

CIV.APP 55/2013

**IN THE COURT OF APPEAL OF SIERRA LEONE**

BETWEEN:

ANDRE ZACHARIAH                      1<sup>ST</sup> DEFENDANT/APPELLANT

AND

ZAIDA ZACHARIAH                      PLAINTIFF/RESPONDENT

MICHAEL BENJAMIN ZACHARIAH      2<sup>ND</sup> DEFENDANT/RESPONDENT

(Through his Next Friend Maimag G. Seekey)

ECOBANKMICROFINANCE(SL)LTD.              Intervener/Applicant/respondent

CORAM:

THE HONOURABLE MR JUSTICE P.O.HAMILTON, JSC.

THE HONOURABLE MRS JUSTICE NYAWO MATTURI JONES, JA.

THE HONOURABLE MR. JUSTICE DEEN-TARAWALLY, JA.

**JUDGMENT DELIVERED THE 14<sup>TH</sup> DAY OF JULY 2015**

THE APPEAL

This appeal was filed on behalf of the 1<sup>st</sup> Defendant/Respondent/Appellant who is dissatisfied with the decision of the High Court presided over by Hon. Mr. Justice N. C .Browne-Marke, JSC (Sitting as High Court judge) and the judgment is dated the 22<sup>nd</sup> July 2013.

The appeal is based on the following grounds:

# **PART OF THE DECISION OF THE LOWER COURT COMPLAINED OF:**

Paragraph 31 of the judgment: *"I find on the facts of the case that the property which remains undisposed of, presently situate at and known as 28 Sir Samuel Lewis Road forms part of the residue devised by M. E. Zachariah to his sons Richard and Elias Zachariah in equal shares. Since both of them are now deceased, the persons now entitled to share in the residue are the Plaintiff who is entitled to 50% thereof and the 1<sup>st</sup> and 2nd Defendants who are together entitled to the remaining 50% thereof. The 2<sup>nd</sup> defendant comes in because his father died after the passage into law of The Devolution of Estates Act 2007, which does not discriminate against children born out of wedlock. It seems unlikely that partitioning would be a workable option. The likelihood is that a sale of the property and distribution of the proceeds of sale to the beneficiaries would be more appropriate. And Orders following the findings as contained in paragraph 32 of the judgment:*

*"32 The Orders of the Court below are as follows:*

*i. This Honourable Court declares that the remainder of the land and hereditaments situate at and known as 28 Sir Samuel Lewis Road Freetown in the Western Area of the Republic of Sierra Leone, form part of the residue devised in the last Will and Testament of Michael Elias Zachariah dated 6<sup>th</sup> January 1987 to Richard Zachariah and Elias Zachariah in equal shares. This Honourable Court declares that the remainder of the land and hereditaments situate at and known as 28 Sir Samuel Lewis Road Freetown in the Western Area of the Republic of Sierra Leone, form part of the residue devised in the last Will and Testament of Michael Elias Zachariah dated 6<sup>th</sup> January 1987 to Richard Zachariah and Elias Zachariah in equal shares.*

*ii. In the premises this Honourable court declares that the persons entitled to the said residue are, as to 50% the Plaintiff Mrs ZAIDA ZACHARIAH and as to the remaining 50% thereof ANDRE ZACHARIAH and MICHEL BENJAMIN ZACHARIAH.*

*iii. This Honourable court declares that the Plaintiff ZAIDA ZACHARIAH and the 1<sup>st</sup> Defendant ANDRE ZACHARIAH are jointly entitled to a Grant of Letters of Administration with the Will annexed to administer the estate of MICHEL Elias Zachariah, provided of course that he is now deceased. If the 1<sup>st</sup> Defendant declines to do so this Honourable court Grants leave to the Plaintiff to obtain the said Grant alone.*



iv. *As soon as such grant has been obtained, the Solicitors responsible for obtaining the Grant shall file a Notice in this court to that effect so that this Honorable court will be able to proceed to the next stage which is to Order the partition or sale of the said property.*

v. *There shall be liberty to apply.*

vi. *No order as to costs at this stage.*

#### **GROUND OF APPEAL:**

1. HIS LORDSHIP COMPLETELY IGNORED THE GUIDELINES IN DECIDING MATTERS OF THIS NATURE AS LAID DOWN IN THE COURT OF APPEAL DECISION OF SC. CIV/APP.8/79 BETWEEN WILLIAM COKER – APPELLANT AND JOSEPH WALKER – RESPONDENT. JUDGMENT OF THE 27<sup>TH</sup> APRIL 1981 HENCE ARRIVING AT AN ERRONEOUS DECISION:

2. THE DECISION OF HIS LORDSHIP WITH RESPECT IS FRAUGHT WITH LAPSES AND IMPRECISIONS THEREFORE MAKING THE SAID DECISION UNSAFE TO STAND.

