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

APPEAL Nº 53/2019

BETWEEN:

BRIDGET BANTUBONSE MUSONDA — 1ST APPELLANT

BOTOMAN PHIRI — 2ND APPELLANT

AND

ZINDABA MWANZA PHIRI — 1ST RESPONDENT
(suing through Priscilla Mwanza his next friend)

MICHAEL PHIRI — 2ND RESPONDENT

CORAM: **Chashi, Mulongoti** and **Lengalenga, JJA**
On 22nd January, 2020 and 26th March, 2021.

For the Appellants: Mr. C. Hamwela & Miss N. Chibuye – Messrs Nchito & Nchito

For the Respondents: Mrs. L. Mushota – Messrs Mushota & Associates

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J U D G M E N T

LENGALENGA, JA delivered the Judgment of the Court.

Cases referred to:

1. **NKHATA & 4 ORS v THE ATTORNEY GENERAL (1966) ZR 124**

2. **THE ATTORNEY GENERAL v MARCUS KAPUMBA ACHIUME (1983) ZR 1**
3. **MONICA SIANKONDO v FREDERICK NDENGA (2005) ZR 22**
4. **ANTI-CORRUPTION COMMISSION v BARNETT DEVELOPMENT CORPORATION LTD (2008) 1 ZR 69**

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**

Other works and materials referred to:

1. **TREITEL'S THE LAW OF CONTRACT, 12th Edition, 2007**

1.0 INTRODUCTION

1.1 This is an appeal against the High Court judgment of Mr. Justice M. J. Siavwapa that was delivered on 28th September, 2016.

2.0 BRIEF BACKGROUND

2.1 The brief background to this appeal is that the Respondents on 7th July, 2010 commenced an action against the 1st Appellant by way of Writ of Summons in which they sought the following reliefs: (For purposes of clarification, the 1st Appellant and 1st Respondent are referred to as the Defendant and Plaintiff respectively).

1. **A statement of account on the estate of Richard Phiri, LASF included, failure to which her letters of administration (Defendant) should be revoked and replaced by the Administrator General. A declaration that the Plaintiff(s) as a child(ren) of the deceased, Richard Phiri, his (their) late father be given his (their) share from the entire estate.**

2. **A declaration that he is entitled to property number LUS/10504 which the Defendant has changed into her name and her biological children's names, Bottoman Phiri, Khondwani Phiri and Dalitso Phiri to the exclusion of the Plaintiff. She has no more beneficial interest in this property.**

3. **A declaration that property number F/609/E/62/6 Lusaka is property of the estate and since the Defendant got married to one Alick Musonda at Roma Parish on 8th January, 2005, she no longer has beneficial interest in it.**

4. **A restraining order stopping the Defendant whether by herself, her agents, servants or others however, from harassing, embarrassing, threatening, black-mailing or doing anything whatsoever to the Plaintiff(s) his next of kin Priscilla Mwanza and any member of Priscilla Mwanza or late Richard Phiri's family.**

5. **Further and other relief the Court may deem just.**

6. **Costs.**

2.2 The Respondents' claim arose from a dispute over among other things a share of properties they believed formed part of the estate

of the late Richard Phiri who died intestate on 16th July, 2000. The properties in contention are a house in Olympia Park being Stand Number LUS/10504 and a house in Chudleigh being Stand Number F/609/E/62/6 also situated in Lusaka.

2.3 Also in contention are the Local Authorities Superannuation Fund (LASF) pension benefits that the Respondents claimed not to have been given a share of.

2.4 In the Court below, the Respondents, being sons of the late Richard Phiri alleged that their stepmother, the 1st Appellant as one of the administratrices of their late father's estate, excluded them in the sharing of the estate and failed, neglected or refused to give an account of the estate when she was asked. The 1st Appellant is also alleged to have changed the title of the Olympia Park property number LUS/10504 into her name and those of her biological children, namely Eneya Botoman Phiri, Dalitso Phiri and Khondwani Phiri who later passed away and excluded the Appellants. It was further alleged that the Chudleigh property number F/609/E/62/6 had not been distributed to the Respondents' detriment.

