

**IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT LUSAKA**

Appeal No. 14/2022

*(Civil Jurisdiction)*

**BETWEEN:**

**JOSEPHINE BWALYA**



**APPELLANT**

**AND**

**JUDITH MITI NYIRENDA**

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

**NDOLA CITY COUNCIL**

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

**ATTORNEY GENERAL**

**3<sup>RD</sup> RESPONDENT**

**Coram: Chishimba, Sichinga, and Ngulube, JJA**

**on 10<sup>th</sup> October, 2023 and 27<sup>th</sup> October, 2023**

*For the Appellant: No Appearance*

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

*For the 2<sup>nd</sup> Respondent: No Appearance*

*For the 3<sup>rd</sup> Respondent: Mr. P.S. Phiri, Senior State Advocate, Attorney-General's Chambers*

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## **JUDGMENT**

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Sichinga JA delivered the Judgment of the Court.

**Cases referred to:**

1. *Moses Milambo (Administrator of the estate of Alfred Sindavu) and Another v Florence H. Mweemba CAZ Appeal No. 9 of 2020*
2. *Mwenya and Randee v Kapinga (1990) ZR 17*
3. *Phiri and Others v The People (1973) ZR 47*

4. *Halimo Mohamed Jama v The Chief Registrar of Lands and Deeds, The Commissioner for Lands and 2 Others 2015/HP/A023*
5. *Nora Mwaanga Kayoba and Another v Eunice Kumwenda Ngulube and Another SCZ Appeal No. 19 of 2003*
6. *Hunt v Luck (1902) 1Ch.D 106*
7. *Charles Kajimanga v Marmetus Chilemya SCZ Appeal No. 50 of 2014*
8. *Sablehand Zambia Limited v Zambia Revenue Authority (2005) ZR 78*
9. *Nkongolo Farm Limited v Zambia National Commercial Bank Limited, Kent Choice Limited (in receivership) and Charles Haruperi [2005] ZR 78*
10. *Pan African Building Society v Pemba Lapidaries Limited and Lapemba Trading Limited CAZ Appeal No. 7 of 2017*
11. *The Attorney-General v Kakoma (1975) ZR 216*
12. *The Attorney-General v Marcus Kampumba Achiume (1983) ZR 1*
13. *Nkhata and 4 others v The Attorney-General (1966) ZR 124*
14. *Silas Ngowani and Others v Flamingo Farm Limited SCZ Selected Judgement No. 5 Of 2019*

**Legislation referred to:**

1. *The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia*
2. *The Rules of the Supreme Court, 1999 edition, White Book*

**Other works referred to:**

1. *Snells Equity*
2. *Black's law Dictionary, Bryan A. Garner, 10<sup>th</sup> Edition, Reuters*

## 1.0 Introduction

1.1 In a plethora of cases including the case of **Moses Milambo (Administrator of the estate of Alfred Sindavu) and Another v Florence H. Mweemba**<sup>1</sup> we have re-stated the following:

*“Simply put where a buyer is or ought to have been aware of the other party's interest in the property, the person cannot be said to be a bona fide purchaser for value without notice. The defence of BFPV is against claims of any prior equitable owner. See Snells Principles of Equity. It is for the person raising the defence that he is a bona fide purchaser for value, without notice to assume the burden of proving that he paid the purchase price in good faith, without notice, actual or constructive of the other party's claims.”*

1.2 The issue in this appeal is whether the appellant as purchaser knew or must have known about the pre-existing equitable interest by the 1<sup>st</sup> respondent before the transaction was complete. This appeal is against a judgment of the High Court delivered by Chembe J, as she then was, and handed down on 31<sup>st</sup> August, 2021. The learned Judge dismissed the appellant's claim that she was the bona fide owner of Plot NDO/10162 Ndola, the subject land.

1.3 The appellant, who at the material time was in possession of the subject land in Ndola Infill of Copperbelt Province of the Republic of Zambia, commenced the matter in the High Court after the 1<sup>st</sup> respondent erected structures on the subject property and allegedly used some of her building materials.

