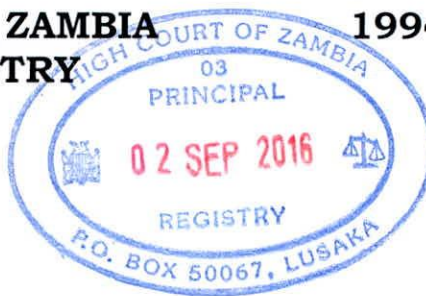


**IN THE HIGH COURT FOR ZAMBIA** 1994/HP/2122  
**AT THE PRINCIPAL REGISTRY**  
**HOLDEN AT LUSAKA**  
**(Civil Jurisdiction)**



BETWEEN:

**JOHN CANISIUS NDILI**

**PLAINTIFF**

AND

**AARON BRISBANE SIANGOMA MAPULANGA**

**1<sup>ST</sup> DEFENDANT**

**STANBIC BANK (Z) LIMITED**

**2<sup>ND</sup> DEFENDANT**

**Before the Hon. Mrs. Justice J.Z. Mulongoti**  
**in Open Court on the 2<sup>nd</sup> day of September, 2016.**

*For the Plaintiff:* Mr. H. Silweya of Messrs Silweya & Company  
*For the 1<sup>st</sup> Defendant:* Mr. L.M. Mwanabo of L.M. Chambers  
*For the 2<sup>nd</sup> Defendant:* Mr. M. Chiteba of Messrs Mulenga, Mundashi  
Kasonde & Company

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

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**Cases referred to:**

1. Foley v. Classique Coaches Ltd(1934) 2KB 1
2. Spiros Konidaris v. Ramlal Kanji Dandiker SCZ Apeal No. 157 of 1999
3. Sithole v. State Lotteries Board of Zambia Ltd (1975) ZR 106
4. Colgate Palmolive (Z) Inc. v. Able Shemu Chuuka & 110 Other SCZ Appeal No. 181 of 2005
5. Musialela v. Chipman (2010/HPC/0256 (unreported)
6. Anti - Corruption Commission v. Barnet Development Corporation Limited (2008) ZR 69 Vol. 1
7. Stanbic Bank Zambia Limited v. Witola Mbuchi & John Fidelis Kabwiri (2010/HPC/565) unreported
8. Mulungushi v. Catherine Bwale Mizi Chomba (2004) ZR 96
9. David Howes and Others v. Betty Butts Carbin (sued in her capacity as Trustee of the Estate of the late Daisy Butts) (2012) ZR 239 Vol. 1

**Legislation referred to:**

1. Lands & Deeds Registry Act, Chapter 185 of the Laws of Zambia

By writ of summons dated 29<sup>th</sup> June, 1994 the plaintiff is seeking an order of specific performance of the contract of sale dated 30<sup>th</sup> December, 1988 of 214 acres out of 614 acres of farm number 3792 chibwe, Kabwe.

In the statement of claim, the plaintiff alleged that sometime in or about 30<sup>th</sup> December, 1988 he agreed to sale the defendant an unmarked off portion of the land being 214 hectares of farm 3792. By clause 3 of the agreement, the plaintiff was to retain 400 hectares (acres) of the total area of 614.8955 hectares. That the plaintiff did not agree to sale the whole of his farm to the defendant. The plaintiff averred that at the time of the said agreement, the property was mortgaged to Lima Bank Zambia Ltd. That to the date he sued, he had never known the mortgage redemption fee from Lima Bank or from anybody at all nor had he ever agreed with the defendant or any other person, any price of the unsurveyed and unmarked off portion or any price at all in respect of either the portion or the whole of farm number 3792 Kabwe. Furthermore, that he has never received nor acknowledged receipt of money or consideration for either the portion or the whole of the said farm.

The plaintiff further alleged that he was surprised to learn that his whole farm had been fraudulently transferred to the first defendant. The particulars of fraud and forgery were that:

- “ (i) Deed of Transfer – the title deed was exclusively drawn by the defendant. The plaintiff did not sign it.
- (ii) The deed is inappropriate and was for passing title to the defendant. It was not drawn by a professional conveyance.
- (iii) Consideration omitted from the transfer - This was deliberately resorted to by the defendant after he had realised that he had not agreed with the plaintiff on any fixed purchase price or any at all. The transaction between the plaintiff and defendant was not a gift but a sale where consideration must always be stated.
- (iv) The transfer was registered with the aid and collusion of some officials from the Lands department. Both the plaintiff's and defendant's signatures were witnessed by the same witness which was unusual.
- (v) The defendant targeted the plaintiff's signature because he always had a sample of it on the contract dated 30<sup>th</sup> December, 1988”.

Thus, the plaintiff's claim is for an order of specific performance of the contract or alternatively, an order of declaration of no sale on account of fraud or an order of rectification of the register at the Lands and Deeds Registry to reflect the results of an order of specific performance or declaration of fraud, permanent injunction restraining the

defendant from evicting and or trespassing onto the plaintiff's property. Such other orders deemed fit by court and costs.

