

IN THE HIGH COURT OF ZAMBIA

2010/HP/A39

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

**CLEMENTINA BANDA
APPELLANT
EMMANUEL NYANJE**

1ST

2ND APPELLANT

AND

BONIFACE MUDIMBA

RESPONDENT

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 9th day of September, 2011.

For the appellants: Mr.V. Kabonga of Messrs Paul Pandola Banda and Company.

For the respondent: Mr. K. Phiri, Senior Legal Aid Counsel with Legal Aid Board.

JUDGMENT

Cases referred to:

English cases

1. *Hughes v Metropolitan Railway Company* [1877] 2 A.C. 439
2. *Wakefield v Cooke* [1904] A.C. 31.
3. *Powell v Streatham Manor Nursing Home* [1935] A.C. 249.
4. *Ward v James* [1965] 1 ALL E.R. 56.
5. *Evans v Norton* [1983] 1 Ch 252.
6. *Peyman v Lanjani* [1985] Ch 457.
7. *Macmillan Inc. V Bishopsgate Trust (No.3)* [1995] 1 W.L.R. 978.

Zambian cases

1. *Diamond v The Standard Bank of South Africa Limited (Executor)* (1965) Z.R. 61.

2. *Nkhata and Others v Attorney General* (1966) Z.R. 124.
3. *Kenmuir v Hattingh* (1974) Z.R. 162.
4. *Sithole v State Lotteries Board* (1975) Z.R. 106.
5. *Mwimbu v Habeenzu* (1977) Z.R. 111.
6. *Mususu Kalenga Building Limited and Another v Richman's Money Lenders Enterprise* (1999) Z.R. 27.

Legislation referred to:

1. *High Court Act, cap 27, s. 13.*
2. *Local Courts Act, cap 29, ss 16 (2), 56 (1), and 58 (2).*
3. *Lands and Deeds Registry Act, cap 185.*
4. *Inheritance (Family Provisions) Act, 1938.*

Works referred to:

1. *John Mc Ghee QC, Snells Equity, (Thomson Reuters (Legal) Limited, 2008).*
2. *Hodge M. Malek, Phipson on Evidence, Seventeenth Edition, (Thomson Reuters (Legal) Limited 2010).*
3. *Jill Martin, Hanbury and Martin Modern Equity, Fifteenth Edition, (Sweet and Maxwell 1997).*
4. *Fleming, The Law of Torts, 3rd Edition (Halstead Press Sydney, 1965).*
5. *Odgers, Principles of Pleading and Practice, (Stevens and Sons London, 1971).*

BACKGROUND

In this appeal I will refer to the respondent as the plaintiff, and the 1st and 2nd appellants as the 1st and 2nd defendants respectively, because these were their designations in the Court below. This matter was commenced on 14th April, 2009, by the plaintiff in the Subordinate Court of the First Class for the Lusaka District. The matter was commenced by way of writ of summons. The plaintiff's claims were for the following:

- (a) Possession of the house;
- (b) An order for interim injunction directed to the defendants that they be evicted;
- (c) Costs; and
- (d) And any remedy that the Court may deem fit.

The writ of summons was accompanied by a statement of claim. In the statement of claim the plaintiff averred as follows: that he bought the plot situated at M 0276, Kanyama, otherwise known as Block 27/13, Kanyama West. After the purchase, he went on to develop the plot and regularised the ownership of the plot with the Lusaka City Council by obtaining an occupancy licence. The 2nd defendant knew that the property in issue did not belong to the 1st defendant. And the 1st defendant went ahead to sell the property in issue; illegally to the 2nd defendant.

According to the record of appeal before me, the defendants did not enter any appearance, or indeed file any defences.

TRIAL

Be that as it may, the trial of this matter commenced on 10th September, 2009. The plaintiff; Boniface Mudimba, was the first person to testify. And i will continue to refer to him as PW1. PW1 testified that on 24th February, 2003, he bought the plot in question from the Movement for Multi Party Democracy (MMD) Constituency Committee, at a price of K 500, 000=00. Following the purchase, in the early part of 2006, PW1 commenced constructing a house on the plot. Initially PW1 built a two roomed house. PW1 completed constructing the house in the early part of 2008, albeit, the windows and doors were not installed. Thereafter, the structure remained unoccupied.

Sometime in July/August, 2008, whilst PW1 was working in Mazabuka, he received a telephone call from one Jackson Mwanza, that Emmanuel Nyanje; the 2nd defendant, was installing door frames and window frames on his property. In response, PW1, asked for permission from his employers to travel to Lusaka to verify the report.

When PW1 eventually visited the site, he found two bricklayers on site. The window frames and door frames were also on site; although they had not yet been installed. The bricklayers informed PW1, that they had been engaged to install the window frames and door frames by the 2nd defendant. PW1 instructed the bricklayers not to install the window frames, and door frames because he was the owner of the property. After issuing these instructions to the brick layers, PW1 returned to Mazabuka. PW 1 stayed in Mazabuka for a period of five days. Subsequently, when PW1 returned to Lusaka, he found that the window frames and door frames had been installed. PW1 also found a caretaker in occupation of the property. Upon been approached by PW1, the caretaker volunteered the telephone number for the 2nd defendant.

Thus PW1 contacted the 2nd defendant and asked him to meet him so that he could explain to him why he had installed the window frames and door frames, on his property. The 2nd defendant is said to have retorted that: "*he did not care,*" because he had just bought the property from Clementine Banda; the 1st defendant. PW1 insisted that he wanted to meet the 2nd defendant. Eventually, the 2nd defendant agreed to meet PW1. The 2nd defendant showed PW1 a letter confirming the sell of the property by the 1st defendant to him. It was thereafter agreed that the trio, (PW1, the 1st defendant, and the 2nd defendant), should meet. When the trio met, they decided to approach the Council Office in Kanyama for assistance in resolving the matter. The trio, accompanied by Council officials proceeded to inspect the site. After the inspection, it was decided that the matter should be referred to Civic Centre.

