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**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(Civil Jurisdiction)**

2008/HP/903



BETWEEN:

**STEVE CHANGALA KAWANDAMI
(SUING THROUGH HIS WIFE
AND NEXT FRIEND) NANCY KAWANDAMI**

PLAINTIFF

AND

ATTORNEY GENERAL

DEFENDANT

Before Hon. Mrs. Justice M.S. Mulenga this 7th day of August 2014.

For the Plaintiffs : Mr. C. Sianondo of Messrs Malambo and Company
For the Defendant : Ms. C. Mulenga, Assistant Senior State Advocate – Attorney
General's Chambers

J U D G M E N T

Cases cited:

1. **Lt General Geojago Robert Chaswe Musengule v Attorney General (2009) ZR 359**
2. **Zambia Consolidated Copper Mines Limited v Richard Kangwa and Others (2000) ZR 109**
3. **Joseph Constantine Steamship Line Ltd vs Imperial Smelting Corporation Limited (1941) 2 All ER 165,**
4. **Nkongolo Farms Limited v Zambia National Commercial Bank Limited, Kent Choice Limited (in receivership) and Charles Haruperi (2005) ZR 78**
5. **Barter v Barter (no.2) (1950) 2 All ER 458**
6. **Anort Kabwe and Charity Mumba Kabwe vs James Daka, the Attorney General and Albert Mbazima (2006) ZR 12.**

This matter was originally commenced by Originating Summons but by an order of the Court was later commenced by Writ of Summons and

Statement of Claim dated 17th June 2009 claiming for the following reliefs:

1. *Whether the decision of the Registrar of Lands and Deeds, cancelling Certificate of Title number 12096 issued in the name of the Plaintiff and relating to or in respect of S/D 161 of Farm no. 441a Lusaka is violative of the fundamental rights of the Plaintiff, such being guaranteed under article 16 of the Republic of Zambia.*
2. *Whether or not the failure by the Registrar of Lands and Deeds to grant the Plaintiff a hearing before proceeding to cancel the Certificate of title referred to above is in breach of the rules of natural justice as he only acted upon the instruction of the Executive Chairman of the Task Force on Corruption addressed to the Commissioner of Lands.*
3. *Whether the Plaintiff is the rightful owner of the property comprised in subdivision 161 of Farm No. 441a Lusaka and is entitled to the reinstatement of the Certificate of Title that was cancelled in respect of the said property and the Plaintiff will seek.*
4. *A Declaration that the decision of the Registrar of Lands and Deeds to cancel the Plaintiff's Certificate of Title No. 12096 relating to or in respect of S/D 161 of Farm 441a Lusaka is null and void and of no effect.*
5. *An Order that the Registrar of Lands and Deeds cause to be reinstated to the Lands Register the Plaintiff's Certificate of Title to subdivision 161 of Farm No. 441a Lusaka.*
6. *Any other relief that the court may deem fit.*
7. *Costs of and incidental to this action.*

The Plaintiff states in his Statement of Claim that at the time of his retirement in the year 2001 he held the position Executive Director in the Office of the President, Special Division. Further that he was allocated no. 10 Tito Road which was discovered to be inhabitable. That subsequently he was retired from the service and upon retirement that he appealed to the Director General of his Department to consider allowing him to purchase the house in issue, S/D/161 of farm 441a also known as house no. 161 Lusitu Road. The Director General then advised the Minister who then wrote a note to Mr. Sweta who was responsible for administering of government houses. The said note had the Minister's date stamp.

The house was valued by the Government Valuation Department at K42,000,000.00 after which he received a formal offer from the Ministry of Lands which offer is dated 19th March 2002. He was then given a price discount in accordance with the rules regulating the sale of government houses to civil servants. The discount was for each year served which brought the total purchase price to K25,200,000.00. That he made several payments and at the time of paying his terminal benefits, the Ministry of Finance and National Planning deducted the sum of K22, 200,000.00 in full payment of the purchase price of the subject property. The Ministry then gave him a form which he took to the Ministry of Lands authorizing the release of the title deeds. The Certificate of Title was then issued to the Plaintiff.