## **2.0 Background**

- 2.1 In narrating the background, we shall refer to the appellant as the plaintiff. The 1<sup>st</sup> respondent, 2<sup>nd</sup> respondent and 3<sup>rd</sup> respondent are referred to as 1<sup>st</sup> defendant, 2<sup>nd</sup> defendant and 3<sup>rd</sup> defendant respectively, as they were in the court below. As deciphered from the record, the plaintiff purchased the disputed land in 2010 from one Champo Zyambo Njamba. The latter did not have title to the land. He purchased the land from the initial offeree, one Daniel Chola. A letter of offer from the Ministry of Lands was issued to Chola in 2008.
- 2.2 The plaintiff alleged that she conducted a search at the Ministry of Lands and found that the land was free of encumbrances. She then purchased Plot NDO/10162 from Njamba. She was subsequently issued with a Certificate of Title in 2012. That between the years 2011 to 2019, the 1<sup>st</sup> defendant claimed ownership of the plot. The plaintiff was advised by the Ministry of Lands that her Certificate of Title had been cancelled and the plot offered to the 1<sup>st</sup> defendant. In addition, the plaintiff alleged that she discovered that the 1<sup>st</sup> defendant initially owned plot no. 11542 but later owned Plot 10162, which belonged to her.
- 2.3 The plaintiff alleged further, that in August 2018, she was issued with a notice of eviction relating to plot 11532 which she never encroached on, as all along she had been in possession of her own land, being plot 10162 which the 1<sup>st</sup>

defendant claimed possession of with authority from the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. She also claimed that the 1<sup>st</sup> defendant used some of her building materials for construction works on the subject land.

2.4 The plaintiff made the following claims before the lower court:

- i) A declaration that the plaintiff is the legal and bonafide owner of Plot No. NDO/10162 Ndola;*
- ii) An order of interim injunction restraining the defendants, their agents, servants and whosoever from interfering with the plaintiff's quiet enjoyment of plot no. NDO/10162 Ndola until full determination of the matter;*
- iii) Damages for mental distress caused by the actions of the defendants;*
- iv) Interest and costs; and*
- v) Any other relief the Court deems fit.*

2.5 The 1<sup>st</sup> respondent, Judith Miti Nyirenda, filed her defence on 14<sup>th</sup> February, 2020. She asserted that the third party who sold the subject land to the plaintiff did not have a letter of offer from the Ministry of Lands or its agents. She alleged that she warned the plaintiff that the subject land had encumbrances, as it was the subject of court proceedings under cause 2006/HN/308, but the plaintiff did not heed her advice. Instead, she went ahead to purchase the land from a third party. She admitted that the

plaintiff's Certificate of Title was cancelled because it was obtained illegally and in bad faith.

2.6 She denied illegally taking possession of the subject land and stated that on the contrary, the said land has belonged to her family since the 1980s. That her late father cultivated crops on the subject land which he acquired from the Ministry of Agriculture in the early 1980s. That in 2004, the 2<sup>nd</sup> defendant, Ndola City Council, agreed with the Ministry of Agriculture to demarcate the land in the area, and the subject land was allocated to her father.

2.7 The 1<sup>st</sup> defendant informed the lower court that she learned of the plaintiff's interest in the subject land in 2011. That in 2012, her family erected a slab on the plot. In March 2011, a Consent Judgment was executed in the other matter, in favour of an association called Gaula, to which her father belonged.

2.8 She averred that in 2014, Ndola City Council proposed that the land be shared between the plaintiff and the 1<sup>st</sup> defendant, however, she rejected the proposal. The matter was then referred to the Ministry of Lands for determination. After hearing the parties, the plaintiff's Certificate of Title was cancelled. The plaintiff rejected the Ministry's offer for an alternative piece of land.

2.9 The 2<sup>nd</sup> defendant's defence was that it had never been engaged by the plaintiff to resolve any land dispute on No.

NDO/10162 Ndola. That it never issued any eviction notice that would interfere with her quiet possession of the said land. Further, that since the plaintiff was offered the subject property by the Ministry of Lands, the 2<sup>nd</sup> defendant had no role to play in the resolution of the dispute.