#### **PARTICULARS:**

In paragraph (7) of the judgment, his lordship had this to say: *“in her affidavit the plaintiff deposed that she was the daughter in-law of M.E. Zachariah. This is of some importance because M.E Zachariah it appears died intestate in Freetown on the 12<sup>th</sup> August 1971 seised of the property at Murray Town which he had bought from Benjamin Lewis in 1943 whether or not he became the sole beneficial owner of the properties in the estate of E. M. Zachariah would depend on whether he had siblings alive at the date of the death of E.M. Zachariah.”*

In paragraph 8 of the judgment his lordship said *“in 1988 E.M.Zachariah left Sierra Leone for London as he was seriously ill. He executed the Power of Attorney referred to above. The Plaintiff does not in this affidavit state whether or not her father in –law died. Her husband died on the 6<sup>th</sup> January 2011.”*



In paragraph 11 of the judgment his lordship continued in his analysis of the evidence *"on the 12<sup>th</sup> June 2013 the 1<sup>st</sup> defendant in opposition to the Plaintiff's claim. He deposed that he is unaware that the property at No 28 forms part of the residue of his late grandfather E. M. ZACHARIAH'S estate"*

In paragraph 13 his lordship said *"on the 12<sup>th</sup> June 2013 the 2<sup>nd</sup> Defendant appearance to the Originating Summons through Jenkins Johnstone & Co. He has not filed any affidavit in opposition. At the hearing of the 28<sup>th</sup> June 2013 Mr D. R. Pratt Counsel of the absent 2<sup>nd</sup> Defendant informed the court that the 2<sup>nd</sup> Defendant and his next friend were not opposing the Plaintiff's application to this court. I am satisfied based on this statement made by Mr. Pratt that in court that his instructions are that there is a residue which ought to be sold as this is what in a nutshell the Plaintiff is claiming."*

At paragraph 14 of the Judgment continuing, his lordship said *"on the 17<sup>th</sup> June 2013 the Plaintiff filed an Affidavit in reply deposed and sworn by her on that same day. The Deed recites the purchase of the property by E. M. Zachariah in 1945, the grant made to E.M. Zachariah in 1987, and the last Will of E.M. Zachariah without even stating the date this will was made. It does not state whether E.M. Zachariah was dead as of that date. E. Zachariah could not sell if his father M.E. Zachariah was alive. In the 3rd preamble the conveyance recited that by the last Will and Testament of Michael Zachariah he devised his house in Freetown Sierra Leone to his son Elias Zachariah..."*

At paragraph (16) continuing his lordship said *"on 11th July, 2013 ....It purports to depict two houses or perhaps one house and an annex. Accordingly to the valuer Mr. Kenny, there are presently four houses on the land also the plan purported to cover an area of 5.2059 acre. The 1943 survey plan in exhibit 22 stated the area to be five (5) acres more or less"*

In paragraph (18) thereof, his lordship referring to the memorandum Exhibit A27 said *"this merely confirms the Plaintiff's contention that all that was given to E.*



*Zachariah the 1<sup>st</sup> Defendant's father was just one house, it being that which he sold during his life time to Assad Ajami."*

At paragraph twenty (20) of the judgment his lordship referring to an affidavit in reply sworn to by the Plaintiff on the 8<sup>th</sup> July 2013, his lordship said, quoting the Plaintiff *"the house that I occupy and the two workshops were built by my late husband and the house that the 1<sup>st</sup> Defendant now occupies was built by my late grandfather-in-law .E.M. Zachariah."*

At paragraph twenty-three (23) His lordship had this to say *"the realty referred to on the face of the grant may well have referred to some other property unless therefore it was declared in that grant the property at No 28 would still remain in the estate of E.M. Zachariah..."*

At paragraph twenty-five (25) *" what it appears has caused some confusion is the devise in the will of M.E. Zachariah which states I demise my house in Freetown, Sierra Leone to my son Elias Zachariah..."* Mr Margai has argued that the plaintiff has described the land to which he is laying claim with any degree of certainty but the same accusation will lie against his client ...It is not disputed by the 1<sup>st</sup> Defendant that his father sold a house in 1998. If the house sold was not the house E.M. Zachariah had built, which house did E. Zachariah sell? The conveyance to Assad Ajami is unclear in this respect.

