

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

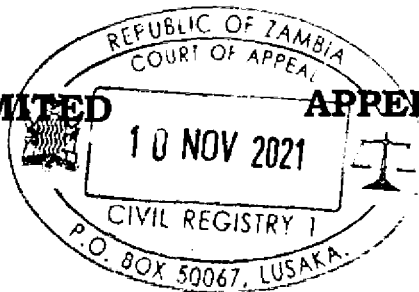
**APP. NO. 25/2020**

BETWEEN:

**A. M. G. GLOBAL TRUST LIMITED**

**APPELLANT**

AND



**THE ADMINISTRATOR GENERAL**

**1<sup>ST</sup> RESPONDENT**

**CALADAMS PROPERTIES LIMITED**

**2<sup>ND</sup> RESPONDENT**

**CORAM: Chashi, Siavwapa and Banda-Bobo, JJA**  
**On the 18<sup>th</sup> day of May, 2021 and 10<sup>th</sup> November, 2021.**

*For the Appellant:* N/A

*For the 1<sup>st</sup> Respondent:* Mr. H. M. Hamanyati, Assistant  
Administrator General

*For the 2<sup>nd</sup> Respondent:* Mr. T. Chali of H. H. Ndhlovu and Co.

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**JUDGMENT**

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***BANDA-BOBO, JA, delivered the Judgment of the Court***

**Cases Referred to:**

1. Myers v. Myers (1969) WLR 19 21
2. Frederick Jacob Titus Chiluba v. The Attorney General (SCZ Appeal No. 125 of 2002)
3. Lonrho Cotton Zambia Limited v. Mukuba Textiles Limited (SCZ Judgment No. 11 of 2002)
4. Lusaka West Development Company Limited, B.S.K. Chiti (Receiver), Zambia State Insurance Corporation v. Turnkey Properties Limited (1990) S.J (SC)
5. Anti-Corruption Commission v. Barnett Development Corporation Limited (2008) Vol. 1, ZR 69

6. James Mbewe (suing for and on behalf of the Small Scale Industries Association of Chipata District) Pot Ati Malunga (Suing for and on behalf of the Small Scale Industries Association of Chipata District) v. James Mwanza (2009/HJ/14)
7. Clementina Banda, Emmanuel Njanje v. Boniface Mudimba (2011) ZMHC 75
8. The Rating Valuation Consortium and D. W. Zyambo and Associates (Suing as a firm) v. The Lusaka City Council and Zambia National Tender Board (2004) Z.R 109 (SC)
9. Mirriam Mbolela v. Adam Bota (SCZ Judgment No. 26 of 2017)
10. Brenda Muzyamba v. Martha Muzyamba Sinabbomba and 21 Others (SCZ/8/70/2016), (App No. 11/2019)
11. Gondwe v. Ngwira (Appeal No. 37/2015)
12. Mukula and Highway Transport Limited v. Chiwala and Another (App No. 163/2012)

#### **Legislation referred to:-**

- Section 19(2) of the Intestate Succession Act, Cap 59 of the Laws of Zambia
- Order 5 rule 24 and 33(1) of the High Court Rules (HCR), Cap 27 of the Laws of Zambia
- Section 33 of the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia
- Order X rule 16 Court of Appeal Rules Act No. 7 of 2016

#### **Other Works Referred To**

- Matibini, J, SC - Zambia Civil Procedure: Commentary and Cases, 2017, LexisNexus, Volume 2 at page 1034
- Chitty on Contracts, Volume 1, 29<sup>th</sup> Edition paragraph 2028 at page 135.

## **1.0 INTRODUCTION**

- 1.1 This appeal emanates from a decision of the Hon. Musona, J who had among others, refused the Appellant's application to adjourn the matter so that they could call their witness who, on the date of hearing, it was claimed had been put on bed

rest by a doctor, and the closing of the Appellant's case without affording them a hearing.

## 1.2 **BRIEF BACKGROUND**

The brief facts leading to this appeal are that the 2<sup>nd</sup> Respondent had sued the Appellant and 1<sup>st</sup> Respondent, claiming the reliefs as revealed by the Writ of Summons and Statement of Claim filed by the 2<sup>nd</sup> Respondent and the defence and counter claim filed by the 1<sup>st</sup> Respondent and the Appellant. The Appellant, who was the 2<sup>nd</sup> Defendant in the Court below, was joined to the proceedings as a party with interest in the subject property, purportedly having been sold the same by the 1<sup>st</sup> Respondent herein.