2.5 There was also evidence before the Court below from the 1st Respondent to the effect that on 8th January, 2005 the 1st Appellant got re-married to one Alick Musonda at Roma Catholic Parish and had, therefore, forfeited her interest in property number LUS/10504 as prescribed by section 9(1)(b) of the Intestate Succession Act, Chapter 59 of the Laws of Zambia.

2.6 In the Court below it was submitted on behalf of the Appellants that the Respondents had failed to prove that the properties in issue formed part of their father's estate, based on the Assignment that states that the property in Olympia Park be assigned to Richard Phiri for and on behalf of the 2nd Defendant (2nd Appellant).

2.7 With regard to the Chudleigh property, number F/609/E/62/6 it was submitted that the Respondents had failed to prove that it was purchased by the late Richard Phiri.

3.0 CONSIDERATION OF EVIDENCE AND DECISION BY THE COURT BELOW

3.1 After consideration of the evidence, exhibits and respective submissions by Counsel the learned trial Judge found that it was not disputed that the Respondents were both sons of the late Richard

Phiri and that their claim to the deceased's estate is premised on the provisions of the Intestate Succession Act.

3.2 He found that the law as prescribed in the said Act provides that if the deceased left two houses, the surviving spouse and the children needed to designate one as devolving upon them with the other forming part of the estate.

3.3 In accordance with section 3 of the Act, he found that both Respondents were issues of the deceased and that they are priority beneficiaries of his estate. He fortified his finding by referring to the fact that they were given their respective shares of the deceased's terminal benefits in their capacity as priority beneficiaries from their late father's former employer, ZESCO.

3.4 With regard to the Olympia Park property number LUS/10504, the learned trial Judge found that based on the history of title to the property as set out in the Lands Register, the late Richard Phiri purchased it from one Muhulumizi Catherine Mbawa in his own name and not in trust for anyone. As such, he dismissed the argument that Richard Phiri bought the said property for Botoman Phiri who was a minor at the time as lacking credible documentary support. He also

noted that the Deed of Assignment that was exhibited as **"EBP1"** to the affidavit in support of summons for joinder filed into Court on 15th May, 2014, was not in its original form and the date was handwritten.

3.5 He further noted that there is a difference in the order in which the names of the Assignor appears in the Assignment and in the Lands Register print-out that was exhibited as they appear in reverse.

3.6 He also noted that there was an omission at entry number 5 at page 28 of the Lands Register, as had the exhibited Assignment been lodged it would have been reflected under Assignee as: Phiri Richard (for and on behalf of Botoman Phiri, a minor) as specified on the Assignment. As no explanation was proffered for the omission in the Lands Register, the learned trial Judge arrived at the inescapable conclusion that Richard Phiri bought the property as the sole owner and that at the time of his demise, the said property was solely owned by him. Consequently, he found that it had to be considered under the provisions of section 9 of the Intestate Succession Act.

3.7 In relation to the Chudleigh house property number F/609/E/62/6, the learned trial Judge noted from the evidence that it was the

deceased's official house provided by his former employer, ZESCO as an incidence of his employment. He further noted that it was the matrimonial home at which he cohabited with his wife, the 1st Appellant at the time of his death in 2000.

3.8 The evidence before the Court below was that the said house was offered for sale to the late Richard Phiri under the Presidential Housing Initiative (PHI) and according to a letter dated 24th April, 2000, he accepted the offer on 3rd May, 2000 and he paid a ten percent (10%) deposit of the purchase price on 4th May, 2000.

3.9 It was partly on that basis that the learned trial Judge found that since the Chudleigh house was offered to and partially paid for by the late Richard Phiri, even though the bulk of the purchase price was paid by the 1st Appellant from her share from the deceased's estate, it was part of his estate.

3.10 He found that it was equitable for the said house to be sold at the prevailing market value on the **"first right of refusal"** basis to the 1st Appellant. He directed that if she opted to purchase the house, she should buy it at the market price less the amount she paid to ZESCO and her share of the proceeds of the sale at twenty percent

(20%) of the gross purchase price. He further directed that the remainder of the proceeds of sale be distributed among the beneficiaries in accordance with section 5 of the Act.

3.11 With regard to the Olympia house, the learned trial Judge held that the same shall devolve among the children exclusively since the 1st Appellant had since re-married as tenants in common as provided for under section 9(1)(a) and (b) of the Act.