The first defendant filed a defence. He averred that at no time had he caused interruptions and or disturbances to the plaintiff's peaceable enjoyment of possession of the farm. He further averred that the plaintiff in his offer letter dated 28<sup>th</sup> December, 1988 agreed to sale the whole farm number 3792 Kabwe.

That the plaintiff had agreed to instruct valuation of the farm but did not have money to do so. The same was paid by the first defendant and the farm was valued at K25,000.00. The parties even agreed to transfer the property after redemption of the mortgage with Lima Bank in the sum of K159,164.42. The deed of transfer was executed by the plaintiff willingly and knowingly.

The first defendant further averred that the consideration was constituted by him discharging the indebtedness of the plaintiff to Lima Bank Limited.

The second defendant filed a defence and counterclaim. It averred that the second defendant created and registered a mortgage over property number F/3792 whose extent is 614.8955 hectares in consideration of a loan of K320,000.00 to the first defendant. The property was registered in the first defendant's name under certificate of title number L.502. At the time the property was free of encumbrances. It averred further that a further charge was created on the same property in consideration of a further advance of K1,180,000.00 to the first defendant and another further advance to him of K350,000.00. The first defendant defaulted and is currently indebted to the second defendant in the sum of K112,258,835.34. Thus, the second defendant is entitled to possession of the mortgaged property on account of the said default. The second defendant therefore claims the following reliefs from the plaintiff (i) Payment of the sum of K112,258,835.34 owed to it by the first defendant (ii) An order of foreclosure/sale of F/3792 Kapiri Mposhi, interest and costs.

At the trial all parties adduced oral evidence.

The plaintiff testified that he bought the farm number 3792 from Tobacco Board of Zambia in 1974. A certificate of title was issued to him. He had surrendered his certificate of title to the Tobacco Board for safekeeping then later to the Commissioner of Lands. He drew the Court's attention to page 34 of the plaintiff's bundle of pleadings and read aloud the line marked xx. He said it was a certificate of official search which showed that on 11<sup>th</sup> November, 1988, Tobacco Board of Zambia issued to him a certificate of title for farm number 3792. The certificate of title was now with the first defendant. He disclosed that the first defendant who was his tenant approached him sometime in October, 1988 and asked for 10 hectares to plant maize. A month later the first defendant asked him to sale him the 10 hectares but he refused. Then the first defendant took some documents for him to sign in the night around 19:00hours. He asked the first defendant to leave them behind so he could sign later but the latter refused. He signed in the night because the first defendant told him that he needed them for security for a loan. He referred the Court to page 19 of his bundle of pleadings and indentified the contract of sale which he signed in the night.

It was the plaintiff's further testimony that though he signed there was no sale as there was no price. He emphasised that he never agreed to sale the whole or part of the farm. The first defendant took advantage of him and wanted to trick Grindlays Bank to give him a loan to buy two trucks. He went on to state that later the first defendant went back to him and asked to borrow the certificate of title. He told him it was with the Tobacco Board of Zambia. Then he was later detained for three days after the first defendant complained to police that he was a squatter on his land. After his release he lodged a complaint with the Commissioner of Lands that the first defendant had changed his certificate of title into his name. He was advised to lodge a caveat to stop the first defendant from mortgaging the farm to the Bank and to stop him from evicting him. He later instituted these proceedings.

When cross examined, he testified that he bought the farm in early 1974. However, when referred to paragraph 4 of the statement of claim he conceded that it stated that he bought the farm in 1988.

He insisted that he bought it in 1974 though he had no proof. He denied the assertion that he gave his certificate of title to the Tobacco Board of Zambia as security. When further cross examined he admitted that he did.

However, he declined mortgaging his farm to Lima Bank. He reiterated that he never offered to sale the farm to the first defendant. When shown the letter at page 1 of the first defendant's bundle of documents captioned 'letter of offer' – he admitted that he authored it and that he was writing to the first defendant, offering him to buy his farm number 3792. He added that the first defendant forced him to sign the letter. When referred to page 1 of his bundle of documents which is a letter from Lima Bank to himself referring to a loan he should have liquidated by 30<sup>th</sup> September, 1988, he insisted that he never owed any money to Lima Bank and never got any loan from them. He conceded that he did not write Lima Bank to dispute this letter.

Under further cross examination, he reiterated that he signed the contract of sale at 19:00hours when there was no power at the farm because the first defendant wanted to get a loan. It was his testimony that the deed of transfer



was not in line with the contract of sale. He conceded that he did not have a document to show that he surrendered his certificate of title to Tobacco Board of Zambia and not Lima Bank. He reiterated that he signed the contract at night by duress or trick. When referred to the plaintiff's bundle of pleadings page 4 paragraph B(i) of the statement of claim, he admitted that it referred to sale of 214 hectares but added that there was no agreement for sale of 214 hectares or for the whole farm.

