

DLYS

IN THE COURT OF APPEAL FOR ZAMBIA

HOLDEN AT LUSAKA

(Civil Jurisdiction)

Appeal No. 52/2019

CAZ/08/312/2018



BETWEEN:

PETER MATIMBA

1ST APPELLANT

RICHWELL SIAMUNENE

2ND APPELLANT

AND

COLLINS MAZUBA *(Suing as Administrator
Of the estate of the late Bernard Mazuba)*

1ST RESPONDENT

HAMINI MATIMBA

2ND RESPONDENT

Coram: Chisanga, JP, Sichinga and Ngulube, JJA

On 22nd January, 2020 and 30th March, 2021

For the 1st Appellant: Mr. K. Kombe, Messrs Andrew and Partners

For the 2nd Appellant: No appearance

For the 1st Respondent: Mr. C. Sianondo, Messrs Malambo and Company

For the 2nd Respondent: No appearance

JUDGMENT

Sichinga, JA, delivered the Judgment of the court.

Cases referred to:

1. *Clementina Chanda and another v. Bornface Mudimba* (2011) ZR 65
2. *Trywell v. The People* (2015) ZR 69
3. *Communications Authority of Zambia v. Vodacom Zambia Limited* (2009) ZR 21
4. *Mundia v. Sentor Motors Limited and another* (1982) ZR 66
5. *Mazoka and 2 others v. Mwanawasa and 2 others* (2005) ZR 135
6. *Jere v. DVR/SGT Shamayawa and another* (1978) ZR 204
7. *Mohamed Muazu v. The Attorney-General* (1988-1989) ZR 204
8. *Buchman v. Attorney-General* (SCZ Judgment No. 14 of 1994)
9. *Mususu Kalenga Building Limited and another v. Richman's Money Lenders Enterprises* (SCZ Judgment No. 4 of 1999)
10. *Re Stirrup's Contract: 1961 Swarb.co.uk*
11. *Riverlate Properties Limited v. Paul* (1975) Ch 133

Legislation referred to:

1. *Intestate Succession Act, Chapter 59, Laws of Zambia*
2. *Lands and Deeds Registry Act, Chapter 185, Laws of Zambia*
3. *Land Transfer Act, 60 and 61 Vict. United Kingdom Statutes*
4. *Property Transfer Tax Act, Chapter 340, Laws of Zambia*
5. *Interpretation and General Provisions Act, Chapter 2, Laws of Zambia*

Other works referred to:

- 1. *The Law of Real Property, 5th Edition, Stevens Press, (1975) Sir Robert Megarry and H.W.R Wade***
- 2. *Snell's Equity, 13th Edition, Sweet and Maxwell, John McGhee, QC***
- 3. *Land Law in Zambia: Cases and Materials, (2007) Fredrick S. Mudenda, University of Zambia***
- 4. www.land.search.co.uk**
- 5. *Black's Law Dictionary, 9th Edition, Bryan A. Garner, Thomsom Reuters***

1.0 Introduction

- 1.1 This is an appeal substantially by the 1st appellant, Peter Matimba, against the decision of High Court at Livingstone (Mukulwamutiyo J.) delivered on 22nd September, 2016. On a claim by the 1st respondent, Collins Mazuba, that the estate of his father, late Bernard Mazuba, was the lawful owner of the property known as Farm No. F/3277/A Kalomo, the learned Judge found in favour of the 1st respondent. The learned Judge ordered specific performance of the contract between the 2nd respondent, Hamini Matimba and the late Bernard Mazuba. He ordered cancellation of Certificate of Title issued to the 2nd appellant, Richwell Siamunene. The High Court also declared that the appellant, one Naomi Mizinga and one Joshua Mweene had no interest in the said farm.

2.0 The parties and reliefs sought

2.1 In the court below, the 1st respondent, Collins Mazuba, was the plaintiff. He commenced an action by way of writ of summons against the 2nd respondent, Hamini Matimba (1st Defendant) and the 2nd appellant, Richwell Siamunene (2nd Defendant). The 1st appellant, Peter Matimba, was joined to the proceedings as the 3rd defendant along with Naomi Mizinga as the 4th defendant, and Joshua Mweene as the 5th defendant. The plaintiff sought the following reliefs:

- I. An order of specific performance of a contract dated 1st December, 2002 made between the 1st Defendant (Hamini Matimba) and the late Bernard Mazuba and an order that late Bernard Mazuba was the rightful owner of Farm No. 3277A, Kalomo;**
- II. An order to cancel the Certificate of Title issued to the 2nd Defendant (Richwell Siamunene);**
- III. An order of injunction directing the 3rd Defendant (Peter Matimba) and his family to vacate the said property;**
- IV. An order that the 5th Defendant (Joshua Mweene) removes the caveat he placed on the said property;**
- V. Costs; and**
- VI. Any other relief the court may deem fit.**