3.12 To effect that provision, the Commissioner of Lands was ordered to cancel Certificate of Title № 30796 that was issued in Bridget C. Bantubonse's name (for and on behalf of Botoman Phiri, Khondwani Phiri and Dalitso Phiri) and to issue another one in the names of Michael Phiri, Botoman Phiri, Zindaba Mwanza Phiri, Khondwani Phiri and Dalitso Phiri to hold as tenants in common.

3.13 With respect to the terminal benefits payable to the late Richard Phiri's estate from the Local Authorities Superannuation Fund (LASF), the learned trial Judge found that according to the layout of the distribution of the benefits by LASF in exhibit **"BBM12(a)"** the total lump sum payable was K25 998 900.48. He noted that all the payment vouchers issued by LASF exhibited as **"ZMP11 to 19"** in

the plaintiffs' bundle of documents were payable to Bridget Phiri, the 1st Appellant between 23rd April, 2002 and 27th September, 2004.

3.14 He further noted that by a letter dated 13th August, 2004, the 1st Appellant had requested LASF to pay the balance of the benefits in her name as the sole administratrix of the deceased's estate and LASF duly acknowledged the request and complied. He further found that there was no evidence that the Respondents or their next of kin received their share of the benefits either directly from LASF or from the 1st Appellant as the sole administratrix following the death of the other administratrix Mrs. Dube.

3.15 Consequently, he held that it was incumbent upon the 1st Appellant to show that the shares belonging to the Respondents had been duly paid to them but she had failed to do so through the statement of account filed into Court on 15th May, 2014. He thereby directed that in the absence of documentary evidence of payment of the Respondents' shares within thirty (30) days from date of the judgment, the 1st Appellant should pay the same within thirty (30) days thereafter.

4.0 APPELLANTS' GROUNDS OF APPEAL

4.1 Dissatisfied with Mr. Justice M. J. Siavwapa's judgment, the Appellants have now appealed to this Court and advanced the following grounds of appeal:

(i) The learned trial judge erred in both law and fact when he held that property number LUS/10504 ('Olympia House') formed part of the deceased's estate when there was evidence to show that the said property was purchased for and on behalf of the 2nd Appellant.

(ii) The learned trial judge erred in both law and fact when having properly found that the 1st Appellant paid 90% of the purchase price for property number F/609/E/62/6 ('Chudleigh Property'), he failed to order that the 1st Appellant purchased the said property by paying the estate the 10% which he held was paid by the deceased.

5.0 APPELLANTS' ARGUMENTS IN SUPPORT OF APPEAL

5.1 In support of ground one, the Appellants' Counsel contends that the Court below erred in law and fact when it held at J17 of the judgment (lines 16 to 17) page 24 of the record of appeal that:

> **"The argument that Richard Phiri bought the property for Bottoman Phiri, who was a minor at the time, lacks credible documentary support....."**

5.2 It was further submitted that despite the learned trial Judge acknowledging the existence of a Deed of Assignment registered on 12th August, 1998, exhibited as **"EBP1"** that proved that the deceased purchased the Olympia property for and on behalf of the 2nd Appellant, he still found that the said property formed part of the deceased's estate.

5.3 In trying to persuade this Court that the Olympia property was purchased by the deceased for and on behalf of the 2nd Appellant, Counsel for the Appellants relied on the parole evidence rule. He submitted that when a written instrument (such as a deed) is tendered into Court as part of evidence, the parole evidence rule states that other evidence cannot be admitted (or even if admitted, cannot be used) to add to, vary or contradict a written instrument as stated by the learned author of **TREITEL'S THE LAW OF CONTRACT, 12th Edition, 2007** at paragraph 6-012.

5.4 It was further submitted that such document is, generally, both exclusive and conclusive evidence of its terms.

5.5 He further relied on section 7(1) and (2) of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia which deals with priority of documents and date of registration.

> **"(1) All documents required to be registered as aforesaid shall have priority according to date of registration; notice of a prior unregistered document required to be registered as aforesaid shall be disregarded in the absence of actual fraud.**
>
> **(2) The date of registration shall be the date upon which the document shall first be lodged for registration in the Registry or, where registration is permitted in a District Registry, in such District Registry."**

5.6 It is the Appellants' contention through Counsel that the Deed of Assignment was properly lodged at the Lands and Deeds Registry on 12th August, 1998. It was argued that the Respondents did not present any evidence in Court to contradict the validity of the Deed of Assignment that proves that Olympia property number LUS/10504 was purchased by the deceased for and on behalf of the 2nd Appellant.