When referred to the letter at page 41 of the first defendant's bundle of documents, which was written by the plaintiff's counsel to the first defendant, the plaintiff testified that he was aware of the letter but was not aware that the first defendant obtained the certificate of title with his consent. When further cross examined, he testified that he wants his whole farm back because the first defendant did not give him anything. He admitted being the author of the letter at page 37 of the first defendant's bundle of documents captioned "*notice to vacate the farm*" and that it was a response to the first defendant's letter over the same subject. He said he was challenging or fooling the first defendant when he wrote that he would vacate the house and asked the 1<sup>st</sup> defendant to build him a house on the 400 acre area, because the whole farm was

his. He further testified that he lodged a caveat on the whole farm (614.985 acres) in 1994. When referred to the caveat, he admitted that it covered the 400 acres. When referred to page 4 of the 1<sup>st</sup> defendant's bundle of documents, he admitted that Lima Bank put a caveat on the land which was withdrawn on 28<sup>th</sup> March, 1988. He also admitted that the land was valued by a valuer who was taken to the farm by the first defendant.

When re-examined, he testified that he paid back all the debts he owed the first defendant and that those debts had nothing to do with the land. He also testified that the letter authored by his lawyer to the first defendant was not conclusive. When referred to the plaintiff's bundle of pleadings at page 44 paragraph 5 of the statement of claim, he reiterated that he did not sign any deed of transfer or assignment. When referred to page 30 he testified that it is a certificate of title in the name of the first defendant but added that he did not sale his land to him.

That was the evidence on behalf of the plaintiff.

The first defendant Aaron Brisbane Siangoma, 68, testified that on or about 30<sup>th</sup> December, 1988, the plaintiff approached him with the intention of selling his farm. He

requested him to put the intention in writing. The plaintiff did so by letter dated 28<sup>th</sup> December, 1988 which is at page 1 of the first defendant's bundle of documents. He read aloud the letter of offer. It was his testimony that after a few days he prepared his letter of acceptance and conditions dated 30<sup>th</sup> December, 1988, appearing at page 2 of his bundle of documents. Later, he asked the plaintiff for the value of the farm and also for Lima Bank to confirm how much he should pay. The plaintiff told him there were forms to be signed. On 3<sup>rd</sup> January, 1989, the two of them went to Lima Bank, Kabwe, where he paid the total of the plaintiff's indebtedness to the Bank. He was issued a receipt which he took to the Bank's headquarters in Lusaka. The caveat placed by the Bank was then withdrawn.

The court heard that the farm was valued by Mwitumwa and Associates at K25,000.00. The amount of the valuation was even confirmed by Lima Bank. Lima Bank also confirmed the amount the plaintiff was owing on the loan. The amount was K153,213.76 as shown by the document marked "D1". He paid Lima Bank over K150,000.00. The plaintiff also showed him the certificate of title and conversion of title which they both signed together with the contract of sale which was witnessed by

the Bank Manager. He drew the Court's attention to page 3 of the first defendant's bundle of documents and identified the contract of sale which was witnessed by the Bank Manager. He also identified the transfer documents at pages 5 to 14 duly signed by the plaintiff and himself.

He further testified that after that he applied for state consent. At the time, the plaintiff's title deed was with the Tobacco Board as he was their tenant first and later he was sold the farm at K12,000.00. He disclosed that he eventually obtained title in his name. He identified his certificate of title dated 8<sup>th</sup> February, 1989 at pages 30 to 33 of the first defendant's bundle of documents. He further testified after reading aloud clause 3 of the contract of sale; that after the plaintiff lost the farm, the two of them agreed that he should have access to 400 acres, not that he owned the 400 acres. The relationship between them became sour and the plaintiff then sued over the 400 acres.

He reiterated that the farm was his. The plaintiff sold it to him and he could not have bought it without Lima Bank's involvement. Lima Bank even wrote to the plaintiff telling him that it had contacted him (first defendant) and that he had not made payment then. He denied tricking the plaintiff into signing the contract of sale. It was his

testimony that the plaintiff who was still in occupation of the farm had allowed squatters who are paying him and have vandalised the farm.

During cross examination, he testified that he was not aware that the plaintiff paid Lima Bank K153,213.79 after it executed on him. When referred to page 11 of the plaintiff's bundle of documents he stated that the letter was written by the Bank before he paid, to advise the plaintiff that he (first defendant) had not paid. That this was because the plaintiff had told the Bank that the first defendant had to pay and he (plaintiff) was about to be evicted. He pleaded with him to pay and they went together to the Bank to pay. He reiterated that he paid the plaintiff's debt to the Bank as per receipts in the bundle of pleadings at page 20 for K100,000.00 and page 21 for K59,164.92. The total being K159,164.92. He further testified that this was the consideration for the farm. He conceded that the contract did not state the price. When referred to the deed of transfer at page 28 of the first defendant's bundle of documents, he admitted that the amount of K159,164.92 is not stated. He said the value was K25,000.00. He conceded that he did not take the documents to Ministry of Lands to record the price. When asked as to how he got the certificate of title without the

deed of dealing and no stamp duty, he testified that the plaintiff applied for consent and as vendor was supposed to pay stamp duty.

