IN THE HIGH COURT OF ZAMBIA **2006/HPC/0032**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Commercial Jurisdiction)

BETWEEN:

INFINITY T. V. LIMITED **PLAINTIFF**

AND

CHAMBA VALLEY ROSE GARDENS LIMITED **1ST DEFENDANT**
ODDYS WORKS LIMITED **2ND DEFENDANT**
ODYSSEAS MANDEN AKIS **3RD DEFENDANT**
COMMISSIONER OF LANDS **4TH DEFENDANT**

BEFORE THE HON. MR. JUSTICE C. KAJIMANGA THIS 27TH DAY OF SEPTEMBER, 2011

FOR THE PLAINTIFF: Mr. M. Chitambala, Messrs Lukoma Chambers and Mr. S. Musune, Messrs Mvunga Associates

FOR THE 1ST DEFENDANT: Mr. W. Kabimba, Messrs W. M. Kabimba & Company

FOR THE 2ND & 3RD DEFENDANTS: Mr. S. Sikota, SC, Messrs Central Chambers

FOR THE 4TH DEFENDANT: Mrs. M. C. Kombe, Chief State Advocate

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J U D G M E N T

Cases referred to:

1. Gideon Mundanda v Timothy Mulwani, Agricultural Finance Company Limited and S. S. S. Mwiinga (1987) Z. R. 29

2. Tito v Waddel (No.2) [1977] Ch D 106

3. Arnot Kabwe, Charity Mumba Kabwe v James Daka, The Attorney-Gerenal and Albert Mbazima (2006) Z. R. 12

Legislation referred to:

Lands Act Cap 184, Section 13
Lands and Deeds Registry Act Cap 185, Sections 7 and 79

The Plaintiff issued a writ of summons out of the Commercial Registry endorsed with the following claim:

1. Specific performance of the contract dated the 23rd December, 2003 made between the Plaintiff company and the 1st Defendant company for the sale of the property known as Stand 19028, Lusaka ("the property") by the 1st Defendant to the Plaintiff.

2. An order for delivery of possession to the Plaintiff of the property on the terms contained in the contract of sale dated 23rd December, 2003 between the Plaintiff and the 1st Defendant.

3. An injunction restraining the 2nd and 3rd Defendants from doing whether by themselves or agents or otherwise, the following acts or any of them, that is to say, enter the premises and carry out any earth works or whatever works on the property until further order of the Court.

4. A declaration that the Agreement in writing dated 23rd December, 2003 entered into between the Plaintiff and 1st Defendant in respect of Stand No. 19028, Lusaka is a binding and enforceable contract on the terms contained in the said agreement.

5. A declaration that the certificate of re-entry which was registered on the 10th February, 2004 was null and void as it did not comply with the provisions of the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia ("the Act").

6. A declaration that the certificate of title No. 26241 issued on the 10th June 2004 to the 2nd Defendant was null and void for it was issued at the time when there was a caveat in place and the 4th Defendant had no power and lacked capacity to issue a state lease to the 4th Defendant under the circumstances.

7. A declaration that entry numbers 10, 11, 12, 13, 14, 15 and 16 purportedly made on the Lands Register and instruments registered

therein, pertaining to the property from the 24th December, 2004, are null and void as they were entered without the consent of the Plaintiff who had placed a caveat and without any court order and in breach of Section 79.

8. Further and in the alternative, damages for breach of the contract dated the 23rd December, 2003 and for breach of Section 79 of the Act respectively.

9. Any other relief the Court might deem fit.

10. Costs of and incidental to the proceedings.

In its statement of claim, the Plaintiff contended that by a written agreement dated 23rd December, 2003, the 1st Defendant agreed to sell the property to the Plaintiff at a consideration of US$100,000.00 of which US$20,000.00 was payable upon exchange of contracts and the balance in monthly instalments of US$6,000.00. The Plaintiff duly paid to the 1st Defendant a total sum of US$38,650.21 and the Plaintiff has been ready and willing to complete the sale. The Plaintiff through its advocates also placed a caveat on the property as intending purchaser on 24th December, 2003.

The Plaintiff also contended that on 10th June, 2004 and without giving any notice to the Plaintiff as caveator, the 4th Defendant purported to grant a lease of 99 years to the 2nd Defendant in respect of the property notwithstanding the caveat. The said caveat has not been removed and continues to subsit to date. On 18th November, 2005 the 4th Defendant allowed the 3rd Defendant to register a caveat against the property when another earlier caveat was still in force contrary to the provisions of Section 79 of the Act. Notwithstanding the existence of a contract of sale between the Plaintiff and the 1st Defendant, the latter purported to sell the property to the 2nd Defendant for K250,000,000.00 and that by reason of the aforesaid matters, the Plaintiff has suffered loss and damage.

In its defence, the 1st Defendant contended that the Plaintiff only paid a sum of US$36,000.00 towards the purchase price. The Plaintiff was in breach of the terms and conditions of the contract of sale hence the non-completion of the transaction and the 1st Defendant is no longer the leaseholder of the property. There has been no sale of the property by the 1st Defendant to the 2nd Defendant and the Plaintiff has not suffered any loss or damages at all.

In their similar defences, the 2nd and 3rd Defendants contended that they were not privy to any contract between the Plaintiff and the 1st Defendant. There was or is no caveat subsisting or entered by the Plaintiff on the property as the print out from the Lands and Deeds Register dated 26th October, 2005 does not show the caveat the Plaintiff claims to have filed. A caveat was entered by the 3rd Defendant on 18th November, 2005 on the property but the 2nd and 3rd Defendants are not aware of the prior subsisting and valid caveat entered by the Plaintiff. They deny that there was a contract of sale between the 1st and 2nd Defendants and that the Plaintiff is entitled to any loss or damages.