PW1 further testified as follows: that on 5th July, 2009, he went to Civic Centre. After his visit to the Civic Centre, he was accompanied by council officials from Civic Centre to the site again. After he showed the Council officials documentary evidence showing that he was the owner of the

property, he was advised by the Council officials to sue the defendants. Hence the action in the Court below.

PW1 called one witness; Hellen Nkandu Jere. I will continue to refer to her as PW 2. PW2 is a social worker employed by the Lusaka City Council. PW2 is based at Kanyama. PW2 testified as follows: PW1 was referred to him by his supervisor at Civic Centre, a Mr. Phiri. She was requested to investigate the dispute surrounding the property in issue. After she conducted the investigations, she found two different houses with two different numbers. One relates to a big house, and is numbered 27/13. The other is a small house, and is numbered 27/12. The two properties are separate. And they also have separate occupancy licences. The ground rates are also received separately. During cross-examination by the 1st defendant, PW2 reiterated that house number 27/13 refers to a big house, and house number 27/12 refers to the small house.

The defence was opened by Clementina Banda; the 1st defendant. And I will continue to refer to her as the 1st defendant. The 1st defendant is a personal secretary at the National Housing Authority. The 1st defendant testified as follows: that she bought plot number 27/12 sometime in 1997, from a Mr. Mugala. The plot measured 30 x 40 metres. She built a three bedroomed property up to window level. Sometime in 2005, the person who was contracted to build the property for her, informed her that she had been summoned by the Chairman of the area. The reason why she was summoned, was to make him aware that the area had been legalised and therefore was urged to go to Civic Centre to settle the ground rates. She went to Civic Centre and presented the Land Record Card given to her by the vendor. At Civic Centre, the Land Record Card was not accepted. And she was advised to go to Kanyama to collect the number for the property. At the Council office in Kanyama, she was advised that the plot number for her property is 27/12. Whilst at the Council office in Kanyama, she settled the

sum of K 5, 000=00; a levy payable by residents in Kanyama. Whilst still at Civic Centre, she paid the sum of K 100, 00=00, as ground rates. Thereafter, she took the receipt issued at Civic Centre to the Council office in Kanyama to enable the Council officials register her for the purpose of paying ground rates.

The 1st defendant further testified that in the early part of 2007, she decided to sell her plot. Thus in the company of two estate agents she went to the site. To her utter surprise, she found that her house had been demolished, and someone was constructing on the plot. After that discovery, she left her telephone number with her neighbours, and requested them to pass on her telephone number to whoever was constructing on her plot with a message that he should contact her. This was to no avail. She then decided to put up a notice on the plot stating that whoever is constructing should stop. On the same notice she indicated her telephone number.

Shortly after she put the notice on the plot, she was contacted by a person by the name of Chris who enquired why she had put up the notice inviting the person concerned to come to the plot with all the relevant documents showing how that person acquired the plot. Chris informed her that the owner of the plot died. She asked Chris why despite the notices, he had continued to build. Chris replied that that is the way plots are acquired in the area. And was advised to continue building by the plaintiff. Chris also informed her that the plot was sold to him by MMD cadres, under the pretext that the owner had died. She requested Chris to direct her to the person who sold to him the plot.

Eventually, the Chairman informed her that it was the plaintiff who sold the plot to Chris and used the money personally. The Chairman requested him to be lenient with Chris, and allow him to continue building. Further, the 1st defendant testified that the Chairman suggested that Chris should

compensate her. She spurned the offer. And requested Chris to reconstruct what he had destroyed. Chris pleaded with her that she should sell the plot to him since she in any event intended to sell the plot. Eventually, she relented, and gave Chris six months within which to pay for the plot. Later, she learnt that Chris had been refunded by the plaintiff half of the amount, Chris had paid to the plaintiff. Thus when she asked Chris whether he was still interested in buying the plot, Chris told her that he could go ahead and sell the plot to anyone.

At that juncture, she requested some of his colleagues from her office to go and clear the area for her. It was at that point that she was informed that the plaintiff was harassing them, and alleging that the plot was his. She then decided to meet the plaintiff. Initially, the plaintiff refused to meet her. Later on, she went to Kanyama to have an audience with the plaintiff.

Subsequently, she also decided to erect a notice stating that the property was for sell. As a result, Emmanuel Nyanje; the 2nd defendant expressed interest in the plot. Since the 2nd defendant was interested, she decided to sell the property to the 2nd defendant; and eventually transferred the plot to the 2nd defendant.

After the acquisition, the 2nd defendant employed caretakers to secure the property. It is then that the plaintiff started harassing the caretakers. As a result, the 2nd defendant contacted the 1st defendant and requested her to intervene. The 1st defendant requested the plaintiff to contact her. The 1st defendant testified that the plaintiff did not bother to contact her. The 1st defendant then decided to go to Kanyama with the 2nd defendant. When the 1st defendant met the plaintiff, and the chairman, the 1st defendant was informed that the property belonged to the plaintiff because it had been repossessed from her. The 1st defendant testified that the plaintiff and the

chairman pleaded that they should reach a compromise. She however decided to report the matter to Kanyama Police.

The plaintiff was summoned to the police station. The plaintiff was accompanied to the police station by the Chairman. At the police station, the plaintiff and the Chairman confirmed that a colleague of theirs, who had since died, is the one who sold the plot to the plaintiff. And that the plaintiff came on to the site with an occupancy licence for plot 27/13. Further, the plaintiff confirmed that he is the one who was constructing on the plot. Furthermore, the plaintiff informed the police officer that he had contracted Chris as his builder.

Since the plaintiff and herself had documentation evidencing ownership, the police officer decided to refer the plaintiff and herself to the Council office in Kanyama. Officials in Kanyama confirmed that the plot was the 1st defendant's. The confirmation by the Council was also reinforced by information gathered from neighbours. The 1st defendant testified that the plaintiff and herself were then referred to the Civic Centre to verify whether or not the documents in possession of the plaintiff were genuine. She testified that he did not go to the Council with the plaintiff. Instead, the 1st defendant was served with a Local Court summons. At the conclusion of the trial in the Local Court, the plaintiff lost the case.