At paragraph twenty-nine (29) relying on the rules of construction his lordship held *" it seems to me that the devise to E. Zachariah in his late fathers Will, of a house is vague and could be said to be void for uncertainty. There is no evidence of which house M.E. Zachariah was referring to. Neither side has adduced evidence that he may have had one or more houses...That being the case it is quite evident that the property at No 28 save perhaps that sold by Elias in 1998 has fallen into residue and falls to be dealt with in accordance with the residue clause in the Will."*

At paragraph thirty (30) states *"the difficulty as I now state above is that neither side has produced evidence of M.E. Zachariah's demise..."*

3. HIS LORDSHIP ERRONEOUSLY SHIFTED THE BURDEN OF PROOF WARRANTING PARTITIONING OR SALE FROM THE PLAINTIFF TO THE



1<sup>ST</sup> DEFNDANT/RESPONDENT HENCE ARRIVING AT THE WRONG DECISION.

4. THAT ORDER 3 OF HIS LORDSHIP'S RULING IS HIGHLY IRREGULAR IN THE FACE OF THE TESTATOR'S WILL EXHIBITED AS EX 'ZZ5' (ADDITIONAL GROUNDS. )

### **Facts Briefly:**

The Plaintiff, (Zaida Zachariah) is widow of Richard Zachariah (deceased) one of the sons of Michael Zachariah (deceased) The other son of Michael was Elias Zachariah (also deceased). Zaida and Richard never had children. Elias Zachariah had two sons Andre and Michael Benjamin Zachariah. (the 1<sup>st</sup> defendant/Appellant and the 2<sup>nd</sup> Defendant/Respondent respectively. ) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' great grandfather, Elias Mousi Zachariah first bought the land in question in 1943. It was about 5 acres. He died intestate in 1971. His son Michael Elias Zachariah took out Letters of Administration in the Probate Division of the High Court of Sierra Leone on the 17<sup>th</sup> June, 1987. (ZZ3) Michel Zachariah however could not administer because he was seriously ill and had to leave the country. In 1988 Michael Zachariah left Sierra Leone and executed a Power of Attorney in favour of his two sons -(Richard and Elias,) to administer the estate of their grandfather. Michael Zachariah died testate on the 1<sup>st</sup> of May 2011. By a clause in his Will, he left the residue of his property to his two sons (Richard and Elias) in equal shares. One DEREK COX and Elias are named Executors of the Will. Richard and Elias died in 2011 without administering their grandfather's estate. Zaida being the widow of Richard claimed her late husband's share by Originating Summons in the High Court. The High Court, presided over by Hon. Justice Browne Marke JSC then JA, sitting as High Court Judge gave judgment in favour Zaida Zachariah the Plaintiff/Respondent in this case.

Michael Benjamin has not challenged his aunt's claim. But his brother Andre did and he has appealed against the High Court decision. The 3<sup>rd</sup> Defendant/Respondent/Intervener was joined as a party in this court. They allege

to be creditors to the estate of Michael Zachariah seeking and order to be paid directly out of the proceeds of sale.

**THE PLAINTIFF/RESPONDENT BY ORIGINATING SUMMONS SOUGHT THE FOLLOWING RELIEFS IN THE LOWER COURT:**

That the estate of Mr. Michel Elias Zachariah in respect of all that piece and parcel of land hereditaments lying and situate and being at No. 28 Sir Samuel Lewis Road Freetown be partitioned so as to have the applicant have her own share.

That alternatively the said property be sold by auction or private treaty to the highest bidder at a price not below the reserve price of \$450,00 (Four Hundred and Fifty United States Dollars) or its Leone equivalent set by an independent licensed Evaluator such price to be sanctioned by the court.

That The Master and Registrar of the High Court do execute the conveyance in favour of the purchaser.

That either party be at liberty to bid at the said sale and in the event of any of the Defendant/Respondents being the purchaser thereof the Deed of conveyance be executed by the Plaintiff/Applicant or the Master and Registrar of the High Court.

That the solicitors' costs and the evaluator's fee be paid by the proceeds of sale.

That any further and or necessary directions may be given.

Any further orders that this Hon Court may deem fit and just.