3.0 Background

- 3.1 Hamini Matimba, the 2nd respondent herein, was the owner of Farm No. F/3277A, Kalomo. He sold the farm to the late Bernard Mazuba (his estate now represented by Collins Mazuba) at a cost of K5,000,000.00 (unrebased) and fifteen (15) herd of cattle on 1st December, 2002. Mazuba took possession of the farm after paying K4,300,000 (unrebased) of the purchase price. However, Hamini Matimba, the vendor, did not take possession of the cattle.
- 3.2 Two years later, in 2004, late Bernard Mazuba took out an action in the Subordinate Court against Hamini Matimba seeking an order for the latter to complete the sale of the property. The Subordinate Court found in favour of Mazuba and ordered the parties to complete the sale. Following the subordinate court's judgment of 30th September, 2005, Mazuba sought to register his interest in Farm No. 3277A, Kalomo. The Lands Registry at the Ministry of Lands revealed that the property was registered in the name of Richwell Siamunene.
- 3.3 At some time in 2004, Hamini Matimba had entered into another contract with Richwell Siamunene for the sale of Farm NO. 3277A Kalomo. Siamunene subsequently obtained a Certificate of Title in his name.
- 3.4 Upon being joined to the suit as 3rd Defendant, Peter Matimba's assertion was that Farm No. 3277, Kalomo was initially jointly purchased in 1972,

by his father (Samagapa Haluba), his uncle Samson Matimba, and his aunt Nomai Mizinga. The trio were siblings. They agreed to place the property in the name of Samson Matimba as he was the one that had acquired an education. That against the rest of the family's wishes, the property's title passed on from Samson Matimba to his son, Hamini Matimba by way of a deed of gift.

- 3.5 Peter Matimba then took out an action at Livingstone High Court in respect of the same land against his aunt, Nomai Mizinga. That action resulted in a consent order by which terms Mizinga 'gave' the said Farm No. 3277A to Peter Matimba with effect from the date of the order, 29th November, 2011.

4.0 Decision of the court below

- 4.1 After taking all the interests into account, the lower court in its judgment of 22nd September, 2016 found that the farm belonged to Hamini Matimba who sold it to Bernard Mazuba. The said Matimba then sold the same property to Richwell Siamunene. The learned trial Judge found that the sale to Bernard Mazuba was made in good faith. Therefore, the claims made by Peter Matimba and Nomai Mizinga could not affect the sale because Hamini Matimba's subdivision A of Farm 3277, Kalomo belonged to him by way of a deed of gift made by the administrator of his late father's estate. The learned Judge found that Peter Matimba and Nomai Mizinga had no interest in the property.

4.2 As regards Richwell Siamunene, the court below found that he proceeded to register the farm in his own name without the consent of Hamini Matimba. The learned trial Judge found that the sale to Siamunene was incompetent because both Matimba (Peter) and Siamunene knew that the farm had been sold to Bernard Mazuba who had paid for the property. That Mazuba could not register his interest in the farm because when he went to the Ministry of Lands to do so, he discovered that it was registered in the name of Siamunene without the consent of the owner. The learned trial Judge found that the sale to Siamunene was a fraud which could not be allowed to stand. The court below found in favour of the estate of late Bernard Mazuba.

5.0 Grounds of appeal

5.1 Aggrieved by the decision of the lower court, the 1st appellant launched this appeal advancing two grounds of appeal couched as follows:

- 1. That the learned trial Judge erred in law and in fact when he held that the appellant had no interest in Subdivision A when in fact the appellant has an equitable interest in the land; and**
- 2. The learned trial Judge erred in law and fact when he failed to determine whether the 2nd respondent had the authority to sell the land in question considering he received it through a Deed of Gift by a person who was not an owner but a mere administrator.**

6.0 Submissions by the 1st appellant

- 6.1 At the hearing of this appeal, Mr. Kombe, learned counsel for the 1st appellant entirely relied on the 1st appellant's heads of argument filed on 1st April, 2019 and the three volumes of the record of appeal.
- 6.2 Submitting in support of the first ground of appeal, Mr. Kombe firstly conceded that the 1st appellant does not have Certificate of Title to Farm No. F/3277/A in his name. He also accepted that a Certificate of Title was conclusive evidence of ownership. However, he submitted that the law recognised equitable interests in land. He referred us to the text of ***The Law of Real Property¹ 5th Edition authored by Sir Robert Megarry and H.W.R Wade*** at page 114 where the authors state that:

“.....its general meaning is that equitable rights advanced almost to status of legal rights,....The rules relating to notice and the system of conveyancing founded upon them protected equitable interests....but because of their peculiar infirmity, that they would be lost if the legal title came to a bona fide purchaser without notice.”