During cross-examination by the plaintiff, the 1st defendant maintained that there is only one plot in dispute. Namely, plot 27/12. She also maintained that she bought the plot in question from a Mr. Mugala. And later sold the house on plot number 27/12 and not plot 27/13.

The 1st defendant testified under cross examination by the plaintiff that that when her house was demolished, she reported the matter to the police station at Kanyama. The police officers advised her to contact the person

who had demolished the house. The police officers further advised her that if she had any difficulties in locating the person who demolished the house, she should revert to the police officers.

The 1st defendant also testified that she believed the account by Chris. Further, she maintained that her plot number was 27/12. And the number 27/12 was written on the building when she bought the plot. She maintained that plot number 27/13 does not in fact exist.

The second witness for the defence was Emmanuel Nyanje; the 2nd defendant; The 2nd defendant testified that sometime in June, 2008, he applied for a loan from the Pension Board to purchase a house. Whilst he was searching for a house to purchase, he met a Mr. Phiri who informed him that there was a house available in Kanyama. The following day he went with Mr. Phiri to Kanyama, and was shown a house on which it was written, "*House for Sale.*" Alongside the inscription; "*House for Sale,*" was a mobile telephone number. The house was incomplete.

After he was shown the house by Mr. Phiri, he enquired from a teacher in the neighbourhood who the owner of the house was. He was informed that the house belonged to the 1st defendant, and that she was also the owner of the mobile phone number depicted on the wall. He then decided to contact the 1st defendant. When he contacted the 1st defendant, he was advised to meet her the following day at her work place. The following day, he went to her work place. When he met her, she confirmed that the house in question was hers, and that she had documents to prove her ownership of the property. He expressed interest in the property and requested for a copy of certificate of title for him to present to the Pensions Board. The parties also agreed on a purchase price of K 25 million. The 2nd defendant took the documents evidencing ownership to the property, to the Pensions Board. The Pensions

Board in turn wrote to the Civic Centre to confirm whether or not the property belonged to the 1st defendant.

After the 2nd defendant paid for the property, he took some workers to the site to work on the property. The workers were on site for three days. After the third day, the 2nd defendant received a telephone call from his workers that the plaintiff was claiming that the property in question was his. He advised his workers to ignore the plaintiff because he was a party cadre. However, the plaintiff persisted. He then advised his workers that the plaintiff should be given his number. Eventually, the plaintiff was given the 2nd defendant's number. And the plaintiff contacted the 2nd defendant. When the plaintiff contacted the 2nd defendant, he claimed that the property was his. The 2nd defendant countered that the property was his, as he had bought it from the 1st defendant. In view of the fact that the plaintiff persisted in his claim, he decided to meet the plaintiff in person.

During the meeting with the plaintiff, the plaintiff persisted in his claim that the property was his. The plaintiff claimed that he had an occupancy licence to the property. The plaintiff produced an occupancy licence registered in his name, and has plot number 27/13 endorsed on it. Yet the wall of the property in dispute still had plot number 27/12 inscribed on it. After the encounter with the plaintiff, the 2nd defendant then decided to give the plaintiff, the 1st defendant's number. The plaintiff refused to accept the number. The 2nd defendant then decided to call the 1st defendant himself. The 1st defendant agreed to meet with the 2nd defendant the following Saturday.

The following Saturday, the 1st and the 2nd defendants, met with the plaintiff in the presence of the Chairman. During that meeting, the Chairman confirmed the following: that the owner of the property was the 1st defendant. The 1st defendant had developed property up to window level.

The Chairman confirmed that they repossessed the plot and sold it to another person. The chairman informed the meeting that he repossessed and resold the property because he was responsible for allocating the plots in the area. This was done in concert with the plaintiff.

The 2nd and the 1st defendants did not accept the explanation given by the Chairman and the plaintiff. Thus the duo; (the 1st and 2nd defendant), decided to report the matter to the police. At the police station, both the plaintiff and the 2nd defendant produced evidence of ownership of the property. The police officers decided to refer the plaintiff, and the 2nd defendant to Civic Centre. Thus he arranged with the 1st defendant to go to Civic Centre. The plaintiff was unable to accompany them, because he said he was busy.

At the Civic Centre, the 2nd defendant testified that he conducted a search on plot 27/13. There were no entries on plot 27/13. A search on plot 27/12, revealed that the property was registered in the name of the 2nd defendant. Later, the 2nd defendant was sued in the Local Court, and judgment was entered in his favour. After the plaintiff lost the case in the Local Court, he sued the 2nd defendant again. The 2nd defendant maintained that plot 27/13 and 27/12 is the same plot.

The first witness for the 2nd defendant was Mabuko Kalima. And I will continue to refer to him as DW1. DW1 is a Legal Assistant with the Lusaka City Council. And is based at Civic Centre. DW 1 testified that he has records for plot 12/27. And plot 12/27 was registered in favour of the 1st defendant sometime in 2007. The registration was done at the Council office in Kanyama. Further, DW1 testified that he has not come across plot 27/13. And does not know whether or not it exists.

The second witness for the 2nd defendant was Noble Kalima Kwenda; i will continue to refer to her as DW2. DW2 is a Field Team Leader responsible for

Kanyama, Chibolya, and John Laing areas. According to DW2, both plot 27/12 and 27/13 exist in the records. 27/12 is registered in favour of the 1st defendant. And 27/13 is registered in favour of the plaintiff. DW2 also testified that officials at Civic Centre omitted to register plot 27/13.

