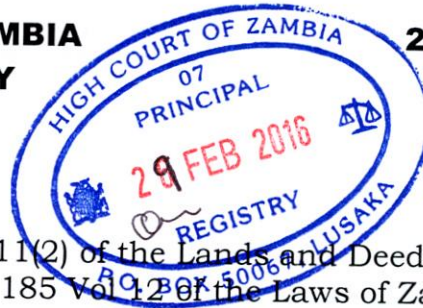


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(CIVIL JURISDICTION)**

2015/HP/A023



In the matter of: Section 11(2) of the Lands and Deeds Registry Act Cap 185 Vol 12 of the Laws of Zambia

And
In the matter of: Section 87 of the Lands and Deeds Registry Act Cap 185 Vol 12 of the Laws of Zambia

And
In the matter of: Order 6(2) of the High Court Rules, Cap 27 Vol 3 of the Laws of Zambia

And
In the matter of: Sections 35, 48, 54, 58 and 57 of the Lands And Deeds Registry Act Cap 185 Vol 12 of the Laws of Zambia

And
In the matter of: An appeal by the Applicant to the Court against the cancellation of Certificates of Title No. 289670 and 193614 in respect of Stand 35322 and Stand 35323, Lusaka respectively Made pursuant to section 87 of the Lands and Deeds Registry Act, Cap 185 vol. 12 of the Laws of Zambia.

BETWEEN:

HALIMO MOHAMED JAMA (Female Sole)

APPELLANT

AND

THE CHIEF REGISTRAR OF LANDS

1ST RESPONDENT

AND DEEDS

THE COMMISSIONER OF LANDS

2ND RESPONDENT

THE ATTORNEY GENERAL

3RD RESPONDENT

AL BAQRA GENERAL DEALERS LIMITED

4TH RESPONDENT

Before Hon. Mrs. Justice M.S. Mulenga on the 29th day of February, 2016

FOR THE APPELLANT : MR. L. MAYEMBE, MESSRS CENTRAL
CHAMBERS
FOR THE 1ST, 2ND & 3RD RESPONDENTS : MRS S. CHANDA, STATE ADVOCATE –
ATTORNEY GENERAL’S CHAMBERS
FOR THE 4TH RESPONDENT : NO APPEARANCE

J U D G M E N T

Cases cited:

1. **Magic Carpet Travel and Tours v Zambia National Commercial Bank Limited (1999) ZR 61**
2. **Zambia Consolidated Copper Mines Limited v Eddie Katalayi and Max Chilongo (2001) ZR 28**
3. **Chilufya v Kangunda (1999) ZR 166.**
4. **Pilcher v Raswlins [1872] 7 CH 259**
5. **Mwenya and Randee v Kapinga (1998) S.J 12**
6. **Anti Corruption Commission vs Barnet Development Corporation Limited (2008) ZR 69 Vol 1**
7. **Banda and Anor v Mudimba [2011] ZR 162**
8. **Nkongolo Farm Limited v Zambia National Commercial Bank Limited, Kent Choice Limited (in receivership) Charles Haruperi (2005) ZR 78 (S.C)**
9. **Zambia Revenue Authority vs Hitech Trading Company Limited (2001) ZR 17**

The Appellant by way of Notice of Appeal dated 3rd June, 2015 appeals against the decision of the Registrar of Lands and Deeds to cancel her certificate of title No. 289670 and certificate of title No. 193614 in respect of stand No. 35322 and stand No. 35323 Lusaka, respectively under section 11(1) of the Lands and Deeds Registry Act, on ground that it was procured by fraud. She sets out her grounds of appeal as follows:

1. *That the Appellant was not accorded an opportunity to be heard before cancelling her certificates of title.*
2. *The decision to cancel her certificates of title is arbitrary*
3. *That, in cancelling the said certificates of title, the Respondent failed to take into account that the Appellant was an innocent purchaser for value.*

