

IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 214/2021  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

BETWEEN:

NAMAKOBO MOOMBE

APPELLANT

AND

GODWIN CHISELE

1<sup>ST</sup> RESPONDENT

YUSSUF ALI ABDI

2<sup>ND</sup> RESPONDENT



CORAM: Makungu, Sichinga and Ngulube JJA

On the 16<sup>th</sup> day of June, 2022 and on the 25<sup>th</sup> day of October, 2022

For the Appellant: In person

For the 1<sup>st</sup> Respondent: No Appearance

For the 1<sup>st</sup> Respondent: No Appearance

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## JUDGMENT

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MAKUNGU, JA delivered the Judgment of the Court.

Cases referred to:

1. Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) ZR 172
2. Attorney General v. Marcus Kampumba Achiume (1983) ZR 1
3. Dunlop Pneumatic Tyre Company Limited v. Selfridge and Company Limited [1915] A.C. 847
4. Anti-Corruption Commission v. Barnnet Development Corporation Limited (2008) Z.R. 69 Vol. 1 (SC)
5. Base Chemicals Zambia Limited Mazzonites Limited v. Zambia Air Force and The Attorney General (S.C.Z. Judgment No. 9 of 2011)

Legislation referred to:

1. The Evidence Act Chapter 43 of the Laws of Zambia
2. The Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia

**Other works referred to:**

1. *Chitty on Contracts, General Principles, Vol. 1, Sweet and Maxwell, 2008*
2. *Halsbury's Laws of England 4<sup>th</sup> Edition Volume 17 (London: Butterworth, 1976)*
3. *The Law of Contract, 7<sup>th</sup> Edition Oxford University Press, 2016*

**1.0 INTRODUCTION**

1.1 This appeal emanates from a Judgment of the High Court delivered by the Hon. Mrs. Justice Mapani Kawimbe on 21<sup>st</sup> July, 2021. The appellant, commenced this action against the 1<sup>st</sup> and the 2<sup>nd</sup> respondents herein, following a dispute over Lot L/CHILI/1000024687, situate in Chililabombwe District of the Copperbelt Province of Zambia.

1.2 As far as possible, we will refer to Lot L/CHILI/1000024687 as 'the subject property,' while the parties will be referred to by their designations in this Court, rather than as plaintiff, 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant respectively, which is what they were in the Court below.

**2.0 BACKGROUND**

2.1 On 14<sup>th</sup> March, 2019, the Ministry of Lands issued a Certificate of Title, in respect of the subject property, in the 1<sup>st</sup> respondent's name. Subsequently, on 4<sup>th</sup> July, 2020, to be

precise, the 1<sup>st</sup> and 2<sup>nd</sup> respondents signed a contract of sale followed by an assignment, by means of which the latter proceeded to change title into his name. A new Certificate of Title No. CT-78804 was issued on 16<sup>th</sup> July, 2020 in the name of Yussuf Ali Abdi, the 2<sup>nd</sup> respondent.

2.2 It was in the wake of the foregoing development that the appellant took out a suit in the Court below, by writ of summons accompanied by a statement of claim, seeking the following reliefs:

- (i) *Payment of the sum of K3, 500, 000, being an amount for the sale of the subject property;*
- (ii) *In the alternative, a declaration that the Plaintiff is the true owner of the subject property;*
- (iii) *Damages for the inconvenience caused by the actions of the defendants;*
- (iv) *10% as collection fees;*
- (v) *Costs of and incidental to this action;*
- (vi) *Any other relief the Court may deem fit.*

2.3 In his statement of claim, the appellant averred that, using the name of the 1<sup>st</sup> respondent, who is his brother-in-law, he

applied to Chililabombwe Municipal Council for allocation of land. That the application was approved in October, 2016, the subject property was recommended, albeit in the name of the 1<sup>st</sup> respondent, and finally the Certificate of Title was issued in the same name.

2.4 It was averred by the appellant that on 24<sup>th</sup> April, 2019, the 1<sup>st</sup> respondent executed a memorandum of understanding, acknowledging the appellant as the true owner of the subject property. That the 2<sup>nd</sup> respondent was fully aware of the existence of the said memorandum of understanding at the time he and the 1<sup>st</sup> respondent signed the contract of sale, the assignment and obtained consent to assign from the Ministry of Lands.

2.5 It was the appellant's further averment that the signing of the documents named in the preceding paragraph was done without the 2<sup>nd</sup> respondent having paid any money to him or to the 1<sup>st</sup> respondent for the subject property.