JUDGMENT

The judgment in this matter was delivered on 31st March, 2010. After reciting the testimony of the parties, and the witnesses, the learned trial magistrate found the following evidence to be common cause. First, that both parties claim to have plots in Kanyama, and produced documentary evidence to that effect. Second, that plot 27/12 belongs to the 1st defendant, and plot 27/13 belongs to the plaintiff. The issue that fell for determination in the considered view of the learned trial magistrate was whether or not plot 21/12 and 27/13, is one plot or are two separate plots.

The learned trial magistrate went on to observe that from the evidence of the plaintiff and 2nd defendant, it is not in dispute that both have documentation in relation to their respective properties. However, the learned trial magistrate noted that the 2nd defendant maintained that plot 27/13 did not exist as plot 27/12. And 27/13 is one plot under the number 27/12.

The learned trial magistrate further observed that the 2nd defendant expressed ignorance as to whether 27/13 did in fact exist. The learned trial magistrate went on to observe that having seen the documents produced by both parties, he concluded that plot 27/12 and 27/13 are separate plots, owned by different individuals. The learned trial magistrate held that plot 27/12 belonged to the 1st defendant and plot 27/13 belongs to the plaintiff. The learned trial magistrate then made the following observation albeit *obiter dicta*. Wit;

“The law in Zambia under the Lands and Deeds Registry Act does support this finding as the law provides that title is conclusive evidence of ownership unless the contrary is proved. As the title of the plaintiff has not being challenged, i find the same conclusive evidence of ownership of land by the plaintiff.”

Ultimately, the learned trial magistrate issued the following order:

“I therefore order as follows:

- 1. 27/13 belongs to the plaintiff;*
- 2. The defendants shall leave that the plaintiff has vacant possession of the said land;*
- 3. Each party to bear their own costs; and*
- 4. Any party dissatisfied by this judgment can appeal against the same within 30 days from Friday, and having paid K 3 million as security for costs”*

GROUNDS OF APPEAL

The defendants were dissatisfied with the judgment of the learned trial magistrate, and filed the following grounds of appeal:

1. The Court below erred in that it did not consider the 1st defendant’s evidence properly, thereby failing to resolve the matters in controversy;
2. The plaintiff changed positions about the plot when during proceedings in the Court below he introduced what was not pleaded before to contend that there were two plots; and
3. Further grounds as may be filed later.

The preceding grounds were later recast to read as follows:

1. The Court below erred in law and fact by trying the action afresh when the respondent who had lost his case at the Local Court did not appeal against the decision of the Local Court either within the time limited, or

outside the time limited after having been informed of the right to appeal within 30 days but failed to do so and instead commenced a fresh action by writ of summons and statement of claim filed on 14th April, 2009. A copy of the writ of summons and statement of claim are attached; and

2. The Court below erred in law and fact by holding that there are two plots 27/12 and 27/13, and that the plaintiff has title to the same land the 1st defendant had owned before the plaintiff obtained title;

HEADS OF ARGUMENTS

The two grounds of appeal were addressed in detail in the heads of arguments filed by Mr. Kabonga. Under the first ground of appeal, Mr. Kabonga argued that a Court judgment that is not appealed against or set aside by a High Court remains in force. In aid of this submission, Mr. Kabonga referred me to a passage from Odgers, Principles of Pleading and Practice, (1971) (Stevens and Sons, London) at pages 306 as follows:

“A judgment finally disposes of all controversy as to matters in issue in the action. The rights of the parties as to any such matter depend in future wholly on the judgment. As long as that judgment stands, none of the issues raised in the action can be re-tried. The original cause of action is gone, transit in rem judicatum. It is merged in the judgment. This result is peculiar to a judgment; a mere stay of proceedings or the acceptance of money paid into Court has not the same effect.”

Thus Mr. Kabonga argued that the commencement of the fresh action by the plaintiff in the Court below was a nullity. Still under the first ground of appeal, Mr. Kabonga argued that the commencement of the fresh action by the plaintiff was an abuse of the Court process. Mr. Kabonga quoted from Fleming, The Law of Torts, 3rd Edition, (Halstead Press, Sydney, 1965) at pages 591 - 592, the following passage:

“The essential elements of abuse of process are: first, a collateral or improper purpose such as extortion, and second, a definite action, or threat in furtherance of a purpose not legitimate in the use of the process. Some such overt conduct is essential because there is clearly no liability when the

defendant merely employs regular process to its proper conclusion all but with bad intentions.”

Mr. Kabonga submitted that a failure to appeal by the plaintiff against the judgment of the Local Court constituted an improper motive on the plaintiff's part. Mr. Kabonga contends that the plaintiff had not right to commence a fresh action in a matter that was decided in favour of the 1st defendant.

As regards the second ground of appeal, Mr. Kabonga argued that the learned magistrate failed to resolve the issue of who truly owned the land in dispute. Mr. Kabonga submitted that the 1st defendant categorically denied that there were two plots; 27/12/ and 27/13. Mr. Kabonga maintains that there was only one plot in issue. Namely, plot 27/12, which belonged to the 1st defendant. Mr. Kabonga suggested that plot 27/13 might have been created through the intervention of the plaintiff and behind the back of the 1st defendant. To support this suggestion, Mr. Kabonga referred to the following illustrations;

1. the plaintiff's name does not appear in the records (see memorandum 02/04/09, from Kanyama);
2. the ground rent Registration Form dated 22/03/07 and marked BM 11 in the record of appeal is in conflict with the memorandum dated 02/04/09. In that the memorandum of 02/04/09 denied that there was a name against plot number 27/13. Mrs. Jere is the author of the memorandum dated 02/04/09; and
3. the 1st defendant purchased her plot in 1997. While the plaintiff obtained title of the same plot on 24th February 2003; seven years later.