4. *That the 1st Respondent failed to take into account the fact that the 2nd Respondent endorsed the sale of the said properties to the Appellant by the 4th Respondent when it granted the 4th Respondent Consent to Assign on the 3rd and 4th December 2014 respectively*
5. *That, by failing to warn the general public as to the 4th Respondent's alleged fraudulent procurement of the properties in question for over three years, by putting an appropriate notice on the register of the properties, the 1st and 2nd Respondents endorsed the 4th Respondent clean titles to the said properties.*
6. *Other such grounds as shall be furnished on the date of hearing.*

The Appellant states in her affidavit of even date that she is a Somali National permanently resident in Zambia. That she is the bonafide purchaser for value and legal owner of stands 35322 and 35323 Lusaka respectively whose certificates of title are produced, marked "HMJ1 and HMJ2." The said properties were purchased from the 4th Respondent in December 2012 as per the contracts of sale marked "HMJ3" and HMJ4" and that prior to concluding the above transactions, she caused to be conducted searches on both properties at the Lands and Deeds Registry which revealed that there was a Restriction Notice placed on stand 35322 by the Anti Corruption Commission on 16th December, 2009 under section 24 of the Anti - Corruption Commission Act No. 42 of 1996. Copies of the computer printouts are produced, marked "HMJ5 and HMJ6." She was subsequently advised by her advocates that the restriction notice was valid only for one year from the date of issue and that it had expired on 15th December, 2010 and thus they could proceed with the transaction. As regards stand 35323, there was no notice whatsoever of any adverse effect placed on the property and thus they proceeded with the transaction for the said property as well.

State Consent to assign for both transactions was applied for and granted by the 2nd Respondent on 3rd and 4th December, 2012 marked "HMJ7 and HMJ8" without any queries raised whatsoever. The 4th Respondent then proceeded to pay property transfer tax on the two properties. Assignment documents were subsequently lodged in the Lands and Deeds registry on 19th December, 2012 however as regard stand 35322, Lusaka, the 1st Respondent raised a query to the effect that the assignment could not be approved for registration because there was a restriction notice placed on the property by the Anti Corruption Commission on 16th December, 2009. As regards stand 35323, Lusaka the assignment was duly registered and a certificate of title no. 193614 issued in the Applicant's name and which is currently in her possession.

The Appellant states that the refusal by the 1st Respondent to sanction the registration of the assignment on stand no. 35322, Lusaka was appealed to the High Court on 22nd July, 2013 wherein it was found that there was no valid restriction notice on the property as the same expired on 15th December, 2010 and directed the 1st Respondent to facilitate the registration of the assignment in the Appellant's name. A copy of the Ruling is produced, marked "HMJ11." Further the Ruling was registered with the Lands and Deeds Registry on 24th July, 2013 as shown on the exhibit marked "HMJ12". That her advocates followed up the registration of the assignment from July 2013 to about 27th January, 2014, when the Senior Registrar of Lands and Deeds Mr. Michael Chisengele confessed that the file pertaining to stand 35322 Lusaka was lost and advised that her advocates to apply for duplicate

copies despite the documents having been lost while in the custody of the 1st Respondent.

That in order not to delay the matter any further, they complied with this request and processed all the documents for the issuance of a duplicate certificate of title. Produced, marked "HMJ13 and HMJ14" are copies of newspaper and gazette cuttings and the statutory declaration. The documents were all handed to the Senior Registrar of Lands and Deeds on 18th February, 2014 and between 20th February, 2014 and 19th March, 2014, they made numerous follow ups at the Lands and Deeds to uplift the certificate of title to no avail.

On 19th March, 2014, her advocates were called to the office of the Senior Registrar of Lands and Deeds to uplift the certificate of title but were served with two identical letters both dated 19th March, 2014 to the effect that the 2nd Respondent had requested the 1st Respondent to cancel the certificates of title for stands 35322 and 35323 on allegation that the same were procured by the 4th Respondent under fraud, the said letters are marked "HMJ16 and HMJ17". Further on 20th March, 2014, upon conducting a search her advocates came across a letter marked "HMJ18" dated 30th July, 2013 from the Commissioner of Lands directing the cancellation of titles for stands 35322 and 35323, Lusaka respectively and setting out the alleged fraud committed by the 4th Respondent in procuring the said properties.