The Hon. Judge heard the summons and gave judgement for the Plaintiff/Respondent. A full judgement is recorded and is part of the papers before this court. The judge for reasons stated made his assessment and conclusions. However the learned judge made several comments in the judgment which have occasioned the second ground of appeal as above enumerated. After his judgment, the Hon. Judge made the following orders:

*The third of these orders has been raised as a ground of appeal. The following orders were made in the court below:*



1. *This Honourable Court declares that the remainder of the land and hereditaments situate at and known as 28 Sir Samuel Lewis Road Freetown in the Western Area of the Republic of Sierra Leone, form part of the residue devised in the last Will and Testament of Michael Elias Zachariah dated 6<sup>th</sup> January 1987 to Richard Zachariah and Elias Zachariah in equal shares.*
2. *This Honourable Court declares that the remainder of the land and hereditaments situate at and known as 28 Sir Samuel Lewis Road Freetown in the Western Area of the Republic of Sierra Leone, form part of the residue devised in the last Will and Testament of Michael Elias Zachariah dated 6<sup>th</sup> January 1987 to Richard Zachariah and Elias Zachariah in equal shares.*
3. *In the premises this Honourable court declares that the persons entitled to the said residue are, as to 50% the Plaintiff Mrs ZAIDA ZACHARIAH and as to the remaining 50% thereof ANDRE ZACHARIAH and MICHEL BENJAMIN ZACHARIAH.*
4. *This Honourable court declares that the Plaintiff ZAIDA ZACHARIAH and the 1<sup>st</sup> Defendant ANDRE ZACHARIAH are jointly entitled to a Grant of Letters of Administration with the Will annexed to administer the estate of MICHAEL Elias Zachariah, provided of course that he is now deceased. If the 1<sup>st</sup> Defendant declines to do so this Honourable court Grants leave to the Plaintiff to obtain the said Grant alone.*
5. *As soon as such grant has been obtained, the Solicitors responsible for obtaining the Grant shall file a Notice in this court to that effect so that this Honorable court will be able to proceed to the next stage which is to Order the partition or sale of the said property.*
6. *There shall be liberty to apply.*
7. *No order as to costs at this stage.*



The Hon. Judge heard the evidence -documentary and oral he referred to these in his judgment. He did not set out the facts which he thought were tied up with affidavit evidence. In his judgment, he considered the issues in dispute.

Right at the outset of his assessment of evidence in his judgment, he said quite clearly that the land in dispute is certain, (page 108 records) contrary to the 1<sup>st</sup> Defendant/Respondent/Appellant. He wrote thus: *"it is the property which was assessed by the 1<sup>st</sup> defendant's valuer and the Plaintiff's valuer. ;It is the land and building situate and known as 28 Sir Samuel Lewis Road; The house which was sold by Elias Zachariah , the first defendant's father was once part of that same land which in 1943 measured 5 acres more or less. E.M.Zachariah died intestate being seised.of the property at 28 Sir Samuel Lewis Road"*.

### **RELIEFS SOUGHT FROM THE COURT OF APPEAL:**

*The judgment/Ruling delivered by Hon. Justice N.C Browne-Marke (JA) in the matter herein on the 22<sup>nd</sup> July 2013 and all Orders made there under be set aside and one substituted in favour of the 1<sup>st</sup> Defendant/Respondent/Appellant*

*Such other or further reliefs as may appear just in the circumstances to be granted to the 1<sup>st</sup> defendant/Respondent/Appellant.*

*Costs to the 1<sup>st</sup> Defendant/Respondent/Appellant in this court and the court below.*

## ARGUMENTS AND SUBMISSIONS:

Solicitors for the Plaintiff/Respondent, 1st Defendant/Appellant the 2<sup>nd</sup> Defendant/Respondent and the 3<sup>rd</sup> Defendant/Respondent/Intervener filed synopsis and made oral submissions.

REGARDING GROUND 1: *(His lordship completely ignored the guidelines in deciding matters of this nature as laid down in the Court of Appeal decision, Civ/app.8/79 Between William Coker – Appellant and Joseph Walker – Respondent. Judgment of the 27<sup>th</sup> April 1981, hence arriving at an erroneous decision.)* **Mr. Margai for the appellant** submitted that the discrepancy in the description of the subject matter of the application by the Plaintiff was unhelpful to the court, thus making it unsafe to grant the application, particularly when there had been no amendment of the same or at best to establish a nexus between the various descriptions. Further that the trial Judge should have referred the matter to the Administrator and Registrar General or the Master and Registrar, for an inquiry to be conducted to determine/ascertain the parties who are entitled, their interests, their shares, etc before concluding as he did in paragraph 32/33 of his judgment:

**Counsel for the Plaintiff/Respondent** submitted that the property was certain and precise though the numbering and Streets had changed. She submitted that the judge had to consider all sides of the case. That even the 1<sup>st</sup> Defendant/Appellant in his affidavit evidence described the property as 28 Sir Samuel Lewis Road, implying that all are referring to the same property. Further that this issue of uncertainty was never raised in the lower court. She submitted that this ground was frivolous and vexatious and cannot hold as the property was described with precision.