Mr. Kabonga argued that the 1st and 2nd defendant's title supercedes the plaintiff's title. Mr. Kabonga further argued that the learned trial magistrate should have been guided by the maxim of equity which stipulates that *“first in time, is the first in right.”* Mr. Kabonga pressed that where there are equal

equities, the first in time prevails, *qui prior est tempore potior est jure* (meaning; *He who is first in time has the strongest claim in law.*")

Mr. Kabonga argued that in this case there is really no dispute about whose interest ranks in priority. Mr. Kabonga submitted that the 1st defendant has priority over the plaintiff. Further, Mr. Kabonga argued that the 1st defendant's priority was passed on to the 2nd defendant, who in any case purchased the plot as a *bona fide purchase for value without notice*. These competing interests, Mr. Kabonga maintains were not properly considered by the learned trial magistrate. In short, Mr. Kabonga submitted that the plaintiff has no superior title to the plot in question. Rather, it is the 1st and 2nd defendants who have prior interest and title to the plot. Thus ultimately, Mr. Kabonga urged me to set aside the learned trial magistrate's order because it was misdirected both in law and in fact.

Mr. Phiri on behalf of the respondent filed the heads of argument on 9th November, 2010. Mr. Phiri submitted that the learned trial magistrate was on firm ground when he entertained a fresh action initiated by the plaintiff because it was an entirely different matter from the one before the Local Court. Mr. Phiri pointed out that parties before the learned trial magistrate were the plaintiff and the 2nd defendant. And the claim was that the 2nd defendant should vacate the property built by the plaintiff on plot 27/13.

Mr. Phiri submitted that the claim in this case is in respect of plot 27/13, as opposed to plot 27/12. Mr. Phiri submitted that the learned trial magistrate made it clear that the two properties are different. Namely, that plot 27/13 is for the plaintiff and plot 27/12 is for the defendants. Furthermore, Mr. Phiri submitted that the 1st defendant sold the property in dispute to the 2nd defendant which she did not build.

Mr. Phiri contends that the Local Court dismissed the matter on the ground that the plaintiff had sued a wrong party. As a result, the plaintiff had an option of suing the right party. Hence the suit against the 1st defendant. Further, Mr. Phiri argued that the Local Court is not a Court of record. And therefore, the learned trial magistrate has the power of revision over the Local Court and or from the Local Court *de novo*. That is to say, starting the matter afresh. Thus Mr. Phiri urged that the learned trial magistrate had jurisdiction to try the matter *de novo*.

In relation to the second ground of appeal, Mr. Phiri argued that the learned trial magistrate was on firm ground when he held that they are two separate plots. Namely, plots 27/12 and 27/13. Mr. Phiri contends that the two plots are evidenced by Land Record Cards. Mr. Phiri endorsed the submission by Mr. Kabonga that the first in time has the strongest claim in law. Mr. Phiri maintains that the plaintiff was first because he obtained his title on 14th June, 2007. While the 1st defendant obtained hers on 1st November, 2007.

THE LAW

I am indebted to counsel for the spirited submissions and arguments in this matter. As I see it, two questions fall to be determined in this appeal. The first is whether the plaintiff was barred from starting a fresh action in the Subordinate Court, having lost the action in the Local Court. And the second question is who is entitled to the property in dispute.

APPEALS FROM LOCAL COURTS; HEARD DE NOVO

I would like to state at the outset that any interested party who is aggrieved by any judgment, order, or decision of a Local Court may appeal to the Subordinate Court of the First Class, or Second Class within whose area of jurisdiction such Local Court is situate. (See section 56 (1) of the Local Court Act). Whenever such an appeal is made, it takes the form of a rehearing, unless the appellate Court in its discretion, shall see fit to dispense with

rehearing with all, or part of such rehearing. (See section 58 (2) of the Local Courts Act).

The provisions of section 58 (2) of the Local Courts Act were the subject of interpretation by the Supreme Court in the case of *Mwiimbu v Habeenzu* (1977) Z.R. 111. The facts of the case were that the appellant sued the respondent in the Local Court for damages for the impregnation by the respondent of the appellant's daughter. The respondent was ordered to pay K 200 damages, and his appeal to the magistrate's Court was unsuccessful save that damages were reduced on further appeal to the High Court. The appeal was allowed on the basis that the Court below had not properly construed a vital piece of evidence given by the appellant. The magistrate had not exercised its power to re-hear the evidence. In delivering the judgement of the Supreme Court, Gardner JS, made the following observation at page 113:

"It is unfortunate that the magistrate who heard the appeal from the Court saw fit to dispense with a rehearing of the evidence."

Gardner JS reproduced the provisions of section 58 (2) of the Local Courts Act. And he then went on to observe as follows at page 113:

"The terms of this section are directory, and mean that in general the magistrate should rehear all the evidence. In special circumstances, a magistrate may exercise his discretion to dispense with a rehearing for example, where all or part of the evidence consists of admitted facts, or where the evidence of one or more witnesses is purely formal. In any case, where the question of credibility of witnesses is involved their evidence should be taken afresh."

Thus appeals from the Local Courts are heard *de novo* by magistrates in the Subordinate Courts. A re-hearing is especially necessary where the credibility of the witnesses is in issue. Hearing of the appeals *de novo* can only be dispensed with, where the evidence consists of admitted facts or where the

evidence of one, or more witnesses is purely formal. That is, not controversial.

RES JUDICATA ESTOPPEL

The Learned authors of Phipson on Evidence, Seventeenth edition, (Thomson Reuters (Legal) Limited 2010, state in paragraph 5, - 08 at page 112, as follows: that estoppels by record originally principally comprised judgments the conclusiveness of which is considered in conjunction with their admissibility. However, the modern tendency is to refer to estoppels based on judgments as estoppels by *res judicata*. The learned authors of Phipson on Evidence, (supra), go on the state in paragraph 43-23, at page 1433, as follows:

“A final adjudication of a legal dispute is conclusive as between the parties to the litigation and their privies as to the matters necessarily determined, and the conclusions on these matters cannot be challenged in subsequent litigation between them. This principle applies absolutely to a conclusion that a cause of action does not exist, but it will not apply to other issues necessarily determined if there are special circumstances.”

