

**IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 129/2021  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)**



**BETWEEN:**

**MATAA MATE (FEMME SOLE)**

**APPELLANT**

(Suing as the Administratrix of the  
Estate of the late Godfrey Mkandawire)

AND

**DERICK CHANSA SIPANJE  
KAFUE DISTRICT COUNCIL  
ATTORNEY GENERAL**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> RESPONDENT**

**CORAM: KONDOLO SC, MAKUNGU, NGULUBE JJA  
On 15<sup>th</sup> June 2023 and 26<sup>th</sup> October 2023**

*For the Appellant:* Mr. B. Mweemba of Messrs Keith Mweemba  
Advocates

*For the Respondents:* No Appearance

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**J U D G M E N T**

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**KONDOLO SC JA delivered the Judgment of the Court.**

CASES REFERRED TO

1. **Anti-Corruption Commission v Barnet Development Corporation Limited [2008] Vol 1 ZR 69**
2. **Nkhata & Four Others v The Attorney General (1966) ZR 124 CA**
3. **Wilson Masauso Zulu v Avondale Housing Project Limited [1982] ZR 172**
4. **Attorney General v. Marcus Achiume (1983) ZR 1**
5. **Zambia Revenue Authority v Dorothy Mwanza and Others (2010) 2 ZR 181**
6. **Henderson v Foxworth Investments Ltd [2014] UKSC 41**
7. **Attorney General v Roy Clarke (2008) 1 ZR 38**
8. **Anderson Kambela Mazoka & 2 Others v Levy Patrick Mwanawasa and 2 Others (2005) ZR 138**

STATUTES REFERRED TO

1. **Lands and Deeds Registry Act, Chapter 185, Laws of Zambia**
2. **Lands Act, Chapter 184, Laws of Zambia**
3. **Halsbury's Laws of England 4<sup>th</sup> Edition, Volume 16, para 1219**

**1. INTRODUCTION**

1.1. This is an appeal against the Judgment of the High Court delivered by Honorable Lady Justice. F.M Lengalenga on 31<sup>st</sup> March 2021.

1.2. In the lower Court, the Appellant was the Plaintiff, and the 1<sup>st</sup> Respondent, 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondent were the 1<sup>st</sup> to 3<sup>rd</sup> Defendants accordingly.

## **2. BACKGROUND**

2.1 The appeal follows an action commenced by writ of summons and accompanied by statement of claim dated 21<sup>st</sup> April 2016. The plaintiff sought the following reliefs:

- 1. A declaration that certificate of title, number 283431 dated 17th February 2014 issued to the 1<sup>st</sup> Defendant by the 3<sup>rd</sup> Defendant was obtained by means of fraud and or impropriety in its acquisition.**
- 2. A declaration that the late Godfrey Mkandawire or his estate is the legal owner of Lot12545/M Kafue District and is entitled to its possession.**
- 3. An Order of interim injunction restraining, the 1<sup>st</sup> Defendant whether by himself or his servants, or agents whomsoever acting under his authority from taking possession, erecting, or building,**

**any buildings or structures of whatsoever nature on the land in issue or subdividing or selling any part of Lot, 12545/M, Kafue in any way whatsoever until the determination of the matter hereof or until further order of this Court.**

- 4. An Order directed at the 3<sup>rd</sup> Defendant through the Chief Registrar of Lands and Deeds to cancel Certificate of Title No 283431 issued to the 1<sup>st</sup> Defendant for fraud or reasons of impropriety in its acquisition.**
- 5. An Order directed at the 3<sup>rd</sup> Defendant through the Commissioner of Lands to cancel the letter of offer dated 5th, September 2014 issued to the 1<sup>st</sup> Defendant for fraud or for reasons of impropriety in its acquisition**
- 6. An Order directed at the 3<sup>rd</sup> Defendant through the Commissioner of Lands to reinstate the deleted or withdrawn letter of offer issued to the late Godfrey Mkandawire.**