**On the same note, Counsel for the 2<sup>nd</sup> Defendant/Respondent** submitted that he was satisfied with their submissions given at the hearing of the Originating Summons, the supporting affidavit and the affidavit in Opposition. On pages 1-5 and 28-54 of the records. Counsel for the 2<sup>nd</sup> Defendant/Respondent continued that his Lordship's 1<sup>st</sup> Order refers to No 28 Sir Samuel Lewis Road. And that even the Will refers to 28 Sir Samuel Lewis Road Freetown.



He also referred to the affidavit in Opposition of the 1<sup>st</sup> Defendant/Appellant where he deposed: **“that apart from the subject matter at Sir Samuel Lewis Road Freetown descending from my grandfather Mr. Michael Elias Zachariah, I know of no residuary.**” Counsel for the 2<sup>nd</sup> Defendant/Respondent continued that there are several points raised to satisfy the court that there is no uncertainty as that sought to make the Judge’s conclusions regarding this decision unsafe. He cited the case of KWOADZO V ADJEI 10 WACA 274 per Kingdon CJ: *‘the acid test is whether a surveyor taking a record could produce a plan showing accurately the land.*”

Further Counsel for the 2<sup>nd</sup> Defendant/Respondent submitted that by virtue of the provisions of the Devolution of Estates Act 2007, the court has jurisdiction to hear and determine the matter and determine the shares of the beneficiaries.

REGARDING GROUND 2: *(the decision of his lordship with respect is fraught with lapses and imprecision therefore making the said decision unsafe to stand,)* and, Counsel for the 1<sup>st</sup> Defendant/Appellant submitted that the particulars highlighted at pp 215-217 of the records, clearly indicate that, His Lordship was in a confused state as to the discharge by the Plaintiff of the burden of proof which rested on her. In other words the doubts expressed by his lordship were of such magnitude as to warrant any reasonable tribunal to dismiss the plaintiff’s application which fell short of the standard of proof, this, his lordship failed to do )

Counsel for the Plaintiff/Respondent stated that the particulars highlighted where His Lordship said; *“in her affidavit the plaintiff deposed that she was the daughter in-law of M.E.Zachariah. This is of some importance because M.E Zachariah it appears died intestate in Freetown on the 12<sup>th</sup> August 1971 seised of the property at Murray Town which he had bought from Benjamin Lewis in 1943 whether or not he became the sole beneficial owner of the properties in the estate of E. M. Zachariah would depend on whether he had siblings alive at the date of the death of E.M. Zachariah,”* and In paragraph 8 of his judgment, *“in 1988 E.M. Zachariah left sierra Leone for London as he was seriously ill. He executed the Power of Attorney referred to above.*



*The Plaintiff does not in this affidavit state whether or not her father in -law died. Her husband died on the 6<sup>th</sup> January 2011,"*his Lordship merely repeated what was in the Plaintiff/Respondent's affidavit.

**Counsel for the Plaintiff/Respondent** submitted further, that when in paragraph 13 his lordship said that: *"on the 12<sup>th</sup> June 2013 the 2<sup>nd</sup> Defendant's appeared to the Originating Summons through Jenkins Johnstone & Co. He has not filed any Affidavit in Opposition. At the hearing of the 28<sup>th</sup> June 2013, Mr. D. R. Pratt Counsel of the absent 2<sup>nd</sup> Defendant informed the court that the 2<sup>nd</sup> Defendant and his next friend were not opposing the Plaintiff's application to this court. I am satisfied, based on this statement made by Mr. Pratt in court that his instructions are that there is a residue which ought to be sold as this is what in a nutshell the Plaintiff is claiming."*

The learned Judge merely stated that the 2<sup>nd</sup> Defendant/Respondent was not opposing the claims in the Originating Summons. In other words, that Zaida Zachariah's claims stand. i.e. that No 28 Sir Samuel Lewis Road is residue. In other areas, she submits that **His lordship stated that he believed Plaintiff/Respondent's evidence.** Counsel for the Plaintiff/Respondent submits that the decision is safe.