When further cross examined, he admitted that he paid K159,164.92 which was more than the K153,213.76 the plaintiff owed Lima Bank. He denied taking the documents at night and forcing the plaintiff to sign. He conceded that he used the certificate of title to borrow. He denied that at the time he lodged the assignment the plaintiff had already put in a caveat. He insisted that his certificate of title was earlier than the caveat and that the contract of sale was earlier than the certificate of title.

He reiterated that when the plaintiff made the offer, he said he had nowhere to go and requested that he be allowed to take possession of 400 acres, which was done. He said the contract of sale is at page 3 of the defendant's bundle of documents. He testified that there was no contract for the subdivision to repossess 400 acres because possession is different from ownership. And that he did not tell the plaintiff to subdivide 400 acres and there was no subdivision before his certificate of title. He later allowed the plaintiff to subdivide 400 acres but the plaintiff later changed his mind and refused to vacate the farm.

Under further cross examination, he testified that the plaintiff's letter of offer to him stated that the price was the balance of the loan from Lima Bank. He received his certificate of title through Lima Bank but never collected the plaintiff's old title deed. When cross examined by the second defendant's counsel, the first defendant admitted that he was the registered title holder of the farm. He also agreed that he got a loan from Grindlays Bank the predecessor of Stanbic Bank to pay for the property. He further admitted that the loan was not completely paid off. When re-examined he testified that he paid the plaintiff through Lima Bank. That the subdivision had no time table for when it could be done. He said it was not true that parties agreed to subdivide before he got his certificate of title.

That was the evidence on behalf of the first defendant.

The second defendant called its manager Specialised Recoveries, Mr. Reuben Matale Malindi to testify.

It was his testimony that in 1989 the second defendant applied for a loan from the second defendant which was then known as Grindlays Bank. His application for the sum

of K320,000.00 was granted and it was secured by a legal mortgage over the farm in question number 3792, Kapiri Mposhi. The Bank conducted a search at Ministry of Lands and discovered no encumbrances. When referred to page 7 of the second defendant's bundle of documents which is a lands print out, he testified that the first entry was dated 9<sup>th</sup> January, 1990 and is a withdrawal of caveat by the plaintiff.

He further testified that in May, 1991 the second advance was given to the first defendant in the sum of K1,180,000.00 (unrebased). A further charge was registered on the same property. In 1993, the first defendant obtained a further advance of K350,000.00 secured by a second further charge on the property. This was registered in March, 1993. The status was that the sum of K112,000,000.00 (unrebased) plus interest is still due as at the date the second defendant filed its defence.

He reiterated that the Bank did due diligence prior to lending to the first defendant and the searches at lands did not reveal that the first defendant obtained title by fraud.



He further testified that the Bank attempted to sale the first defendant's portion to recover its money but the plaintiff and first defendant had a dispute leading to this case. When referred to the letter at page 18 of the plaintiff's bundle of documents, from the Bank to the plaintiff's counsel dated 18<sup>th</sup> July, 2001, he testified that the extent of land the Bank was willing to cede to the plaintiff was 400 acres as per agreement. However, that the issue was never resolved because the dispute was now whether it was 400 acres or 400 hectares.

When cross examined by the plaintiff's counsel he testified that prior to registration of the mortgage, the Bank had no contact with the plaintiff as he was not the owner then and not the applicant of the mortgage.

It was his testimony that the caveat was withdrawn on 9<sup>th</sup> January, 1990 while the mortgage was registered on 7<sup>th</sup> November, 1989. When referred to page 34, he testified that the first defendant's certificate of title was issued in February, 1989 and thus earlier than the withdrawal of the caveat. He conceded that if a subdivision was done, the Bank's claim would be limited to the portion due to the first

defendant but in this case no subdivision was done so the Bank has recourse to the whole farm i.e. 614 hectares.

When cross examined by the first defendant's counsel, he testified that the caveat at pages 34 and 35 of the bundle of pleadings was entered by the plaintiff on 5<sup>th</sup> December, 1989 for interest in land of 400 acres.

When re-examined, he testified that the caveat of 5<sup>th</sup> December, 1989 was withdrawn in 1990. That the mortgage was registered on 7<sup>th</sup> July, 1989 and the caveat was entered on 5<sup>th</sup> December, 1989. Thus, there was no encumbrance then.

That was the evidence on behalf of the second defendant.