- 6.3 Mr. Kombe submitted that the evidence on record was that the respondent was aware of the occupation by the 1st appellant of Farm F/3277, Kalomo. That the 1st appellant in concert with his relatives lived on the said property, and each of these families were given a portion of

the land to do as they pleased. Counsel submitted that all parties were aware of the persons living on the property. It was submitted that the 1st respondent was not a bona fide purchaser without notice as he had notice of the appellant's presence. Therefore, the 1st respondent should have queried his interest. That in this regard, the 1st appellant's interest cannot be lost because the 1st respondent was not a purchaser without notice. We were referred to another portion of ***The Law of Real Property*** *supra* at page 149 where the learned authors state:

“If anyone except the vendor is in occupation of any part of the land....the purchaser will usually be affected by notice of that person's rights and he should make inquiry of the occupier personally....The House of Lords has indicated that where occupation is shared with the vendor by members of his family should give protection, so that purchasers must make similar enquiries about their possible rights.”

- 6.4 It was counsel's assertion that the central question *in casu* is – who owns this property and indeed does the 1st appellant have interest in the land given that the only interest he can claim is an equitable one?
- 6.5 Mr. Kombe also cited ***Snell's Equity, 13th Edition***, by **John McGhee QC** at paragraph 4-06, at page 47 where it states that:

“....at law, as in equity, the basic rule is that estates and interests primarily rank in the order in which they are

created. In equity, the result is expressed more directly in terms of temporal priority. The maxim is this: "qui prior est tempore potior est jure". That is, "he who is earlier in time is stronger in law."

6.6 Counsel submitted that according to the authors of **Snell's Equity** where there are two competing equitable interests, the general rule of equity is that the person whose equity attached to the property first will be entitled to priority over the other. Where the equities are equal and neither claimant has the legal estate, the first in time prevails, since *"every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity possess only that which he is justly entitled to and no more."*

6.7 On the question of a bona fide purchaser for value without notice we were referred to **Snell's Equity** at paragraph 4-08 at page 48:

"that an important qualification to the basic rule of first in time priority of interests is the doctrine of bona fide purchaser for value without notice, which demonstrates a fundamental distinction between legal and equitable interests in some kinds of property."

6.8 And at paragraph 4-22 at page 65-66 where it states that:

"The doctrine is most easily understood by an example taken from a disposition of unregistered land. A legal estate, or interest was generally enforceable against any person who took the property, whether, or not he had notice of it. This followed from the basic rule of priority that interests in property rank in order in which they were created. If V sold to P land over which W had a legal right of way, P took the land subject to W's right even if he was ignorant of it. But historically, it was different for equitable rights: a bona fide purchaser for value consideration who obtained a legal estate at the time of his purchase without notice of a prior equitable right was entitled to priority in equity as well as at law. He took free of the equitable interest. In such a case equity followed the law. The purchaser's conscience was in no way affected by the equitable right. So there was no justification for invoking the jurisdiction of equity against him where there was equal equity the law prevailed. The onus on the purchaser to prove that he was a bona fide purchaser for value, and also that he took without notice of the equitable interest."

- 6.9 According to Mr. Kombe, the following requirements need to be fulfilled when relying on the doctrine:

- “ a) a purchaser must act in good faith;*
- b) a purchaser is a person who acquires an interest in property by grant rather than operation of law. The purchaser must also have given value for the property;*
- c) the purchaser must generally have obtained the legal interest in the property; and*
- d) the purchaser must have had no notice of the equitable interest at the time he gave his consideration for the conveyance. A purchaser is affected by notice of an equity in three cases:*
- I. actual notice; where the equity is within his own knowledge;*
 - II. constructive notice; where the equity would have come to his own knowledge if proper inquiries had been made; and*
 - III. imported notice; where his agent as such in the course of the transaction has actual, or constructive notice of the equity.”*

6.10 It was Mr. Kombe's argument that the 1st respondent had notice of the 1st appellant's interest in Farm F/3277 Kalomo. That it would be unjust to remove him from his home. He argued that the 2nd respondent was only entitled to sell his subdivision since the legal owner of the land in question, Samsom Matimba, gave each of his relatives a portion of land.

upholds the beneficial interest of biological children of a person that dies intestate as was the case in Samson Matimba's death."

6.15 It was submitted that the 1st respondent went on to submit that in accordance with **Section 5** of the **Intestate Succession Act**¹ the 2nd respondent qualified as a beneficiary and he was therefore entitled to the land in question and in turn could do as he pleased with it including selling it to the 1st respondent.