The Appellant was surprised as all along in dealing with these properties there was no indication or mention of the issues raised in the 2nd Respondent's letter and the 1st Respondent knew of the existence of the said

letter but neither made mention of this issue nor was an entry made on the register of both properties to that effect. That she is an innocent purchaser for value and should not be punished for deeds she did not commit and for which both the 1st and 2nd Respondents never raised any alarm or warning as no entry was ever made on the register of both stands 35322 and 35323 of the alleged fraud in which they were procured by the 4th Respondent. That when a search was conducted on 22nd November, 2012 the properties clearly showed that both titles were clean apart from the expired Restriction Notice by the Anti Corruption Commission. The 2nd Respondent had an opportunity to put her on alert on 3rd and 4th December, 2012 when he granted State's Consent to assign for both properties but failed to do so and this was a mark of approval. That even when the matter went to Court in April, 2013 on the challenge of the refusal to register the assignment on stand 35322, Lusaka the 1st and 2nd Respondents never raised any issues of fraud. The 2nd Respondent cannot now turn around and cancel her titles on allegations of fraud.

That as shown on the computer printouts for both properties, the 4th Respondent held both properties from 17th April, 2009 until December, 2012 when she purchased them and neither the 2nd Respondent nor the 1st Respondent raised any issues or made any warning to the general public about the alleged fraudulent obtaining of title by the 4th Respondent. Further that the 1st and 2nd Respondents had an opportunity to cancel the 4th Respondent's titles for over three years but failed to do so and that since acquiring the properties in issue, she has proceeded to develop stand No. 35323 Lusaka on which she has built a house which is almost complete

and valued at six million five hundred thousand (K6,500,000.00). Also produced are copies of the application to erect a building which was duly approved by the Lusaka City Council and a copy of the Valuation Report indicating the development on the property.

The Appellant's advocates filed skeleton arguments dated 30th June, 2015 and cited section 87 of the Lands and Deeds Registry Act Chapter 185 (the Act) which provides that:

"If the Registrar refuses to perform any act or duty which he is required or empowered by this Act to perform, or if a Registered Proprietor or other interested person is dissatisfied with the direction or decision of the Registrar in respect of any application, claim, matter or thing under this Act, the person deeming himself aggrieved may appeal to the Court."

Counsel for the Appellant has urged this court to reverse the decision of the 1st Respondent to cancel her certificates of title in respect of stand no. 35322 and stand no. 35323, Lusaka on instructions from the 2nd Respondent alleging fraud by the 4th Respondent. That the 2nd Respondent claims that under the *nemo dat* rule, there is no way a good title could have passed from an illegal cause but does not state what illegality the Appellant committed.

Counsel argues that the Appellant is an innocent purchaser for value. She was not privy to what transpired between the 2nd and 4th Respondents and could not have known how the 4th Respondent acquired the properties. The 2nd Respondent did not help matters by failing to raise the necessary alarm to innocent third parties by placing an entry on the properties so as to warn the general public about the alleged fraud committed by the 4th Respondent in acquiring the properties in question. The 2nd Respondent went on to grant the state's consent to assign to the 4th Respondent when it sold the properties to the Appellant. Thus the 2nd Respondent gave authority for the

transfer of the properties to the Appellant and cannot now turn around and cancel the certificates. That even assuming that the *nemo dat* rule applies, the 2nd Respondent waived whatever objections it had when it granted the 4th Respondent state consent to assign and is thus precluded from applying the said principle.

In view of the above, the Appellant acquired good title to both stand 35322 and stand 35323 Lusaka and thus this court is urged to restore her certificates of title. Counsel relies on the case of **Magic Carpet Travel and Tours v Zambia National Commercial Bank Limited (1999) ZR 61** wherein it was held that:

"The question is, did the Plaintiff get a valid title? The answer is yes. From the affidavits and submissions, there is nothing to suggest that the Plaintiff was not an innocent purchaser. The facts show that the Plaintiff acquired the title without any notice of fraud. There is no evidence that the Plaintiff acted fraudulently."