5.7 In further challenging the learned trial Judge's finding that the Olympia property forms part of the deceased's estate, Counsel for the Appellants called in aid the cases of **NKHATA & 4 ORS v THE**

ATTORNEY GENERAL[1] and **THE ATTORNEY GENERAL v MARCUS KAPUMBA ACHIUME**[2] to move this Court to interfere with the findings of fact of the Court below. The principle in the cited cases is 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."**

5.8 It is the Appellants' contention through Counsel that based on the cited authorities this is a proper case for this Court to reverse the finding of the Court below, and this Court was urged to uphold ground one.

5.9 In support of ground two, Counsel for the Appellants submitted that the statement of account submitted into the Court below exhibited in the record of appeal by the 1st Appellant indicates that the deceased paid ten percent (10%) of the purchase price for the Chudleigh property. It was further submitted that it is clear that an amount of ZMK9 310 000.00 was deducted from the 1st Appellant's share of the deceased's estate which is the bulk of the purchase price of the

property as acknowledged by the learned trial Judge at J23 of the judgment and page 30 of the record when he stated that:

> **"In this judgment, I however take cognizance of the fact that it was the 1st Defendant who paid the bulk of the purchase price for the Chudleigh house. It is only equitable that the said house be sold at the prevailing market value on the 'first right of refusal' basis to the 1st Defendant."**

5.10 Based on the said finding and decision, the Appellants contend that the beneficiaries should only fairly be entitled to the amount of the consideration paid by the deceased for the Chudleigh property which was ten percent (10%) of the total cost of the property.

5.11 It is further contended that the Respondents have been granted all other dues as beneficiaries of the deceased estate as indicated in the Statement of Account filed in the Court below and exhibited in the record of appeal.

5.12 This Court was therefore urged to uphold ground two and to accordingly set aside the judgment of the Court below which erroneously ordered the sharing of property not part of the deceased's estate.

6.0 THE RESPONDENTS' ARGUMENTS OPPOSING THE APPEAL

6.1 Heads of argument were filed into court on behalf of the Respondents. Although a large proportion of the same are more of a narrative of the evidence on record than legal arguments. Nevertheless, an effort was made to glean the legal arguments from them.

6.2 With regard to ground one, Counsel for the Respondents, Mrs. Lillian Mushota submitted that the Respondents oppose it on the basis that the issue that property number LUS/10504 **("Olympia house")** formed part of the deceased's estate was properly analyzed by the Court below in its judgment of 28th September, 2016. It was argued that whilst the Lands and Deeds Registry Act provides that only a certificate of title is conclusive proof of ownership, the Appellants had not produced any certificate of title to either prove their ownership or to show that it was held in trust for the 2nd Appellant. It was submitted that similarly, title deed number L5443 was issued to the deceased, Richard Phiri on 12th August, 1998 and had no entry to support the claim. It was further submitted that the purported Deed of Assignment bears the same date of 12th August, 1998. It is

contended that it is not possible for title deeds to be processed into another person's name, buyer or assignee or heir on the same day of lodgement at the Ministry of Lands.

6.3 Counsel for the Respondents submitted that the learned trial Judge's analysis of the evidence and conclusion is further confirmed by the fact that the Deed of Assignment was:

(i) submitted to court only on 15th May, 2014;

(ii) by a person who was 17 years or so at the commencement of the matter and not by the 1st Appellant who purports to have been aware of this status before Richard Phiri died;

(iii) long after the first judgment by Judge Kabuka and not at the time of the first review.

6.4 Counsel for the Respondents in agreeing with the learned trial Judge's analysis submitted that if the property did not belong to the deceased, the 1st Appellant would not have lodged the Deed of Assent which was only lodged in the deceased estate matters with a death certificate and order of appointment of administrator.