1.3 The 2<sup>nd</sup> Respondent alleged that he was sold the property in contention by one Moses Makokwa Mwala, who represented himself as the owner of the property in issue. He said that he had seen the original certificate of title, as well as the National Registration Card (NRC) for the vendor and had done a search at the Ministry of Lands and was thus satisfied that there were no encumbrances on the property, and that he was dealing with the actual owner of the property. Further

that he had paid a visit to the property where he found Moses Mwala Makokwa and Faustina Mwiinga in occupation.

1.4 Subsequently, he said he executed a contract of sale with Moses Mwala Makokwa, which was witnessed by Faustina Mwiinga. Thereafter, he said he placed a caveat on the property to protect his interest. He claimed that he was given the original Certificate of Title by Mr. Mwala. In the meantime, Mwala and Mwiinga became tenants in the same property, though they were later evicted for non-payment of rentals.

1.5 It was while trying to obtain consent to assign at the Ministry of Lands that, the 2<sup>nd</sup> Respondent was advised that the certificate of title he had been given by the vendor was a forgery. The matter was reported to the Police and when queried, Mwala claimed the original certificate of title was lost. The 2<sup>nd</sup> Respondent sued Mwala and obtained judgment in default of appearance as Mwala never filed appearance nor defence. It was then that he applied for a duplicate certificate by way of advertisement in the newspaper as by law required.

1.6 The 2<sup>nd</sup> Respondent later discovered that the 1<sup>st</sup> Respondent had locked up the house, claiming interest as administrator

of the estate of Mr. Moses Mwala Makokwa, since 2011. To resolve the issue, the parties held a meeting at the 1<sup>st</sup> Respondent's office, where it was revealed that infact, the 1<sup>st</sup> Respondent was instructed to sell the property and was in the process of selling it to the Appellant herein, who had infact already paid a deposit of K500,000. It was stated that during the meeting the 1<sup>st</sup> Respondent did not produce letters of probate to substantiate their claim as administrators and also failed to indicate why they failed to put a caveat on the property or why it took them over a year to take possession of the property. The 2<sup>nd</sup> Respondent riled against the locking up of the house by the 1<sup>st</sup> Respondent and claimed loss as a result thereof.

2.0 The 1<sup>st</sup> Defendant filed a defence, admitting that they had not seen the newspaper advertisement, hence locking up the premises, but denied that the Plaintiff had been denied quiet possession of the house.

2.1 The Appellant, as 2<sup>nd</sup> Defendant in the Court below denied all the claims and averred that the Plaintiff was not entitled to the reliefs, especially taking into consideration that the

Plaintiff had admitted in the Statement of Claim that the title deeds were a forgery.

2.2 In the counter-claim, the 2<sup>nd</sup> Defendant claimed to be the bona fide purchaser of the property and asked the Court to find that the purported purchase by the Plaintiff was fraudulent and therefore null and void.

2.3 Both the Plaintiff and 1<sup>st</sup> Defendant adduced evidence in the Court below through their witnesses. However, the 2<sup>nd</sup> Defendant, Appellant herein, when the matter came up for them to adduce their evidence through one witness, that witness was not before Court, with counsel claiming that he had been put on bed rest and asked for an adjournment. The Court refused to entertain the application to adjourn and closed the case and reserved Judgment, stating that the matter had been in backlog and needed to be completed.

### 3.0 **JUDGMENT OF THE LOWER COURT**

3.1 After due consideration of the evidence, the Court found, on the claim for an order that the Plaintiff is the rightful owner of Stand No. 6860, Akanono Road, Olympia, Lusaka for the Plaintiff. The Court noted that at the time of purchase of the house by the Plaintiff, the Plaintiff had conducted a search at

the Ministry of Lands, which search revealed that there was no caveat or probate registered on the property. The Court determined that based on the above, the property was not encumbered. That the Plaintiff placed a caveat. That the Plaintiff advertised before applying for a duplicate certificate of title.

3.2 The Court was of the view that the 1<sup>st</sup> Defendant could not have sold the house to the 2<sup>nd</sup> Defendant because they had not obtained a Court Order as vendors to sell the property as per the provisions of the Intestate Succession Act, Cap 59 of the Laws of Zambia.