2.6 The 1<sup>st</sup> and the 2<sup>nd</sup> respondents each entered an appearance and filed a defence.

2.7 In his defence filed on 8<sup>th</sup> February, 2020, the 1<sup>st</sup> respondent substantially admitted the allegations contained in the appellant's statement of claim, including the avowal that the 1<sup>st</sup> respondent never received any money from the 2<sup>nd</sup> respondent as payment for the sale of the subject property.

2.8 The 2<sup>nd</sup> respondent's defence, on the other hand, was that his advocates dealt with the 1<sup>st</sup> respondent, in whose name the title to the subject property was registered. He stated that, in fact, the 1<sup>st</sup> respondent obtained consent to assign and paid Property Transfer Tax.

2.9 As regards his alleged non-payment of the contract sum, the 2<sup>nd</sup> respondent averred that the full purchase price of K250, 000.00 was paid and receipt thereof acknowledged by the 1<sup>st</sup> respondent.

2.10 By way of reply, the appellant stated, *inter alia*, that the contract amount was way more than K250, 000.00. That in an effort to evade tax, the 2<sup>nd</sup> respondent filed at the Ministry of Lands a forged contract of sale showing K125, 000 as the contract sum.

2.11 The appellant and his wife gave sworn evidence and relied on their witness statements, the same being in line with the statement of claim. Both respondents were absent from court during the trial.

### **3.0 DECISION OF THE LOWER COURT**

3.1 The learned trial Judge discerned the issue in dispute as being *“whether the Plaintiff is the true owner of Lot L/CHILI/1000024687, Kasumbalesa Chililabombwe.”* She went on to find that the subject property was owned by the 1<sup>st</sup> respondent when he sold it to the 2<sup>nd</sup> respondent. That, on the other hand, the appellant was a stranger and not privy to the agreement between the respondents.

3.2 Based on the foregoing, the learned trial Judge held that the appellant had failed to prove his case against the respondents. She accordingly dismissed the case in its entirety.

### **4.0 GROUNDS OF APPEAL AND ARGUMENTS**

4.1 Aggrieved by the decision of the Court below, the appellant escalated the matter to this Court, advancing three grounds of appeal framed as follows:

1. *The learned trial Judge erred and misdirected herself for not making reference to the Memorandum of Understanding between the Plaintiff and the 1<sup>st</sup> Defendant, which is contained in the bundles of pleadings;*
2. *The learned trial Judge erred and misdirected herself both in law and fact by ignoring other facts of adduced evidence by the Plaintiff as she did not refer at all to the audio evidence which constitutes part of the bundle of documents and was on record;*
3. *The learned trial Judge erred and misdirected herself by ruling out the fact that the 1<sup>st</sup> Defendant Mr. Godwin Chisele was the legal owner of the property but was not paid by the second defendant as is contained in the audio evidence as well as the 1<sup>st</sup> Defendant's defence, and that neither was the Plaintiff who is the true owner of the property paid. This is evident as the 2<sup>nd</sup> Defendant failed to adduce proof of evidence of having paid for the property into*

*court. Therefore, the Appellant humbly prays that the appellate court applies its competent jurisdiction to enable the 2<sup>nd</sup> Respondent pay him or, in the alternative judgment, by reversing the transaction for the land to go back to the Plaintiff's brother in law.*

- 4.2 At the hearing of the appeal on 16<sup>th</sup> June, 2022, the appellant informed us that he would rely on his heads of argument filed into Court on 16<sup>th</sup> September, 2021 which he would augment orally.
- 4.3 For the respondents, there was no appearance, and no arguments had been filed in opposition to those of the appellant.
- 4.4 In support of ground 1 of the appeal, the appellant contended that the question of ownership of the subject property was not in issue. Therefore, it was a misdirection, on the part of the learned trial Judge, to ask the question whether the appellant was the true owner of the said property. That the 1<sup>st</sup> respondent, in his defence, did not contest the said issue.
- 4.5 It was the appellant's submission that both he and his wife the 1<sup>st</sup> respondent's sister (PW2) testified that the subject property

was offered to the 1<sup>st</sup> respondent on behalf of the appellant, and their evidence was not challenged through cross-examination. He drew our attention to the purpose of cross-examination, as explained at page 194 paragraph 279 of ***Halsbury's Laws of England***.<sup>2</sup>

4.6 The appellant further took issue with the trial Judge insofar as she stated, at page J8 of the Judgment that other than the averment in the appellant's pleadings and the 1<sup>st</sup> respondent's defence that they executed a memorandum of understanding dated 24<sup>th</sup> April, 2019, there was "*nothing produced in evidence to prove the assertion*." According to the appellant, the said memorandum (appearing at page 79 of the record of appeal) was before the learned trial Judge. That had she taken the trouble to peruse her record, she would have found it and would not have found as she did.