- 7. An Order directed at the 2<sup>nd</sup> Defendant to cancel, the recommendation made under a Minute No. KDC/C/ 398/04/ 2011 for the allocation of Lot 12545/M to the 1<sup>st</sup> Defendant for fraud, or for reasons of impropriety.**
- 8. Any other relief the court May deem fit and just.**
- 9. Interest.**
- 10. Costs.**

2.2 The 1<sup>st</sup> Defendant filed a Defence challenging and disputing the Plaintiff's claims and also filed a Counterclaim in which he claimed the following:

**1. Special damages as follows:**

- a. Legal fees for criminal defense in the sum of 156,000.00**
- b. Transport costs in the sum exceeding 7000.00.**

**2. Damages and costs as follows:**

- a. A sum of K1,300,000.00 Million damages for false imprisonment, malicious, prosecution and defamation of character arising out of**

arrest, imprisonment and prosecution of the 1<sup>st</sup> Defendant by the Plaintiff and the officers, namely Inspector Potiphar and Commissioner Kunda on accusation that he has trespassed on land belonging to Rabson Malupenga.

b. Aggravated damages in the sum of 700,000.00 in that the Plaintiff and 3<sup>rd</sup> Defendant defamed, the 1<sup>st</sup> Defendant by alleging that he had grabbed land from an orphan there by extinguishing his political career.

3. Interest

4. Further or other relief, the Court may deem fit and just.

5. Costs incidental to this action.

### **3. HIGH COURT PROCEEDINGS**

#### **3.1. The Plaintiffs Case**

3.2. The Plaintiff PW1, testified as the Administratrix of the estate of Mr. Godfrey Mkandawire and told the Court that the

deceased was the owner of Farm Number L/12545/M Lilayi situate in Kafue District and that he died in 2011.

- 3.3. She testified that the deceased had built a house on the farm where he lived with his family. That the 1<sup>st</sup> Respondent Derrick Sipanje took possession of the farm when the deceased's family were away in Mazabuka, laying the deceased to rest.
- 3.4. The Plaintiff testified that the 1<sup>st</sup> Respondent obtained his certificate of title by fraud and she complained that the deceased's details had been fraudulently deleted from the records at the Lands and Deeds registry to facilitate issuance of title to the 1<sup>st</sup> Respondent.
- 3.5. The Plaintiff however referred to the Management Information System Report which showed the deceased's name in relation to the property.
- 3.6. The family further wrote a letter to the Commissioner of Lands referring to council minutes which showed that the 1<sup>st</sup> Respondent was allocated the land as a sitting tenant despite the fact that he was not a sitting tenant.

- 3.7. The Plaintiff informed the Court that the 2<sup>nd</sup> Defendant never notified the deceased's family of any intention to re-enter the property.
- 3.8. During cross examination PW1 was unable to prove that the consideration fee and annual rent were paid as required in the offer letter. She was asked whether she had proof that the deceased had ever paid ground rates and she said she didn't have such proof.
- 3.9. PW1 was unable to show that the deceased had accepted the offer but insisted that he was granted building permission. She attributed the problem to the fact that the deceased's details were fraudulently deleted from the computer at the Ministry of Lands.
- 3.10. **Defendants case**
- 3.11. The 1<sup>st</sup> Defendant stood as DW1, and he testified that in 2010, he applied to the Kafue District Council to purchase Plot 12545/M.
- 3.12. That the Council sat and approved his application as indicated in the Council Minutes contained in the Defendants bundle of documents and that upon this approval he paid



K1000 as service charge before his application was forwarded to the Ministry of Lands.

3.13. He testified that in 2012, the Ministry of Lands, placed an advertisement in the Daily Mail to repossess more than 500 plots in Kafue District, among them Plot No. 2545. DW1 testified that he later, attended interviews at the Ministry of Lands and was offered the said property in 2013 as indicated in the offer letter. He accepted the offer by paying K4000 and was issued a Certificate of Title number 283431 in 2014.