The 2nd and 3rd Defendants also contended that the Plaintiff is estopped by the doctrine of res judicata from bringing this action against them as the question of ownership of the property had been settled in two different consent judgments in cause numbers SCZ/8/245/2005 (Appeal No. 157 of 2005) and SCZ/8/34/2005. The particulars of res judicata are that the Plaintiff had been aware of the two actions which were settled by consent order from the outset but chose not to make itself a party to the actions; the Plaintiff which is a television broadcaster had kept on reporting on the Court actions in which the two consent orders were made on its television station; the Plaintiff's director and major shareholder gave evidence in the first action and were very active participants in that litigation when it commenced before the Lands Tribunal but chose not to make themselves a party to that

action; the Plaintiff had at all material times aware that the two actions which culminated into consent orders were likely to impact on its claim of having an interest in the property and would be resolving the question of its legal ownership but it chose to sleep on its rights and not make itself party to the actions; the Plaintiff stood by without any action as the 2nd Defendant begun clearing the property and thereafter started construction and only begun this action months later on 7th February, 2006 when the 2nd Defendant had already spent over five billion Kwacha in construction; the 2nd Defendant obtained title deeds to the property from the 4th Defendant after it was offered to them; the 2nd Defendant has made massive investment on the property worth billions of Kwacha on the basis of title given to them by the State and secured finance from banks and individuals on the basis of the title to the property.

The 4th Defendant contended in his defence that he was not privy to the alleged contract of sale between the Plaintiff and the 1st Defendant. Acting on behalf of the President, he granted a 99 year lease to the 2nd Defendant. He was at liberty to do so without notifying the Plaintiff which was not the title holder or lessee of the property as it had reverted to the State following the certificate of re-entry due to the 1st Defendant's breach of the development clause.

The 4th Defendant further contended that the caveat which was registered by the Plaintiff on 24th December, 2003 did not forbid the 4th Defendant to cause a re-entry as the title holder held title subject to fulfilling the lease conditions. There was no caveat lodged and registered on the property on 24th December, 2004. The caveat registered on 24th December, 2003 ceased to subsist after the re-entry was done by the 4th Defendant and is therefore of no force or effect. The registration of a caveat lodged and registered by the 3rd Defendant on 18th November, 2005 was not done by the 4th Defendant but the Registrar of Lands and Deeds who caused an entry to

be made on the register as there was no subsisting and valid caveat in force since the re-entry by the 4th Defendant on the property made previous entries ineffective. The Plaintiff is not entitled to any damages or loss as alleged.

The Plaintiff's sole witness was Bwalya David Menga, its director of operations. His witness statement disclosed that sometime in 2003 the Plaintiff was approached by Mr. Lottie Simfukwe from the 1st Defendant company to the effect that they had a piece of land for sale along Great East Road next to Mulungushi International Conference Centre which he later came to know as Stand No. 19028 Lusaka. On 23rd December, 2003 the Plaintiff and the 1st Defendant signed a contract of sale relating to the said property at the agreed price of US$100,000.00 payable in instalments of US$20,000.00 upon exchange of contracts and monthly instalments of US$6,000.00 from January 2004 to September 2004. The first instalment of US$20,000.00 was made on 24th December, 2003 and on the same date a caveat was registered on the property by the Plaintiff as intending purchaser. A sum of US$18,650.21 was paid to the 1st Defendant bringing the total amount paid towards the purchase price to US$38,650.21.

The witness statement of PW1 also disclosed that in February 2004, the 1st Defendant informed the Plaintiff that the 4th Defendant had registered a re-entry on the property against National Hotels Development Corporation instead of the 1st Defendant and there was no notice served for the re-entry. It was agreed between the Plaintiff and the 1st Defendant to temporarily stop payment because of the re-entry. After the 1st Defendant's advocates made representations to the 4th Defendant, he wrote a letter to the effect that the re-entry was erroneously done and the 1st Defendant was given 90 days within which to develop the property. In June 2004, the Plaintiff was surprised to see the 3rd Defendant's agents move onto the property and started developing it and upon enquiry it was discovered that the 3rd

Defendant had been issued with title deeds for the property. A search at the Lands and Deeds registry revealed that a 99 year lease had been registered as from 10th June, 2004 and a certificate of title issued.

The witness statement of PW1 further disclosed that the 1st Defendant through one of its directors Martha Luwely Simfukwe purportedly registered a caveat on 11th June, 2004 claiming an interest as a registered proprietor and all this was happening while the matter was pending before the Supreme Court. Mrs. Simfukwe decided to sell the property to the 3rd Defendant and as a result of the consent order signed by her the caveat registered on 11th June, 2004 was removed despite the fact that the Plaintiff had already made a down payment towards the purchase price. The Plaintiff had never removed or did it at any time consent to the removal of the caveat it lodged on 24th December, 2003 and all entries made on the lands register in relation to the property after the said date were made without the knowledge or consent of the Plaintiff.

In cross-examination, PW1 testified that the Plaintiff's claim against the 1st Defendant was based on the execution of the contract of sale between the Plaintiff and the 1st Defendant. He told the Court that the purchase price of US$100,000.00 was not paid by the Plaintiff to the Defendant but he denied that the former was in breach and that a total of US$38,650.21 had been paid towards the purchase price. PW1 testified that according to the letter on page 7 of the 1st Defendant's bundle of documents only US$36,000.00 was paid by the Plaintiff as a deposit towards the purchase price.