### **3.0 Decision of the High Court**

3.1 On the issue of whether the cancellation of the plaintiff's Certificate of Title was unlawful, the learned trial Judge considered the evidence to the effect that at the time the plaintiff purchased the subject property from one Mr. Champo Njamba, who was in possession of a letter of offer from the Commissioner of Lands, she was aware of the 1<sup>st</sup> defendant's interest in the property. However, she proceeded to acquire a Certificate of Title. The learned Judge found that the plaintiff had constructive notice of the 1<sup>st</sup> defendant's family interest in the subject land. She held therefore, that the plaintiff was not an innocent purchaser for value without notice.

3.2 The trial Judge also addressed the plaintiff's argument that she was not given an opportunity to be heard prior to the cancellation of her Certificate of Title, but merely found an entry in the lands register to the effect that the cancellation was effected pursuant to a letter from the Chief Land Officer. The learned trial Judge found that the Chief Lands Officer fell in grave error when he recommended the cancellation of title without affording the appellant an

opportunity to be heard or giving her reasons for the cancellation. She therefore found that the cancellation was tainted with illegality.

3.3 The trial Judge found that Mr. Chola and Mr. Njamba, who sold the subject land to the plaintiff, did not have good title to pass on to her. This was on the premise that there was unchallenged evidence that the two were aware of third party interests, more so that they sold the subject land within two years without developing the same.

3.4 On the question of who between the plaintiff and the 1<sup>st</sup> defendant was entitled to ownership of the subject property, the learned Judge considered **section 33 of the Lands and Deeds Registry Act<sup>1</sup>**. She stated that although cancellation of the plaintiff's Certificate of Title was irregular, the 1<sup>st</sup> defendant's interest preceded that of the plaintiff. That there is no evidence of fraud or impropriety in the manner the 1<sup>st</sup> defendant acquired her Certificate of Title, as the proprietary rights were established after successful litigation on the part of the 1<sup>st</sup> defendant and her family. The plaintiff's claims were, consequently, dismissed.

#### **4.0 Appeal before this Court**

4.1 Displeased with the judgment, the plaintiff appealed to this Court advancing the following grounds of appeal:

- 1) The trial court erred in law and fact when she held that the plaintiff had notice of the 1<sup>st</sup> defendant's interest in the land, when in fact not;*



- ii) The trial court erred in law and fact when she held that Mr. Njamba and Mr. Chola did not have good title to pass to the plaintiff when they were in possession of the letter of offer obtained by/from the Ministry of Lands.*
- iii) The trial court erred in law and fact when she held that the title was cancelled following the dispute being brought to the attention of the Ministry of Lands when in fact there was no evidence to show that the said dispute or judgment was brought to the attention of the said Ministry;*
- iv) The trial court erred in law and fact when she held that there was absence of evidence to show that the Certificate of Title was cancelled by the Chief Lands Officer when in fact the lands register established the fact that it was the Chief Lands Officer who cancelled the Certificate of Title.*
- v) The trial court erred in law and fact when it declined to cancel the 1<sup>st</sup> defendant's Certificate of Title when in fact there was procedural impropriety and fraud in the manner it was acquired.*

## **5.0 Appellant's submissions**

**5.1** The appellant filed heads of argument on 25<sup>th</sup> January 2022. At the hearing, neither the appellant nor her advocates were in attendance. We resolved to consider the appeal as all parties were duly served.

**5.2** It was argued in support of the first ground of appeal that what influenced the lower court's finding that the appellant was aware of the 1<sup>st</sup> respondent's interest in land was the evidence suggesting that at the time she acquired a Certificate of Title, she was aware of a pending matter regarding the subject property, which had been resolved in

favour of the 1<sup>st</sup> defendant. That on this basis, this Court should determine at what point a purchaser is required to have notice of another person's interest in land: whether at the time of issuance of the Certificate of Title as held by the lower court or at the time of purchasing the property.