3.14. In cross-examination DW1 accepted that the 3<sup>rd</sup> Defendants defence indicated that prior to 8<sup>th</sup> February 2013 the late Godfrey Mkandawire was the registered proprietor of the farm.

3.15. He stated that when he applied to the council for the land, he was not aware of the advertisement by the Ministry of Lands and was not aware that the land was undeveloped and that ground rent had not been paid since 2001.

3.16. DW1 further stated that as at 25<sup>th</sup> September 2010, he was a squatter on the land and he conceded that the council does not approve applications for squatters. Further, he admitted

that in his application to the council he indicated that he was a sitting tenant.

3.17. He denied that PW1 lived on the land with her family and that it was developed.

3.18. When pressed further DW1 conceded that he did not mention to the Commissioner of Lands that he was a squatter. He however stated that he did not know that a sitting tenant is different from a squatter.

3.19. He also conceded that the advert by the Ministry of Lands to repossess land in Kafue was not an invitation to apply for plots and that he agreed that he paid for survey diagrams before he received his letter of offer.

3.20. He told the Court that he had since subdivided the plot into 35 subdivisions which he had sold.

#### 4. **HIGH COURT DECISION**

4.1. After analysing the evidence before her, the trial judge noted that the Appellant was not in possession of a Certificate of Title whilst the Respondent was. She cited **section 33 of the Lands and Deeds Registry Act** which provides that possession of a Certificate of Title is conclusive ownership of property.

- 4.2. The learned trial judge also noted that there was no evidence on record showing that the deceased accepted the offer by paying the consideration fees or the annual rent and that no proof was proffered to show that the deceased took any steps to obtain a Certificate of Title.
- 4.3. The learned trial Judge held that though the deceased had an interest in the subject property by virtue of living there, his failure to formalize his ownership meant his claim, to the land lapsed and became inferior to that of the 1st Defendant who came much later. The case of **Anti-Corruption Commission v Barnet Development Corporation** <sup>(1)</sup> was cited.
- 4.4. She further found that the notice of re-entry of the deceased's land by way an advert in the press by the Commissioner of Lands was not in breach of **section 13 of the Lands Act**.
- 4.5. The learned trial judge explained that **section 13** aforesaid relates to land where a Certificate of Title has been issued. She noted that the deceased was not issued with a certificate of title and his offer had lapsed as neither he nor the Appellant accepted the offer by paying the consideration fee's.

4.6. The trial judge dismissed the allegation of fraud on the basis that once the deceased's offer lapsed, the land was available to anyone who was interested. She held that the offer to the deceased lapsed on 15<sup>th</sup> October, 1998 by reason of failure to pay the consideration fees and that the Certificate of Title No. 283431 dated 17<sup>th</sup> February 2014 was lawfully issued to the 1<sup>st</sup> Respondent.

4.7. The Trail Judge further considered the 1<sup>st</sup> Defendant's counter claim and found it without merit.

## **5. APPEAL & APPELLANT'S ARGUMENTS**

5.1. The Appellant has appealed against the judgement on the following four grounds;

- 1. That the trial Judge misdirected herself in law and in fact when she held that, there was no evidence on record that the deceased accepted the offer by paying the consideration fees or the annual rent contrary to the evidence on record showing that the deceased accepted the offer.**

- 2. That the trial Judge misdirected herself in law and in fact when she held that based on the evidence adduced, the 1<sup>st</sup> Defendant was lawfully allocated the land by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants after the offer to the deceased had lapsed on 15 October, 1998 by reason of failure to pay the consideration fees.**
- 3. That the trial Judge misdirected herself in law and in fact, when she held that, it was the failure to pay the consideration fees that led to the Ministry of Lands issuing the notice of intention to re-enter and withdrawal of the offer letter on 5th, September 2012.**
- 4. That the trial Judge misdirected herself in law and in fact when she held that the Plaintiff did not prove the allegation of fraud/impropriety in the manner that the 1<sup>st</sup> Defendant acquired Lot L/12545/M Kafue.**

5.2. The Appellant's heads of argument commence by suggesting that this entire appeal turns on the trial courts findings of fact that the deceased's letter of offer lapsed because of failure to accept the offer by paying the consideration and annual rent.