6.16 According to Mr. Kombe, the submission may be true in part, that is, that **Section 5** of the **Intestate Succession Act** provides the hierarchy or list of persons entitled to benefit from a deceased's person's estate where that person dies intestate. That the said Act also provides what should happen where the deceased has more than one house/piece of land. That in this case the intestate subdivided the land so that his relatives could all live on the said land. We were referred to **Section 9 subsection 2 of the Intestate Succession Act** *supra* which provides:

"Where the estate includes more than one house the surviving spouse or child or both shall determine which of the houses shall devolve upon them and the remainder shall form part of the estate."

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"Where the estate includes more than one house the surviving spouse or child or both shall determine which of the houses shall devolve upon them and the remainder shall form part of the estate."

- 6.11 Mr. Kombe contended that the 2nd respondent's character, as deciphered from the record, was scrupulous and dishonest because he received money for the same land from two people. That he did so even though he was not the legal owner of the land and knowing that the land was not for his sole use and benefit, but that several of his relatives lived on the land in question.
- 6.12 Counsel urged us to recognise that law and equity should be administered concurrently. We were further urged to recognise the beneficial equitable interest that the 1st appellant has in the land in dispute. Counsel prayed that the 1st appellant and his family be allowed to remain on the subdivision given to him.
- 6.13 On the second ground of appeal, we are asked to note the record that Samson Matimba was the legal owner of Farm F/3277 and that he gave subdivisions of the property not only to his son, that is the 2nd respondent, but he gave land to the 1st appellant as well. We are also asked to note that the gifts to the 1st appellant and the 2nd respondent were neither registered nor granted through a deed.
- 6.14 We were referred to the 1st respondent's submission in the court below where it was stated that:

"....even if it were to be argued that there was no gift of land bestowed on the 1st Defendant (2nd respondent herein) from his father, Samson Matimba, the law itself recognises and

- 6.17 Mr. Kombe's submission on the above provision was that since Samson Matimba had subdivided his land into portions, the 2nd respondent, being a beneficiary would only be entitled to his father's home on the death of his mother, that is, the subdivision that Samson Matimba and his wife lived on. That the rest of Samson Matimba's property would form part of his estate to be converted into money by the administrator.
- 6.18 It was argued that although it is on record that the deceased, Samson Matimba gave his son, the 2nd respondent, a gift, that is, a portion of Farm F/3277, he did not do so through a deed of gift. Therefore, the 2nd respondent, like the 1st appellant merely had an equitable interest in Farm F/3277.
- 6.19 Mr. Kombe's submission was that the **Intestate Succession Act** *supra* does not in any circumstances provide for an administrator to give land by way of deed of gift, as that could only be executed by the intestate, Samson Matimba. It was contended that the administrator could not give what he did not own. His duties, in accordance with **Section 19** of the **Intestate Succession Act** *supra* were merely to pay all of the intestate's debts and liabilities, and administer the estate for the benefit of those entitled. It was submitted that since the administrator had no authority to execute a deed of gift, the 2nd respondent did not pass title to the 1st respondent. We were implored by counsel to scrutinise the record of the court below.

- 6.20 In conclusion, counsel reiterated that the 1st appellant and the 2nd respondent had equitable interests in Farm No. F/3277, Kalomo. It was argued that even if the 2nd respondent did possess the authority to sell, the purchasers were not without notice of the 1st appellant and his family's presence on the land. Further, that the 2nd respondent could only sell the portion given to him by his father and not the entire land.
- 6.21 We were urged to overturn the decision of the lower court and to recognise the rights and interests that the 1st appellant has in Farm F/3277 by virtue of the fact that he was given a portion by the late Samson Matimba which has been his and his family's home since 1972.

7.0 1st respondent's submissions

- 7.1 On behalf of the 1st respondent, Mr. Sianondo submitted, in respect of the 1st ground of appeal that the 1st appellant's claim to an interest is premised on a purported equitable interest in F/3277 and not necessarily subdivision F/3277/A. That his equitable interest in F/3277 is by virtue of his family having lived thereon since 1972, and on the fact that the respondents were aware of his presence on the farm. Therefore, the 1st respondent was not a *bona fide* purchaser for value without notice of property F/3277/A.
- 7.2 Mr. Sianondo submitted that this position of the law is misconstrued because the evidence does not show that the 1st appellant lived on the

surveyed portion described as subdivision A of F/3277. However, it shows that the 1st appellant and his family occupied the portion described as subdivision B of F/3277. It was submitted that the 1st appellant failed to prove that the 1st respondent had any knowledge of notice of his purported equitable interest when he contracted to buy subdivision A of Farm 3277 from the 2nd respondent.

7.3 Mr. Sianondo framed the question for determination as – *Did the 1st appellant have any equitable interest in F/3277 at all?* He submitted that the answer is a resounding negative because the 1st appellant failed to prove that his father did contribute cattle to purchase property no. F/3277, or that he had any proprietary interest in the said land. Counsel argued that the undisputed evidence on record was that the 2nd respondent's father, Samson Matimba, held a legal estate and right in F/3277, which was duly registered as reflected on Certificate of Title No. L3804. **Section 54 of the Lands and Deeds Registry Act²** was referred to.