In the Defence dated 4th August 2009, the Defendant states that the allocation of S/D 161 of Farm no. 441a to the Plaintiff was irregular as the same was an institutional house for the Office of the President. That indeed various houses were allocated to the Plaintiff but he claimed that they were inhabitable. That when the Plaintiff was applying to purchase house no. 161 Lusitu Road, it was an institutional house and was not meant to be offloaded for sale.

That the house was procured irregularly and this was brought to the Plaintiff's attention in a meeting held on 29th October 2002. That the late minister Godden Mandandi wrongly and irregularly instructed Mr. Singleton Sweta to assist the Plaintiff purchase the house in issue even though it was an institutional house not to be sold. That the Ministry of Lands issued the Certificate of Title to the Plaintiff without knowing the irregular circumstances behind the purchase of the house.

The Defendant denies that the Chairman of the Task Force on Corruption made unfounded allegations of fraud. That the Registrar acted within the provisions of the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia. The Defendant denies that the Plaintiff is entitled to any of the reliefs sought.

At trial PW Nancy Kawandami, gave an account of all the houses she and the Plaintiff occupied during his tenure of employment and went through all the allocation letters issued in respect of this matter. Her testimony was basically an outline of the Statement of Claim. She added that there were other institutional houses which did not appear on the

list of houses earmarked for sale at pages 1 to 5 of the Defendant's bundle of documents which were sold such as House number 14 Makishi Road, Adraige Court opposite Lusaka playhouse, Penby Court in Church Road, Chisikela Flats in Northmead and Emmasdale Flats.

Further that house no. 17/137 Kabulonga, occupied by the former Director General, Mr. Xavier Chungu was also sold to him as sitting tenant although it was not on the list. Also, the Woodlands flats and houses, number 15 Mwanasekela Road, Kasupe Complex Handsworth Park and house no. 42 was sold to Mr. Chilubi when he retired.

When cross examined, PW stated that she was not aware of the two categories of the houses for sale and not for sale. She also stated that she was not aware that for a house to be sold there should be correspondence over the same. She did not agree that the house in issue was not for sale. She was not aware that the allocation has to come from the Permanent Secretary. That the house was allocated from the Office of the President and not the Housing Committee on the sale of government houses. She had no idea that the procedure followed by her husband was not the correct one.

In re-examination PW stated that the government received the purchase price from the Plaintiff. They further did not explain how the Plaintiff committed the fraud.

The Defendant also called one witness, Andrew Banda, DW, an Inspector of Government Houses who testified that the procedure for

purchasing institutional houses was the same as that of pool houses except that the Permanent Secretary of a particular Ministry had to issue instructions de-classifying the particular institutional houses to pool houses. That in this particular instance he did not receive any instructions to that effect as the Vice Secretary of the Committee on the sale of government houses. He was working under Mr. Sweta who was the Secretary of the Committee. He did not recall the Committee ever considering the offer to the Plaintiff of the house in issue. That at the time the plaintiff was issued with a letter of offer on 19th March 2002, the Committee was still in existence.

In cross examination DW stated that the only role the Plaintiff played in the process of purchasing the house is submitting the application and the rest was done internally. That all communication was being done with the Office of the President and not the Plaintiff. DW also admitted that the Permanent Secretary under the Ministry of Lands and also the Permanent Secretary, Ministry of Finance were both involved in the process and both could have objected to the offer being issued to the Plaintiff. In reference to exhibit marked "EM2" in the Defendant's affidavit in opposition to the Originating Summons, DW admitted that the house in issue no. 161 Lusitu road, had been listed for sale.

Counsel for the Plaintiff filed submissions dated 25th March 2014 wherein he relied on the provisions of sections 33, 34 and 54 of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia. He argued that section 34 was considered in the case of **Lt General Geojago**

Robert Chaswe Musengule v Attorney General (2009) ZR 359 wherein

Judge Mwanamwambwa held that:

"Subjection 1 talks of action or actions for possession or recovery of land, against the registered proprietor. Subsection 2 talks of production of the register as evidence "in every Court of law or equity" in the possession or recovery action of land against the registered proprietor. In my view, when section 34 is read as a whole, the action referred to is Court action, and not administrative action.