5.3. The Appellant made an impassioned submission imploring this Court to exercise its discretion to overturn or reverse the findings of fact made by the trial court. The cases of **Nkhata and Others v Attorney General** <sup>(2)</sup>, **Wilson Masauso Zulu v Avondale Housing Project Limited** <sup>(3)</sup>, **Attorney General v Marcus Achiume** <sup>(4)</sup>, **Zambia Revenue Authority v Dorothy Mwanza and Others** <sup>(5)</sup> and **Henderson v Foxworth Investments Ltd** <sup>(6)</sup> were cited in aid of the courts power in this regard.

5.4. **Ground 1**

5.5. It was submitted under Ground 1 that the findings by the learned trial Judge to the effect that the offer to the deceased Godfrey Mkandawire lapsed because he failed to pay the consideration fee and annual rent had no basis as it is not supported by any evidence and as such a misapprehension of the facts which on the proper view of the evidence, no court

acting correctly can reasonably make as held in **Nkhata and Others v Attorney General** <sup>(7)</sup>.

5.6. The Appellant argued that the failure to pay annual rent cannot be the basis for finding that the offer was not accepted because the penalty for failure to pay annual rent is payment of a 25% penalty as provided by **section 14 of the Lands and Deeds Registry Act**.

5.7. It was further submitted that the question of the deceased's offer having lapsed should not even arise because the 3<sup>rd</sup> Respondent had stated in paragraph 3 of its defence that prior to 8<sup>th</sup> February, 2013 the deceased was the registered proprietor of the subject land. It was opined that this could only mean that the deceased had in fact accepted the offer and been registered as the proprietor and in the face of this fact the trial judge's finding was perverse and should be overturned.

5.8. The Appellant further submitted that in fact the issue regarding the alleged failure by the deceased to accept the offer within 30 days was only raised in the 2<sup>nd</sup> Defendants submissions and was never raised at trial. The Appellant

contended that neither the court nor a party can rely on matters which were not pleaded except where there is no objection to such evidence. The cases of **Attorney General v Roy Clarke** <sup>(8)</sup> and **Anderson Mazoka and Others v Levy Mwanawasa and Others** <sup>(9)</sup> were relied on.

5.9. The Appellant added the argument that the 2<sup>nd</sup> Respondent neither filed a defence nor called any witnesses with regard to the letter of offer lapsing and led no evidence at all in that respect.

5.10. The Appellant drew the Court's attention to page 167 of the record of appeal, a copy of the Land Information Management System Computer Screen Print Out dated 15 February 2012. The said document clearly shows that the deceased accepted the offer as shown by the letter 'Y' for Yes. He opined that if the offer was accepted it means the consideration fee was paid and that the submission is reinforced by the 3<sup>rd</sup> Respondents submission that the deceased was the registered proprietor.

5.11. The Appellant described, as perverse, the trial judge's conclusion that if at all the deceased had paid the



consideration fees, then a Title Deed would have been issued. The Appellant explained that Title can only be issued after survey fees have been paid and survey diagrams obtained from the Surveyor General and no timeframe was set for that activity.

5.12. The Appellant prayed that ground 1 be allowed.

5.13. **Ground 2**

5.14. It was submitted in ground 2 that having established in ground 1 that the deceased's letter of offer did not lapse, the question of the property being legally offered to the Appellant cannot arise.

5.15. **Ground 3**

5.16. In ground three the judge's finding of fact was assailed on account of the submissions in the preceding grounds that the question of the offer lapsing does not arise.

5.17. To this was added the argument that according to paragraph 6 of the 3<sup>rd</sup> Defendant's defence at page 130 of the record of appeal, the real reason for re-entering the deceased's property was the failure to develop the property as published in the

Daily Mail Newspaper on 5<sup>th</sup> September, 2012 and that the said property was re-entered on 8<sup>th</sup> February, 2013.