4.7 We were urged, on the authority of ***Wilson Masauso Zulu v. Avondale Housing Project Limited*** <sup>(1)</sup> and ***Attorney General v. Marcus Achiume***, <sup>(2)</sup> to reverse the said holding.

4.8 The gist of ground 2 of the appeal is that there was placed before the trial Judge evidence in the form of a Compact Disc

(CD), a review of which would have revealed that no consideration was paid by the 2<sup>nd</sup> respondent for the subject property. That at no point did the Court below make reference to the said CD, despite the same being contemplated in the definition of the word "document" under **section 2 of the Evidence Act.**<sup>1</sup>

4.9 The third and last ground of appeal reiterates the contention that no consideration was paid by the 2<sup>nd</sup> respondent for the purchase of the subject property.

4.10 The appellant leveraged the 1<sup>st</sup> respondent's confirmation, as per paragraph 14 at page 24 of the record of appeal, that neither he nor the appellant received any payment from the 2<sup>nd</sup> respondent for the sale of the subject property. Therefore, the contract of sale between the 1<sup>st</sup> and the 2<sup>nd</sup> respondent was void for want of consideration.

4.11 By way of validating the foregoing argument, the appellant referred us to paragraphs 6.1 and 6.2 of **The Law of Contract**,<sup>3</sup> where the learned authors have stated the following:

*“One of the most puzzling aspects of the English law of contract is the requirement that, to be binding, a contract must be supported by consideration. It is not enough that an offer made by one party, made seriously and with the intention to create a contract, has been accepted by the other party – without the added magic ingredient of consideration, there is no binding, enforceable contract... the easiest way to understand consideration is to think of it as the price of the promise – what one contracting party is getting, in return for the promise, from the other.”*

4.12 It was argued that the Court below should have resolved in favour of the appellant the inconsistencies surrounding the registration of the subject land in the 2<sup>nd</sup> respondent's name. One such inconsistency, according to the appellant, was the 2<sup>nd</sup> respondent's assertion that he bought the subject land for K250, 000, and yet the Lands Register at page 92 of the record of appeal shows that the land was conveyed at K125, 000.

4.13 On the basis of the foregoing submissions, the appellant urged us to set aside the Judgment of the lower Court with costs against the 2<sup>nd</sup> respondent.

4.14 As indicated earlier, the appellant at the hearing took the liberty to orally augment his written arguments. We hasten to state that his oral submissions, in respect of the first ground of appeal, were essentially a repeat of the arguments filed into this Court. Of note, though, is that he confirmed that at the time of the transaction between the 1<sup>st</sup> and the 2<sup>nd</sup> respondent, the subject property was registered in the 1<sup>st</sup> respondent's name, and that the appellant himself was not a party to the said transaction.

4.15 He insisted, however, that the CD referred to in paragraph 3.7 above would have shown that he was supposed to be part of the transaction if only the 2<sup>nd</sup> respondent had waited for him to return from his father's funeral in Lusaka.

4.16 When asked whether he did tender the said CD in evidence before the trial Court, the appellant's response was that he told the Court that he would rely totally on the record, trusting that the learned trial Judge would read through and see all

the evidence before her. That he did mention that there were recordings corroborating his evidence.

## **5.0 CONSIDERATION AND DECISION OF THIS COURT**

5.1 We have considered the record of appeal, including the Judgment appealed against, the appellant's submissions and the authorities relied upon.

5.2 Firstly, we wish to place on record our observation that at paragraph 17 of her Judgment, the trial Judge stated the following:

*"As far as this court is concerned, the 1<sup>st</sup> defendant owned the suit land when he sold it to the 2<sup>nd</sup> defendant. On the other hand, the plaintiff was not privy to the agreement between the defendants. According to the learned authors of Halsbury's Laws of England 4<sup>th</sup> Edition, Volume 9 at paragraph 329, a contract cannot confer rights or impose obligations on a stranger to it. In other words, the only parties to a contract are those persons who reach agreement. Consequently, I find and hold that the plaintiff has failed to prove his case against the defendants."*

5.3 Despite seeming to have addressed the merits in paragraphs preceding the one we have just quoted, the Court below, in our view, dismissed the case on the basis that the appellant, not being owner of the subject property, was a stranger to the contract between the 1<sup>st</sup> and the 2<sup>nd</sup> respondent. In other words, he had not demonstrated his *locus standi* or cause of action against the respondents, arising from the contract.