Learned counsel for the plaintiff submitted that the plaintiff intended to sale 214 acres out of the 614 acres. The subdivision to be sold to the first defendant was not yet surveyed, nor indicated on a plan or map. These were to be made in future including the price of the unborn subdivision. Since the negotiations were in the future it is not enforceable, for absence of an agreed consideration and for absence of conclusion of any fundamental terms of contract. That a future contract does not amount to a

contract at law. The case of **Foley v. Classique Coaches Ltd**<sup>1</sup> was relied upon per Lord Mangham that “*an unconcluded bargain is not a contract; an agreement to agree in the future is not a contract.*”

It is counsel's submission that the mortgage funds are not equivalent of a price of the 214 acres/hectares or 614 acres. That on 8<sup>th</sup> February, 1989 long after the contract of 30<sup>th</sup> December, 1988, the first defendant received a letter from Lima Bank informing him that the plaintiff had not cleared his indebtedness. Thus, a clear warning to the plaintiff that he should not do anything to the property without the permission of or advice of AFC and Tobacco Board of Zambia, the mortgagees of the former mortgages. That there are clear gaps of information to the plaintiff from AFC or Tobacco Board of Zambia leading to the sum of K12,800.00 appearing on the certificate of search at page 34 of the plaintiff's bundle of pleadings. The first defendant did not settle the plaintiff's indebtedness to AFC and Tobacco Board on behalf of the plaintiff. Thus, there are ‘tall stories’ and ‘sharp practices’ which amount to fraud pursuant to the claim to fraud as categorized by the precedent of the unreported judgment of the Supreme Court of Zambia in **Spiros Konidaris v. Ramlal Kanji Dandiker**<sup>2</sup>.

That the parties did not agree on a fundamental term of the contract and the first defendant prematurely and fraudulently lodged the transfer/assignment at the Lands and Deeds Registry. In the absence of consideration the contract is null and void. It was further submitted that even the deed of transfer used by the first defendant is erroneously or wrongly transmitted from the plaintiff to the first defendant. There was no completion statement date such that no one knows when the completion of the transaction took place. Thus, the transaction was never completed and the lodgement was premature. The certificate of title be reversed.

Learned counsel contends that the letter from his law firm to the second defendant is privileged and does not amount to a contract between the second defendant and the plaintiff. Nor is the Registrar of Lands and Deeds a party to the mortgage of the second defendant's mortgage deeds. That there was no other communication to the plaintiff when the second defendant was negotiating their loan with the first defendant because their search revealed that in fact the mortgage was to be secured by the whole farm which was by then in the name of the plaintiff. The subdivision (if

any) was only for 214 acres. By registering the mortgage on the whole property, the mortgage was over secured and the proceeds of the mortgage be recoverable from the first defendant.

Thus the mortgage be treated as the “unsecured debt” recoverable from the recipient of the funds, in equity.

Learned counsel for the first defendant Mr. L.M. Mwanabo, submitted that the plaintiff gave more than one version of his side of the story in this matter. In paragraph 15 of his statement of claim he states:

**“the plaintiff averred that sometime in or about 30<sup>th</sup> day of December, 1988, the defendant agreed with the plaintiff for the sale of an unmarked – off portion only being to 214 hectares of the said Farm 3792 Kabwe aforesaid: and that by clause 3 of agreement the plaintiff was to retain 400 Hectares (400 Acres by mistake) of the total area of 614.8955 Hectares...”**

In his oral testimony he denied entering into an agreement with the first defendant for sale of the farm in issue. And that he signed the contract ignorantly and was forced to do so by the first defendant. The defendant contends that he bought the farm in issue and a contract of sale was executed by the parties as shown on pages 2 and 3 of the plaintiff's and first defendant's bundle of documents respectively, subject to the acres to be given back to the

plaintiff. After that the first defendant paid the loan the plaintiff owed the Bank and had title processed in his names.

It was counsel's submission that according to section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence as to ownership of land. However, there are instances when it can be cancelled, which the plaintiff has failed to prove. The statement of claim is clear that the plaintiff agreed to sale an unmarked off portion of 214 acres, which clearly shows an intention to sale the land and which was reduced in writing on 30<sup>th</sup> December, 1988. The plaintiff's testimony that he never agreed to sale part of his farm to the first defendant, flies in the teeth of documentation before court. The documents show there was an agreement to sale and purchase. As for the price, it was to be determined by Lima Bank. This is shown by document 1 and 2 in the first defendant's bundle of documents. All the formalities for purchase of land were followed; the contract was in a written form as prescribed by the Statute of Frauds 1677.

Additionally, that the contract does not refer to any other or future contract. Lima Bank had an interest in the land and placed a caveat on the property. The plaintiff did not

even dispute the first defendant's evidence that the contract was witnessed by an employee of Lima Bank. Neither did he adduce evidence to disprove the fact that he had failed to settle his loan with Lima Bank and that the same was settled by the first defendant.