5.18. The Appellant remarked that even this averment by the 3<sup>rd</sup> Respondent was surprising in the face of an inspection report showing that the land was fully developed as per pages 160-161 of the record of appeal.

5.19. It was prayed that ground 3 be allowed.

5.20. **Ground 4**

5.21. Ground 4 challenged the trial Judges finding that the Appellant had failed to prove that the 1<sup>st</sup> Respondent's certificate of title was issued fraudulently. The Appellant opined that the trial Judge's finding in this regard was largely based on the erroneous finding that the Appellants offer had lapsed.

5.22. The Appellant stated that according to **Halsbury's Laws of England 4<sup>th</sup> Edition, Volume 16, para 1219**, fraud usually takes the form of a statement that is false or suppression of what is true. He cited various other authorities which describe fraud, including that fraud is a deceptive act done intentionally by one party in order to influence or induce

another party to believe or accept the existence of a certain state of affairs when the actual state is otherwise.

5.23. The Appellant submitted that when the 1<sup>st</sup> Respondent applied to Kafue District Council he told them that he was the sitting tenant when in fact not. That when the 2<sup>nd</sup> Respondent recommended allocation of the property to the 1<sup>st</sup> Respondent, the deceased was still the legal owner because by that date the 3<sup>rd</sup> Respondent had not yet withdrawn the offer letter from the deceased and as such the deceased was still the legal owner of the premises.

5.24. The Appellant pointed to further evidence of fraud when the 1<sup>st</sup> Respondent used the deceased's address as his own as shown on the receipt for payment of ground rent at page 300 of the record of appeal. This was the address to which the deceased's letter of offer was directed.

5.25. Other instances of alleged fraud included where he represented at page 301 of the record of appeal that he already had survey diagrams way before the land was available for re-allocation and in the same letter, he represented that the land was not developed contrary to the

inspection report at pages 160-160 which indicated that the land was fully developed.

5.26. It was also pointed out that the Commissioner of Lands wrote to the 2<sup>nd</sup> Respondent reminding them that they had recommended that title be issued to the 1<sup>st</sup> Respondent because he was a sitting tenant but there was now an appeal against the allocation on the ground that the 1<sup>st</sup> Respondent was not a sitting tenant when his application was considered. That the 2<sup>nd</sup> Respondent had to date, not provided clarity.

5.27. The Appellant submitted that she had pleaded fraud and impropriety. That whilst the judge pronounced herself on fraud, she had made no mention of impropriety. It was argued that the trial judge had thus failed to adjudicate on all issues in controversy contrary to the direction given by the Supreme court in the case of **Wilson Masauso Zulu v Avondale Housing Project Limited (supra)**.

5.28. It was submitted that the trial judge should have found that there was fraud and impropriety and the Appellant prayed that the appeal be allowed.

## **6. RESPONDENTS ARGUMENTS**

6.1. The Respondents Heads of Argument were not on record.

## **7. THE HEARING**

7.1. At the hearing, the Respondents were absent without notice.

7.2. The Appellant submitted that she would rely entirely on the record of appeal and the filed heads of argument.

## **8. DECISION OF THIS COURT**

8.1. We have considered the record of appeal and the arguments advanced by the Appellant.

8.2. Grounds 1 and 2 are similar and shall be addressed as one. They are both premised on the purported failure of the deceased to accept the offer letter on account of failing to pay the consideration fees and the annual rent.

8.3. The offer letter to the deceased is found at page 157 of the record of appeal and stated that the plot had been offered to him on condition that he paid the sum of K94,749.85 within 30 days of the date of the letter, failure to which it would be assumed that he did not require the stand and the offer would lapse.