A person who acquires title to land in the absence of any encumbrances and who does so without having notice of prior fraudulent transaction acquires good Title to the land"(emphasis theirs)

Counsel contends that the Appellant is an innocent purchaser for value of the properties in question and that she acquired the same without any notice of fraud or encumbrances. There is no evidence that the Appellant acted fraudulently in acquiring the said properties in question. Further counsel relies on the case of **Zambia Consolidated Copper Mines Limited v Eddie Katalayi and Max Chilongo (2001) ZR 28** wherein it was held that:

"These were very strong moral grounds. However, the legal position, as we see it, was that it was not possible without proper basis to ignore the rights of Kangali who was an innocent purchaser for value and who had no reason to suspect there was to be an adverse claim. There would be no jurisdiction to inflict injustice on the third party in the name of justice for the appellant."

Counsel further submits that the 2nd Respondent had a chance to cancel the 4th Respondent's title from 2009 to 2012 before the Appellant purchased it but failed to do so. Instead, the 2nd Respondent even proceeded to grant state's consent to assign as a mark of approval or authority that the 4th Respondent had good title. Counsel opines that the court cannot ignore the rights of the Appellant who has even built a property on the land valued at K6,500,000.00 as per exhibit marked "HMJ20". That as held by the Supreme Court there is no justification for inflicting injustice on the Applicant in the name of justice for the 2nd Respondent who in fact encouraged the problem by failing to raise any notice of adverse effects on the property. That even when the *nemo dat* rule was to be applied, it can be argued that the true owner of the properties being the 2nd Respondent gave authority for the 4th Respondent to transfer the properties to the Applicant.

Counsel concludes that the Appellant is an innocent purchaser for value and cannot be deprived of her properties in the absence of any encumbrances or notices of fraud. She acquired good title to the properties and thus this appeal should be upheld.

The 1st, 2nd and 3rd Respondents filed heads of argument dated 23rd October, 2015 opposing the appeal. They argue that the 1st Respondent was on firm ground when she cancelled the certificates of title relating to stands 35322 and 35323 according to section 11 of the Lands and Deeds Registry Act which states 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"

The 1st Respondent is thus empowered to cancel any certificate of title which was erroneously issued. That the certificates of title were subject of investigations by the Anti Corruption Commission in conjunction with the Zambia Police and Drug Enforcement Commission. The investigations revealed that the titles were not authentic and on that basis the 1st Respondent was advised to cancel them. That fraud vitiates the authenticity of a certificate of title and according to section 21, registration shall not cure any defect in any instrument registered or confer upon it any effect or validity other than that provided by that part, this position was affirmed in **Chilufya v Kangunda (1999) ZR 166.**

Further, it is argued that the Appellant is not an innocent purchaser for value without notice. That it is common knowledge that there was a restriction notice placed on property No. 35322 by the Anti Corruption Commission on 16th December, 2009 and it is not in contention that a restriction notice is valid only for 1 year from the date of issue. However the fact that a restriction notice had been placed on the property in the recent past should have sent signals to any would be purchaser that the property in question had unresolved issues. More so that both properties were being sold by the same vendor.

It is also submitted that the Appellant acted unreasonably by proceeding to purchase the properties this goes against the spirit and principle of the doctrine of notice. This doctrine states that an equitable interest will bind all persons other than a bonafide purchaser for value without notice. In **Pilcher v Rawlins [1872] 7 CH 259**, James LJ pointed out that the plea of purchaser of a legal estate for value without notice is an absolute, unqualified

answerable defence. The burden of proof lies on the person who would wish to rely on the defence.

The Appellant thus bears the burden of proof to show that she did not have notice of any encumbrances, actual, constructive or implied. It is clear that the Appellant had notice of the encumbrances of the subject properties and cannot therefore be said to be a bonafide purchaser for value without notice. On this basis alone, even though consent to assign was granted the same does not override the fact that there were encumbrances on the properties.