5.4 We further note that the appellant himself has not, at any point, asserted that he was a party to the said contract. Rather, his contention is predicated on the memorandum of understanding whereby the 1<sup>st</sup> respondent, according to the appellant, acknowledged him as the true owner of the subject property.

5.5 This Court is fully cognizant of the principle that contractual rights and duties can only be conferred or imposed on the parties to a contract, and that only a party to a contract can sue on it (*Dunlop Pneumatic Tyre Company Limited v Selfridge and Company Limited* <sup>(3)</sup>). However, as opined by the learned authors of *Chitty on Contracts, General Principles*<sup>1</sup> at para 18-021-022, "...it does not follow that a

*contract between A and B cannot affect the legal rights of C indirectly”.*

5.6 It appears, that a person whose legal rights stand to be affected by a contract can properly sustain an action despite not being a party to the contract. In our view, therefore, the assertion that the 2<sup>nd</sup> respondent had prior notice of a document acknowledging the appellant as owner of the subject property should have been interrogated *vis-à-vis* the 1<sup>st</sup> respondent's title to the property. The trial Judge should, therefore, have dealt with the case on the merits.

5.7 Having observed the foregoing, we now turn to the appeal itself.

5.8 In the first ground of appeal, the appellant's contention is that the Court below misdirected itself by not referring to the memorandum of understanding executed between himself and the 1<sup>st</sup> respondent on 24<sup>th</sup> April, 2019, by which the 1<sup>st</sup> Respondent acknowledged the Appellant as the true owner of the subject property. According to the appellant, the ownership of the subject property was not in issue, so the trial

Judge misdirected herself by interrogating the aspect of the true owner of the property.

5.9 A perusal of the statement of claim in the Court below will show that the second relief sought by the appellant (as plaintiff then) was “***a declaration that the plaintiff is the true owner of Lot L/CHILI/1000024687***”. In all fairness, we do not see how the learned trial Judge can be said to have misdirected herself by inquiring about the ownership of the subject property when that is exactly what she had been called upon to do by the appellant. As we see it, in fact, the question of ownership of the subject property lay at the core of the dispute in this matter.

5.10 The appellant has never disputed that at the time of the transaction between the 1<sup>st</sup> and the 2<sup>nd</sup> respondent, the Certificate of Title to the property was in the 1<sup>st</sup> respondent's name. It must be recalled that according to **section 33 of the Lands and Deeds Registry Act** –

**“A Certificate of Title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other**

person of any estate or interest, whether derived by grant from the President or otherwise, which but for Parts III to VII might be held to be paramount or to have priority; the Registered Proprietor of the land comprised in such Certificate shall, except in case of fraud, hold the same subject only to such encumbrances, liens, estates or interests as may be shown by such Certificate of Title and any encumbrances, liens, estates or interests created after the issue of such Certificate as may be notified on the folium of the Register relating to such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever." [Underlining for emphasis]

5.11 The preceding provisions are crystal clear.

5.12 We pause here to reflect on the contention by the appellant that despite having been placed before the Court below, the memorandum of understanding between him and the 1<sup>st</sup> respondent eluded the trial Judge's attention. For purposes of context, we find it necessary to reproduce, below, the relevant

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property. In other words, that the 2<sup>nd</sup> respondent was not a *bona fide* purchaser for value without notice of the appellant's interest in the subject property, which claim the 2<sup>nd</sup> respondent denied in paragraph 3, as read with paragraph 12 of his defence.

5.15 We have examined the record, having in mind **section 33** of the **Lands and Deeds Registry Act**. There is not the faintest indication that the appellant did register his interest in the subject property at the Lands and Deeds Registry prior to the date of the contract of sale between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent.

5.16 The claim that the 2<sup>nd</sup> respondent was aware of a document acknowledging the appellant as the true owner of the subject property appears to have been without evidential backing, on the basis of which the trial Court would have comfortably found that the 2<sup>nd</sup> respondent was aware, or ought to have been aware, of the appellant's interest in the land before contracting to purchase it. The burden to prove that fact to the requisite standard lay squarely on the appellant (See ***Wilson Masautso Zulu v. Avondale Housing project Limited***.<sup>1)</sup>)

5.17 The appellant having failed to discharge the burden of proof referred to in the preceding paragraph, entails that the first ground of appeal is devoid of merit, and we dismiss it.