PW1 also told the Court that he was aware that there was a direct lease from the State to the 2nd Defendant even before the matter went to Court. The witness testified that although he had stated in his witness statement that Mrs. Simfukwe tried to sell the property to the Defendant on 11th June, 2004 the 2nd Defendant had already been given a direct lease from

the State by that date. He conceded that the 3rd Defendant had never been registered as owner of the property contrary to his statement that it was sold to him. The witness said that the Plaintiff's claim against the 2nd Defendant and the 3rd Defendant was based on the fact that the latter is a director in the 2nd Defendant company and they are both on the property. PW1 conceded that directors have a separate legal personality from the company in which they are directors.

It was also the evidence of PW1 that the 2nd Defendant got a lease from the State, paid all lease charges and complied with all the conditions for acquiring land from the State. He told the Court that currently, there is a service station and office block which are both completed and that the development had been put up by the 2nd Defendant. The witness testified that before the developments on the plot there was a court action by the 1st Defendant against the 2nd Defendant and that the Plaintiff decided not to join the action. He conceded that the Plaintiff slept on its rights by not joining the action as they believed that the 1st Defendant which had their money would protect their interest.

PW1 also testified that the Plaintiff did not challenge the re-entry of the property by the 4th Defendant. He told the Court that by virtue of the consent judgment, the 1st Defendant endorsed the re-entry. The witness testified that the Plaintiff was challenging the re-entry because it was wrongly done and notice was given. He said that the Plaintiff's basis for the challenge is the contract of sale which the Plaintiff believed was still valid and they were prepared to finish paying the purchase price.

PW1 also told the Court that it was not a term of the deed of variation that the 1st Defendant should sell the property. He conceded that the 4th Defendant has a right to re-enter if there was a breach of the lease conditions. The witness testified that the re-entry has denied the Plaintiff

occupation of the property, hence its claim for damages because of the loss suffered.

In re-examination PW1 testified that the Plaintiff sued the 4th Defendant because they were informed by the 1st Defendant that a re-entry had been made on the property by the 4th Defendant and that as the 1st Defendant was trying to sort out the issue they were surprised in June 2004 to see the 3rd Defendant and his agents working on the plot.

The 1st Defendant's sole witness was its director, Lottie Simfukwe. His witness statement disclosed that in December 2003 the 1st Defendant offered the property to the Plaintiff for sale and the parties executed a contract of sale on 23rd December, 2003 at the purchase price of US$100,000.00. The sum of US$20,000.00 was paid by the Plaintiff to the 1st Defendant on exchange of contracts, the balance to be paid in instalments of US$6,000.00 per month between January and September 2002 and the final balance was to be paid by 31st October, 2004. The payments did not proceed as agreed due to the erroneous notice of re-entry which was registered by the 4th Defendant in February 2004. Consequently, the Plaintiff and the 1st Defendant mutually agreed to a variation of the payment schedule to allow for the removal of the re-entry notice after appeal but the Plaintiff neglected or failed to make any payments towards the purchase of the property to facilitate completion of the sale.

The witness statement of DW1 further disclosed that in December 2004 the Plaintiff sought a refund of US$36,000.00 paid towards the purchase price plus other incidental expenses and advocates' fees. Following the failure by the Plaintiff to complete the transaction the 1st Defendant was at liberty to sell the property to any interested buyer, hence the offer by the 1st Defendant to the 2nd Defendant. This sale was completed and title was transferred accordingly and the 1st Defendant does not

therefore own the property. The Plaintiff is therefore not entitled to any of the reliefs sought.

The supplementary witness statement of DW1 disclosed that additional facts and information had become known to him following the demise of two of the original directors in the 1st Defendant company, namely, Luwely Simfukwe and Masutano Simfukwe. Following the death of Masutano Simfukwe DW1 became a director of the 1st Defendant company with his mother Luwely Simfukwe but the day to day management of the company was directed by the latter until her death in August 2007.

The witness statement of DW1 also disclosed that the question of ownership of the property was a subject of legal proceedings in the High Court between the 1st Defendant and the 2nd Defendant under cause number 2005/HP/1122 which ended in two consent judgment in the Supreme Court under Appeal No. 175 of 2005 in full and final settlement of the action. During the period of the proceedings, his mother's health deteriorated and she was in need of urgent medical attention abroad. She approached the 3rd Defendant for a loan of K250,000,000.00 for her medical treatment and also to partially liquidate a loan owed by the 1st Defendant to Zambia Coffee Board. There was therefore no question of any sale of the property to the 2nd Defendant by the 1st Defendant since the former already had a valid certificate of title issued by the 4th Defendant, hence the absence of any contract of sale or assignment to evidence the transaction. The statement in his witness statement dated 5th February, 2010 is incorrect to the extent that it refers to the sale of the property to the 2nd Defendant by the 1st Defendant.

In cross-examination DW1 told the Court that the 1st Defendant contested the re-entry of the property by the 4th Defendant and the property was eventually restored as per entry number 7 on page 15 of the Plaintiff's bundle of documents which cancelled entries 3, 4, 5 and 6.

The witness testified that the Plaintiff breached the contract of sale on instalment payments. He said that on page 3 of the 1st Defendant's bundle of documents, the second payment of US$2,000.00 was made on 13th January 2004; on page 5 there is a payment of K3,000,000.00; on page 6 the second payment of K1,000,000.00 was made on 9th January, 2004; and on page 7 the payment of K11,837,500.00 (US$2,500.00) was made on 27th January, 2004. DW1 told the Court that there was no payment after February 2004. He said that the letter from Lukona Chambers on page 7 was demanding US$36,000.00 deposit and not that the Plaintiff was going to pay the balance to facilitate completion of the transaction.