6.5 She drew this Court's attention to the fact that ten years after Richard Phiri's death, on 12th July, 2010 the 1st Appellant wrote to the Ministry of Lands advising that property LUS/10504 ought to indicate

that it was held by the deceased on behalf of the 2nd Appellant. It is the Respondents' contention that by the said letter of 14th July, 2010 to the Registrar of Lands, the 1st Appellant acknowledged that the title was solely in the late Richard Phiri's name and that if there was a mistake, he himself would have noticed that his intentions were not effected by the Ministry of Lands and had it rectified.

6.6 It was submitted that changes were effected at the 1st Appellant's instance despite the fact that in 2010 the Respondents had placed a caveat on the said property.

6.7 Mrs. Mushota concluded by arguing that the Respondents as the deceased's sons, had an equal right to his property as the 1st Appellant had given no reason for changing ownership of the property by Deed of Assent. She submitted that ground one not only lacks merit but smacked of illegalities and must, therefore, fail.

6.8 In opposing ground two, Counsel for the Respondents argued that the Judge was on firm ground when he found that the deceased, Richard Phiri was offered the property, accepted it and paid the ten percent (10%) as provided by the offer.

6.9 She reacted to the 1st Appellant's contention that the property, namely Number F/609/E/62/6 (Chudleigh house) did not belong to the deceased because she paid the balance of the purchase, same being ninety percent (90%) of the purchase price, by arguing that the deceased having paid 10%, thereby accepted the offer. She further argued that by so doing, a valid contract of sale was constituted between the late Richard Phiri and the employer, ZESCO. It was submitted that the said property qualifies to be property under the deceased's estate as it belonged to the late Richard Phiri.

6.10 It is further contended that all the beneficiaries should have been considered, not just the 1st Appellant's biological children as the deceased had benefits with his former employer, ZESCO that could have been towards part or full payment of the purchase price for the property. She also referred to the Local Authorities Superannuation Fund (LASF) money which she submitted had not been paid to the Respondents by the 1st Appellant who had earlier called it. She admitted that, therefore, there was a possibility that the Respondents might have opted to buy the house from the estate.

6.11 It was submitted that the Court below properly held that the law provides that where there are two houses (or more) the deceased's children and the widow should choose which house they wished to live in and which to devolve upon them as part of the estate for sharing in accordance with section 9(2) of the Intestate Succession Act.

6.12 It is further contended that the 1st Appellant did not give the Respondents an opportunity to decide together with her children which of the two houses they preferred to live in.

6.13 It was submitted that whilst the 1st Appellant may have paid the bulk of the purchase price, she had no authority to do so as the property was part of the deceased's estate.

6.14 Counsel for the Respondents further submitted that the Court below was on firm ground and properly analyzed the case of **MONICA SIANKONDO v FREDERICK NDENGA**[3] in applying and distinguishing it from the present case. She also agreed with the Court's reliance on section 3 of the Intestate Succession Act which defines estate as:

> **"Means all the assets and liabilities of a deceased, including those accruing to him by virtue of death or**

after his death and for the purposes of administration of the estate under Part III includes personal chattels."

6.15 The Respondents prayed that ground two fails. In concluding their arguments, the Respondents through Counsel prayed that the entire appeal fails and they be awarded costs, to be taxed in default of agreement.

7.0 THIS COURT'S DECISION

7.1 We have considered the grounds of appeal, the arguments by the parties, authorities cited and judgment appealed against. It is evident that the issues in contention in this appeal relate to the two houses.

7.2 The thrust of the arguments in ground one is that the Deed of Assignment dated 12th August 1998, is conclusive evidence that the deceased purchased property No. LUS/10504, Olympia, Lusaka for the 2nd Appellant, Botoman Phiri. It is contended that the deed was duly registered as shown by the Registry stamp appended thereto in terms of section 7 of the Lands and Deeds Registry Act and that, therefore, no other evidence can be admitted to add, vary or contradict the said instrument.

7.3 In his judgment, the learned trial Judge found that the Lands Register does not recognise the 2nd Appellant as a beneficiary of the property at the time it was bought by the deceased, but that it only does so at the instance of the 1st Appellant by way of deed of assent and a vesting order after the death of the deceased. It was further, rightly observed by the learned Judge that the said vesting order, curiously brought on board the 2nd Appellant and two of his siblings, which is contrary to the letter and spirit of the Deed of Assignment which only recognises the 2nd Appellant.