**5.3** The appellant submitted that notice is required at the time of purchase and therefore she cannot be affected by claims that arose at the time of issuance of Certificate of Title. That moreover, judgment relating to the land was delivered two years after the appellant acquired a Certificate of Title.

**5.4** The appellant further relied on the case of *Mwenya and Randee v Kapinga*<sup>2</sup> for the position that for one to be considered an innocent purchaser for value without notice, there should be evidence to show that they reasonably inquired and inspected and found that there was no other person with an interest in the land. That on this premise, there is unchallenged evidence to the effect that the appellant did make an inquiry at the Ministry of Lands and found that the land belonged to the person who was selling it, the said seller having bought it from Chola. That on this premise, the appellant was an innocent purchaser for value without notice.

**5.5** In support of the second ground of appeal, the appellant challenged the basis upon which the trial Judge found that Njamba and Chola did not have good title; that is, the sale of

property from Njamba to Chola was done within a year and that the said people never developed the property. Counsel argued in this vein that there is no law that precludes a person who acquires land to sell it within the same year of acquiring it, and this cannot insinuate lack of good title as the same holding was not supported by facts but assumptions on the part of the lower court. The case of ***Phiri and Others v The People***<sup>3</sup>, was cited in this regard, where it was held that;

***"The courts are required to act on the evidence placed before them. If there are gaps in the evidence the courts are not permitted to fill them by making assumptions adverse to the accused."***

- 5.6** In light of the above, counsel submitted that there was no evidential basis upon which Njamba and Chola can be assumed not to have had good title.
- 5.7** In support of the third ground of appeal, the appellant contends that the question to determine is whether there was evidence to show that the dispute was escalated to Ministry of Lands in order to justify the holding of the lower court. That since the lower court found it as a fact that there was no meeting at Ministry of Lands that inspired the cancellation of title, there is no justification for the holding by the lower court that the title was cancelled following the meeting when there was no evidence of the said meeting. Further, that the assumption taken by the lower court that the cancellation was upon realization that the judgment had

determined the rights of the parties has no evidential basis. This is so, because the said Judgment was not registered against the said property with the Ministry of Lands as the register does not indicate any registration.

**5.8** The fourth and fifth grounds essentially speak to the effect of cancellation of the appellant's Certificate of Title, following the lower court's finding that the said cancellation was tainted with illegality. The appellant is challenging the lower court's refusal to cancel the 1<sup>st</sup> respondent's Certificate of Title despite the procedural impropriety and fraud in its acquisition.

**5.9** That although the appellant did not plead fraud in the lower court, evidence of procedural impropriety and fraud arose at trial and this relief should have been granted under '*any other relief the court deems fit to give.*'

**5.10** We were pointed to the case of ***Halimo Mohamed Jama v The Chief Registrar of Lands and Deeds, The Commissioner for Lands and 2 Others***<sup>4</sup> where the High Court reversed an order for cancellation of Certificate of Title which was cancelled pursuant to ***section 11 of the Lands and Deeds Registry Act***<sup>1</sup>, on the basis that the said provision only authorises the Registrar to make corrections of entries. In addition, the cancellation was made without affording the appellant a hearing.

## **6.0 1<sup>st</sup> Respondent's submissions**

**6.1** The 1<sup>st</sup> respondent filed her heads of argument on 21<sup>st</sup> April, 2022.

**6.2** In response to the first ground of appeal the 1<sup>st</sup> respondent stated that the appellant sought to show that she was completely unaware of the 1<sup>st</sup> respondent's interest in the disputed land, and therefore, she was an innocent purchaser for value. We were referred to the 1<sup>st</sup> respondent's evidence at page 15 paragraph 20 of the record of appeal where the 1<sup>st</sup> respondent stated that she warned the appellant of her interest in the land way before she purchased it.

**6.3** We were further referred to page 27 paragraphs 5 to 10 of the record of appeal where the 1<sup>st</sup> respondent testified that her family had been in possession of the land since the 1980s and carried out agricultural activities on it. It was submitted that the evidence nullified the thrust of the appellant's argument that she had no notice of the 1<sup>st</sup> respondent's interest in the disputed land before she purchased it. In support of submissions on the doctrine of purchaser without notice reliance was placed on the case of ***Nora Mwaanga Kayoba and Another v Eunice Kumwenda Ngulube and Another***<sup>5</sup> and the learned authors of ***Snells Equity***<sup>1</sup>.