- 8.4. During the trial, the Appellant admitted that she had no receipt or any document to prove that the deceased had paid the required sum of money.
- 8.5. She however, insisted that he had paid for it and proceeded to build a house and plant some fruit trees there. She referred to the Land Information Management System Printout at page 11 of her bundle of documents, exhibited at page 167 of the record of appeal.
- 8.6. We have considered with interest paragraph 3 of the defence put up by the 3<sup>rd</sup> Respondent exhibited on page 130 of the record of appeal which reads as follows;

***“3. The 3<sup>rd</sup> Defendant will aver at trial that prior to 8<sup>th</sup> February 2013, the late Mkandawire Godfrey was the duly registered proprietor of the subject land”***

- 8.7. Counsel for the Appellant urged us to read this paragraph together with the information contained in the Land Information Management System Printout dated 15<sup>th</sup> February 2012 at page 167 and the testimony of PW1 at pages 445 to 446 of the record of Appeal. It was pointed out that the former shows that the deceased accepted the offer and latter pages is

where she explained how her late uncle's details were deleted from the computer system at the Ministry of Lands.

8.8. As pointed out by counsel for the Appellant, it is notable that the 3<sup>rd</sup> respondent in paragraph 6 of its defence stated that the reason for reentering the deceased's property was on account of failure to develop the property. There was no mention of the offer never having been accepted and failure to pay the consideration fees.

8.9. We agree that when all these things are considered together, the probability rests more in favour of the deceased having paid for the property than having not paid.

8.10. We hold the view that the trial Judges finding of fact that the deceased did not accept the offer and the findings that he did not pay the consideration fees were made on a misapprehension of the facts and a failure to consider all the evidence before her. We feel compelled to exercise this Courts power to interfere with the trial Judges findings of fact as guided by the principles set out in the **Attorney General v Marcus Kapumba Achiume Case (supra)** and grounds 1 and 2 succeed.

- 8.11. Having found that the deceased did in fact accept the offer to purchase the land and in view of the averments by the 3<sup>rd</sup> Respondent, the trial courts finding that the re-entry was on account of the Appellants failure to pay the consideration fees, cannot be sustained and should suffer the same fate as the findings of fact in ground 1.
- 8.12. Lastly with regard to the allegations of fraud and impropriety, it is common cause that even though **section 33 of the Lands and Deeds Act** states that possession of a Certificate of Title is conclusive proof of ownership, the provision does provide for cancellation of a Certificate of Title procured by fraud or impropriety. This point was emphasized by the Supreme Court in the case of **Anti-Corruption Commission v Barnet Development Corporation Limited (supra)**.
- 8.13. The Appellant has chronicled a number of things that if incapable of being classified as fraudulent, they most certainly amount to impropriety.
- 8.14. The very beginning of the Respondent's journey in acquiring this property started with a lie when he applied for this particular piece of land and misrepresented that he was a



sitting tenant on the land which he falsely claimed was unoccupied.

8.15. The recommendation to the Commissioner of Lands to issue the 1<sup>st</sup> Respondent with a certificate of title was based on the premise that he was a sitting tenant.

8.16. There is evidence on record that the 1<sup>st</sup> Respondent paid for and obtained survey diagrams before the property was actually offered to him. This was quite inappropriate and points to the probability that the 1<sup>st</sup> Respondent had a hand in how the subject property was being dealt with by the council.

8.17. The failure by the Council to respond to the Commissioner of Lands query as to whether the 1<sup>st</sup> Respondent was a sitting tenant when he was offered the property.

8.18. It is evident that the 1<sup>st</sup> Appellant started pursuing the subject property whilst the deceased was still alive and before the Ministry of Lands published the notice of re-entry.

8.19. We are alive to the fact that the standard of proof required to cancel a certificate of title under grounds of fraud and impropriety is higher than a mere preponderance of


probability. The entire manner in which the 1<sup>st</sup> Respondent acquired the deceased's land points only to fraud or impropriety and we so find.

8.20. This appeal succeeds and we order that the Certificate of Title issued to the 1<sup>st</sup> Respondent be cancelled and that he yields vacant possession of the subject premises to the Appellant.

8.21. The costs both in this court and the court below are awarded to the Appellant.

  
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**M. KONDOLO, SC**  
**COURT OF APPEAL JUDGE**

  
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**C.M. MAKUNGU**  
**COURT OF APPEAL JUDGE**

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