3.3 The Court was of the view that there was no offer made to the 2<sup>nd</sup> Defendant and neither was there an acceptance of the offer. The learned judge said he was satisfied that the Plaintiff exercised due diligence before concluding the sale with the putative Moses Makokwa Mwala, notwithstanding that he was a rogue and vagabond. That because of the due diligence exercised by the Plaintiff prior to concluding the conveyance, the Plaintiffs were the bonafide purchasers without notice of any defect in title. He ordered that they were the rightful owners of the property.

3.4 As regards the claim to unlock the house, the learned Judge determined that since he had found the Plaintiff to be the owners of the property, they were entitled to have access to the house and ordered that it be unlocked. He awarded the Plaintiffs costs.

#### 4.0 **THE APPEAL**

4.1 Dissatisfied with the decision of the learned Judge, the Appellant, who was the 2<sup>nd</sup> Defendant in the Court below has come to this Court with five grounds of appeal as follows:

4.1.1 That the Hon. Court below erred in both law and fact in not affording the Appellant an opportunity to testify before the Court, despite informing the Court that the Appellant's witness was ordered to be on bed rest by a certified medical practitioner.

4.1.2 That the Hon. Court below erred in law by barring the applicant from opening its case and defending it.

4.1.3 That the Hon. Court below erred in both law and fact in holding that the 2<sup>nd</sup> Respondent is the rightful owner of Stand No. 6860 Olympia, Lusaka.



4.1.4 That the Hon. Court below erred in both law and fact when it held that the 2<sup>nd</sup> Respondent is a bona fide purchaser of Stand No. 6860, Olympia, Lusaka against the weight of the evidence.

4.1.5 That the Hon. Court below erred in both law and fact in holding that there was no offer made to the Appellant and that there was no acceptance by the 1<sup>st</sup> Respondent.

## **5.0 ARGUMENTS BY THE APPELLANT**

5.1 The Appellant filed heads of arguments and combined the arguments in respect of grounds 1 and 2 and asserted in the argument that the learned Judge ought not to have denied them an adjournment to enable them call their witness who had been put on bed rest by a duly certified medical practitioner and that he should not have closed their case as doing so denied them an opportunity to open their case and defend it.

5.2 The gravamen of the argument in that respect is that a witness in any proceedings should be examined viva voce, unless the parties agreed otherwise. That in a case where a witness is not before court, the court is vested with power to grant an adjournment when it is satisfied that there are good

and compelling grounds for the adjournment. Our attention was brought to Order 5 rule 24 and 33(1) of the High Court Rules (HCR), Cap 27 of the Laws of Zambia, in support of that argument.

- 5.3 In furtherance of the argument on the powers of the Court to grant an adjournment, we were referred to the case of **Myers v. Myers (1969)**<sup>1</sup>, as well as the works of Matibini, J, SC, in his book Zambia Civil Procedure: Commentary and Cases, 2017, LexisNexus, Volume 2 at page 1034, where the key principles to be taken into account by a judge when considering an adjournment application were outlined.

In dealing with the learned Judge's assertion in his ruling, that the matter had taken too long, the case of **Frederick Jacob Titus Chiluba v. The Attorney General**<sup>2</sup> was adverted to where the Supreme Court said that:-

**“delayed hearing is justice denied, but also rushed judgment is equally justice denied.”**

- 5.4 It was submitted that the trial Judge by his Ruling, failed to serve the interest of justice by not weighing the consequences of denying the adjournment against those of granting the adjournment. Further that the learned Judge had been

informed by counsel that she had the sick note, contrary to his assertion that no medical slip had been presented to Court for the Court to examine it. Counsel went on to state that the learned Judge failed to appreciate that counsel had not had an opportunity to file the sick note that day as the matter was starting at 09:00 hours the same time the Registry opens.

6.0 In ground 3, the Appellant sought to resile the learned Judge's holding that the 2<sup>nd</sup> Respondent is the rightful owner of Stand No. 6860, Olympia, Lusaka. In arguing this ground, counsel referred us to page 9 line 21 of the learned Judge's Judgment as appear at page 19 of the record of appeal; where the learned Judge found as a fact that **"M/Moses Makokwa Mwala, who sold the disputed house to the Plaintiff in 2014 was a rogue, who used the names and details of the deceased."**

6.1 Counsel's argument was that it is not possible for a person without title to pass title to another. That this principle is known as the *Nemo dat quod non habet* rule. That a person in those circumstance cannot give what he does not have and the buyer does not acquire good title. The case of **Lonrho**

**Cotton Zambia Limited v. Mukuba Textiles Limited**<sup>3</sup> was also referred to on this same principle.

6.2 Counsel's argument on this was that at the time the 2<sup>nd</sup> Respondent was buying the property from the rogue and vagabond, the rightful owner, Mr. Moses Makokwa Mwala had been dead for over 16 years. That it was therefore not possible that he could have passed on title legally to the 2<sup>nd</sup> Respondent.