I am of the view that with the exception of re-entry for breach of a covenant, under State Lease by a Lessee, possession or recovery of land against the registered proprietor under this section, can only be done by Court action. It cannot be done by administrative action as was attempted by the state in this matter. Therefore, I do not accept the argument by the learned Solicitor General that the State's bid in this matter was administrative channel to correct shortfalls in the transaction of the disputed property. I have so far found that there was no fraud on the part of the petitioner to warrant possession of his property under section 34 of the Act."

Counsel then reasoned that there being no court action to recover the land as against the Plaintiff the alleged attempted recovery of the property from the Plaintiff is illegal and as such null and void ab initio. That the aspect of whether or not the procedure was followed in acquiring title cannot react against the Plaintiff who had no hand in the alleged non - compliance. That in the **Musengule case** cited above Judge Mwanamwambwa held as follows:

"I think the Army was right. The guidelines on the sell of Government houses were deliberately not followed, particularly in Lusaka. Had they been followed, the four VIP houses on 'P' 9-12 would not have been sold. I would add that as regards to sell of these four VIP houses, there is no talk by the State that "they were erroneously sold" to the individuals concerned. In my view, either the State repossesses all VIP houses or none at all. Singling out and trying to repossess only one is discriminatory. The prudent thing would be not to repossess any at all. The Government must stand by its decisions and deeds over the issue. At the material time, the Government made those decisions and executed them with its eyes and mind open. In my view, it is bound by them, at law. The Government must be consistent in its conduct. If it deliberately breached its own guidelines on sell of Government houses, it must live with that decision. All people who benefited from that breach must be treated the same."

Counsel then argued that there is evidence on record that the former Director General Mr. X. Chungu purchased house 17/137 Kabulonga Lusaka and that there is also evidence by PW that other properties were sold without being declassified. It would be discriminatory if the recovery is only done to the Plaintiff. That in any case, there is evidence that the house in issue was put for sale by the Office of the President through a letter dated 29th January 1997 and as such, the State is bound at law. That in the same Musengule case the Court held at page 390 as follows:

"From the evidence on record, I find that the house in issue was not erroneously sold to the petitioner. The State sold him the house with its mind and eyes wide open. The State advised him to apply for it. He did so. It approved his application. It offered him the house at a price it fixed. He accepted the offer and paid the price. It issued him with the certificate of title. True, it was a V.I.P house. But there is evidence that this is not the only V.I.P house declassified into a pool house and sold to a sitting in tenant."

That the house in issue was not the only one declassified but the Plaintiff is being targeted by the State. The house was valued by the State and the price given by the State. It cannot now be heard that the same was irregularly given and such contention should be rejected. That the allocation of the of the house in issue was at the instance of the President of Zambia in conjunction with the office of the President and the Ministers of Works and Supply and of Presidential Affairs. That these are government organs through which the decision on the sale of the government houses were made.

Further, counsel cited the case of **Zambia Consolidated Copper Mines Limited v Richard Kangwa and Others (2000) ZR 109 at page 110** where Ngulube CJ (as he then was) observed as follows:

“For our part, we are prepared to take judicial notice of the fact that sales of houses to “sitting tenants” across the country in local authority and public institution houses was the brainchild and decision of the government which ultimately also owns the appellant as the majority shareholder. It is a mistake to talk about political directives and to ignore the government’s other more relevant character and capacity as the shareholder with the controlling interest. The attitude of the appellants seems to be that the wishes of the ultimate majority owners (that is the Government of the Republic of Zambia) as expressed by the Head of State or his representatives can be ignored in this matter. They cannot. In fact, the law accepted in this country and in many others is that the beneficial owners of a company – the shareholders – have and enjoy as of right overriding authority over the company’s affairs and even over the wishes of mere nominees or directors”

Counsel surmised that the directive of the government expressed through the Head of the State cannot be ignored. It was at the instance of the Republican President, through the office of his Ministers that a directive was given to look for a house for the Plaintiff. After the house was allocated, it cannot now be heard that the same was irregular. The house was properly and legally allotted and paid for by the Plaintiff.