The case of **Mwenya and Randee v Kapinga (1998) S.J 12** is cited in which the Supreme Court relied on the Halsbury's Laws of England paragraph 1322 on page 887 vol 16 4th Edition where the learned author said:

"Notice may be actual or constructive and where the said notice is imputed on the subsequent purchaser then the plea of purchaser without notice is defeated."

It is prayed that this appeal be dismissed with costs to the 1st, 2nd and 3rd Respondents.

In reply, the Appellant filed skeleton arguments dated 9th December, 2015, wherein it is argued on her behalf that the said restriction notice was only placed on one property, stand No. 35322 Lusaka and there was none on 35323, Lusaka. From a legal stand point there was no restriction notice placed on stand 35322, Lusaka at the time the Appellant purchased it as under the law in place at the time, the Anti Corruption Commission Act No. 42 of 1996, a notice had a life span of twelve months and there was no provision for renewal. Thus it ceased to have effect on 15th December, 2010,

having been filed on 16th December, 2009 nearly two years before the Appellant purchased stand No. 35322, Lusaka.

The case of **Anti Corruption Commission vs Barnet Development Corporation Limited (2008) ZR 69 Vol 1** is cited wherein it was held that:

"At the outset, we agree with both counsel that there is no provision for renewal of a restriction notice under the law. What is in issue here is whether the appellant commission can issue a fresh restriction notice after the earlier one has expired. Under section 24(3) of the Act, the life of a restriction notice is 12 months if not earlier cancelled by the Director General..." (emphasis theirs)

In light of the above holding, it cannot be argued that there was a restriction notice on the property at the time of the Appellant's purchase the same having expired on 15th December, 2010 almost two years before the Appellant purchased this property. Counsel further argues that in the appeal Ruling exhibited as "HMJ11" the High Court found as a fact that there was indeed no restriction notice as it had expired by operation of the law. The Appellant therefore had no notice of any encumbrance. Furthermore stand no. 35323 had no restriction notice whether valid or expired. That the allegation of fraud by the 1st, 2nd and 3rd Respondents has not been pointed out as to what fraud exactly was committed by the Appellant in purchasing the subject properties. That the Appellant obtained good title to the properties she acquired.

This Appeal raises five grounds which can be grouped in two parts. The first is that the Appellant was not accorded an opportunity to be heard and thus her certificates of title were cancelled arbitrarily. The second is that the Appellant was an innocent purchaser for value and the 2nd Respondent had endorsed the sale of the properties by granting the consents to assign and

there was no notice as the 1st and 2nd Respondents did not put appropriate notices on the register of the alleged fraudulent procurement. The main argument in this appeal is that the Appellant was a bonafide purchaser for value without notice of any encumbrance while, the 1st, 2nd and 3rd Respondents argue otherwise.

For one to rely on the doctrine of bonafide purchaser for value without notice, Judge Matibini in **Banda and Anor v Mudimba (2011) ZR 162 at p.183** listed the requirements as follows:

- 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 the 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 equity.**

The Learned author S.M Mudenda in his book **Land Law in Zambia, 2007 Unza Press**, states at pages 153 to 158 on the equitable doctrine of bonafide purchaser for value without notice as follows:

"The basic doctrine of notice provides that an equitable interest will bind all persons other than 'equity's darling'. i.e the *bonafide* purchaser for value of the legal estate without notice. The doctrine of notice is fundamental to property law."