6.3 Counsel also argued that the whole transaction between the 2<sup>nd</sup> Respondent and the "rogue" was tainted with deception from inception, something that the learned trial Judge identified, as appear at page 20 line 14, page 22, line 12 as well as at page 19 line 21 of the Record of Appeal, in his Judgment.

6.4 Counsel contended that it was clear that Faustina and the 'rogue', colluded to obtain the deceased's details and used them to fraudulently defraud the 2<sup>nd</sup> Respondent into believing that the 'Rogue' was the deceased, with capacity to sell the property when infact not. That infact the issue of the forged certificate of title was brought to the 2<sup>nd</sup> Respondent's attention, and he admitted as much in his pleadings,

appearing at page 27 of the Record of Appeal, and that he should have stopped the sale, but unfortunately proceeded to apply for a duplicate certificate of title from the Ministry of Lands.

6.5 Counsel argued that the whole transaction having been adulterated by fraud, was *void ab initio*. Counsel argued on the question of fraud being a vitiating factor, whose effect is the termination of the contract, leaving the parties in the same position they were in prior to the contract. To buttress, counsel pointed us to the cases of **Lusaka West Development Company Limited, B.S.K. Chiti (Receiver), Zambia State Insurance Corporation v. Turnkey Properties Limited<sup>4</sup>** and **Anti-Corruption Commission v. Barnett Development Corporation Limited<sup>5</sup>**, and Section 33 of the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia. Counsel submitted that due to fraud, the 2<sup>nd</sup> Respondent could not legally have purchased Stand No. 6860, Olympia, Lusaka as the transaction was void ab initio. That in light of the evidence and authorities cited, the 2<sup>nd</sup> Respondent could not be said to be the rightful owner of Stand No. 6860, Olympia, Lusaka as he did not buy it from a

person legally authorised to sell the land. That thus no title had passed.

6.6 Counsel went on to submit that an omission on the part of the 1<sup>st</sup> Respondent does not give any rogue on the street, who has no legal interest, the right to convey property belonging to another. Counsel's view was that allowing the Judgment to stand on the facts would create a situation where any rogue on the street who stumbles upon someone's certificate of title and sells it to another, an innocent party, because he thinks the rogue is the original owner of the certificate of title, when not, would pass good title. Counsel prayed that the judgment be quashed and the certificate of title issued to the 2<sup>nd</sup> Respondent be cancelled and any purported sale by the 2<sup>nd</sup> Respondent to any third party be reversed forthwith.

7.0 In ground 4, the argument was that the Court should not have held that the 2<sup>nd</sup> Respondent is a bona fide purchaser of Stand No. 6860, Olympia, Lusaka as it was against the weight of evidence. The contention here was that the 2<sup>nd</sup> Respondent is not a bonafide purchaser for value without notice. In aid of this argument, we were referred to a number of authorities, namely:- **James Mbewe (suing for and on**

**behalf of the Small Scale Industries Association of Chipata District) Pot Ati Malunga (Suing for and on behalf of the Small Scale Industries Association of Chipata District) v. James Mwanza<sup>6</sup>, Clementina Banda, Emmanuel Njanje v. Boniface Mudimba<sup>7</sup>.**

- 7.1 Counsel said these cases set out the four requirements needed for one to be a bonafide purchaser for value without notice. He went on to set the requirements out thus, whether the 2<sup>nd</sup> Respondent acted in good faith, whether he purchased a legal estate or interest, whether he furnished consideration in money or money's worth, and whether the 2<sup>nd</sup> Respondent had no notice of any equitable interest. After analysing the evidence on record, counsel submitted that it was clear that the Respondent does not qualify to be called a bonafide purchaser for value without notice as he had not satisfied all the requirements; namely, that the 2<sup>nd</sup> Respondent did not act in good faith, did not purchase any legal interest from the actual owner of the property, did not call any evidence showing that the purchase price was paid, and to whom it was paid and finally, that the 2<sup>nd</sup> Respondent had been aware

of the forgery of the certificate of title before completion of the sale.