That the President through his Minister in collaboration with the Office of the President and without any influence from the Plaintiff, instigated the allocation and subsequent purchase of the house by the Plaintiff. That it follows that if any breach was done in the process, of which it was argued there was none, the same cannot be attributed to the Plaintiff. Counsel then prayed that this Court should recognize the Plaintiff's right to property as prayed in the originating process.

The Defendant also filed submissions dated 12th May 2014 that the Plaintiff's acquisition of the house in issue was irregular and as a matter of fact became the subject of investigations by the Task Force on corruption.

That the Plaintiff was allocated House no. 10 Tito Road, Rhodes Park, Lusaka as seen on page 3 of the Plaintiff's Bundle of documents and it was for that house that he was given the requisite allocation slip issued by the Housing Committee as reflected in the said letter. That later on the letter of 7th March 2000 appearing on page 4 of the Plaintiff's bundle of documents was written in which it was suggested that House No. 10 Tito Road was in a deplorable condition and that alternative accommodation be found. That these two correspondences are appreciated but that house no. 161 Lusitu Road which the Plaintiff eventually got was irregularly sold contrary to the procedure on the sale of government pool houses. That the sale was done in collusion with the then late Minister of Home Affairs Mr. Godden Mandandi and Mr. Sweta who was a member of the Housing Committee.

That the letter at pages 1 to 5 of the Defendant's bundle indicates the list of institutional houses which were to be sold to sitting tenants. A perusal of this letter shows that the house in issue was not amongst those earmarked for sale. That during trial, the Plaintiff's advocate referred DW to the exhibit marked "EM2" which is a letter dated 29th January 1997 which is purportedly communicating to the Chairman, Supervisory and Monitoring Adhoc Committee on the sale of

government pool houses, on which institutional houses were earmarked for sale. That in questioning DW on this document the Plaintiff's counsel was obviously trying to assert that this house had been earmarked for sale contrary to the Defendant's argument before the Court.

Counsel argued that this document must be looked at and understood within the context in which it was exhibited and the intention of the deponent when it was exhibited. That the said affidavit was deposed to by Elizabeth Mutale a Police Officer who was investigating the irregular sale of the house in issue under the Task Force on Corruption. Counsel then referred to paragraphs 8 to 10 of that affidavit and stated that within the context of that affidavit the Investigating Officer deposes that the document marked "EM2" which includes the house in issue is a forgery. That "EM1" which is also shown on page 1 to 5 of the Defendants bundle of documents, was received by the Ministry but not "EM2" as it could not be found among their files.

Therefore, that the attempt by the Plaintiff's counsel to assert that "EM2" was validating that the house in issue was earmarked for sale is misconceived as was revealed by the actual context of the affidavit within which the document is produced.

That the minutes relating to house number 161 dated 29th October 2002 at pages 13 to 16 of the Defendant's bundle of documents reveal that the Plaintiff was very aware of the concerns of the Office of the President as regards the irregularity in his purchasing of the house in

issue as they had engaged him on the issue as evidenced by these minutes. He was also questioned on the alterations on his application form as well as on why his application forms were not completely filed.

Further counsel referred to the letter at page 17 of the Defendant's bundle of documents which is dated August 2, 2006 and which was authored by the late Maxwell Nkole who at the time was the Executive Chairman of the Task Force on Corruption. That letter states in paragraph 2 that *"It has since been established that the former Minister of works and Supply, Mr. Golden Mandandi committed an offence of abuse of authority of office, in collusion with Mr. Sweta and Mr. Kawandami who committed the fraud, which resulted in the Commissioner of Lands offering Number 161 Lusitu Road to Mr. Kawandami for purchase."* Paragraph 3 states that *"It is also noted that this property belongs to the Office of the President (Special Division) and was not recommended for sale. Mr. Mandandi and Mr. Sweta have since died making it difficult for any criminal prosecution against Mr. Kawandami the Purchaser."*

A request was made by Mr. Nkole to correct the Lands and Deeds Register under Section 11(1) of the Lands and Deeds Registry Act, Cap 185 in that the entry on the register on behalf of Mr. Kawandami was procured by fraud. That the investigations in regard to the Plaintiff's purchase of the house revealed that a fraud had been committed as seen from the letter. The Executive Chairman was thus in order to

request the Commissioner of Lands to cancel the Plaintiff's Certificate of Title.