The plaintiff was insincere and very economical with the truth whereby he even told this Court in his evidence that he submitted his certificate of title to Tobacco Board of Zambia and that he did not know how the first defendant got it when it is clear from the documentation such as his own letter on page 1 of the first defendant's bundle of documents that the title was with Lima Bank kept as security for the loan he obtained. Furthermore, the plaintiff's attempt to show as if he was not aware of the change of title into the first defendant's names flies in the teeth of the letter from his own lawyer dated 24<sup>th</sup> April, 1994 appearing on page 4 of the plaintiff's bundle of documents. The said letter is in fact in line with the contract of sale and confirms the size of the land to be given back to the plaintiff. The plaintiff's assertion that he was to retain 400 hectares and not acres is not supported by any documentation. The size is expressed in words and figures therefore, this eliminates any mistake or oversight.

The agreement was binding and it was proper for the property or certificate of title to be issued to the first defendant for the whole land as subdivision was being awaited so that the plaintiff could get his portion in accordance with the agreement while affording the first defendant use of the title. It was argued that in **Nkongolo Farm Limited v Zambia National Commercial Bank Limited, Kent Choice Limited (in receivership), Charles Haruperi (2005) Z.R. 78 (S.C)** the Supreme Court cited the case of **Zambia Export and Import Bank Limited v Mukungu Farm Limited and Others (1993) (1994) ZR36** where it was held that:

*“an agreement is signed freely if it is signed in the course of business practice and the respondent had a choice not to sign. Consequently, I hold that the plaintiffs freely signed the documents in the course of the business practice, as they had the choice not to sign them”.*

The plaintiff in casu had a choice not to sign but he went ahead and signed.

Thus, even if the Court was compelled by the plaintiff's argument that he did not sign freely, the plaintiff cannot plead mistake in signing the document. The case of **Saunders v. Anglia Building Society (1971) AC 1004** was cited, in which Mrs. Gallie a 78 year old widow signed a



document which a Mr. Lee had told her was a deed of gift of her house to her nephew. She did not read through the document since at the time of signing her glasses were broken. The document which she signed was in fact an assignment of her leasehold interest in the house to Mr. Lee. The Anglia Building Society advanced 2,000 pounds to Lee on the strength of the deed. Mrs. Gallie brought an action against Lee and the building society claiming that the deed was void. She pleaded *non est factum*. The House of Lords held that:

*“the plea of non est factum must fail. Although her signature had been induced by fraud, the document she signed was not fundamentally different from that which she thought she signed. Moreover, persons wishing to plead non est factum must show that they exercised reasonable care in signing. Mrs. Gallie had not taken the trouble to read the document”.*

According to counsel, in casu there are no true stories of fraud nor was there a plea that the document in the first defendant's bundle of document is fundamentally different from the one the plaintiff thought he was signing as the plaintiff has not proved so before court.

The case of **Sithole v. State Lotteries Board of Zambia Ltd**<sup>3</sup> was cited as authority that “*the standard of proving fraud is greater than a simple balance of probabilities*”. It was further submitted that the plaintiff also failed to prove

that his signature was forged on the deed of transfer. No handwriting expert adduced evidence to prove this. The plaintiff's signature is similar to his signature on all the other documents he does not dispute signing. The case of **Colgate Palmolive (Z) Inc. v. Able Shemu Chuuka and 110 Others**<sup>4</sup> was relied upon that:

*“if there is one thing more than another which public policy requires it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be enforced by Courts of justice”.*

Also **Musialela v. Chipman**<sup>5</sup> that *“where parties have embodied the terms of their contract in a written document, extrinsic evidence is not generally admissible to add to vary or subtract from or contradict the terms of the written contract”.*

Accordingly, that the plaintiff knew what was going on and cannot today claim that he had not contracted to sale a portion of his farm. Additionally, that in the case of **Anti-Corruption Commission v. Barnet Development Corporation Limited**<sup>6</sup> the Supreme Court held that *“under section 33 of the Lands & Deeds Registry Act, of certificate of title is conclusive evidence of ownership of land by a holder of a certificate of title. However, under section 34 of*

the same Act, a certificate of title can be challenged and cancelled for fraud..." The plaintiff has failed to prove fraud and has not shown any impropriety by the first defendant in the acquisition of the certificate of title.

Mr. Chiteba, the learned counsel for the second defendant submits that from the evidence on record and the contract of sale, executed by the plaintiff and the first defendant, a claim for fraud is misconceived. The terms and conditions of the contract were clear that the parties had agreed for the transfer of 614 acres of the farm. The parties further agreed for the plaintiff to retain 400 acres which location was to be determined by the first defendant.