7.4 It was submitted that since Samson Matimba died intestate, **Section 5** of the **Intestate Succession Act** *supra* applies. It provides for the persons entitled to benefit from the intestate's estate being the surviving spouse, children, dependants and parents only.

7.5 Mr. Sianondo submitted that *in casu* the 1st appellant cannot claim a greater interest in F/3277 over and above the children of Samson

Matimba, who include the 2nd respondent. That upon obtaining a legal interest in subdivision A of F/3277, the 2nd respondent held a better interest than any equitable rights of anyone, if at all. To buttress this point we were referred to the learned author of **Land Law in Zambia, Cases and Material³ - Fredrick S. Mudenda (2007)** who quotes Megarry's Manual of the Law of Real Property as follows:

“There is a great difference between legal and equitable rights. This is sometimes expressed by saying that legal rights are rights in rem, equitable rights are rights in personam. A legal interest in land is a right in the land itself, so that whoever acquires the land is bound by that right, whether he knew of it or not. A legal right is like a live electric wire which shock those who touch it whether or not they knew of it. Equity on the other hand would enforce equitable rights only against certain persons....Legal rights against all persons except a bonafide purchaser of a legal estate, for value without notice and those claiming under such a purchaser....The extent to which a purchaser is bound by third party rights when acquiring property is often determined by whether the rights are equitable or legal....”

7.6 Further, the case of **Clementina Chanda & another v. Bonface Mudimba¹** was cited where it states at page 65 that:

“....an important qualification to the basic rule of first in time priority of interests is the doctrine of bona fide purchaser for value without notice, which demonstrates a fundamental distinction between legal and equitable interests in some kinds of property.” (Quoting Snells Equity by John McGhee, GC, London, Thomson Reuters (Legal) Limited, 2008 at paragraph 4-21).

- 7.7 According to Mr. Sianondo, if the 1st appellant had any equitable interest in subdivision A, the same was subordinate to the legal right that the 1st respondent acquired thereto. That the evidence on record shows that the 1st appellant's father was only granted, at the very least, a licence to occupy a portion of F/3277. That is, no legal right was ever conveyed to him by Samson Matimba. It was submitted that a licence could be revoked at any time by the donor and those claiming/entitled under him.
- 7.8 We were urged to dismiss the appeal in light of the evidence before the lower court and the learned Judge's findings of fact and holding that the 1st appellant had no interest in Farm 3277/A. The cases of ***Trywell v. The People***² and ***Communications Authority of Zambia v. Vodacom Zambia Limited***³ referred to.
- 7.9 On the second ground of appeal, Mr. Sianondo reacted to Mr. Kombe's submission that the 2nd respondent lacked authority to sell by reason of an incompetent deed of gift. He argued that the 1st appellant was raising

a new issue which was not pleaded. According to Mr. Sianondo, it is settled law that the appellate court will not entertain grounds of appeal which tend to present new matters that were not claimed before the lower court. He cited the cases of ***Mundia v. Sentor Motors Ltd and another⁴*** and ***Mazoka and 2 others v. Mwanawasa, Electoral Commission of Zambia and the Attorney-General⁵*** in which cases the Supreme Court pronounced itself on the functions of pleadings and on exclusion of matters not pleaded especially where an objection is raised respectively.

7.10 To further buttress the point on raising issues on appeal which were not pleaded, we are referred to the cases of ***Jere v. DVR/SGT Shamayuwa and another⁶*** and ***Mohamed Muazu v. The Attorney-General⁷***. It was submitted that the issues raised by the 1st appellant are ones that could have been dealt with in the court below as they were at the time available to him to plead.

7.11 On the 1st appellant's submissions as related to **Section 9 (2)** of the **Intestate Succession Act** *supra* Mr. Sianondo submitted that the section refers to a situation when the estate is comprised of more than one house, that in that case the surviving spouse and/ or children shall determine which house shall devolve upon them and the remainder shall form part of the estate. That *in casu* the 1st appellant is not a child of the deceased and therefore not entitled to benefit from the deceased's estate.

We were urged to dismiss this ground of appeal as it is an abuse of the court process.

- 7.12 In conclusion, Mr. Sianondo emphasised in his submissions that the 1st appellant's father and relatives lived on the subject land as mere licensees at the pleasure of the donor and his heirs. He urged us to dismiss the appeal with costs.