7.4 As rightly observed by the learned Judge in his judgment, no explanation was proffered for the omission of the names of the 2nd Appellant at entry No. 5 and 6 of the Lands Register. We opine that if there was an omission on the part of the Registrar of Lands and Deeds, then the deceased would have brought it to the attention of the Registrar for correction in terms of section 11(1) of the Lands and Deeds Registry Act which provides that:

> **"11. (1) Where any person alleges that any error or omission has been made in a Register or that any entry or omission therein has been made or procured by fraud or mistake, the Registrar shall, if he shall consider such allegation**

> **satisfactorily proved, correct such error, omission or entry as aforesaid."**

7.5 We find that the deceased made no such application for correction of the alleged omission having been issued certificate of title No. L5443 on 12th August 1998 in his names two years prior to his death. We are fortified in this regard, in that the Supreme Court in **ANTI-CORRUPTION COMMISSION v BARNNET DEVELOPMENT CORPORATION LIMITED**[4] guided that:

> **"Under section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of land by a holder of a certificate of title. However, under section 34 of the same Act, a certificate of title can be challenged and cancelled for fraud or reasons of impropriety in its acquisition."**

7.6 Based on the cited authority and as guided by the Supreme Court, we find that entry Nos. 5 and 6 of the Lands Register, in relation to the certificate of title issued to the deceased, are conclusive evidence that Property No. LUS/10504 was acquired by the deceased, Richard Phiri, for himself. The certificate of title thus supercedes the deed of assent and the purported assignment indicating that the deceased acquired the property for and on behalf of the 2nd Appellant.

7.7 Consequently, we find that the Court below was on firm ground when it held that Property No. LUS/10504 Olympia, Lusaka formed part of the estate of the deceased to devolve among all the five children of the deceased. We accordingly uphold the order that the Commissioner of Lands cancels certificate of title No. 30796 issued in the name of Bridget C. Bantubonse (for and on behalf of Botoman Phiri, Administrator for the late Khondwani Phiri and Dalitso Phiri), and that it be replaced with one issued directly in the names of Michael Phiri, Botoman Phiri, Zindaba Mwanza Phiri, Administrator for the late Khondwani Phiri and Dalitso Phiri.

7.8 We turn to ground two which faults the learned trial Judge for failing to order that the 1st Appellant purchased property number F/609/E/62/6 (Chudleigh property) after having properly found that she paid 90% of the purchase price for it after her late husband had earlier paid the 10% deposit towards the purchase of the house. The learned trial Judge after properly finding that the 1st Appellant used her share of the benefits received from the deceased's estate to pay the balance of the purchase price, however, reasoned that the said

house formed part of the deceased estate to which provisions of the Intestate Succession Act applied.

7.9 We opine that even though the late Richard Phiri was offered the property for which he only paid the 10% deposit, the property could not vest in the deceased's estate. In other words, the contract of sale could only be concluded upon the balance of the purchase price being paid. In this case, the 1st Appellant as a member of the deceased's family was permitted to conclude the contract of sale.

7.10 The learned trial Judge considered it equitable for the said property to be sold at the prevailing market value on a **'first right of refusal'** basis to the 1st Appellant. We are, however, not persuaded that the Chudleigh house formed part of the deceased estate, taking into account that the 1st Appellant paid the bulk of the purchase price as rightly acknowledged by the learned trial Judge.

7.11 We are of the considered view that what would be just and equitable in the circumstances would be for the 1st Appellant to reimburse the deceased's estate the 10% deposit of the purchase price that was paid by the late Richard Phiri as a deposit with interest thereon at the average short term deposit rate from the date of filing the Writ in the

Court below to date of judgment and thereafter, at the average bank lending rate up to date of payment, and for her to purchase the Chudleigh house for which she paid 90% of the purchase price.

7.12 Based on the said considerations, we find merit in ground two and it succeeds. Consequently, we set aside that part of the judgment by the Court below that ordered the sale of the Chudleigh house at market value for purposes of having the proceeds from the sale shared by the beneficiaries.

7.13 In conclusion, the Appellants being unsuccessful in ground one and successful in ground two, the respective parties to bear their own costs.

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J. Chashi

COURT OF APPEAL JUDGE

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J. Z. Mulongoti

COURT OF APPEAL JUDGE

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F. M. Lengalenga

COURT OF APPEAL JUDGE