The essential features of the doctrine are hereby discussed in relation to the Appellant's arguments. The first is that one must be a bonafide purchaser meaning that the purchaser must act in good faith, that is, there must be no fraud or sharp practices. The question then is whether there was any fraud

occasioned by the Appellant herein in the purchase of the properties. No evidence of fraud was produced in this court by the 1st, 2nd and 3rd Respondents herein, however they have argued that the said title to both properties were fraudulently acquired by the 4th Respondent and thus was under investigation. 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 1st, 2nd and 3rd Respondent elected not to file any affidavits to particularize the fraud as alleged but instead settled to file written arguments wherein the alleged fraud and investigations are stated. This is unacceptable because as held in **Zambia Revenue Authority v Hitech Trading Company Limited (2001) ZR 17:**

"It is trite law that arguments and submissions at the bar, spirited as they may be, cannot be a substitute for sworn evidence."

Thus I find that there was no fraud on the part of the Appellant as none was alleged and proved.

On the issue of purchaser for value, Mudenda in his book **Land Law in Zambia** states that:

"Purchaser includes any person who takes the property by sale, mortgage, lease or otherwise but excludes any acquisition by operation of law. The learned authors of Megarry's Manual of the Law of Real Property have observed that the "words 'for value' are included to show that value must have been given, because 'purchaser' in its technical sense does not necessarily imply this. 'Purchaser' covers persons who receive property otherwise than by the operations of the law (e.g. under the intestacy rules) and so includes donees and devisees."

The Appellant herein did give value for the purchase of the property. She states in her affidavit that she paid the amount of K300,000,000.00 for the purchase of each property as shown in the exhibits marked "HMJ3" and "HMJ4."

On the aspect of the legal estate, the principle is that the estate purchased must be a legal estate as opposed to an equitable interest. The Appellant herein stated in her affidavit that she was duly issued with a certificate of title for each property copies of which are marked "HMJ1" and "HMJ2". This culminated into the Appellant having a legal estate and not a mere equitable interest.

The bonafide purchaser must buy the land without notice of any adverse claims. As stated in the case of **Banda and Another v Mudimba** cited above, there must be no actual, constructive or imputed notice. As regards constructive notice, a purchaser is under obligation to undertake full investigation of title before completing his purchase. He can only plead absence of notice if he made all the usual and proper enquires. If he does not do so or is careless or negligent, he is deemed to have 'constructive notice' of all matters he would have reasonably discovered. Land transactions are not to be approached casually but with all due diligence. One is expected to physically inspect the land and make inquiries over anything which appears inconsistent with the title being offered by the vendor. Imputed notice is the notice that the purchaser is deemed to have by virtue of the fact that her agent or legal practitioner acting for her in the transaction would have reasonably discovered.

The Appellant herein apparently conducted due diligence through her advocates and obtained computer printouts marked "HMJ5" and "HMJ6" for both properties wherein it was revealed that there was a restriction notice registered against stand 35322 which notice had expired on 15th December, 2010 having been valid for a year only. Subsequently, she applied for consent to assign for both transactions which was granted by the 2nd Respondent on 3rd and 4th December, 2012. However when the assignments were presented for registration the same were refused registration citing the restriction notice. This culminated into court proceedings wherein it was ruled or resolved that the restriction notice had expired and was not in force and thus the 1st Respondent was ordered to proceed to register the deeds of assignments.

Later, when the Appellant's advocates where summoned to go and uplift the certificate of title they were presented with letters marked "HMJ16" and "HMJ17" both informing them that the certificates of title for the two subject stands were to be cancelled as same were procured under fraud. Upon further enquiry they came across a letter marked "HMJ18" which was authored by the 2nd Respondent instructing the 1st Respondent to cancel the titles on grounds of fraud.

Counsel for the Appellant argues that the Appellant was not made aware of this letter all the while she was dealing with the 1st Respondent. Counsel for the 1st, 2nd and 3rd Respondent's argues that despite the restriction notice having expired its existence should still have put the Appellant on notice that there were still issues against the property before continuing to register the assignment.

It is apparent that the Appellant herein conducted a due diligence search as provided for under section 22 of the Lands and Deeds Registry Act which provides that:

"Subject to such regulations as the Minister may make from time to time, the Register may during the usual office hours be searched and examined by anyone and certified copies of any entry may be obtained, if required, upon payment of such fees as may be prescribed.