- 6.4** It was argued that the record reveals that the only step that the appellant took was a search on the record of the Ministry of Lands when in fact a more serious inquiry on the land would have revealed the encumbrances on the ground. It was submitted that the appellant's assertion that she was an innocent purchaser is without substance.
- 6.5** In response to ground two, it was submitted that the lower court took note of Njamba and Chola's conduct in view of the unchallenged evidence that they were aware of the encumbrances that existed on the disputed land. That the court's supposition was purely based on a balance of probabilities.
- 6.6** We were referred to paragraphs 5 and 10 at page 26 of the record of appeal where the learned Judge cited the case of **Hunt v Luck<sup>6</sup>** and **Mwenya and Randee v Kapinga supra** on the inquiries that the appellant ought to have made. It was submitted that Njamba, Chola and the appellant were aware of the presence of tenant in possession at the time their transactions were taking place. That they neglected to make inquiries from the 1<sup>st</sup> respondent or her agents carrying out agricultural activities of the status of the disputed land. It was argued that this left them subject to the rights of the tenant in possession and any title passed on from them would not be good title.

**6.7** With respect to ground three, it was advanced that there was no evidence from the Ministry of Lands either by way of *viva voce* or documentary evidence to show that the said dispute or Consent Judgment were brought to the attention of the Ministry. It was submitted that the appellant, who had the burden of proof, did not summon any witness from the Ministry of Lands or any other. That the court was therefore left with no option but to make deductions on the balance of probabilities in the absence of evidence that the appellant should have led. We were invited to take judicial notice that a court document, such as a consent order, is a public document which can be accessed by any interested party. It was submitted that the appellant led no evidence to ascertain that the Ministry of Lands did not have sight of the Consent Judgment at page 87 of the record of appeal.

**6.8** In response to ground four, it was submitted that given that only the registrar is mandated to alter documents at the Ministry of Lands, it was incumbent for the lower court to view the best evidence to determine who made the cancellation. It was submitted that the entry at page 80 of the record of appeal did not disclose out rightly who made the cancellation. That the referenced letter is merely an inquiry to the Acting Chief Lands Officer as to why the title was cancelled and not why the Acting Chief Lands Officer himself cancelled the title deed. That the evidence made it difficult for the lower court to make an accurate determination as to who cancelled the title deed.

**6.9** It was advanced that the lower court stated concisely that, at the very least, the letter referred to at paragraph 15 of page 28 of the record of appeal should have been adduced as it would have served as the best evidence to make an accurate determination of who cancelled the title and the circumstances that led to it.

**6.10** In response to ground five, we were referred to **sections 33 and 54** of *the Lands and Deeds Registry Act supra* and the case of *Charles Kajimanga v Marmetus Chilemya*<sup>7</sup>, on conclusive evidence of ownership of property that a Certificate of Title represents. It was submitted that the 1<sup>st</sup> respondent was indisputably in possession of a title deed that grants her unequivocal rights over the disputed parcel of land. That the provisions of the law permit only fraud as a vitiating factor.

**6.11** On the question of fraud, it was submitted that the same must be pleaded. Reliance was placed on a number of cases and authorities including *Sablehand Zambia Limited v Zambia Revenue Authority*<sup>8</sup>, *Nkongolo Farm Limited v Zambia National Commercial Bank Limited*, *Kent Choice Limited (in receivership)* and *Charles Haruperi*<sup>9</sup> and *Practice Note 18/12/2* and *Order 8 rule 1 of the White Book*<sup>2</sup> on the requirement to specifically plead fraud and to give particulars reflecting the overriding principle that litigation between parties should be conducted fairly,



openly, without surprises, and as far as possible to minimise costs.