Counsel then went on to rely on the provisions of section 33 of the Lands and Deeds Registry Act Cap 185 of the Laws of Zambia and stated that the Act is clear as to when a Certificate of Title does not prove conclusive ownership one of the circumstances being where there is fraud as in this case. That the cancellation of the Plaintiff's Certificate of Title as seen on page 36 of the Plaintiff's Bundle of Documents is therefore correct and not violative of the Plaintiff's fundamental rights as alleged as the title was cancelled on account of the fraud he perpetuated with the two deceased Government officials who aided him in purchasing the house outside the laid down procedure.

Further that section 11(1) of the Lands and Deeds Registry Act pursuant to which the cancellation was done, is self serving and once an allegation of fraud or mistake is made and the Registrar considers such allegation satisfactorily proved, he shall correct such error, omission or entry as aforesaid. That there is no hearing at that point, as all it takes is for the Registrar to consider such an allegation satisfactorily proved. Section 11(2) goes on to provide for what an aggrieved person should do upon such correction.

Counsel then prayed that the cancellation of the Certificate of Title be upheld as the same was procured by fraud contrary to the provisions of section 33 of the Lands and Deeds Registry Act Cap 185. That the findings of the Task Force on Corruption have never been challenged by

the Plaintiff in any Court of law and neither have these findings been overturned, thus they still stand.

That house no. 161 belongs to the Office of the President and it was never intended to be offered for sale. Even the former occupant, Mr. Siachilubi was not offered the same house because it was a safe a house in line with a letter from the Office of the President clearly stating this position. Counsel finally prayed that this matter be dismissed and all the reliefs sought be dismissed and the action or decision of the Registrar of Lands and Deeds be accordingly upheld.

Counsel for the Plaintiff filed submissions in reply dated 15th May 2014 wherein he states that the law is very clear as to when there is an allegation of fraud. In the case of **Joseph Constantine Steamship Line Ltd vs Imperial Smelting Corporation Limited (1941) 2 All ER 165**, the Court reasoned that **"....there is for example, no presumption for fraud. It must be alleged and proved."**

Further the Court held in **Nkongolo Farms Limited v Zambia National Commercial Bank Limited, Kent Choice Limited (in receivership) and Charles Haruperi (2005) ZR 78** that:

"Where a party relies on any misrepresentation, fraud, breach of trust, willful default or undue influence by another party, he must supply the necessary particulars of the allegation in the pleadings. Fraud must be precisely alleged and strictly proved. There is no presumption of fraud."

That the Court will note that the Defendant has not particularized any fraud committed by the Plaintiff. There was equally no evidence to prove

the allegation of fraud. That apart from the need to precisely allege and strictly prove, the standard of proof is higher than that of the balance of probability. In **Barter v Barter (no.2) (1950) 2 All ER 458 at page 459**, it was held that:

"A civil court when considering a charge of fraud will naturally require a higher degree of probability than that which it would require if considering whether negligence was established."

That the documents being referred to in the Defendant's submissions have not been testified to. What is being sought through the Defendant's submissions is to introduce evidence from the bar. Thus no matter how forceful they may be, cannot be admitted and let alone be used to prove fraud.

That the approach to make reference to the evidence which was never adduced in Court was discouraged by the Supreme Court in the case of **Anort Kabwe and Charity Mumba Kabwe vs James Daka, the Attorney General and Albert Mbazima (2006) ZR 12**. That the guidance in this case explains the treatment of the documents which are just placed on record without being introduced, testified on and the witness cross examined. They are in fact hearsay. That the Court will note that no witness came to testify on the documents which the Defendant now seeks to introduce through submissions. This cannot be done and this Court should equally ignore those submissions. Fraud which requires to be precisely alleged and provided on a higher standard cannot be proved by hearsay evidence which the Defendant now seeks to do.

Counsel then prayed that the claim by the Plaintiff be upheld and the allegation of fraud by the Defendant be dismissed with costs.