8.0 Decision of the court

- 8.1 We have considered the evidence on record, the submissions of counsel and the issues raised by the parties. In the first ground of appeal, the 1st appellant's main contention is that the court below ought to have found and held that he had an equitable interest in subdivision A of Farm No. F/3277.
- 8.2 From the documents on record, particularly Lands Register on page 268 of the record of appeal, Farm No. 3277 Kalomo was assigned by one Erasmus Maria Magdalena to Matimba Samson on 16th October, 1972. The land was in extent 3049 acres. It is common cause that this land was registered to Samson Matimba exclusively by way of Certificate of Title No. 34089. It is not in dispute that the land was subsequently subdivided by Samson Matimba and 212.98 hectares were transferred to Hamakando Matimba as subdivision B of Farm No. 3277. Samson Matimba retained the remaining extent of Farm No. 3277 Kalomo as

evidenced by Certificate of Title No. L3804 at page 335 of the record of appeal. It is not in dispute that Samson Matimba died on 10th August, 1999 and by way of court order for appointment of administrator, Godfrey Hikwale Matimba was subsequently appointed as the administrator of the former's estate.

8.3 In the court below, the 1st appellant testified that Samson Matimba was the registered title holder of Farm No. F/3277. Further, that in 2002 he learnt that the 2nd respondent had sold a portion of the farm to Bernard Mazuba. When he queried the 2nd respondent about the sale, the 2nd respondent informed him that he had sold the portion that was his.

8.4 Under cross-examination, the 1st appellant told the court that the whole of Farm 3277 was registered in Samson Matimba's name. That upon his demise the Matimba family chose Godfrey Matimba as the administrator of the deceased's estate. That as the Administrator of Samson Matimba's estate Godfrey Matimba had the power to transfer to the deceased's son, Hamini Matimba. He further told the court that Godfrey Matimba as administrator made a deed of gift to Hamini Matimba as the deceased's son relating to subdivision A of Farm 3277. The latter then assigned the land to the 2nd appellant in February, 2005. From this evidence the learned trial Judge found at page J9 of the Judgment, that:

"It follows therefore that there is no doubt that the farm was sold to the plaintiff's father by the 1st defendant. There is

also no doubt that the sale to the plaintiff's father was done before the 1st defendant sold or purposed to sell to the second defendant of the sale when he approached him for the purchase of the farm. The sale of the farm to the plaintiff's father was made in good faith and the protests by the 3rd and 4th defendants could not affect the sale for the 1st defendant has owned the farm which was a subdivision of the main farm in which main farm the 3rd and 4th defendant had interests but subdivision A of farm 3277 belonged to the first defendant to whom it was gifted by his father, now late, which gift was confirmed and evidenced by a deed of gift made by his late father's estate. The 3rd and 4th defendants had no interest in subdivision 3277A of farm number 3277 as that subdivision was given to the 1st defendant, which subdivision he sold to the plaintiff's father and received payment. This was before he purported to sell the same subdivision to the second defendant. (Emphasis is ours)"

- 8.5 We equally find that the finding by the learned trial Judge, that the 1st appellant had no interest in subdivision A of Farm 3277 is well supported by the evidence on record. Godfrey Hikwale Matimba was in fact the registered lessor of the whole of Farm 3277 following Samson Matimba's demise. As administrator he was legally obliged to transfer

the land to the intestate's beneficiaries. We do not accept the submission that the 1st respondent ought to have had notice of the 1st appellant's interest in Farm 3277, Kalomo because **Section 58** of the **Lands and Deeds Registry Act** provides as follows:

"58. Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer or mortgage from the Registered Proprietor of any estate or interest in land in respect of which a Certificate of Title has been issued shall be required or in any manner concerned to inquire into or ascertain the circumstances in or the consideration for which such Registered Proprietor or any previous Registered Proprietor of the estate or interest in question is or was registered, or to see to the application of the purchase money or of any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

8.6 Since Godfrey Hikwale Matimba was infact the registered proprietor of Farm 3277, his interest in the land was subject only to the

encumbrances, liens, estates or interest as shown by such Certificate of Title. From the record, the Certificate of Title held by Godfrey Hikwale Matimba, as administrator of the estate of Samson Matimba, was not subject to any interest legal or equitable as held by the 1st appellant. We thus agree with Mr. Sianondo's submission to the effect that the 2nd respondent entered into a valid contract of sale of subdivision A of Farm 3277 with the 1st respondent (Bernard Mazuba). Bernard Mazuba did purchase for valuable consideration of K5,000,000.00 (unrebased and 15 herd of cattle, receipt of which was duly acknowledged by Hamini Matimba, acquired a legal interest in subdivision A of Farm 3277 Kalomo. The 1st appellant's interest was not visible on the Certificate of Title. The first ground of appeal cannot succeed.