DW1 also told the Court that his mother told him that she had requested for and was given a loan of K250,000,000.00 by the 2nd Defendant but he did not know whether it had been paid back.

It was also his evidence that pages 12 to 13 of the 2nd Defendant's bundle of documents refer to cause number LAT/25/2004, a claim by the 1st Defendant seeking to reverse the re-entry. He said that the challenge to the re-entry had been abandoned by the consent settlement order. DW1 testified that cause number SCZ/8/245/05 also relates to the issue of re-entry and that the 1st Defendant having abandoned the challenge, it meant that the certificate of title it had was no longer valid. The witness said that the re-entry was made due to lack of development on the property. He said that according to the deed of variation on page 3 of the 4th Defendant's bundle of documents, the 1st Defendant was in 2002 given an extension of time to develop the property. DW1 told the Court that the deed of variation talks of developing the property and not selling it.

The 3rd Defendant testified on his own behalf and on behalf of the 2nd Defendant. His witness statement disclosed that after the 2nd Defendant had completed constructing Spectra Oil Corporation Complex along Lumumba Road in Matero, Lusaka it needed to embark on another project to put up a

top class hotel, shopping mall and a service station. In the process of searching for land, they came across the area between Mulungushi International Conference Centre and Katima Mulilo roundabout, opposite the Arcades Shopping Complex. DW3 made enquiries on behalf of the 2nd Defendant and he was advised to apply for the land through the Ministry of Local Government and Housing as it fell under the control of the Department of Physical Planning and Housing of that Ministry. On 12th June, 2002 the 2nd Defendant formally applied for the land. On 20th September, 2002 the Ministry of Local Government and Housing made a recommendation to the Ministry of Lands for the 2nd Defendant to acquire the property. On 2nd June, 2004 the 2nd Defendant was offered the property and Stand No. 19029 Lusaka. The 2nd Defendant paid the requisite lease charges in the sum of K248,581.00 on each property and a certificate of title was issued to the 2nd Defendant on 10th June, 2004.

The witness statement of DW2 also disclosed that neither the 2nd Defendant nor himself were told of any adverse effects or claims affecting the two pieces of land. He was advised by officials from the Ministry of Lands that the property had been re-entered due to non development and the State needed to give it to someone who could develop it as the land was in a prime area of Lusaka and had remained idle for a very long time. Before the 2nd Defendant could start developing the property the 1st Defendant commenced an action in the Lands Tribunal claiming that it was the owner of the property. The action culminated into a Supreme Court consent settlement order dated 14th November, 2005 in Appeal No. 157 of 2005 in which the 1st Defendant clearly stated that it had no claims against the 2nd Defendant. The plaintiff was at all times aware of the action in the Lands Tribunal and the Supreme Court as it even regularly had news items over the same on its television station. At no time did it seek to be made a party before the matters were concluded in both the Lands Tribunal and the Supreme Court.

The witness statement of DW2 further disclosed that following the consent judgment the 2nd Defendant commenced developing the two pieces of land by constructing a hotel, office block and service station. The office block and service station are now operational having been constructed at a cost of US$4.5 million or K22.0 billion. At the commencement of the construction DW2 advanced the 2nd Defendant K500.0 million and he lodged a caveat to protect his interest. Furthermore and as shown by entries 18, 19, 20, 21 and 22 on pages 18 to 19 of the Plaintiff's bundle of documents, the 2nd Defendant obtained a loan of K3.0 billion from Zambia National Commercial Bank Limited to carry out the developments on the property. The loan was increased to K21.0 billion and has since been transferred to Finance Bank Zambia Limited. Another sum of US$1.5 million was obtained by the 2nd Defendant from Leasing Finance Company Limited which has a pari pasu mortgage debenture on the property.

The witness statement of DW2 also disclosed that the 2nd Defendant did not purchase the property from the 1st Defendant but acquired it on direct lease from the State. Apart from the legal proceedings in the Lands Tribunal and the Supreme Court, the 2nd Defendant has had no dealings whatsoever with the 1st Defendant in relation to the property as the first time the 2nd Defendant heard about the 1st Defendant was when the latter sued the former in the Lands Tribunal over the property. The 2nd Defendant has had no dealings with the Plaintiff either over the property. Further, the 2nd Defendant is not a party to the purported contract of sale between the Plaintiff and the 1st Defendant which could not possibly contract to sell the property when it did not own it, the State having re-entered the same. The Supreme Court cause number SCZ/8/39/2006 vacated an injunction that had been filed in relation to the 2nd Defendant developing the said land on 19th June, 2007.

In cross-examination DW2 testified that he knew the late Mrs. Simfukwe around 2004 and 2005 when he met her at the Lands Tribunal during the dispute over the property which was settled in the Supreme Court through a consent settlement order. He told the Court that he did not give her a loan but that the sum of K250,000,000.00 was consideration for the dispute settlement. The witness stated that Mrs. Simfukwe asked for the money as a loan because she had a lot of problems; Coffee Board of Zambia wanted to repossess the farm and she had just lost her husband and son. DW2 told the Court that the purpose of the consideration was to avoid further conflicts in court and not for the purchase of the property.

DW2 testified that there were no developments on the property when it was allocated to the 2nd Defendant by the Commissioner of Lands. He told the Court that there are developments on the property today valued at about US$15,000,000.00. DW2 said that he was not aware that after the certificate of title was issued to the 2nd Defendant there was a protest from the 1st Defendant; and that the 1st Defendant had placed a caveat on the property. He told the Court that he was aware that the caveat on the property had been removed.