This is the summary of the evidence and submissions received in this matter which has been taken into consideration in arriving at this Judgment.

The Plaintiff's claim is mainly for the declaration that he is the rightful owner of the subject property, a declaration that the decision of the Registrar of Lands and Deeds to cancel the Plaintiff's Certificate of Title No. 12096 relating to S/D 161 of Farm 441a Lusaka is null and void and of no effect and an order that the Registrar of Lands and Deeds cause to be reinstated to the Lands Register the Plaintiff's Certificate of Title to subdivision 161 of Farm No. 441a Lusaka (also referred to as house no. 161 Lusitu Road.)

On the evidence on record it is not in dispute that the Plaintiff at the time of his retirement in the year 2001 held the position of Executive Director in the Office of the President, Special Division. By the memorandum dated 19th February 1999 from the Director General, the Plaintiff was allocated the said house 161 Lusitu Road as an institutional house. At a meeting of directors with the Head of State, it came to the President's attention that the Plaintiff was the only one among the directors in the institution that had not been allocated a house to purchase. The President assigned the Presidential Affairs Minister to look into the issue. Through the efforts of the Minister of Presidential Affairs and in the letter dated 19th January 2000 the

Plaintiff was allocated house no. 10 Tito Road which was discovered to be inhabitable. After the said house was inspected by staff from the Office of the President, the institution through the office of the Director General replied to the Presidential Affairs Minister stating that the house was not suitable and asked for the Ministry of Works and Supply to find alternative accommodation or provide funds for rehabilitation.

That subsequently the Plaintiff was retired from the service as per letter at page 5 of the Plaintiff's bundle of documents dated 3rd May 2001. That he appealed to the Director General to consider allowing him to purchase the house in issue. The Director General spoke to the Minister of Works and Supply and then advised the Plaintiff to see the Minister who subsequently wrote a note to Mr. Sweta who was the Secretary of the Housing Committee responsible for administering the sale of government houses. The said note had the Minister's date stamp and is produced at page 7 of the Plaintiff bundle of documents. The Plaintiff signed the application form to purchase the house No. 161 Lusitu Road on 15th February 2001 and this application was signed on 22nd May 2001 by Office of the President on part 2 meant for Permanent Secretaries to sign. It is also not disputed that the house in issue was valued by the Government Valuation Department at K42,000,000.00 after which the Plaintiff received a formal offer from the Ministry of Lands which offer is dated 19th March 2002 and produced at page 32.

He was then given a price discount in accordance with the rules regulating the sale of government houses to civil servants. The discount

was for each year served which brought the total purchase price to K25,200,000.00. It is also not disputed that he made several payments as shown on pages 10 to 14 of the Plaintiff's bundle of documents. Further at the time of paying his terminal benefits, the Ministry of Finance and National Planning deducted the sum of K22, 200,000.00 in full payment of the purchase price of the subject property. The Ministry then gave him a form which he took to the Ministry of Lands authorizing the release of the title deeds as shown on pages 13 and 14 of the bundle of documents.

The Certificate of Title was then issued to the Plaintiff dated 27th September 2002 as produced on pages 16 to 24 on the Plaintiff's bundle of documents. The Office of the President wrote him two letters of eviction in October 2002 to which the Plaintiff and his lawyers responded that he was the legitimate purchaser and availed them the documents. The Defendant then never pursued the matter until after about five (5) years had passed when it wrote another eviction notice on 16th August 2007. This was about a year after the Task Force on Corruption wrote a letter to the Commissioner of Lands to cancel the Certificate of Title on 2nd August 2006.

The Defendant acknowledges that the Plaintiff was offered the said house for sale and he purchased it but contends that the procedure followed was fraudulent as the house in issue was an institutional house and was not declassified to form part of the government pool houses. That the then Minister, Mr. Mandandi and Mr. Sweta

committed a fraud in collusion with the Plaintiff. The evidence of DW is that as vice secretary he never saw the instructions to declassify the subject house and that he did not recall considering the offer to the Plaintiff. He further stated that the only role played by the Plaintiff in the process was to fill in or submit the application and the rest was done internally. That all the communication was with the Office of the President and not the Plaintiff.