**6.12** It was argued that the appellant has attempted to formulate the pleading of fraud on appeal by unfairly pinning responsibility on the lower court. It was submitted that there was no evidence adduced by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to sustain impropriety on the part of the 1<sup>st</sup> respondent.

**6.13** It was submitted that the 1<sup>st</sup> respondent is the legitimate owner of the property in dispute. We were urged to dismiss the appeal in its entirety with costs.

#### **7.0 The 2<sup>nd</sup> Respondent's submissions**

7.1 The 2<sup>nd</sup> respondent did not file any heads of argument and did not attend court at the hearing.

#### **8.0 The 3<sup>rd</sup> Respondent's submissions**

8.1 Mr. Phiri, Senior State Advocate, appeared on behalf of the State. He informed the Court that the matter had not been defended by the 3<sup>rd</sup> respondent in the lower court. Further, that the 3<sup>rd</sup> respondent had not filed its heads of argument on appeal. He stated that a perusal of the record revealed that the Court could reach a decision without the 3<sup>rd</sup> respondent's submissions. He left it to the wisdom of the Court.

#### **9.0 Considerations and decision of this Court**

- 9.1 We have carefully considered the record of appeal together with submissions for the appellant and 1<sup>st</sup> respondent.
- 9.2 At the core of this appeal is the question whether or not the appellant was a bona fide purchaser of the disputed land without notice of the 1<sup>st</sup> respondent's equitable interest. To a large extent, we consider the appeal as challenging findings of fact. To hold that the appellant had notice of the 1<sup>st</sup> respondent's interest is a finding of fact. We shall address grounds one, two and three together as they are interrelated.
- 9.3 With respect to grounds one, two and three the appellant contended that the learned trial Judge based her decision that the appellant did not have good title on the premise that she was aware of the 1<sup>st</sup> respondent's interest at the time she acquired a Certificate of Title. We are requested to determine, for purposes of acquiring good title, at which point it is pertinent for a purchaser to have had notice of another party's interest: whether at the time of issuance of the Certificate of Title or at the time of purchasing the property.
- 9.4 The learned Judge found after hearing the evidence that the 1<sup>st</sup> respondent's family had acquired an equitable interest in the property earlier. That at the time the appellant obtained title, she was aware of their interest. She stated at page 27 of the record of appeal (page J15 of the Judgment) as follows:

***“There was also evidence the 1<sup>st</sup> defendant’s family had been in possession of the land since the 80s. The 1<sup>st</sup> defendant’s family used to cultivate the area and had grown sugar cane and mangoes. In my view, had the plaintiff inspected the land, she would have learnt that there was someone already in possession of the land. I am therefore of the view that the plaintiff was not an innocent purchaser for value without notice as she had constructive notice of the interest of the 1<sup>st</sup> defendant’s family.”***

9.5 Our reading of the record shows that in her testimony, the appellant stated that she became aware of the 1<sup>st</sup> respondent’s interest in the subject property when she applied for a building permit. That the 2<sup>nd</sup> respondent then called for a meeting in an effort to resolve the matter and she was advised to keep her plot. That it was only when she begun construction works that she was served with an eviction order relating to Plot 11542, yet what she occupied was 10162.

9.6 We note that that unlike the appellant’s submissions, the trial Judge did not attribute the appellant’s lack of good title to her awareness of the 1<sup>st</sup> respondent’s interest at the time she acquired the Certificate of Title. On the contrary, the Court stated that there was unchallenged evidence to the effect that Mr. Chola and Mr. Njamba were aware of the third party interest on the land and they therefore did not have good title to pass to the appellant.