The 4th Defendant called Fortune Kachamba, the former Commissioner of Lands. His witness statement disclosed that the property was first allocated to the 1st Defendant and it was given title on 12th June, 2007. By its lease agreement, the 1st Defendant was supposed to develop the property and pay annual ground rent among other conditions but breached them resulting in a notice to re-enter being issued to it on 1st July, 1995. The property was finally re-entered on 7th December, 1999. After re-entry the property was allocated to the National Hotels Development Corporation in November 2000. The 1st Defendant contested the re-entry in the Lands Tribunal after which the parties agreed on 6th March, 2002 that the land be restored to the 1st Defendant. It was further agreed on 20th May, 2002 to

extend the development period given to the 1st Defendant. By a deed of variation the development period of the property was extended from 18 months to 48 months and from 9 months to 20 months for the foundation. Instead of taking advantage of the extension of time to develop the property, the 1st Defendant offered it for sale to the Plaintiff. This was a violation of the agreement between the 4th Defendant and the 1st Defendant which was under an obligation to develop the property within the period of extension.

The witness statement of DW3 also disclosed that the violation of the lease agreement led the 4th Defendant to repossess the land on 10th February, 2002 after issuing a certificate of re-entry. The caveat which was registered on 24th December, 2003 did not forbid the 4th Defendant to cause the re-entry as the 1st Defendant was in breach of the lease conditions and after the re-entry, the caveat ceased to subsist. The repossessed property reverted to the State and was offered to the 2nd Defendant which was offered title deeds on 10th June, 2004. The Plaintiff as a prudent company should have carried out a search in the Lands and Deeds Registry to ascertain if the property it intended to purchase had any encumbrances. Such a search would have revealed that the property had been repossessed for non-development and that when restored, the development period had been extended. The Plaintiff must therefore be taken to have known that the property it was buying which was not developed in accordance with the terms of the lease agreement could be repossessed and was therefore taking a chance if at all it parted with any money.

The witness statement of DW3 further disclosed that a caveat is not a sale of property and therefore the 4th Defendant had no reason to believe that there had been a sale of the property and he could not address the Plaintiff whose sale transaction was not registered. Further, the 4th Defendant did not issue any notice of intention to re-enter to the Plaintiff because there was and is still no relationship with the Plaintiff as the 4th

Defendant owed no obligation to the Plaintiff. When a certificate of re-entry was issued against the 1st Defendant for the second time on 10th February, 2004 the 1st Defendant contested the 4th Defendant's action in repossessing the property. The matter ended up in the Supreme Court where all parties endorsed the 4th Defendant's action of re-entry and allocation of the property to the 2nd Defendant.

In cross-examination, DW3 testified that the lease agreement relating to the property specified that the lessee needed to develop the land and the Lands Register shown that the lessee had not only been given notice of intention to re-enter but also that the property had been repossessed. He told the Court that the register would have revealed that the lessee had been given further time within which to comply with the lease agreement and anybody dealing with this property should have been put on notice. It was his evidence that the fact that the matter even went through the court process means that the notice was given as it was acknowledged in the deed of variation.

The witness told the Court that a notice of intention to re-enter must be served either personally, by registered post or by advertisement on the owner of the land to enable him take action but it is not necessary to serve the certificate of re-entry. He said that he did not know how service was effected on the 1st Defendant. DW3 told the Court that he was not aware that Section 13 of the Lands Cap 184 of the Laws of Zambia requires registration of a notice of re-entry.

The witness testified that entry number 10 on page 11 of the Plaintiff's bundle of documents in respect of National Hotels Development Corporation was a genuine mistake because entry number 7 shows that it was cancelled. He also told the Court that a caveat can not prevent the Commissioner of Lands from performing its statutory function of repossessing land. DW3 testified that entry number 15 on page 12 of the Plaintiff's bundle of

documents was a consent order cancelling entry number 13 where the 1st Defendant was claiming that the provisions under the Lands Act was not followed. He said that by entry number 15 the 1st Defendant's objection on the process of re-entering the land was done away with.

The witness also told the Court that innocent third parties who have not been joined to this action would be affected if the certificate of title issued to the 2nd Defendant was not recognized. He further testified that a title holder has locus standi to challenge a certificate of re-entry. He said that the Plaintiff has no locus standi in respect of the certificate of re-entry as it was never at any stage the title holder of the property.

In re-examination, DW3 testified that the effect of entry number 15 was to restore the action of the Commissioner of Lands to re-enter the property and offer it to the 2nd Defendant as having been valid.

On behalf of the Plaintiff it was submitted by Mr. Chitambala that non-completion of the sale transaction between the Plaintiff and 1st Defendant was due to the failure by the latter to guarantee clean title of the property to the former as a result of the erroneous re-entry on the property by the 4th Defendant. It was contended that the Plaintiff is entitled to the remedy of specific performance and the Court was referred to the case of ***Gideon Mundanda v Timothy Mulwani, Agricultural Finance Company Limited and S. S. S. Mwiinga(1)*** where the Supreme Court stated that:

> ***"A Judge's discretion in relation to specific performance of contracts of sale of land is limited as damages cannot adequately compensate a party for breach of contract for the sale of land."***

The Court was also referred to the case of ***Tito v Waddel (No.2)(2)*** where it was stated at page 322 as follows:

"The question is not simply whether damages are an "adequate" remedy but whether specific performance as it were will do more perfect and complete justice than award of damages. This is particularly so in all cases dealing with a unique subject matter such as land."