In civil matters the standard of proof as held in **Zambia Railways Limited v Pauline S Mundia, Brian Sialumba (2008) Z.R. 287 Vol. 1 (S.C)** "... is not as rigorous as the one obtaining in a criminal case. Simply stated, the proof required is on a balance of probability "as opposed to beyond all reasonable doubt in a criminal case". The old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable. "

To prove fraud on Title Deeds one has to come within the limits as set out in the case of **Sithole v State Lotteries Board (1975) ZR 106 at 115** where it was held that "if a party alleges fraud the extent of the onus is greater than a simple balance of probabilities." The case of **Bater v Bater** was cited in which Denning LJ stated that:

"A civil case may be proved by a preponderance of probabilities but there may be a degree of probability within that standard. The degree depends on the subject matter. A civil court when considering a charge of fraud will naturally require a high degree of probability than that which it would require if considering whether negligence was established. It does not adopt so high a degree on a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."

In **Nkongolo Farm Limited v Zambia National Commercial Bank Limited, Kent Choice Limited (in receivership) Charles Haruperi [2005] ZR 78 (S.C)** the Supreme Court held that **"where a party relies on any misrepresentation, fraud, breach of trust, willful default or undue influence by another party, he must supply the necessary particulars of the allegation in the pleadings. Fraud must be precisely alleged and strictly proved. There is no presumption of fraud. In the instant case, fraud was not alleged."**

The Plaintiff in this matter has outlined the process he followed in purchasing the house. He has produced evidence of documentation which was issued in his favour, the payments made and the Certificate of Title issued in his name. The Defendant has alleged that the sale of the house was fraudulent as the same was not listed for sale and the Office of the President had no intentions of selling the said house.

The Defendant in its affidavit in opposition to the Originating Summons produced a document marked "EM2" which lists house no. 161 Lusitu Road as one of the institutional houses to be sold. The deponent in that affidavit stated that the said document was a forgery. However at the trial of this matter, no evidence was led to show that that document was a forgery indeed and that none of those houses were sold to the listed sitting tenants.

Even when this document is disregarded, it is apparent that the Plaintiff has proved on the balance of probabilities that he was sold the said

both the Minister and Mr. Sweta were deceased and does not state how it came to establish the allegations of fraud. The letter even goes further to state that Mr. Sweta forged the Plaintiff's application with regard to substituting house No. 10 Tito Road with the subject house. There is no evidence whatsoever on how they arrived at this conclusion and many others listed in the letter. The Defendant had opportunity to call witnesses to speak to these documents but did not do so and therefore only has itself to blame. These documents cannot assist the Defendant in the current state.

The evidence of DW does not bring out or prove any particulars of fraud in relation to the Plaintiff. It is acknowledged that the Plaintiff played no role beyond the filling in of the application letter as dealings were normally with the concerned ministry or department and the Committee on the sale of government houses of which the Permanent Secretaries for Ministry of Finance and Ministry of Lands, among other, were members. These were to ensure that their respective ministry concerns and interests were taken care of.

The authorities cited above are clear that fraud must be specifically alleged and strictly proved as there is no presumption to fraud. The Defendant has not provided particulars of the Plaintiff's fraudulent actions apart from making insinuations.

It is also apparent that the mere fact that the Plaintiff bought an institutional house which was not on the list of houses to be sold dated 1st April 1997 shown at pages 1 to 5 of the Defendants bundle of

documents does not make the purchase fraudulent. This is fortified by the evidence of PW that a number of houses which were not on this list and were institutional houses were sold and none of them is being challenged. The prominent one is house No. 17/137 Kabulonga which was sold to the then Director General Mr. X. Chungu, the Woodlands flats, house No. 15 Mwanasekela Road, house No. 42 sold to Mr. Chilubi after retirement and a number of blocks of flats listed in the witness's evidence in chief. The Defendant did not rebut this evidence. It cannot therefore be allowed to single out and treat the Plaintiff differently when other institutional houses were sold which were not on the list, including that of the Director General. No evidence has been produced to show that the others were declassified or the procedure which was followed. As stated in the **Musengule case** cited above, targeting the Plaintiff alone is discriminatory when the Government sold the house to the Plaintiff with its eyes open and without any duress from the Plaintiff. If the government deliberately breached its own guidelines on the sale of the house to the Plaintiff, it must live with that decision. DW stated that the Plaintiff was not involved in any of the procedures taken up to the issue of the Title Deed apart from submitting the application.