9.7 In our view, there is indeed no evidence that at the time the appellant bought the property from Mr. Njamba and carried out a search at the Ministry of Lands, she knew of the

interest of the 1<sup>st</sup> defendant's family, as the same was not registered at the Lands Registry either by way of caveat or otherwise. We stated in the case of ***Pan African Building Society v Pemba Lapidaries Limited and Lapemba Trading Limited***<sup>10</sup> that:

***"Although a Caveat is not expressly defined under The Lands and Deeds Registry Act<sup>5</sup>, it is generally a caution or warning to a person searching the Register, of an outstanding equity claimed by the Caveator against any land. Its effect is as provided under Section 79 of the Act which states as follows: "So long as a Caveat in form 8 remains in force, the Registrar shall not make any entry on the Register having the effect of charging or transferring or otherwise affecting the estate or interest protected by such Caveat" "***

9.8 There is no evidence that the 1<sup>st</sup> respondent or any of her family members registered their interest at the Ministry of Lands even when the land was subject to court proceedings. Further, the 1<sup>st</sup> respondent's testimony that she told the appellant of her interest in land in 2011 shows that at that time, the appellant had already purchased the property in 2010. ***Black's law Dictionary***<sup>2</sup>, defines bonafide purchaser for value as:

***"Someone who buys something without notice of another's claim to the property and without actual or constructive notice of any defects on or infirmities, claims or equities against the seller's title, one who has in good faith paid valuable consideration for property without notice of prior adverse claims."***

9.9 The learned trial Judge found that at the time the appellant acquired her Certificate of Title, she was aware of the 1<sup>st</sup> respondent's interest. The pertinent question is whether the appellant, at the time she bought the land, was aware of third party interests. From the evidence on record, it was not in dispute that the appellant purchased the disputed land from Mr. Njamba, who in turn had purchased it from Mr. Chola. Mr Chola had been issued with an offer letter by the Commissioner of Lands on 17<sup>th</sup> September, 2008. Pages 47, 48, 49, 51 and 52 of the record of appeal refer.

9.10 The evidence on record which the learned Judge accepted was that the 1<sup>st</sup> respondent's family was in possession of the land from the early 80s. Pages 130 to 135 of the record of appeal refers. Given the evidence presented, the learned Judge considered whether or not the appellant was an innocent purchaser for value without notice. She relied on the cases of *Hunt v Luck supra* and *Mwenya and Randee v Kapinga supra* on the inquiries a purchaser ought to make. She found there was evidence that the appellant was aware of the 1<sup>st</sup> respondent's interest in the subject land in 2011 but proceeded to obtain title in her name.

9.11 Whether, the dispute was brought to the attention of relevant institutions or whether the appellant was aware of other judicial proceedings equally amounts to factual findings. Whilst the record suggests missing pages between

pages 125 and 126 of the record of appeal, it is clear that the dispute between the appellant and 1<sup>st</sup> respondent was brought to the attention of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. In her oral evidence at page 126 of the record of appeal, the appellant speaks to the receipt of an eviction letter from the 2<sup>nd</sup> respondent.

9.12 What she said in cross-examination appears missing from the record. There are no pages 128 and 129. However, at page 132 and 133, the 1<sup>st</sup> respondent testified that the Ministry of Lands cancelled the appellant's title after listening to the parties' respective positions. She further referred to the alternative land that was offered to the appellant.

9.13 We form the view that even though the appellant may not have known of the third party interests on the subject land when she purchased it, she became aware that the land was subject of court proceedings as early as 2011 when she met the 1<sup>st</sup> respondent. However, she proceeded to obtain a Certificate of Title.

9.14 We opine that the appellant's subsequent knowledge of the 1<sup>st</sup> respondent's interest before acquiring a Certificate of Title ought to have put her on notice or raised her suspicion. She could, for instance, have applied to join the proceedings as an interested party or pursued the seller for rescission of the contract of sale and refund of her purchase price. Instead, she went ahead to obtain a

Certificate of Title in respect of land which, to her full knowledge, was subject of court proceedings. This conduct, in our view, does not demonstrate good faith on the part of the appellant.

9.15 We therefore cannot fault the learned Judge for the findings she made after a careful review of the evidence. We are guided by the Supreme Court in the case of ***The Attorney-General v Kakoma***<sup>11</sup> where it held that:

***“A court is entitled to make findings of fact where the parties advance directly conflicting stories and the court must make those findings on the evidence before it having seen and heard witnesses giving that evidence.”***

9.16 We find no basis to upset the findings of the lower court as guided in a plethora of celebrated cases including ***The Attorney-General v Marcus Kampumba Achume***<sup>12</sup>, ***Nkhata and 4 others v The Attorney-General***<sup>13</sup>. Grounds one, two, and three fail and are dismissed accordingly.