- 8.0 In ground five, the Appellant contends that an offer was made to it and a contract entered into by the parties contrary to what the learned Judge held. That the contract was evidenced by the conduct of the parties thereto. Counsel submitted that the 1<sup>st</sup> Respondent had offered the house to Ms. Faustina Chibvweka, who requested that the land be sold to the Appellants. That the parties transacted and entered into a contract of sale.

The gravamen of the submissions was that an offer and acceptance can be inferred from the conduct of the parties to the transaction. The case of **The Rating Valuation Consortium and D. W. Zyambo and Associates (Suing as a firm) v. The Lusaka City Council and Zambia National Tender Board**<sup>8</sup> was referred to on this point as were the learned authors of Chitty on Contracts, Volume 1, 29<sup>th</sup> Edition paragraph 2028 at page 135.

- 8.1 Based on the said authorities, counsel submitted that there was a clear offer and acceptance of the offer between the 1<sup>st</sup>



Respondent and the Appellant. That the contracts exchanged appear on pages 126 and 127 of the Record of Appeal.

8.2 Ultimately, it was prayed that the whole Judgment of the lower Court be set aside.

9.0 **ARGUMENTS BY THE 2<sup>ND</sup> RESPONDENT.**

9.1 In their arguments, the 2<sup>nd</sup> Respondent argued grounds three, four and five together. The first argument proffered was that the sale to the Appellant herein was a nullity because there was no Court order; and thus the Court was on firm ground when it held thus. Our attention was drawn to Section 19(2) of the Intestate Succession Act, Cap 59 of the Laws of Zambia and the authorities of **Mirriam Mbolela v. Adam Bota<sup>9</sup>** and **Brenda Muzyamba v. Martha Muzyamba Sinabbomba and 21 Others<sup>10</sup>** on the import of **Section 19(2) of the Intestate Succession Act**, namely that it proscribes the sale of any asset belonging to the estate of a deceased person without a court order. That in the Court below, DW2 admitted that even though that was the normal practice, they had not obtained any order in this matter.

9.2 As regards the Court's pronouncement that the 2<sup>nd</sup> Respondent was a bonafide purchaser of the property, hence

being the rightful owner, the 2<sup>nd</sup> Respondent was in total agreement, submitting that they had conducted a search at the Ministry of Lands, and had not discovered any encumbrances in form of a caveat or a probate order. That infact, there was already a caveat on the property as at 21<sup>st</sup> August, 2007 placed by the 2<sup>nd</sup> Respondent when the Appellant and 1<sup>st</sup> Defendant were concluding a contract.

9.3 Counsel submitted that they had sued Mr. Moses Mokakwa Mwala and had advertised the originating process in the newspaper and as far as they were concerned, the 1<sup>st</sup> Respondent and the Appellant had been served; but did not appear. Further, that there was no opposition to their advertisement in the newspaper before applying to obtain duplicate title deeds; and subsequent registration of the Judgment at the Ministry of Lands.

9.4 Counsel also submitted on the fact that Ms. Faustina Chibvweka Mwiinga had been a tenant of the 2<sup>nd</sup> Respondent for almost six months but both the Appellant and 1<sup>st</sup> Respondent were nowhere to be seen. Further that the record shows that the house was offered to Faustina Chibvweka, but

there is no proof of an offer to the Appellant to procure the house.

9.5 In a startling submission, counsel said the Appellant had deliberately omitted documents from the record that showed that the house no longer belongs to the 2nd Respondent as it was sold to a third party before they appealed and that they ought to have joined the third party to the appeal. I said a startling submission, because clearly, they are the ones who sold the property and it was incumbent upon them to join the third party to whom they sold the property knowing that the decision of this Court on the appeal might impact on the third party to whom they sold the property.

10.0 The argument under grounds one and two was that there was no sick note laid before Court, and the matter, having been in backlog, the learned Judge was on firm ground in refusing to adjourn. Further, that the company is a limited company and anyone could have testified.

10.1 Counsel went on to contend that there was an allegation of fraud, which was not particularised and that fraud required a higher standard of proof and could thus not be proved viva voce. On the standard of proof where fraud is alleged,

reliance was placed on the case of **Gondwe v. Ngwira**<sup>11</sup>. Counsel submitted inter alia, that the Court held that only fraud of the purchaser and not that of the vendor can vitiate a certificate of title.