Further, the Plaintiff was issued the Certificate of Title on 27th September 2002 and it was after this that the Office of the President gave eviction notices of 2nd and 21st October 2002 produced at pages 25 and 27 of the Plaintiff's bundle of documents. The Plaintiff and his lawyers responded by letters at pages 26 and 28 to 29, respectively stating that the Plaintiff had legitimately bought the house and availed

the relevant documents. After this no action was taken until the next eviction notice of 16th August 2007 and the letters from the Task Force to the Director General and Commissioner of Lands alleging fraud.

No fraud has been prove and this defence fails. I note that even when the Defendant felt there was fraud, it never took any Court action against the Plaintiff but was brought to Court by the Plaintiff.

The other issue for consideration is whether or not the cancellation of the Certificate of Title based on the letter by the Task Force was irregular. I find that the cancellation of the Certificate of Title pursuant to section 11(1) was irregular. Section 11(1) of the Lands and Deeds Registry Act provides that:

"Where any person alleges that any error or omission has been made in a Register or that any entry or omission therein has been made or procured by fraud or mistake, the Registrar shall, if he shall consider such allegation satisfactorily proved, correct such error, omission or entry as aforesaid."

Under this section, the Registrar is clearly mandated to consider whether the allegation has been satisfactorily proved and correct such error, omission or entry in the Register.

This section however does not empower the Registrar to cancel Certificates of Title. The High Court is the institution empowered to cancel the Certificates of Title. The said section 11(1) of the Act must not be read in isolation but with the other provisions of the Act. When this is done, it is clear that the said section 11(1) was not meant as another means of canceling Certificates of Title through administrative action. Cancellation of Certificates of Title is a serious issue hence the

provisions in section 33, 34, 35 and 54 of the Act for the same to be done by the High Court after due process and consideration of the relevant evidence. The Defendant thus cannot use section 11(1) to go against the clear provision of sections 33 and 34 on how Certificates of Title can be cancelled. And where fraud is in issue the same has to be proved at a higher standard and as discussed above.

Therefore the entries 14 and 15 of the Lands Register relating to the caveat and cancellation of title, respectively were done outside the provisions of the law. If the Task Force Chairman had properly considered the evidence in this matter he would have not made the decision he did and to insist that the Office of the President had no intention to sell the house in issue. The **Musengule case** is clear that a Certificate of Title cannot be cancelled by administrative procedures. The Task Force should have brought the matter to Court and proved the allegations it was making.

Further, when the Registrar was repeatedly requested to furnish minutes of his decision he failed to furnish the Plaintiff's counsel with the same. The said minutes or documents were also not brought to Court to show how the Registrar came to the conclusion that the fraud alleged was satisfactorily proved. This shows that the decision was not properly made. All in all the Defendant did not strictly prove fraud and further as admitted by its witness, DW, the Plaintiff had no hand in what transpired behind the scenes as all he did was fill out an application form. The Defendant cannot seek to avoid proving the

allegations in Court in line with section 33 and 34 by resorting to use section 11(1) through an administrative action.

The Plaintiff has proved his claims. I hereby grant the declaration that the subject house belongs to the Plaintiff and the declaration that the decision of the Registrar of Lands and Deeds to cancel the Plaintiff's Certificate of Title No. 12096 in respect of S/D/161 of farm 441a Lusaka which is house No. 161 Lusitu Road is null and void and of no effect. I accordingly order that the Registrar of Lands and Deeds cause to be reinstated to the Lands Register the Plaintiff's Certificate of Title to subdivision 161 of farm No. 441a Lusaka.

I further order that the caveat place on S/D/161 of farm 441a Lusaka by Maxwell Nkole, as Chairman of the Task Force on Corruption, be forthwith removed.

I awards costs to the Plaintiff to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 7th day of August, 2014



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M.S. MULENGA
HIGH COURT JUDGE