**Counsel for the 2<sup>nd</sup> Defendant /Respondent** submitted that his lordship's decision was clear and devoid of lapses. He drew the court's attention to the fact that apart from the property that was sold, there are four other houses which form part of the residue and which the Zachariah beneficiaries are entitled to share in the said will. Mr. Jenkins-Johnstone referred to the relevant clause of the testator's will: **"I devise my home in Freetown Sierra Leone to my son Elias Zachariah."**(Who is the father of the 1<sup>st</sup> Defendant/Appellant and the 2<sup>nd</sup> Defendant/Respondent) The said Will went on to state: **"I devise and bequeath all the residue of my property both real and personal, situate in Sierra Leone to my said sons Richard and Elias in equal shares absolutely. "**

Counsel for the 2<sup>nd</sup> Defendant/Respondent referred to evidence before the court that Elias sold a house/his own share in 1998 to a purchaser by name of ASSAD AJAMI, and to the fact that there are four other houses which form part of the residue.



He added that His lordship carefully considered this fact before him and cites him in his judgment which says: *"I find on the facts of the case that the property which remains undisposed of, presently situate at and known as 28 Sir Samuel Lewis Road forms part of the residue devised by M.E.Zachariah to his sons Richard and Elias Zachariah in equal shares. Both of them are now deceased, the persons now entitled to share in the residue are the Plaintiff who is entitled to 50% thereof and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who are together entitled to 50% thereof."*

*Counsel for the 2<sup>nd</sup> Defendant/Respondent repeated his submission that Counsel for the 1<sup>st</sup> Defendant/Appellant is seeking to open a new area of contention which they did not plead in the court below. He went on to buttress his submission by reference to Halsbury's Laws of England 3<sup>rd</sup> Edition Volume 30 –paragraph 4 page 4 which defines the function of pleadings. Counsel for the 2<sup>nd</sup> Defendant/Respondent submitted that the identity of the property was not challenged in the High Court and that could not be raised in this court. Furthermore he submitted that the burden of proof was discharged by the Plaintiff and that at the conclusion of the case the Learned Judge delivered his judgment and made the orders as he deemed fit.*

### REGARDING GROUND 3:

3.That his lordship erroneously shifted the burden of proof warranting partitioning or sale from the plaintiff to the 1<sup>st</sup> Defendant/Respondent, hence arriving at the wrong decision. 'Mr. Margai submitted that the particulars following the above ground are self explanatory needing no further amplification to show that his lordship erred in law. (page 203 para 25).

**Counsel for the Plaintiff/Respondent**, admitted that the burden of proof in the High Court was on the Plaintiff/Respondent. She referred to Mozley & Whitley's Law Dictionary-meaning of Burden of Proof as: "the duty of proving ones case" and submitted that it was the plaintiff's duty to establish prima facie evidence – by adducing evidence sufficient to establish a prima facie case, thereby shifting the burden of proof to the other side.



She submitted that in the present case, Zaida Zachariah adduced sufficient evidence to establish a prima facie case against the 1<sup>st</sup> Defendant/Appellant. For example, she presented the **marriage certificate**; the **Conveyance in 1943**; **Letters of Administration** taken out by the testator on behalf of his father on the 17<sup>th</sup> June 1987; **Power of Attorney** by the Testator to his two sons dated 23<sup>rd</sup> June 1988 ; **The Will dated 6<sup>th</sup> January 1987**; the **Conveyance of the house that was sold by 1<sup>st</sup> Defendant/Appellant's father** dated 18<sup>th</sup> December 1998, which proved that he sold his own share as provided for in the Will, making the said No 28 Sir Samuel Lewis Road the residue of the said estate and making the Plaintiff/Respondent a beneficiary to that said estate.

*REGARDING GROUND 4: ("that order 3 of his lordship's ruling is highly irregular in the face of the testator's Will exhibited as ex 'ZZ5' (additional grounds. ) ( i.e. This Honourable court declares that the Plaintiff ZAIDA ZACHARIAH and the 1<sup>st</sup> Defendant ANDRE ZACHARIAH are jointly entitled to a Grant of Letters of Administration with the Will annexed to administer the estate of MCHIEL Elias Zachariah, provided of course that he is now deceased. If the 1<sup>st</sup> Defendant declines to do so this Honourable court Grants leave to the Plaintiff to obtain the said Grant alone. ) On this ground Counsel for the Plaintiff/Respondent submits that this order is not irregular; That there were two executors of the said will: the 1<sup>st</sup> Defendant/Appellant's late father ( Elias) and the second was the testator's son in law – Derek Cox who lives out of Sierra Leone and had not been seen in this country for over 43years according to 1<sup>st</sup> Defendant/Appellant's evidence (Exhibit AZ 7) That there was no evidence before the court that that Derek Cox was dead or alive*