The learned authors of Phipson on Evidence (supra) conclude as follows in paragraph 43-24 at page 1433:

“The principle that estoppel arise from a judgment in previous litigation between the same parties applies in general to all civil litigation, including arbitrations, and civil proceedings in Courts of summary jurisdiction. A cause of action estoppel operates to prevent a party relitigating a claim he has lost, even if he is now able to show that the earlier decision was wrong.”

Thus estoppels based on judgments are now referred to as estoppels by *res judicata*. The effect of an estoppel by *res judicata*, is that a final adjudication of a dispute is conclusive as between the parties to the dispute. Estoppels by *res judicata*, operate to prevent a party re-litigating a claim he has lost, even

where he can show that the earlier decision was in fact wrong. It is instructive to note that the term “*parties*” includes not only those named on the record, but also those who had an opportunity to attend the proceedings. (See *Evans v Norton* [1893] 1 Ch 252, at 264; and *Wakefield v Cooke* [1904] A.C. 31 at 36).

In sum, where a person seeks to rely on a cause of action estoppel to prevent a claimant from pursuing a subsequent case, it will be clearly necessary to establish that the Court in the first case did in fact determine the non-existence cause of action. (See Phipson on Evidence, (supra) paragraph 43 - 30 at page 1440).

WAIVER

There are two separate doctrines which are often referred to as “*Waiver.*” These two doctrines are also associated with the doctrine of estoppel. By the way, in modern law, the term estoppel is used to describe a variety of devices, some of which merely have the effect to precluding a party from denying a particular fact or assumption. (See Phipson on Evidence, (supra) paragraph 5 - 01, at page 100).

These two types of waiver are distinguished by the terms “*waiver by election,*” and “*equitable waiver.*” According to the learned authors of Phipson on Evidence, (paragraph 5 - 33, at p. 130), a “*waiver by election*” is described in the following terms: a waiver by election occurs when a party acts to the knowledge of another party in that is consistent with choosing to rely on one or two alternative, and mutually exclusive rights. The effect of such an election is that the party will be precluded from asserting the other right. However, a party will only be held to such an election if he knew, or had the means of knowing the existence of the alternative rights. (See *Peyman v Lanjani* [1985] Ch 457).

The learned authors of Phipson on Evidence, (supra), go on to state in paragraph 5 - 33, at page 131, regarding “*equitable waiver*,” as follows: “*Equitable waiver*” occurs when a party lead another to believe that he will not rely on a particular right. (See *Hughes v Metropolitan Railway Company* [1877] 2 A.C. 439). This doctrine is closely associated with the doctrine of promissory estoppel. The doctrine requires a clear representation, though usually of a future conduct, and action in reliance by the representee.

At this juncture, I will now pass to apply the law to the first the question or issue. Namely, was the plaintiff barred from starting a fresh action in the Subordinate Court, having lost the action in the Local Court. First, it is trite law that any interested party who is aggrieved by any judgment, order, or decision of the Local Court may appeal to the Subordinate Court. And whenever such an appeal is made, the matter is heard *de novo*, or afresh, unless of course there exists good, and sufficient reasons to dispense with a hearing. In this particular case, it is contended by the defendants that the earlier decision by the respondent in the Local Court was not appealed against. Instead, the respondent commenced a fresh action in the Subordinate Court. The plaintiff concedes that the Local Court dismissed the matter on the ground that the plaintiff sued a wrong party. Consequently, the plaintiff elected instead to sue the right party in the Subordinate Court. My finding on this point is that the earlier decision by the Local Court was not appealed against. And the plaintiff proceeded to initiate fresh proceedings.

In the circumstances, the defendants contend that the commencement of the fresh action by the plaintiff in the Court below was a nullity because it amounted to an abuse of the Court process. This submission imports in my opinion, the notion of *res judicata* estoppel. Namely, that a final adjudication of a legal dispute is conclusive as between the parties to the litigation, and a party who has lost a claim is not permitted to relitigate the same issue. I must state at once that the defendants have not shown me that the parties

to this action, litigated the present cause of action before the Local Court. Yet a party to any proceedings before a Local Court may on payment of an appropriate fee procure a copy of any record of the proceedings made by a Local Court (See section 16 (2) of the Local Court Act).

In any event the objection by the defendants should have been made before the Subordinate Court, because when the plaintiff initiated the fresh action, the defendants were already aware____, at least according to their claim____, that the same cause of action by the same parties had already been litigated upon before the Local Court. Thus on the basis of the doctrine of waiver, the defendants are precluded from asserting their rights. Furthermore, since the defendants did not raise the issue of *res judicata* estoppel before the Subordinate Court, they are prevented from raising it on appeal. In stating this proposition, I am fortified by the decision of the Supreme Court in the case of *Mususu Kalenga Building Limited and Another v Richman's Money Lenders Enterprise (1999) Z.R. 27*. In the *Mususu Kalenga* case, the Supreme Court said that where an issue was not raised in the Court below, it is not competent for a party to raise it for the first time on appeal.

EQUITY

The second, and central question in this appeal is simply this: who is entitled to own the property in dispute: in answering this question I will provide the backcloth of the germane law. It is instructive to note that in terms of section 13 of the High Court Act, I am required to administer law, and equity concurrently. In this particular case, the resolution of the dispute at hand, largely imports principles of equity.

John Mc Ghee Q.C, in his book entitled Snells Equity, (Thomson Reuters (Legal) Limited 2008), states in paragraph 4 - 03, at page 56, that at law, as

in equity, the basic rule is that estates, and interests primarily rank in the order in which they are created. In equity, the result is expressed more directly in terms of temporal priority. The maxim is this: *“qui prior est tempore potior est jure.”* That is, *“he who is earlier in time is stronger in law.”* The learned author of Snells Equity, (supra), goes on to state in the same paragraph 4 - 03, that, accordingly, where there are two competing equitable interests, the general rule of equity is that the person whose equity attached to the property first will be entitled to priority over the other. Where the equities are equal, and neither claimant has the legal estate, the first in time prevails, since: *“every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity possess only that which he is justly entitled to and no more.”*

Jill Martin, in his book entitled, Hanbury, and Martin, Modern Equity, (Sweet and Maxwell Limited, 1997), puts the point in this way at page 27:

“Thus prior equitable interest in land can only be defeated by a bona fide purchaser, and without notice, then the equities are equal, and his legal estate prevails. If he took with notice, the position is otherwise, as the equities are not equal. If he does not acquire a legal estate, then the first in time, i.e the prior equitable interest prevails, as equitable interests rank in order of creation.”

BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE

The learned author of Snells Equity, states in paragraph 4-21, at page 65, that an important qualification to the basic rule of first in time priority of interests is the doctrine of *bona fide purchaser for value without notice*, which demonstrates a fundamental distinction between legal, and equitable interests in some kinds of property. (See *Macmillan v Bishopsgate Trust (No. 3)* [1995] 1 W.L.R. 978 at 1001). The learned author of Snells Equity, (Supra) goes on to state in paragraph 4 - 22 at page 65 - 66 that:

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

The onus lay on the purchaser to prove that he was a bona fide purchaser for value, and also that he took without notice of the equitable interest.”

In sum, the following requirements need to be fulfilled when relying on the doctrine:

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

How then are the equities to be assessed and determined, in this matter? The answer to this question is that it is a question of evidence. And further since this not a trial of the action, but rather an appeal, it is proper and inevitable, to consider the principles that inform the evaluation of evidence on appeal.

JURISDICTION OF AN APPELLATE COURT

The *locus classicus* of the approach to be taken by an appellate Court in evaluating evidence is the case of *Nkhata and Others v Attorney General* (1966) Z.R. 124. The following seminal principles were settled in the *Nkhata* case. That is, a trial judge sitting alone without a jury can only be reversed on fact, when it is positively demonstrated to the appellate Court that:

- a) By reason of some non-direction, or mis-direction, or otherwise, the judge erred in accepting the evidence which he did accept; or
- b) In assessing, and evaluating the evidence, the judge has taken into account some matter which he ought not to have taken into account, or failed to take account some matter which he ought to have taken into account; or
- c) It unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen, and heard the witnesses; or
- d) In so far as the judge has relied on manner, and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted, it is not credible, as for instance, where those witnesses have on some collateral matter given an untrue answer.

In addition to the *Nkhata* case, there is also a line of other Zambian cases that have variously defined the appellate Court's concerns, and jurisdiction when evaluating the findings of fact, of trial Courts. The first case is the case

of *Diamond v Standard Bank of South Africa Limited (Executor) and Others* (1965) Z.R. 61. This was an appeal before the Court of Appeal, in respect of an order of the trial Court dismissing an application by the appellant under the Inheritance (Family Provision) Act, 1938, for reasonable provision for maintenance to be made out of the net estate of the deceased; Sidney Diamond.

The judgment of the Court of Appeal was delivered by Charles J. In the course of the judgment, the Court of Appeal made the following observation at the page 66:

*“It follows that, if there is a distinction between appeals in respect of discretionary judgments, or orders, and appeals in respect of non-discretionary judgments, or orders, the concerns of an appellate Court on an appeal relating to an order under the Act is that which arises on appeals in respect of any non-discretionary judgment, or order. That concern is whether the judgment or order of the Court below was wrong in principle, or application of the relevant law, whether its findings of primary facts were supported by the evidence, and by a proper approach to the evidence, and whether its conclusions from the primary facts were correct. It may be noted in passing that if there is a distinction between the two classes of approach, it is not as to the concern of the appellate Court, but only in the scope afforded to the appellate Court to manifest its concern: with either class, the appellate Court will allow the appeal if it is satisfied that the trial judge was wrong. (See *Ward v James*, [1965] 1 ALL E.R. 56).”*

The second case to be considered is the case of *Kenmuir v Hattingh* (1974) Z.R. 162. The facts of the case are that the appellant appealed from a decision of the High Court dismissing his claim for damages arising out of an accident. His appeal was based on the ground that the trial judge made no findings as to distance, or other important issues raised by the evidence, and that his finding that the plaintiff was solely to blame for the accident was against the weight of evidence. The respondent while conceding that the trial judge made no findings on important issues, submitted that there was in fact sufficient on record to enable the Court to make its own findings of fact,

and to determine the issue. In a judgment delivered by the then Deputy Chief Justice Baron, the Supreme Court held as follows at page 163:

“An appeal from a decision of a judge sitting alone is by way of rehearing on the record, and the appellate Court can make the necessary findings of facts, if the findings were conclusions based on facts which were common cause or, on items of real evidence when the appellate Court is in as good a position as the trial Court.”

The third case that will be referred to, is the case of *Sithole v State Lotteries Board (1975) Z.R. 106*. The facts of the case were that the appellant appealed against a decision of the High Court refusing a declaration that the respondent wrongfully refused to pay the appellant the sum of K 35, 500=00, which the appellant claimed he won at a Pick a Lot draw held on the 2nd September, 1977. In a judgment delivered on behalf of the Supreme Court, Deputy Chief Justice Baron, as was then, observed as follows at page 115:

“An appeal to this Court from judge sitting alone is a re-hearing on documents, including the judges notes. This Court is judge of Court.”

In the course of the judgement, Baron D.C.J, referred to passage by Lord Atkins in *Powell v Streatham Manor Nursing Home [1935] A.C 249*, at page 255, as follows:

“I wish to express my concurrence in the view that on appeals from the decision of a judge sitting alone without a jury the jurisdiction of the Court of Appeal is free and unrestricted. The Court has to re-hear, in other words has the same rights to give decisions on the issues of the fact, as well as law as the trial judge.”

In the *Sithole* case, Baron D.C.J, went on to comment as follows at page 116:

“This is clearly a case which turns on inferences from facts which are not in doubt; there is no question here of the learned trial judge having made

findings of facts in respect of conflicting stories based on his impressions of the witnesses; the question for this Court is therefore what is the proper inference to draw from the findings of fact in paragraphs (e), and (f) referred to above, and in this regard, since we are in as good a position as the trial Court to draw the inferences, this Court is at liberty to substitute its own opinion which the trial Court, might have expressed.”