5.18 We will deal with the second and third grounds of the appeal together because they both speak to the protestation that no consideration was paid by the 2<sup>nd</sup> respondent for the purchase of the subject property.

5.19 It has been argued, in the second ground, that the learned trial Judge made no reference to the CDs which are said to have been before her and which allegedly contained proof of non-payment of the purchase price by the 2<sup>nd</sup> respondent.

5.20 At pages 95 - 100 of the record of appeal are PW1 and PW2's witness statements. Both statements allude to the appellant having recorded a telephone conversation between the 1<sup>st</sup> respondent and a Mr. Charles Hisali, the alleged agent of the 2<sup>nd</sup> respondent. However, there is no clear mention of the said recordings or CD being tendered in evidence before the Court below although a CD was mentioned in the plaintiff's list of documents.

5.21 Nonetheless, we have listened to the CD found on the record. It does not contain clear evidence of non-payment of the purchase price. It is clear that the second respondent was not involved in the conversations on the CD.

5.22 That being the case, the lower court's omission of the recording was of no consequence.

5.23 The appellant also argues that the discrepancy between the K125,000.00 appearing in the Lands Register printout as the consideration and the sum of K250,000.00 which the 2<sup>nd</sup> respondent claimed to have paid to the 1<sup>st</sup> respondent as the full purchase price, should have been resolved in favour of the appellant.

5.24 At paragraph 5 of his reply to the 2<sup>nd</sup> respondent's defence, the appellant averred that the amount on the contract was way above K250, 000. We have, in vain, combed the record of appeal in search of a copy of the contract of sale between the 1<sup>st</sup> and the 2<sup>nd</sup> respondent for purposes of confirming that the agreed purchase price was K3, 500, 000, as alleged by the appellant.

5.25 Again, we cannot ignore the settled principle of law that he who alleges must prove. While the discrepancy alluded to by the appellant is palpable, that does not of itself validate the assertion that the contract price was K3, 500, 000. The appellant himself ought to have placed before the trial Court evidence of the real purchase price as agreed by the two contracting parties. Devoid of such evidence, there remained no basis upon which the trial Court could have resolved the discrepancy in the manner suggested by the appellant.

5.26 As stated momentarily, we agree that there is a discrepancy between the K125, 000 stated in the Lands Register printout as having been paid by the 2<sup>nd</sup> Respondent for the subject land, and the K250, 000 appearing in the 2<sup>nd</sup> respondent's defence. The appellant alleges, in this regard, that the 2<sup>nd</sup> respondent lodged a forged contract of sale at the Ministry of Lands in order to evade tax.

5.27 It would seem that, by the foregoing assertion, the appellant is imputing fraud or some kind of impropriety on the 2<sup>nd</sup> respondent, for which he contends that title to the subject property must, in the alternative, revert to the 1<sup>st</sup> respondent.

5.28 This Court is alive to the Supreme Court's guidance in ***Anti-Corruption Commission v. Barnnet Development Corporation Limited*** <sup>(4)</sup> that a Certificate of Title can be challenged and cancelled for fraud or for reasons of impropriety in its acquisition. More recently, the apex Court further guided in ***Base Chemicals Zambia Limited Mazzonites Limited v. Zambia Air Force and The Attorney General*** <sup>(5)</sup> that in such instances, fraud must be clearly and distinctly alleged, and that the party alleging it must lead evidence at trial so that the allegation is clearly and distinctly proved to a standard greater than a simple balance of probabilities.

5.29 In the present case, the record does not disclose that fraud was clearly and distinctly alleged by the appellant and proved against the 2<sup>nd</sup> respondent to the requisite standard so as to bring the 2<sup>nd</sup> respondent's Certificate of Title within the reach of the ***Barnnet*** <sup>4</sup> case.

5.30 Based on the foregoing considerations, we find grounds 2 and 3 of the appeal equally bereft of merit, and dismiss them.

**6.0 CONCLUSION**

6.1 All in all, the appeal is dismissed for want of merit.

6.2 We order that the parties bear their respective costs of the appeal as both respondents hardly ever defended themselves.

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**C.K. Makungu**  
**COURT OF APPEAL JUDGE**

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**D.L.Y. Sichinga, SC**  
**COURT OF APPEAL JUDGE**

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