And upon the search she discovered the existence of the restriction notice on stand 353222 which was eventually declared to have expired by operation of the law by the High Court. It is indeed not disputed that the restriction notice had expired at the time the Appellant began the transfer of title process and for the avoidance of doubt the court declared to have so expired and the effect thereof in its Ruling marked "HMJ11." The High Court in its Ruling of 22nd July, 2013 directed the 1st Respondent herein to register the assignment lodged with respect to the subject stand. The 1st Respondent registered the assignment and the certificate of title dated 13th March, 2014 was subsequently issued in the Appellant's names. The instructions to cancel came from the 2nd Respondent in a letter dated 30th July, 2013. However this letter was never brought to the attention of the Appellant when she conducted her due diligence search and in all her dealings with the 1st Respondent. This letter was written a few days after the said High Court Ruling under cause no. 2013/HP/A008 and was clearly an attempt to circumvent the court's decision through administrative action instead of appealing against the court's decision. I indeed note that the Appellant had no knowledge of the goings on between the 1st and 2nd Respondents as the same were not recorded against the property.

Further, the alleged fraud was not pinned against the Appellant but alleged against the 4th Respondent and no action was taken against the 4th Respondent. The 1st, 2nd and 3rd Respondents had the opportunity to bring up the said allegations and particulars of fraud when they were sued by the 4th Respondent under cause No. 2013/HP/A008 under which the 4th Respondent was challenging the restriction notice. The court ordered that the said restriction notice had expired by operation of law and no fresh restriction notice was issued. The court thus ordered the 1st Respondent to facilitate the registration of the assignment between the Appellant and the 4th Respondent. The 1st Respondent then complied with the court order. If the Respondents were not satisfied, they had the liberty and opportunity to appeal to the Supreme Court but did not do so.

Section 58 of the Act provides that a purchaser from a registered proprietor shall not be affected by notice of any trust or unregistered interest in the absence of fraud. The section provides that:

“Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer or mortgage from the Registered Proprietor of any estate or interest in land in respect of which a Certificate of Title has been issued shall be required or in any manner concerned to inquire into or ascertain the circumstances in or the consideration for which such Registered Proprietor or any previous Registered Proprietor of the estate or interest in question is or was registered, or to see to the application of the purchase money or of any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.”

Further, section 59 of the Act provides that no liability shall accrue on a bonafide purchaser or mortgagee on account that his vendor or mortgagor may have become a registered proprietor through fraud, or error or under any void or voidable instrument. This section 59 provides that:

"Nothing in Parts III to VII shall be so interpreted as to render subject to action for recovery of damages, or for possession, or to deprivation of any land in respect to which a Certificate of Title has been issued, any purchaser or mortgagee bona fide for valuable consideration of such land on the ground that his vendor or mortgagor may have become a Registered Proprietor through fraud, or error, or under any void or voidable instrument, or may have derived from or through a Registered Proprietor through fraud or error, or under any void or voidable instrument, and this whether such fraud or error consists in wrong description of the boundaries or of the parcels of any land, or otherwise howsoever."

It is clear from the record that the Appellant became the registered owner of properties in issue following the laid out procedure and no allegations of fraud have been proven.

I have further considered section 11(1) of the Act under which the purported cancellations of the certificates of title were done. Section 11 (1) provides:

"11(1) 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."

The provision only authorizes the Registrar to correct errors, omissions or entries in the register that have been procured by fraud or mistake. In this case the 1st, 2nd and 3rd Respondents have not proved any fraud or mistake on the part of the Appellant. The decision to cancel was also made without affording the Appellant a hearing. In the absence of proof of fraud or mistake in relation to the Appellant, the Registrar had no authority to cancel the certificates of title in issue.

This appeal succeeds. I accordingly order that the purported cancellation of certificates of title for the Appellant with regard to stands 35322 and 35223 be forthwith set aside.

Costs are for the Appellant to be taxed in default of agreement.

Leave to further appeal is granted.

Dated this 29th day of February, 2016



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M.S. MULENGA
HIGH COURT JUDGE