Learned counsel contends further that the second defendant fully investigated the title before the mortgage could be issued to the first defendant on the premise that the certificate of title was conclusive evidence of the fact that the first defendant was the registered owner of the land in question and therefore, he could assign, transfer or mortgage any part of the same. He added that without prejudice to the rights of the plaintiff and first defendant, the second defendant's legal mortgage on the farm is not affected by the alleged fraud in transfer of the farm between the parties. He relied on the High Court decision

in **Stanbic Bank Zambia Limited v. Witola Mbuchi & John Fidelis Kabwiri**<sup>7</sup> as authority. Therefore, the first defendant was under no duty to investigate the manner in which the first defendant became the registered title holder of the farm before issuing the deed of mortgage.

The plaintiff in his submissions does not dispute the existence of the legal mortgage over the farm. Therefore, the first defendant having defaulted on its mortgage repayments the Court ought to exercise its powers in foreclosing on the farm in line with the counterclaim by the second defendant. That the extent of the mortgaged property was the whole farm 3792 as confirmed by the certificate of title and memorials thereto. However, that second defendant has no objection for the plaintiff retaining the portion of 400 acres as testified by DW2.

After analysing the evidence and submissions by counsel, it is common cause that the plaintiff and the first defendant entered into an agreement for the plaintiff to sale and the first defendant to purchase farm number 3792 Kabwe/Kapiri Mposhi area. However, it is also a fact that disputes arose and the plaintiff contends that he never sold the land to the first defendant either in whole or in part. He testified that the first defendant tricked him into signing

the contract of sale. The first defendant contends otherwise. It is also common cause that the first defendant obtained a mortgage from the 2<sup>nd</sup> defendant to pay for the farm in question.

In my view the issues that fall for determination are whether there was a valid contract of sale between the plaintiff and first defendant and for what portion or extent of the land. What is the effect of the second defendant's mortgage on the land?

It is trite law as submitted by counsel that where real property is the subject of sale, the contract of sale should be evidenced in writing. This is in accordance with section 4 of the Statute of Frauds 1677. It is also settled law that documents relating to a transaction such as notes or memoranda may constitute a valid contract if they contain all the essential terms of the contract such as the names and the property being sold. This is in line with the Supreme Court decisions in Wesley **Mulungushi v. Catherine Bwale Mizi Chamba**<sup>8</sup> and **David Howes and Others v. Betty Butts Carbin (sued in her capacity as Trustee of the Estate of the late Daisy Butts)**<sup>9</sup>. In the latter case, receipts were held to be sufficient memoranda to satisfy section 4 of the Statute of Frauds since they

specified the names of the parties, adequately identified the subject matter and stated the nature of the consideration.

In casu, on 28<sup>th</sup> December, 1988 the plaintiff wrote to the first defendant an offer letter for the sale of farm number 3792. In the said letter he advised that the purchase price would be determined by Lima Bank whom he owed some money. That *"Lima Bank will release the title deeds to you after you have settled my indebtedness with them"*.

At trial the plaintiff confirmed to having authored and signing the letter of offer dated 28<sup>th</sup> December, 1988 but stated that he was tricked by the first defendant. On 30<sup>th</sup> December, 1988, the first defendant wrote to the plaintiff accepting the offer and the terms as contained in the letter of offer. On the same day the parties executed a contract of sale. According to clause 3 of the contract of sale, the buyer agreed to allow the vendor to *"repossess 400 acres part of the farm whose location and site would be determined by the buyer"*.

This is the contract the plaintiff alleged he was tricked into signing. He also contends that it is invalid as it does not state the price. His counsel submits that it was a future contract which is null and void.

The first defendant denied tricking the plaintiff into signing the contract. He testified that the purchase price was determined by Lima Bank as stated in the letter of offer and he paid the sum the plaintiff owed the Bank. His counsel submits that the plaintiff has failed to prove that he was tricked into signing the contract.

Let me state from the outset that I am inclined to accept the first defendant's testimony over the plaintiff's. As submitted by Mr. Mwanabo the plaintiff seriously contradicted himself. The contradictions and inconsistencies in his testimony go to his credibility. His oral testimony is at variance with the written documents in his bundles such as the statement of claim even the letter from his counsel confirming the transaction. During trial he denied getting a loan from Lima Bank and surrendering his title deed to the Bank and yet at page 1 of his bundle of documents is a letter from Lima Bank confirming he got a loan. I also observed him during trial. He did not take the case with the seriousness it deserves. At some point in cross examination, when challenged that he signed the various documents, he stated that he was just fooling the first defendant. I am therefore, inclined to accept the first defendant's version of events as I will explain in due course.

The contract of sale which the parties executed clearly states the parties, the property being sold as "*Farm number 3792 chibwe, Kabwe in extent of 614 hectares with all its assets and unexhausted improvements*". It states in clause 4 that "*the vendor agrees to refund the buyer the principal amount paid to Lima Bank and other expenses incurred (related to farm purchase) by the buyer at Bank interest rate in event of the deal failing through as a result of the default on the part of the vendor*".

