambia, in respect of Stand № 14788, Lusaka, we noted that in the memorials at page 143, the document refers to Muzi High School.
- 7.5 It was submitted that section 2 of the Act provides for the creation of a trust upon application by the trustees to the Minister who may grant a certificate of registration as a corporate body. It was submitted on behalf of the Appellant's that, therefore, there is a presumption that the Muzi High School Registered Trustees was duly incorporated and subsequently registered in terms of section 3(1) of Lands (Perpetual Succession) Act, which provides that:

**"3(1) The certificate of incorporation shall be registered in the Registry of Deeds and upon registration shall vest in such body corporate all land or any interest therein, of what nature and tenure soever, belonging to or held by any person or persons in trust for**

**such community body or association of persons.**

**(2) The Minister may require the registration in the Registry of Deeds of any deed or document disclosing the trust upon which such land is held."**

- 7.6 As we earlier observed, there is no evidence on record to show registration of the Deed of Trust. Furthermore, Counsel for the Respondent submitted that the non-registration is further confirmed by the Appellants' argument that the certificate of title having been issued to the Muzi High School Registered Trustees incorporated under the Lands (Perpetual Succession) Act, there was a presumption that all formalities were followed.
- 7.7 We agree with Counsel for the Respondent that in the absence of documentary evidence of registration of the Deed of Trust, the Latin maxim on the presumption of good faith is not applicable. We, therefore, find that the learned trial Judge was on firm ground in declaring the said Deed of Trust *null* and void for want of registration.
- 7.8 With regard to ground two and the Appellants' challenge of the Court's finding that Stand № 14788, Lusaka was vested in Muzi High

School which is not a body corporate, we noted that the Appellants conceded in their arguments that the error could be attributed to the Lands Register print-out produced by the Respondent which does not show the first entry. Apart from the Respondent's arguments, we also had occasion to peruse the entries in the exhibited copy of the Lands Register which from entry numbers 1 to 9 at pages 67 to 69 of the record of appeal only refer to transactions with Muzi High School and not Muzi High School Registered Trustees. We further find that the finding of the Court below is fortified by the reference of Muzi High School even in the memorials of Certificate of Title № 22491 exhibited as "**FM2**" at page 143 of the record of appeal.

- 7.9 We further noted from the Respondent's arguments that Counsel argued that the issue of Muzi High School being a non-existent entity was not raised in the Court of below and that therefore, this Court lacks jurisdiction to deal with the issue. We, respectfully agree with Counsel for the Respondent that since the issue of the non-existence of Muzi High School as a corporate body was introduced on appeal, this Court lacks jurisdiction.

contended that the Court below made orders that were neither pleaded by the Respondent nor supported by evidence to justify its findings.

7.14 We, however, find that after the Court below discovered that the Trust Deed was not registered in accordance with the provisions of the law, it could not leave the matter hanging without making a pronouncement on the legal status of the Trust Deed. We opine that by taking a further step towards bringing the matter to a logical conclusion by declaring the unregistered Deed of Trust *null* and void, and that properties held thereunder should form part of the deceased's estate, the Court below hence adjudicated upon all matters in controversy and thereby averting the issue of piece-meal litigation. Therefore, we find that the court below was on firm ground.

7.15 Consequently, we find that grounds three and six are devoid of merit and we, accordingly dismiss them.

7.16 We turn to ground four which challenges the learned trial Judge's finding that the deceased's Will did not specify which one of his children would take over his accounts and business accounts when

the same was stated in the Will. We noted that it is contended by the Appellants that their father's Will states that Fred M'tonga and Muzi M'tonga would be in charge of the business accounts and personal finances of the deceased's estate.

7.17 We had occasion to peruse the undated Will at pages 87 to 89 of the record which indicates that it relates to three entities, namely, Muzi High School, Zipas High School and Muzi Transport. The said Will indicated that in the event of the testator's death, Fred M'tonga and Muzi M'tonga would take charge of the estate's business and it further appointed the two as directors of the business entities. The Will states that the said properties were not for sale and that they were for generations of grandsons only.

7.18 We observed that with regard to the bank accounts for the named entities, the Will states that:

**"All the accounts at my bankers should be taken over by my children."**

7.19 With regard to the observation by the Court below that the deceased did not specifically mention which children should take over the accounts, we looked at the law pertaining to Wills, the same being

the Wills and Administration of Testate Estates Act, Chapter 60 of the Laws of Zambia for guidance. Section 16(1) of the said Act provides that:

**"The intention of a testator by his will, shall not be set aside because it cannot take effect to the full extent, but effect shall be given to it as far as possible."**

7.20 Based on the foregoing provision, we opine that whilst the late Costain Muzipasi went to great lengths to express his intentions on how his property and financial affairs would be best administered or managed by his children, his efforts in our view proved to be futile.

7.21 We, therefore, find that ground four has merit and we, accordingly, allow it.

7.22 We finally turn to ground five in which the Appellants contend that the Respondent along with other beneficiaries had obtained their share of the estate twelve years ago. Upon close examination of the copy of the deceased's Will at pages 87 to 89 of the record of appeal, we found a number of irregularities with the said document. The purported Will was undated, with signatures attested to by two witnesses at the same time and was not in the required format. That being the position, we find that the Will of Costain Muzipasi M'tonga

is defective in form, invalid and ineffective in terms of the Wills and Administration of Testate Estates Act as it is incapable of being registered in the Probate Registry. Consequently, all the properties, and finances should be administered in accordance with the provisions of the Intestate Succession Act.

7.23 In the circumstances, the Appellants are, therefore, duty bound to account for their distribution of the estate in terms of section 19(2) of the Intestate Succession Act.

7.24 Consequently, we find no merit in ground five and we, therefore, dismiss it.

7.25 On the whole, the Appellants having succeeded only in one ground out of six, we find that the appeal only succeeds to a small extent and the costs to follow the Respondent. In default of agreement, same to be taxed.



F. M. Chishimba

**COURT OF APPEAL JUDGE**



F. M. Lengalenga

**COURT OF APPEAL JUDGE**



M. J. Siavwapa

**COURT OF APPEAL JUDGE**