*Counsel for the Plaintiff/Respondent submitted that there was no evidence before the court that the said Will was probated and also by law nothing stops a beneficiary who is of full age to take out Probate or letters of Administration. That the 1<sup>st</sup> Defendant/Appellant was not left out in this 3<sup>rd</sup> order but the judge gave him the opportunity to jointly take out Letters of Administration but he refused to do so. She submitted that the Hon. Judge did the proper thing based upon the argument proffered above. She urged the court to strike out the appeal with costs and also allow his lordship in the lower court to give his final order.*



*Counsel for the 2<sup>ND</sup> Defendant/Respondent* submitted that order 3 of the said judgment is regular and in compliance with the provisions of the law. He referred to the discretionary power of the court to grant general or limited power of administration of estates. That administration with Will annexed may be granted to a devisee or legatee or to a person by whom or on whose behalf an application is proposed to be made as dependant of the deceased; That the court can, under the circumstances, in its discretion appoint as administrator any person it thinks expedient; That the court made an order in this case, for the administration of the estate of MICHAEL ELIAS ZACHARIAH by the Plaintiff/Respondent and the 1<sup>st</sup> Defendant/Appellant who were to take out Letters of Administration with the Will annexed, as it is clear that one of the executors is dead and nothing has been done by the other executor. **In conclusion, Counsel for the 2<sup>nd</sup> defendant/Respondent** submitted that this is a bad case for the 1<sup>st</sup> Defendant/Appellant. That under section 11 of the **Devolution of Estates Act 2007** the 1<sup>st</sup> Defendant/Appellant and the 2<sup>nd</sup> Defendant/Respondent can claim their father's share in the estate. He urged this court to strike out this appeal with costs and allow the judge in the High Court to conclude the case and give the final orders.

#### **FINDINGS:**

**On ground 1:** In consideration of the evidence before this court documentary and oral and all the arguments and submissions by and on behalf of all the parties I am convinced that the decision of the court below is safe and that it ought to stand. The judge considered the evidence before him, assessed it and was **quite clear** about his reasons for his conclusions. Moreover, No 28 Sir Samuel Lewis Road is the same property, continuous occupation by one or more members of the Zachariah family from the early forties to date. In the light of the evidence and the arguments, the appeal has failed on this ground.

**On ground 2:** I have considered the evidence and the arguments and submissions put before this court. I am satisfied that these are comments made about pieces of evidence which the learned judge was considering as submitted by Counsel above.

In some cases, the learned judge was lamenting the absence of certain pieces of evidence or depositions; evidence which might have assisted the parties' case one



way or other. Further, the learned Judge accepted that there was a Will referred to by members of the testators' family. He believed the Plaintiff's account of events, and having seen the documents before him the learned judge made comment at paragraph thirty (30) that: *"the difficulty as I now state above is that neither side has produced evidence of M.E. Zachariah's demise..."* In my view, there is little doubt about the testator's death and even less doubt of his father. if this was viewed as a difficulty to the point of mentioning in his judgment, looking at the whole judgment he must have resolved in favour of the Plaintiff/ Respondent. However, it was not sufficient to stop the Plaintiff/Respondent's case which required proof on the balance of probabilities. There was abundant evidence that Elias Mousi, Michael Elias,. Richard, Elias Zachariah are all deceased. The Hon. Judge also considered the Devolution of Estates Act 2007. Even Andre does not deny E. M. Zachariah's demise. All Andre denies is that his aunt - Zaida is not entitled to a share of 28 Sir Samuel Lewis Road. This is a civil case and the standard of proof is proof on a balance of probabilities. I am convinced that the highlighted comments did not prevent that burden being discharged as indeed his lordship concluded that the plaintiff appellant had proved her case. Counsel for the Plaintiff/Respondent and the 2nd Defendant/Respondent sufficiently dealt with this ground of appeal. In the premises, I find for the Plaintiff/Respondent and the appeal has failed on this ground.

**On ground 3,** I refer to the above and the submissions by counsel and find that the appeal has failed on this ground. The judge made it clear that he believed the Plaintiff's account of events. There were several pieces of evidence to be considered by the judge to persuade him that the burden was discharged by the Plaintiff/Respondent. On the whole it remains the overall duty of the plaintiff to prove his case on a balance of probabilities which the judge thought she had done. The appeal therefore fails on this ground.