In my judgment, the contract of sale is clearly in line with the letter of offer of 28<sup>th</sup> December, 1988 which the plaintiff admitted in cross examination that he authored. It references the amount the buyer (first defendant) paid to Lima Bank. I opine that only the plaintiff and Lima Bank knew about his indebtedness. The first defendant came to know about it through the plaintiff. I do not see how he could have been tricked into signing the contract which is in line with his own letter of offer. I am thus inclined to find that he freely signed the contract of sale and letter of offer as submitted by Mr. Mwanabo. I am of the considered view that the contract of sale and letter of offer satisfy section 4 of the Statute of Frauds. The parties are the plaintiff and the first defendant; the property being sold is



farm 3792 Kabwe and the consideration is the balance of the loan the plaintiff owed Lima Bank, which the first defendant paid as determined by Lima Bank. The plaintiff did not challenge the first defendant's testimony that the two actually went together to Lima Bank and that the contract was witnessed by the Bank Manager. He was a free and willing participant in the whole transaction. There is therefore, a valid contract of sale which the Court must enforce. I am guided by the case of Colgate Palmolive supra.

On the evidence before me, I am thus not persuaded by his allegations of being tricked, fraud or sharp practice. The plaintiff willingly sold his farm to the defendant. As submitted it is trite that where parties have embodied the terms of their contract in a written document, extrinsic evidence is not generally admissible to add, vary or contradict the written contract. Furthermore, the plaintiff has failed to prove how he was tricked. Whether he signed at night or during the day is immaterial. He was very much aware of what he was signing having offered the farm for sale and set the terms in the same letter.

I am of the considered view that even clause 4 of the contract of sale cannot aid the plaintiff. He did not default

in any way and acted in accordance with the contract between himself and the first defendant. He has failed to prove that he did not sign the deed of transfer. His signature on the deed of transfer is the same as the one he signed on the letter of offer for instance, which he admits signing. His attempts to frustrate the contract through the caveat which he later withdrew, are of no legal effect, as at that time title to the farm had passed to the first defendant and he used it to obtain loans from the second defendant. I accept DW2's testimony that the second defendant conducted searches at lands before advancing the loans to the first defendant and found no encumbrances.

Having failed to prove fraud, sharp practice or that the plaintiff was tricked I find that the first defendant being in possession of a certificate of title for the said farm is conclusive owner of the farm as contended by both counsel for the defendants. This is in accordance with sections 33 and 34 of the Lands and Deeds Registry Act and the Supreme Court decision in the *Anti-Corruption Commission v. Barnett Development Corporation*, supra.

From the letter of offer and the contract of sale, it is apparent that the plaintiff sold the whole farm in extent 614 plus hectares. I must state though that the plaintiff is

not even sure of the extent of this farm. In one breath he states 614 plus acres in another 614 plus hectares. And in his statement of claim that reference to 400 acres was a mistake. I take it the extent of the whole farm is 614 plus hectares as stated in the contract of sale and the certificate of title. I do not accept that the reference to 400 acres in the contract was a mistake. The contract of sale clearly states 400 acres and both parties signed.

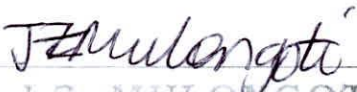
As aforesaid extrinsic evidence is generally not admissible to add, vary or contradict the terms of a written document or contract. I note as testified by the first defendant that the parties agreed to let the plaintiff use 400 acres because he was stranded. This is in line with clause 3 of the contract of sale alluded to. Even the letters to vacate exchanged by the parties attest to this fact. I therefore, accept the first defendant's testimony that because of disputes over the 400 acres, he requested the plaintiff to have it subdivided and surveyed for himself. He confirmed it in cross examination that he has no objection to the plaintiff having the 400 acres. It is noteworthy that in his pleadings the plaintiff is actually seeking an order for specific performance of the contract less 400 acres. Thus, the first defendant not objecting to the plaintiff having the 400 acres subdivided and surveyed, it is so ordered.

Regarding the second defendant, I order that the remainder of 614 plus hectares after removal of the plaintiff's 400 acres, should be foreclosed and sold for it to recover its money. It is clear the whole farm 614 plus hectares was secured by the mortgage the first defendant obtained from the second defendant. However, since DW2 like DW1 (first defendant) testified that the Bank had no objection to the plaintiff having 400 acres, it is so ordered. Both the plaintiff and first defendant should yield vacant possession of the remainder of farm number 3792 to the second defendant so it can foreclose and sale to recover its money.

The second defendant's claim for payment of K112,258,835.34 is therefore, unsuccessful

I award costs of, and incidental to the action to the defendants to be taxed in default of agreement. Leave to appeal is granted.

Delivered at Lusaka this 2<sup>nd</sup> day of September, 2016.

  
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J.Z. MULORGOTI  
HIGH COURT JUDGE