It was submitted that since the Plaintiff had made a substantial part payment towards the purchase price of the property, it is entitled to the equitable remedy of specific performance. It was also contended on behalf of the Plaintiff that after execution of the contract of sale between the Plaintiff and the 1st Defendant the former

lodged a caveat as intending purchaser on 24th December, 2003 and this caveat has never been removed by the Plaintiff or by a court order. It was submitted that the effect of the caveat was to forbid registration of any instrument affecting the interest protected by the caveat and the Court was referred to Section 79 of the Act which provides that:

"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…"

The learned counsel therefore argued that it was improper for the 4th Defendant to re-enter the property on 10th January, 2004 when the caveat lodged by the Plaintiff was still subsisting and that before he could make any valid entries on the property, it was incumbent on the 4th Defendant to seek the Plaintiff's consent or in the alternative, obtain a court order to remove the caveat. It was submitted that all entries made in the Lands Register in relation to the property are null and void and of no legal effect and that the

certificate of title issued to the 2nd Defendant should be cancelled for having been improperly issued.

On whether the re-entry on the property dated 10th January, 2004 made by the 4th Defendant is valid, Mr. Chitambala submitted that a print out of the Lands Register on page 16 of the Plaintiff's bundle of documents shows that the certificate of re-entry was against National Hotels Development Corporation but not the 1st Defendant and that it was not even registered contrary to Section 13(1) of the Lands Act. Counsel argued that under cross-examination DW3 failed to produce proof showing that the notice of intention to re-enter the property was served on the 1st Defendant and the Court was referred to the case of ***Arnot Kabwe, Charity Mumba Kabwe v James Daka, The Attorney-Gerenal and Albert Mbazima(3)*** where the Supreme Court stated that:

> ***"(i) The mode of service of the notice of intention to cause a certificate of re-entry to be entered in the register for a breach of the covenant in the lease as provided for in Section 13(2) of the Land Act, is cardinal to the validation of the subsequent acts of the Commissioner of Lands in disposing of the land to another person.***
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> ***(ii) If the notice is properly served, normally by providing proof that it was by registered post using the last know address of the lessee from whom the land is to be taken away, the registered owner will be able to make representations, under the law, to show why he could not develop the land within the period allowed under the lease.***

(iii) If the notice is not properly served and there is no evidence to that effect there is no way the lessee would know so as to make meaningful representations.

(iv) A repossession effected in the circumstances where a lessee is not afforded an opportunity to dialogue with the Commissioner of Lands with a view to having an extension of period in which to develop the land cannot be said to be a valid repossession."

The learned counsel for the Plaintiff also submitted that no documents were produced to prove that the sum of K250,000,000.00 paid to Mrs. Simfukwe by the 3rd Defendant prior to execution of the consent settlement order was indeed a loan. He contended that the only reasonable inference is that the order was procured by fraud and should therefore be set aside. Mr. Chitambala further argued that the proceedings in Appeal No. 157 of 2005 and LAT/25/2004 did not deal with the issues of the caveat lodged on behalf of the Plaintiff and that the consent settlement order is binding only between the parties to that action and not on the Plaintiff.

Regarding the effect of the status of the re-entry dated 10th February, 2004 on the certificate of title issued to the 2nd Defendant, Mr. Chitabala submitted that all entries on the Lands Register relating to the property after 24th December, 2003 including the issuance of the certificate of title to the 2nd Defendant are null and void and should be cancelled for contravening Section 13 of the Act. Counsel accordingly urged the Court to order the 3rd Defendant to yield vacant possession of the property to the Plaintiff since he is illegally in occupation.

Mr. Chitambala finally submitted that the Court should grant the Plaintiff all the relief sought; in addition to a refund of the sum of

US$38,651.21 paid by the Plaintiff to the 1st Defendant as part consideration for the property.

On behalf of the 1st Defendant Mr. Kabimba submitted that this is not a proper case where specific performance would be an appropriate remedy because the property was not only withdrawn from the 1st Defendant by the 4th Defendant, but it was subsequently allocated to the 2nd Defendant who has developed it extensively thereby making it impossible for an order of specific performance. On the Plaintiff's alternative claim for damages, Counsel submitted that the evidence on record shows that the Plaintiff was in breach of contract. Mr. Kabimba argued that according to page 6 of the 1st Defendant's bundle of documents the Plaintiff and the 1st Defendant had agreed to some variations in the payment of the purchase price from the schedule agreed in the contract of sale but the Plaintiff failed to make any instalment payments from 4th May, 2004, which evidence was not disputed by the Plaintiff.

On behalf of the 2nd and 3rd Defendants, Mr. Sikota, SC submitted that the Plaintiff knew that there were Court actions touching on the re-entry into the land by the State and also the 2nd Defendant's title but for reasons best known to themselves they decided to sleep on their rights and not seek intervention directly by themselves

into the matter. According to the State Counsel, the Plaintiff had an opportunity of recovering and but for their own fault might have recovered in the first two actions that which they seek to recover in this actions. He submitted that the plea of res judicata must be allowed in this matter because the Plaintiff's own witness testified that they knew about the Court action and they already had a dispute with the 1st Defendant but they

decided not to join because they believed that the 1st Defendant was representing their rights.

Mr. Sikota, SC also submitted that under cross-examination PW1 stated that they were informed in February 2004 that there was a re-entry on the property; that the 1st Defendant challenged this re-entry in the Lands Tribunal; that they were not a party to these proceedings; and that their claim is that there was no notice given to them, having placed a caveat. The State Counsel contended that having made this concession it is not open to the Plaintiff to claim that they had no notice of the re-entry and that it should be nullified.