**On ground 4** this ground was not sufficiently canvassed in this court either on the above ground or by way of additional grounds. The judge's order for letter's of Administration to be taken out by the parties mentioned in the Order speaks adequately to the fairness of the case with regards to the three beneficiaries. Also, In the light of the above mentioned Devolution of Estates Act, 2007, this ground of appeal has failed



**FINDINGS AS TO ECOBANK MICROFINANCE (SL) LIMITED INTERVENER/APPLICANT:** The bank is claiming LE.121, 437,599.07 (One Hundred and Twenty-One Million, Four Hundred and Thirty Seven Thousand Five Hundred and Ninety-Nine Leones and Seven Cents. ) to be paid directly out of the estate of The affidavit deposes that she has an interest in the estate of Elias Zachariah the 1<sup>st</sup> and 2<sup>nd</sup> defendant's father.

ECOBANK MICRO FINANCE (SL) Ltd. was made a party in this court. Their claim was supported by the affidavit sworn to by Lornard Taylor Esq. on the 17<sup>th</sup> September 2013. Attached to that affidavit were several exhibits including Account Statement in the name of ZACH TECH, starting with a balance of minus Le 65 000,000/23 on the 2<sup>ND</sup> July 2012 to minus Le.121, 437,599.07 cents on the 30<sup>th</sup> of August 2013. This bank claims that Elias Zachariah was a customer of the bank with account Number 10004721. This was changed later to 1002000359811 by the bank with name Zach Tech. It is this account that is now overdrawn due mainly to interest charges. Because the claim and the prayers in the Originating Summons touches and concerns Elias Zachariah (deceased) they have brought their own claim to have the account settled directly from the proceeds of sale of the property at 28 Sir SAMUEL Lewis Road.

There was an Affidavit in Opposition deposing that Michael Elias Zachariah (deceased) died on the 13<sup>th</sup> march, 1991 and that the applicant was not in existence. The other point raised by Counsel for the 2<sup>nd</sup> defendant was that the subject matter of this action never vested in Elias Zachariah as he and his brother Richard never took out letters of Administration in respect of the said estate. A copy of the death certificate of Elias Zachariah is exhibited attached to counsel's Affidavit in Opposition. In paragraph 8 of the same affidavit in opposition it is deposed that the applicant has no interest in the estate which is the subject matter of this action. This was not argued in the court below however looking at the papers and records and the affidavit evidence the case for the bank is very weak. Although we allowed his application to be joined as a party he has not discharged the burden of proof on a balance of probabilities. Nor is it proper to have this account settled directly from the estate in question. The bank is at liberty to seek redress in the courts below for this amount to be settled by the appropriate estate.

In the circumstances the 3<sup>rd</sup> defendant intervener has not established a prima facie case regarding the estate in question. His application is hereby dismissed with costs to the Plaintiff/Respondent.

*Considering the above evidence in the round, the submissions by the parties at the end of the day we are satisfied that the case for the plaintiff/Respondent was sufficiently proved on a balance of probabilities and that the learned judge's decision on the whole, given his assessment of the evidence law and the relevant facts in issues, is safe. This appeal is hereby struck out with costs to the Respondents.*

**The Order of this court is as follows:**

1. That the estate of Mr. Michel Elias Zachariah in respect of all that piece and parcel of land hereditaments lying and situate and being at No. 28 Sir Samuel Lewis Road Freetown shall be sold by auction or private treaty to the highest bidder at a price not below the reserve price of \$450,00 (Four Hundred and Fifty United States Dollars) or its Leone equivalent set by an independent licensed Evaluator such price to be sanctioned by the court.
2. That the Master and Registrar of the High Court do execute the conveyance in favour of the purchaser.
3. That Appellant, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall be at liberty to bid at the said sale and in the event of any of the Defendant/Respondents being the purchaser thereof the Deed of Conveyance be executed by The Master and Registrar of the High Court.
4. The solicitors' costs and the evaluator's fee shall be paid out of the proceeds of sale.
5. There shall be liberty to apply
6. Costs this appeal is to be borne by the 1<sup>st</sup> defendant/Respondent. *to be tax if not agreed.*



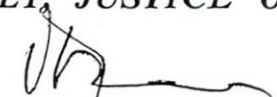
*THE HONOURABLE MRS JUSTICE NYAWO MATTURI JONES, JUSTICE  
OF THE COURT OF APPEAL.*



*THE HONOURABLE MR JUSTICE P.O.HAMILTON, JUSTICE OF THE  
SUPREME COURT*

 agree.

*THE HONOURABLE MR. JUSTICE DEEN-TARAWALLY, JUSTICE OF  
THE HIGH COURT.*

  
I agree.