10.2 In supplementing his submissions orally, Mr. Chali reiterated the issue of the advertising of the originating process as well as the application for a duplicate certificate of title, to aid his case that no one objected when asked if a fraudster could pass good title. Mr. Chali was at pains to provide an answer to our question on this, saying that it was a yes or no as it all depended on the circumstances. He did admit though, after much prompting by the Court that a fraudster cannot pass good title at law, but said there was an exception. The Court was magnanimous enough to allow Mr. Chali time to present before Court any authorities to back up his contention that there were exceptions to the law that a fraudster cannot pass good title.

10.3 Contrary to what he had been directed to provide, Mr. Chali filed what he called the 2<sup>nd</sup> Respondent's Supplementary Heads of arguments. The Court had not granted him leave to file supplementary heads of argument, but just a list of

authorities to back up his assertion that there was an exception. For that reason, therefore we decline to even consider the so called supplementary heads of argument.

10.4 Mr. Hamanyati, counsel for the 1<sup>st</sup> Respondent told Court that they were not opposed to the appeal and prayed that it be upheld.

#### 11.0 **OUR ANALYSIS AND DECISION**

11.1 After examining the five grounds of appeal proffered by the Appellant, we have concluded that grounds one and two can be argued together, as can grounds three and four, while ground five can be argued on its own. We shall thus proceed in that manner.

11.2 Grounds one and two fault the trial Judge who refused to adjourn the matter and went on to close the Appellant's case without affording them an opportunity to be heard. The Judge is faulted for refusing to accept the Appellant's explanation that their witness had been given bedrest by a certified medical practitioner.

11.3 In his Ruling as appears at page 428 of the Record of Appeal, the erstwhile trial Judge noted that the matter had been adjourned three months prior to that date. He said it was

trite that an adjournment is granted at the discretion of the Court. That what that meant was that for a court to allow an adjournment, it must be convinced that the application for an adjournment is genuine or not genuine, compelling and unavoidable. He concluded that the application was not genuine, because nothing had been exhibited to prove that the intended witness had been put on bedrest on advice from a medical doctor. He went on to state that he was not convinced that the application was compelling and unavoidable, as the Defendant was a company. He also alluded to the length of time the matter had been on the record without determination.

- 11.4 Order 33 rules 1 and 2 of the Rules of the High Court Act, Cap 27 of the Laws of Zambia makes it clear that an adjournment is at the discretion of the court. The court has to be satisfied that the purpose for the adjournment is genuine. In our view, the Judge in the lower Court revealed his mind for refusing to adjourn the matter, as appears at page 428 of the Record of Appeal. We are fortified by the case of **Mukula and Highway Transport Limited v. Chiwala and Another**<sup>12</sup> where the Supreme Court said that:-

**“Therefore, by ordering the closure of the case and then proceeding to judgment delivery, the learned trial Judge acted perfectly within his discretionary power.”**

11.5 Further, it has not been shown that the trial Judge exceeded his powers. We have noted from the record, and as emphasised by counsel for the 2<sup>nd</sup> Respondent that, the Appellant herein approached this case in a *laissez-faire* manner. Based on the above, we cannot fault the learned trial Judge in holding as he did. We find no merit in grounds 1 and 2 and we accordingly dismiss them.

11.6 We now turn to consider grounds three and four. The argument here is that the Court, having found that the 2<sup>nd</sup> Respondent bought property from a rogue and vagabond, the 2<sup>nd</sup> Respondent cannot be deemed to have acquired the property legally as the person from whom he bought had no legal rights to the property that he sold.

11.7 In his Judgment, the learned Judge at page 19 of the record of Appeal, paragraph 15 found that one Faustina Mwiinga who witnessed the sale of the house by Moses Makokwa Mwala, was Faustina Chibweka and not Faustina Mwiinga. He also found on the same page at paragraph 20, that

M/Moses Makokwa Mwala died on 12<sup>th</sup> July aged 77. Further that:-

**“There is also no dispute that “M/Moses Makokwa Mwala” who sold the disputed house to the Plaintiff in 2014 was a rogue who used the names and details of the deceased.”**

The learned Judge went further to find that there had been wrangles within the Mwala family, which ultimately ended up with their appointing the Administrator General to administer the estate on their behalf. He also found as a fact that Faustina Chibvweka, as a sitting tenant was offered to buy the house, who in turn requested that she be given a copy of the certificate of title and she was availed a copy. The learned Judge stated that that seemed to suggest how Faustina Chibvweka and her companion who styled himself as M/Moses Makokwa Mwala, obtained the details.