9.17 As the fourth and fifth grounds of appeal are related, we shall address them together. It is trite law that other than for fraud, a Certificate of Title may also be cancelled for impropriety in its acquisition, to the extent that the Supreme Court in the case of ***Silas Ngowani and Others v Flamingo Farm Limited***<sup>14</sup> **SCZ Selected Judgement No. 5 Of 2019** stated that:

***“We agree therefore with counsel for the appellants that fraud as specified in section 33 of the Lands and Deeds Registry Act does not provide the only pathway by which a***

**certificate of title may be cancelled. Other transgressions of the law such as circumvention of the procedure prescribed in the law which would render null and void the allocation of land, would be just as fatal."**

9.18 It follows that even if fraud is not proven, proof of failure to follow the prescribed legal procedure would suffice to warrant cancellation of a Certificate of Title. In *Nkongolo Farm Limited v Zambia National Commercial Bank Limited, Kent Choice Limited (in receivership) and Charles Haruperi supra*, the Supreme Court held that:

**"Where a party relies on any misrepresentation, fraud, breach of trust, wilful default or undue Influence by another party, he must supply the necessary particulars of the allegation in the pleadings. Fraud must be precisely alleged and strictly proved. There is no presumption of fraud. In the instant case, fraud was not alleged."**

9.19 In the present case, the learned trial Judge found at page 28 of the record as follows:

**"No evidence was led on the circumstances under which the cancellation was done and the letter by the Chief Lands Officer was not produced. In the absence of this evidence, it is difficult to state that the Certificate of Title was cancelled by the Chief Lands Officer and not the Registrar."**

9.20 The learned Judge took the view that evidence had to be led to prove that the Chief Lands Officer cancelled the Certificate of Title. The appellant's contention is that since the 1<sup>st</sup> respondent failed to show proof of how she acquired the property by, for instance, failing to show transfer



documents from her father, her title was bound to be cancelled. We do not agree with this proposition. The appellant alleged fraud and impropriety and failed to prove it. As guided by the Supreme Court, there is no presumption of fraud, it cannot be assumed that because the lower court found that the appellant's Certificate of Title was cancelled illegally, it follows that the 1<sup>st</sup> respondent obtained her title by fraudulent and/or improper means.

9.21 The appellant referred us to case of ***Halimo Mohamed Jama supra***, a lower court decision, to which we are not bound. We can distinguish it from the present case. *In casu*, the lower court rightly found that the appellant became aware that the land was subject to litigation after she had purchased it but before acquiring a Certificate of Title, and therefore she did not approach the process of acquisition of title with clean hands. This line of argument ought to be dismissed.

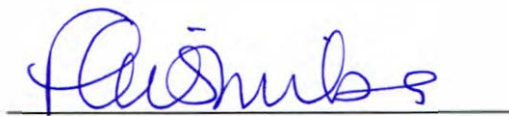
9.22 A reading of the statement of claim at pages 35 to 37 of the record of appeal reveals neither a pleading in respect of procedural impropriety nor fraud on the part of the 1<sup>st</sup> respondent. Further, the appellant did not lead any evidence with respect to procedural impropriety or fraud.

9.23 We started by stating the law on a bona fide purchaser for value without notice. For reasons stated, we have no hesitation in affirming the lower court's position that the

appellant cannot be said to be a bona fide purchaser for value without notice.

**10.0 Conclusion**

**10.1** In the net result, we do not consider the grounds of appeal sustainable. We accordingly dismiss the appeal in its entirety with costs to the respondent, to be taxed in default of agreement.



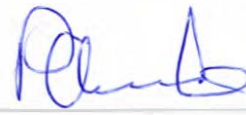
***F.M. Chishimba***

**COURT OF APPEAL JUDGE**



***D.L.Y. Sichinga, SC***

**COURT OF APPEAL JUDGE**



***P.C.M. Ngulube***

**COURT OF APPEAL JUDGE**