- 8.7 Turning to the second ground of appeal, we first wish to address Mr. Sianondo's submission in reaction to Mr. Kombe's submission that the 2nd respondent lacked authority to sell by reason of an incompetent deed of gift. Mr. Sianondo submitted that this was a new matter which had not been pleaded and could not now be raised on appeal. The position is far from it. In the case of ***Nevers Mumba v Muhabi Lungu (sued in his capacity as National Secretary of the MMD)***⁸ the Supreme Court clarified the law as enunciated in the cases of ***Buchman v. Attorney-General***⁹ and ***Mususu Kalenga Building Limited and another v.***

Richman's Money Lenders Enterprises¹⁰. The Court pronounced itself as follows:

"The reason for the position in our view, is that in an adversarial system of justice, such as obtains in this country, it is generally considered fair to accord the opposing party an opportunity to respond to every issue raised. Furthermore, we are loath to reverse a lower court based on an issue that the trial court has not ruled upon. This Court will, however, affirm or reverse or overrule a trial court on any valid legal point presented by the record, regardless of whether that point was considered or even or even rejected."

8.8 The question whether an administrator of an estate can distribute by way of a deed of gift is an important one. We will therefore proceed to consider the second ground of appeal.

8.9 We have had recourse to **Section 61** of the **Lands and Deeds Registry Act** *supra*. **Section 61 (2)** provides as follows:

"(2) Where the Registered Proprietor or Registered Proprietors is or are the personal representatives of a deceased Registered Proprietor, an assent by such personal representative or personal representatives shall be deemed, for the purposes of subsection (4) of section 3 of the Land

Transfer Act, 1897, of the United Kingdom, to be in the prescribed form if the same is in the Schedule.”

8.10 **Subsection (4) of Section 3 of the Land Transfer Act, 1897** states:

“(4) The production of an assent in the prescribed form by the personal representatives of a deceased proprietor of registered land shall authorise the Registrar to register the person named in the assent as proprietor of the land.”

8.11 **Section 61** stipulates *inter alia* that the personal representative (s) of an estate in respect of Certificate of Title may execute for the purpose of registration an assent in a prescribed format. Whilst the Act envisages a deed of assent, an *assent* as stated in *section 61* is not described. However, it is safe to state as deciphered from the Act and other legal sources that a *deed of assent* is a document by which a person inherits property from a deceased's estate. Effectively, by a *deed of assent*, the personal representative is assenting to the transfer of the property to the beneficiary (ies) for no consideration or financial contribution towards it. (See www.land-search.co.uk). This position is equally discernible in the wording of **section 6(4) of the Property Transfer Tax Act⁴**. It provides as follows:

“(4) Where property devolves upon death, the resulting transfer of such property shall not be liable to tax if the

transferee is a member of the immediate family of the deceased: nor shall any intermediate transfer to or by an executor, administrator, personal representative or other person acting in similar capacity be liable to tax if such intermediate transfer is carried out to give effect to such devolution"

- 8.12 In the English case of **Re Stirrup's Contract**¹⁰, land forming part of the estate of H was conveyed to her personal representatives – R and D. D survived R but subsequently died appointing a bank in his will as his executor. The bank then became the personal representative of H's estates. As the land forming its estate had been conveyed to R and D, the bank could not vest the legal estate in the land by means of an assent in the beneficiary, J, entitled to the land under the will of H, but it was conceded that the proper method of transferring the legal estate was by conveyance. The land was transferred by the bank as personal representative of D by way of a deed of assent to J in fee simple. A question was raised on a subsequent sale of the land, whether the assent was effective. It was held *inter alia* that:

"(i) the deed of assent was effective to pass the legal estate then vested in the bank because (a) the intention to pass the legal estate was clear..."

(ii) the purchaser was not entitled to have the formal defect of the assent corrected, for the extent of its right was only to be satisfied that its vendor was shown to be seized of the estate sold and to be in the position, without possibility of dispute or litigation to pass that estate to the purchaser.

8.13 In *casu* it is not in dispute that the 1st appellant was not Samson Matimba's son, and that the 2nd respondent was. It is also not in dispute that Godfrey Hikwale Matimba was appointed as administrator of the estate of Samson Matimba. For that purpose he became the registered lessee of Farm 3277. As an administrator he had the obligation to transfer the property to the beneficiaries of the estate. He subsequently transferred subdivision A of Farm 3277 to the 2nd respondent as a beneficiary of the deceased's estate. The duties and powers of an administrator under **Section 19 (1)** of the ***Intestate Succession*** *supra* include ***"to effect distribution of the estate in accordance with the rights of the persons interested in the estate under this Act."*** **Section 5** of the Act prescribes the persons entitled to benefit from an intestate's estate, being a surviving spouse, children, parents and dependants.