- 11.8 From the above, it is patent that the learned Judge was aware that the “rogue and vagabond” as he termed him, at page 22 of the Record of Appeal; was not the owner of the property which he claimed to have sold to the 2<sup>nd</sup> Respondent herein. Therefore, not being an owner, he could not have passed good title to a purchaser. We are fortified with the holding of the Supreme Court in the authority cited to us of **Lonrho Cotton**



**Zambia Limited v. Mukuba Textiles Limited<sup>3</sup>**, which held that:-

**“where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had.”**

11.9. We agree with counsel for the Appellant that this is a matter in which the learned Judge should have relied on the *nemo dat quod non habet* rule and should have found that the “rogue and vagabond” Mwala had no good title to pass on to anyone. By the same token, the 2<sup>nd</sup> Respondent could certainly not have acquired good title from someone who had none to pass on.

11.10 It is clear also that the whole transaction involving the 2<sup>nd</sup> Respondent and the “rogue and vagabond” Mwala was tainted with deception from the word go. The learned trial Judge recognised this in his Judgment appearing at page 20, line 14, page 22, paragraph 5 and 15 of the Record of Appeal. Section 33 of the Lands and Deeds Registry Act, Cap 185 clearly states that even though a certificate of title is conclusive evidence of ownership of land by a holder of a certificate of title, the same can be challenged and cancelled under Section 34 of the Lands and Deeds Registry Act. The

grounds for challenging and cancellation of the certificate of title would be fraud or reason of impropriety in its acquisition.

- 12.0 Having found that there was impropriety in the acquisition of the property through Faustina Chibvweka and the putative Moses Makokwa Mwala, the certificate of title held by the 2<sup>nd</sup> Respondent can be vitiated. The learned trial Judge seems to have based his reasoning for holding that the 2<sup>nd</sup> Respondents were the rightful owner of the property on the fact that there was due diligence done by the 2<sup>nd</sup> Respondent and that there had been no encumbrance on the property. Be that as it may, PW1 in his evidence as appears at page 289 of the record of appeal said problems arose during the conveyance of the property from Moses Makokwa Mwala to Caladams. He said at that point, they were told that the title deed was forged by the Registrar of Lands. It was then that they reported the case to the police, later sued Mr. Mwala, advertised the case in the newspaper and later obtained judgment in default. He said they then placed adverts in the newspaper indicating that they were applying for a duplicate copy of the certificate of title. The question that begs an

answer is how one can advertise to obtain a duplicate copy of a certificate of title when they already knew that the certificate they held was a forgery or a fake one. At that point, they knew that the person who sold them the property did not own it.

12.1 The advertising for a duplicate certificate of title did not in our view regularise a forged certificate of title into a genuine document. Consequently, even if due diligence was undertaken, and no encumbrance found on the property, it did not mean that the transaction that finally resulted in the new certificate of title being issued to the 2<sup>nd</sup> Respondent was valid. There was impropriety in the acquisition of the property, irrespective of the fact that the 2<sup>nd</sup> Respondent conducted a due diligence and advertised for issuance of a duplicate certificate of title. The 2<sup>nd</sup> Respondent cannot in the circumstances be said to be the rightful owner of Stand No. 6860 Olympia, Lusaka, as he did not acquire good title from the rogue and vagabond seller.

12.2 We also agree that an omission on the part of the 1<sup>st</sup> Respondent to obtain an order to sell or to put a caveat does not give any rogue on the street, with no legal interest to

convey property belonging to another. Mr. Chali counsel for the 2<sup>nd</sup> Respondent was at pains to try and convince this Court that there were exceptions, but in our view, he failed lamentably.

12.3 Mr Chali told us that the property has since been sold to a third party. However, that is something the 2<sup>nd</sup> Respondent has to contend with, with the third party. We are not convinced by Counsel's assertion that when they were selling to a third party, they were not aware that there would be an appeal in this matter. Upon realising and being served with the notice of appeal, it was incumbent upon him to apply to join the third party to these proceedings. It is trite that a party can be joined to an appeal and if not joined, the Court is precluded from considering the interests of non parties. Order X rule 16 Court of Appeal Rules Act No. 7 of 2016 refer.

12.4 In our view, ground three and four have merit. The Judgment passed in the 2<sup>nd</sup> Respondent's favour is hereby quashed. We order that the title issued to the 2<sup>nd</sup> Respondent be cancelled. By extension, the certificate of title issued to the third party is also cancelled and the property reverts to the estate of the

original owner. In this case the Administrator General will carry out the wishes of the family and sell the property.