It was also Mr. Sikota's contention that the Plaintiff having slept on their rights cannot at this stage expect that the equitable remedy of specific performance can still be at their disposal when for their own laxity, third and even fourth parties would now be adversely affected by such a remedy. He submitted that if there was any procedural default in the manner the entry was done such default was waived by the 1st Defendant on their own behalf and on behalf of the Plaintiff by starting the Court action which culminated into the consent order. The State Counsel accordingly prayed that the Plaintiff's claim against the 2nd and 3rd Defendants be dismissed. He further urged the Court to dismiss the order of specific performance against the 1st Defendant as it would have adverse effects on parties who are not privy to the contract between the Plaintiff and the 1st Defendant and that the Plaintiff be condemned in costs.

For the 4th Defendant, Mrs. Kombe submitted that the law relating to re-entry is Section 13 of the Lands Act which reads:

"13(1) Where a lessee breaches a term or condition of a covenant under this Act the president shall give the lessee three months notice of this intention to cause a

certificate of re-entry to be entered in the register in respect of the land held by the lessee and requesting him to make representations as to why a certificate of re-entry should not be entered in the register.

(2) If the lessee does not within three months make the representations required under subsection (1), or if after making representations the President is not satisfied that a breach of a term or a condition of a covenant by the lessee was not intentional or was beyond the control of the lessee, he may cause the certificate of re-entry to be entered in the register.

(3) A lessee aggrieved with the decision of the President to cause a certificate of re-entry to be entered in the register may within thirty days appeal to the Lands Tribunal for an order that the register be rectified."

The learned Chief State Advocate submitted that from this Section, it is clear that the President can re-enter property by giving three months notice to a lessee where there is a breach; and a lessee aggrieved with such a decision may appeal to the Lands Tribunal. She contended that the 1st Defendant challenged the re-entry because of the legal relationship of lessor and lessee that existed between the President and the 1st Defendant. Counsel argued that under Section 13(3) of the Lands Act only the lessee can bring an action against the 4th Defendant and the Plaintiff had no locus standi to appeal against the re-entry because it merely had an interest in the property. This position, Mrs. Kombe contended, is supported by the case of ***Arnot Kabwe, Charity Mumba Kabwe v James Daka, The Attorney-General and Albert Mbazima(3)*** cited by the Plaintiff.

Mrs. Kombe submitted that from the holding of this case the law only recognizes the lessee to be served with the notice and to bring an action against the decision of the President and that therefore the 4th Defendant was under no legal obligation to notify the Plaintiff.

The learned Chief State Advocate further submitted that according to Section 13(3) of the Act, a challenge against the re-entry was supposed to be made within thirty days of the decision being made. She contended that by commencing this action two years after the re-entry was made, the Plaintiff has come too late in the day to try and challenge the 4th Defendant's action.

It was also her contention that the issue of procedure under Section 13(1) of the Lands Act was already dealt with by the Lands Tribunal under cause number LAT/25/2005 and subsequently settled by the Supreme Court when a consent settlement order was executed. According to Mrs. Kombe, the effect of this consent order was to uphold the procedure on the re-entry by the 4th Defendant and that the matter is res judicata.

She also submitted that the certificate of re-entry entered on 10th February, 2004 was not null and void as the issue of procedure was dealt with and concluded by the executed of the consent settlement order in the Supreme Court.

Mrs. Kombe further argued that according to the evidence of DW3, the effect of the re-entry is that the property reverted to the State. She contended that the 4th Defendant was then at liberty to offer the property to the 2nd Defendant as the certificate of re-entry made previous entries (including the caveat) ineffective. The learned Chief State Advocate submitted that the deed of variation between the 1st and 4th Defendants was made long before the contract of sale between the Plaintiff and the 1st Defendant and the lodging of the caveat by the Plaintiff. The Court was referred to Section 7 of the Act which reads:

"7.(1) All documents required to be registered as aforesaid shall have priority according to date of registration…

(2) The date of registration shall be the date upon which the document shall first be lodged for registration in the Registry or, where registration is permitted in a District Registry, in such District Registry."

Mrs. Kombe also submitted that the 4th Defendant was not barred from causing a certificate of re-entry to be entered as a result of the caveat lodged by the Plaintiff. She contended that Section 79 of the Act cannot be construed that a caveat can bar the Commissioner of Lands from carrying out statutory duties as the caveat merely protects the rights of the caveator against other persons excluding the Commissioner of Lands. According to her, it is a misconception of the Plaintiff to contend that it was incumbent on the 4th Defendant to seek the consent of the Plaintiff or obtain an order from the Court to remove the caveat as there was no legal relationship between the Plaintiff and the 4th Defendant. It was also her submission that the certificate of title number 28241 was therefore validly issued by the 4th Defendant to the 2nd Defendant and the issue of its cancellation does not arise.

I have considered the evidence on record, authorities cited and the written submissions filed by the parties.

The Plaintiff claims specific performance of the contract of sale executed by the Plaintiff and the 1st Defendant relating to the property. Mr. Chitambala submitted that since the Plaintiff had made a substantial payment it is entitled to the equitable remedy of specific performance. However, the evidence on record shows that albeit a contract of sale was executed by the two parties, the 1st Defendant is no longer the title holder of the property. The property reverted to the State after a re-entry was made

by the 4th Defendant. The evidence on record also shows that the property was subsequently offered by the 4th Defendant to the 2nd Defendant which has extensively developed it. According to the evidence of DW2 (3rd Defendant) which was not rebutted by the Plaintiff, the developments on the property are valued at about US$15,000,000.00. Indeed, the Court equally takes judicial notice of the massive developments on the property namely, a service station, office block and a hotel which are clearly visible to any one passing along the Great East road. Furthermore, I also accept the submissions of Messrs Sikota, SC and Kabimba that granting an order of specific performance against the 1st Defendant would have an adverse effect on innocent third parties which have financed the massive developments on the property. According to the evidence of DW2, these include Finance Bank Zambia Limited and Leasing Finance Company Limited.