8.14 On the other hand, **Black's Law Dictionary** describes a *deed of gift* as "**a deed executed and delivered without consideration. - Also termed gratuitous deed**". What is evident from the deed of gift on record is that it was drawn to firstly satisfy the provisions of the *Interstate Succession Act supra* in terms of the duty of the administrator to distribute the estate. Secondly, it is plain that since the transfer was of no financial benefit to the donor, it qualified for exemption pursuant to the provisions of the **Property Transfer Tax Act supra**. It is beyond question that whilst the **Lands and Deeds Act supra** envisages a deed of assent, the deed of gift in fact fulfilled the same purpose.

8.15 **Section 47 of the Interpretation and General Provisions Act** provides as follows:

"47. Save as is otherwise expressly provided, whenever any form is prescribed by any written law, an instrument or document, which purports to be in such form, shall not be void by reason of any deviation therefrom which does not affect the substance of such instrument or document, or which is not calculated to mislead"

8.16 In *casu* we have combed through the 1st appellant's evidence on record, and we find it is want of any challenge that the 2nd respondent lacked authority to sell given that he received the land through a *deed of gift* by

a person who was an administrator of an estate. As we have earlier demonstrated, in this case, the deed of gift was in fact in substantial conformity with the form of transfer of property prescribed for an administrator by way of assent.

- 8.17 We have equally visited **Halsbury's Laws of England**⁶, at paragraph 33 where it states:

"Where the intention of the parties to an otherwise valid transaction is recorded in terms which do not accurately reflect that intention, the court may correct the mistake in the record in order to give effect to the intention. Where the transaction is a unilateral one (for example, a deed poll or a will) the intention concerned is that of the maker alone....."

However, the common intention concerned is not necessarily the genuine intention of all parties; the doctrine of estoppel has a role to play. Thus the court may intervene where one party does not realise the mistake but says nothing. On the other hand, if the other party does not realise the first party's mistake, the court will not assist. It does not matter whether the mistake involved is one of fact or of law."

- 8.18 The learned authors of **Halsbury Laws of England** *supra* go on to state that rectification is the equitable remedy by which the court would modify the terms of a written instrument so as to give effect to the intention of the parties to it. That intention may be genuinely agreed on by the parties (where there is consensus *ad idem*), or it may be by

estoppel (where it is the intention of only one of them, but the other is estopped from denying that it is his as well). It is thus the mistake in the way in which the agreement is expressed in writing that is rectified, and not a mistake in the agreement itself. In the case of a deed poll or voluntary transaction, it is the intention of the maker or donor that must be considered.

8.19 In *casu*, the administrator's unilateral intention as the maker of the deed of gift was to transfer the estate of Samson Matimba to his beneficiaries including the 2nd respondent. The parties genuine or estoppel consensus is accurately recorded in the deed of gift. In the case of ***Riverlate Properties Limited v. Paul***¹¹ the landlord prepared a lease which contained no provision for the tenant to bear any costs relating to exterior or structural repairs. The landlord sought rectification of the lease and the Court of Appeal of England and Wales held that:

"1. the tenant neither directly nor indirectly knew of the landlord's mistake and since the tenant was not guilty of sharp practice, there was no justification for rectification, either on the ground of a common mistake or on the ground of knowledge on the tenant's side that the landlord was making a mistake at the time the lease was granted."

2. there was a unilateral mistake by the lessor, there was no principle of law which entitled the lessor to rescind or annul the agreement or to require the lessee, who had acquired an interest on the terms on which he had intended to obtain it, to accede to the terms which the lessor meant to impose but did not."

8.20 The learned trial Judge found, on the evidence which was before him that the property in issue belonged to the 2nd respondent and the sale to Bernard Mazuba was acknowledged by the 1st appellant and the 4th defendant, Nomai Mizinga. The transfer cannot be nullified on account of the fact that the administrator by mistake, did so by way of deed of gift. His intention was clear and that was to give effect to the provisions of the **Intestate Succession Act** *supra*. The 2nd respondent was unaware of the mistake which he understood was to give effect to his interest in his father's estate. There can be no rectification as the deed of gift was expressed in the way the parties understood. We find that Mr. Kombe's arguments in respect of the second ground of appeal are untenable. Ground two is accordingly dismissed.

8.21 Before we leave this appeal, we wish to point out that the 2nd appellant did not participate in the appeal. We have therefore not made pronouncements on his position in the lower court. For the reasons we

have stated we uphold the lower court's finding. We order that a Certificate of Title be issued to the estate of Bernard Mazuba or his legally appointed representative.

8.22 We find this whole appeal lacks merit. It is therefore dismissed with costs to the 1st respondent to be taxed in default of agreement.



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F. M. Chisanga
JUDGE PRESIDENT



.....
D.L.Y. Sichinga
COURT OF APPEAL JUDGE



.....
P.C.M. Ngulube
COURT OF APPEAL JUDGE