- 12.4 Ground five is on whether the Appellant and 1<sup>st</sup> Respondent had entered into a contract for the sale of Stand No. 6860 Olympia, Lusaka. In his Judgment, appearing at page 21 paragraph 20 of the Record of Appeal, the learned trial Judge found that the assertion that the 1<sup>st</sup> Defendant sold the disputed house to the 2<sup>nd</sup> Defendant was not supported by law. He said this was because according to him, the 1<sup>st</sup> Respondent herein had not obtained a court order before selling property that is administered under the Intestate Succession Act, Cap 59 of the Laws of Zambia and there was no evidence to that effect. The learned trial Judge went on to state that the house was offered to Faustina Chibvweka and there was no documentary evidence to that effect and that there was no offer and acceptance to, and by the 2<sup>nd</sup> Defendant. The documentary evidence appearing at page 120 of the Record of Appeal attests to the fact that a letter of offer to purchase property No. 6860 Akanono Road, Olympia extension was made to one Faustina Chibvweka on May, 7, 2014. At page 122 of the Record of Appeal, the person to

whom the offer was made accepted the offer and asked for the original title deeds so that she could avail the same to her financier. On page 125 of the Record of Appeal, the person to whom the offer was made tells the vendor, the Administrator General that she had made a down payment of 10% towards the purchase price of K1,310,000 for the house as per the letter of offer. It is in that letter that she instructed the Vendor that the contract of sale and title deeds should be processed in the name of A.M.G. Global Consult Limited, who was the financier of the purchase. Page 127 of the Record of Appeal, is a letter from the Office of the Administrator General, wherein they enclosed three (03) executed contracts of sale relating to the said Stand No. 6860, Olympia Extension, Lusaka, being the estate of the late Moses Makokwa Mwala and A.M.G. Global Trust Limited.

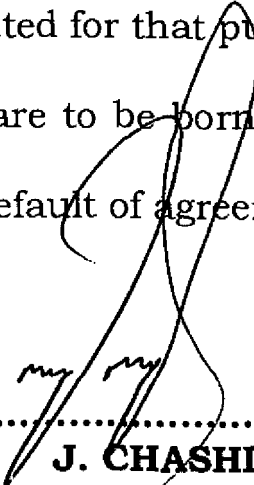
- 13.0 We are of the view that in light of the above evidence, an offer and acceptance was made between the 1<sup>st</sup> Respondent and Faustina Chibweka. It was her decision that the title be put in the name of her financiers, being the Appellant herein. The parties to the transaction agreed. We are persuaded by the cited authority of **The Rating Valuation Consortium and D.**

**W. Zyambo and Associates (suing as a firm) v. The Lusaka City Council and Zambia National Tender Board<sup>8</sup>.** The act of signing the contracts between the Appellant and the 1<sup>st</sup> Respondent is sufficient evidence of the offer and acceptance. Further, the Appellant made payment as appear at pages 124 and 125 of the Record of Appeal. The 1<sup>st</sup> Respondent having accepted the payment and having signed and exchanged contracts with the Appellant, we deem, is a clear intention by the parties to create a legally binding contract having legally been entered into. Whereas it is clear that there was no offer made to the Appellant there is sufficient evidence that Faustina Chibvweka was offered the property, which she accepted, and in turn told the vendor to issue the certificate of title into the Appellant's name, an action she was rightly entitled to do. The omission to obtain an order to sale by the 1<sup>st</sup> Respondent cannot be a factor. Ground five succeeds.


- 13.1 Grounds three, four and five having succeeded, means the appeal succeeds. The upshot of our decision is that the 2<sup>nd</sup> Respondent did not obtain good title to property No. 6860, Olympia, Lusaka as the person who sold them the property had no good title to pass. The sale of the property to the 2<sup>nd</sup>

Respondent by the “rogue and vagabond” Mwala is reversed and the certificate of title issued to the 2<sup>nd</sup> Respondent cancelled, including that of any subsequent buyer, and the property reverts to the estate of the late Moses Makokwa Mwala, to be administered by the Administrator General, who the family had appointed for that purpose.


- 13.2 Costs of this appeal are to be borne by the 2<sup>nd</sup> Respondent same to be taxed in default of agreement.



.....  
**J. CHASHI**  
**COURT OF APPEAL JUDGE**



.....  
**M. J. SIAVWAPA**  
**COURT OF APPEAL JUDGE**



.....  
**A. M. BANDA-BOBO**  
**COURT OF APPEAL JUDGE**