It was also contended by the Plaintiff's counsel that the effect of the caveat lodged by the Plaintiff after execution of the contract of sale was to forbid registration of any instrument affecting the interest protected by the caveat and reliance was placed on Section 79 of the Act. In my judgment, this section only applies to the Registrar's statutory functions. As correctly submitted by Mrs. Kombe, this section does not mean that a caveat can prevent the Commissioner of Lands from exercising his statutory function of repossessing land. I further agree that on the facts of this case, the Commissioner of Lands had no obligation to seek the Plaintiff's consent or obtain a court order to remove the caveat as there was no legal relationship between the Plaintiff and the Commissioner of Lands.

I have read the ***Gideon Mudenda v Timothy Mulwani & Others*** and ***Tito v Wadde***l cases. The principle relating to the equitable remedy of specific performance enunciated in these cases is good law. However, my considered opinion is that for the reasons stated above, these cases do not apply to the facts of this case.

As regards the Plaintiff's contention that the re-entry of the property by the 4th Defendant on 10th January, 2004 is null and void the view I take is that this argument cannot be sustained. The reason for this view is that any procedural default relating to the re-entry by the Commissioner of Lands, as correctly submitted by Mr. Sikota, SC and Mrs. Kombe, was waived by the consent settlement order in the Supreme Court under cause number SCZ/8/245/2005. According to the credible evidence of DW3, the effect of entry number 15 in the Lands Register was to validate the action of the Commissioner of Lands to re-enter the property and offer it to the 2nd Defendant. Entry Number 15 appears on page 12 of the 4th Defendant's bundle of documents and reads:

> ***"CONSENT SETTLEMENT ORDER CANCELLING ENTRY NO. 13 ON THE***
>
> ***REGISTER."***

And entry number 13 was a caveat lodged by the 1st Defendant. Mr. Chitambala urged the Court to set aside the consent settlement order alleging that it was procured by fraud. Firstly, this Court has no jurisdiction to set aside a decision of the Supreme Court which is a superior court. Secondly, the only way to challenge a consent order on the basis of fraud is to commence a fresh action.

Mr. Chitambala also urged the Court to order the 3rd Defendant to yield vacant possession of the property to the Plaintiff on the ground that he is illegally in occupation. I would like to believe that counsel meant the 2nd Defendant and not the 3rd Defendant as the latter is only a director in the former company which is the entity in occupation. I do not agree that the 3rd Defendant is occupying the land illegally. As I have already indicated above, the consent settlement order validated the re-entry of the property by the 4th Defendant. The evidence on record shows that after the re-entry of the

property by the 4th Defendant, he offered it to the 2nd Defendant and a certificate of title number 28241 was subsequently issued. It is trite law that a certificate of title is prima facie evidence of ownership in the absence of fraud, as in this case. In the premises the Plaintiff's argument cannot be sustained as the 2nd Defendant lawfully acquired the property. For the same reasons stated above, I do not agree with the Plaintiff that the entries in the Lands Register relating to the property, particularly numbers 10, 11, 12, 13, 14, 15 and 16 are null and void and should be cancelled, regard being had to the consent settlement order.

Mr. Sikota, SC and Mrs. Kombe further submitted that the procedure on the re-entry of the property by the 4th Defendant is res judicata as it was concluded by the execution of the consent settlement order. I totally agree. The undisputed evidence on record is that the Plaintiff was aware of the proceedings in the Lands Tribunal between the 1st and 2nd Defendants; was reporting about the matter on its television; and decided not to join the proceedings in the belief that the 1st Defendant was representing its rights. In my considered opinion, the matter is not only res judicata. By this action, the Plaintiff is also attempting to close the stable door after the horse has already bolted. Stated differently, it is too late for the Plaintiff to challenge the re-entry two years after it was made. Furthermore, the challenge also flies in the teeth of Section 13(3) of the Lands Act which provides that it should be made within thirty days of the re-entry. But even assuming that the challenge was not out of time, I opine that on the authority of ***Arnot Kabwe and Charity Kabwe v James Daka and Others***, the Plaintiff's challenge would still have failed on account of insufficient locus standi since it is not a lessee of the property.

Mr. Chitambala finally submitted that the Court should order the refund of US$38,651.21 paid by the Plaintiff to the 1st Defendant as part consideration for the property. A perusal of the statement of claim reveals

that this was not pleaded by the Plaintiff and it only arose in the submissions. The Court can therefore not entertain it.

The Plaintiff claimed damages for breach of contract in the alternative. This claim suggests that the failure to complete the sale transaction is attributed to the 1st Defendant. The evidence on record, as already alluded to above, shows that the property was re-entered by the 4th Defendant. The property was subsequently offered to the 2nd Defendant by the 4th Defendant. I believe that at that stage, it was practically impossible for the 1st Defendant to complete as it ceased to be the owner of the property. I am therefore of the firm opinion that under such circumstances, the Plaintiff could not be said to have been in breach of the contract.

In the final analysis, I have come to the ineluctable conclusion that the Plaintiff has not proved its claim against the Defendants on a balance of probabilities. This action is accordingly dismissed with costs to be Defendants, to be taxed in default of agreement.

Leave to appeal to the Supreme Court is granted.

DELIVERED THIS 27TH DAY OF SEPTEMBER 2011

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C. KAJIMANGA
JUDGE