The principles adumbrated, and embraced in the preceding line of Zambian cases may be summarised as follows: an appeal from a trial magistrate, or trial judge sitting alone is a rehearing on the record or documents, including the trial magistrate’s, or trial judges notes. In other words, an appellate Court has the same rights to give decisions on the issues of fact as well as law, as the trial magistrate or trial judge. Thus the jurisdiction of the appellate Court is free, and unrestricted.

Thus an appellate Court can make the necessary findings of facts, if the findings were conclusions based on facts which were common cause, or on items of real evidence, when the appellate Court is in as good as position as the trial Court. Where an appellate Court is in as good a position as the trial Court, it can draw inferences, and is also at liberty to substitute its own opinion with that of the trial magistrate, or trial judge, as the case may be.

Therefore, the findings of facts of a trial magistrate, or trial judge can only be disturbed, or interfered with where it is positively demonstrated that: a trial magistrate, or trial judge erred in accepting the evidence; took into account some matter which he ought not to have taken into account; or failed to take into account a matter which he ought to have taken into account; failed to take proper advantage of his having seen, and heard the witnesses; or the evidence which he accepted was palpably not credible.

I will now turn to apply the principles referred to above to this case. The plaintiff testified that he bought the property in issue on 24th February, 2003, from the MMD Constituency Committee at K 500, 000=00. Following the

purchase, he proceeded to construct a two roomed house. Sometime in July/August, 2008, he was informed that the 2nd defendant was installing door frames, and window frames on his property.

The 1st defendant testified as follows: he bought the property number 27/12, sometime in 1997, from a Mr. Mugala. After the purchase, she constructed a three bedroomed property up to window level. She regularised ownership of the property with the Lusaka City Council sometime in 2005. And at the time of the regularisation, she was told that the property number was 27/12.

Further in 2007, she decided to sell the property in question. Thus in the company two estate agents she went to the site. To her utter surprise, she found that her house had been demolished, and someone else was constructing on the plot. In due course, she discovered that the person who was developing the plot was a person by the name of Chris. When confronted, Chris claimed that the plot was sold to him by some MMD cadres. In the course of further investigations, she came to learn that it is the plaintiff who sold the plot to Chris. After approaching Chris, the MMD Chairman for the constituency interceded in the matter. The chairman is said to have pleaded with her, and persuaded her, to permit Chris to continue with the development. The chairman suggested in the alternative that Chris should compensate her for the development. She spurned the offer. Eventually, she elected to offer property to Chris. And Chris was given six months in which to settle the purchase price. However, Chris did not settle the purchase price. Instead, she learnt that Chris had been refunded half of the purchase price by the plaintiff. Thus when she enquired from Chris whether he was still interested in the plot, Chris is said to have told her that he was not, and that she could go ahead and sell the property. As a result, she sold the property to the 2nd defendant.

The testimony of the 1st defendant was corroborated by DW1, and DW2. To recapitulate, DW1, was Mabuko Kalima; a Legal Assistant with the Lusaka City Council. And DW 2 was Noble Kalima Kwende; a Field Team Leader, responsible for Kanyama, Chibolya, and John Laing areas. DW1 confirmed that plot number 12/27 was registered in favour of the 1st defendant sometime in 2007. He however expressed doubt as to whether plot 27/13 actually exists. DW2 also confirmed that plot 27/12 is registered in favour of the 1st defendant. And plot 27/13 is registered in favour of the plaintiff.

The 2nd defendant confirmed the he purchased the plot in question from the 1st defendant. (See memorandum dated 23rd July, 2008, from the Chief Housing Officer, to the Council Registrar recommending change of ownership from the 1st defendant to the 2nd defendant at page 27 of the Record of Appeal). Before doing so, he was shown documents depicting the 1st defendant as owner of plot 12/27. The 2nd defendant also testified that before the Pensions Board disbursed the loan that enabled him to purchase the property, the Board enquired from the Lusaka City Council, whether, or not the 1st defendant owned the plot in dispute.

From the preceding evidence, the following findings facts can be made from the undisputed evidence:

- a) The plaintiff bought the property in issue on 24th February, 2003, from the MMD Constituency Committee;
- b) The 1st defendant bought the property in issue from a Mr. Mugala sometime in 1997;
- c) The 1st defendant regularised ownership of the property with the Lusaka City Council sometime in 2005. And the property was numbered as plot 12/27;

- d) The ground Rent Registration Form dated 22nd March, 2007, reflects that plot 12/27 belongs to the 1st defendant. And plot 13/27 belongs to the plaintiff. (See page 19, and 35 of the Record of Appeal).
- e) The plaintiff holds an Occupancy Licence number 22765 in relation to plot 13/27 (see page 14 of the Record of Appeal).
- f) The 1st defendant was issued an Occupancy Licence number 22368, in relation to plot 12/27 (see page 26 of the Record of Appeal).
- g) DW 1, and DW2 confirmed that plot number 12/27 belongs to the 1st defendant. And DW2 confirmed that plot 27/13 belongs to the plaintiff; and
- h) The 2nd defendant bought plot 12/27, from the 1st defendant. And at the time of the purchase, the 1st defendant was in possession of documents showing that he was registered owner of plot 12/27.

In view of the foregoing, I have no hesitation in pronouncing, and declaring that the 1st defendant was first in time to own plot 12/27. And that he lawfully sold plot number 12/27 to the 2nd defendant; a *bona fide purchaser for value without notice*. For avoidance of doubt, I declare that plot 12/27 belongs to the 2nd defendant, and is entitled to possession of the property.

Costs follow the event. To be taxed in default of agreement. Leave to appeal is hereby granted.

**Dr. P. Matibini, SC,
HIGH COURT JUDGE**