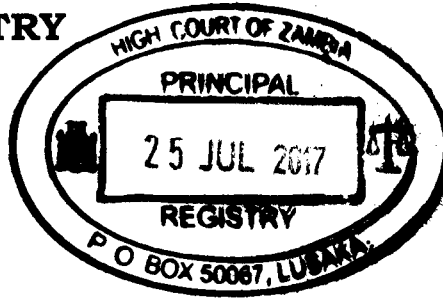


**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**2012/HP/1073**



**B E T W E E N:**

**CHOONGO HAMANYATI MWEEMBA**

**PLAINTIFF**

**AND**

**MUBANGA KASAKULA  
DIANA MOYO  
JOHN CHISHIBA  
SEVENTH DAY ADVENTIST CHURCH  
GEORGE CHAPENDEKA TEMBO  
SATELLITE FARMERS COOPERATIVE**

**1<sup>ST</sup> DEFENDANT  
2<sup>ND</sup> DEFENDANT  
3<sup>RD</sup> DEFENDANT  
4<sup>TH</sup> DEFENDANT  
5<sup>TH</sup> DEFENDANT  
6<sup>TH</sup> DEFENDANT**

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 25<sup>th</sup> day of  
July, 2017**

*For the Plaintiff : Mr. M. Lungu, Messrs Lungu, Simwanza & Co.  
For the Defendant : Mr. I.C. Ng'onga, Messrs I C Ng'onga & Co.*

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

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**Cases Referred To:**

1. *Deventor v Rural Development Corporation Zambia (1973) ZR 282*
2. *Nkongolo Farms Limited v Zambia National Commercial Bank, Kent Choice Limited and Charles Harupe (2007) ZR 78*
3. *Rosemary Phiri Madaza v Awadh Keren Coleen (2008) ZR 12*
4. *Anti-Corruption Commission v Barnet Development Corporation Limited (2008) ZR 69*
5. *David Howes & 8 Others v Betty Butts Carbin (sued in her capacity as Trustee of the Estate of the late Butts) SCZ Judgment No. 5 of 2012*
6. *Zambia Consolidated Copper Mines Limited v Eddie Katalayi and Max Sichilonga SCZ Judgment No. 2 of 2001*
7. *Mijoni v Zambia Publishing Company Limited (1987) ZR 23*

8. *Zambia Building and Civil Engineering and Contractors Limited v Georgopollos*
9. *Wesley Mulungushi v Catherine Chomba*

**Other Works Referred To:**

1. *Land Law in Zambia: Cases and Materials, Fredirick S. Mudenda, UNZA 2007*

By Writ of Summons and Statement of Claim, the Plaintiff seeks the following reliefs:

- i. **A declaration that the Plaintiff is the rightful owner of Subdivision No. 5 of Subdivision C of Farm 175a and that the Defendants have no legal interest or claim therein.**
- ii. **An order that the fourth Defendant removes his property from the Plaintiff's property.**
- iii. **An injunction restraining the Defendants and each of them whether acting through their agents, servants and employees from trespassing on Subdivision No. 5 of Sub division C of Farm 175a.**
- iv. **Mesne profits**
- v. **Damages for trespass**
- vi. **Costs**

The particulars given in the Statement of Claim are that sometime in 1995, the Plaintiff through his deceased father, Mr. Raymond Himalambo Mweemba (the deceased) verbally agreed to host Munyewu SDA Church congregation on his property. Whilst the Plaintiff was away in the United States of America, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants without his knowledge, and authority unlawfully subdivided and sold 10 and 7 acres of land to the 5<sup>th</sup> and 6<sup>th</sup> Defendants respectively. Further, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup>

Defendants without the Plaintiff's consent and any planning permission constructed a substandard structure on his land.

The Plaintiff states that when he returned to Zambia on 11<sup>th</sup> February, 2012, he issued the Defendants a notice to vacate his property on 13<sup>th</sup> May, 2012 and revoked the consent given to the Church to congregate. The Plaintiff states that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants met on 13<sup>th</sup> May, 2012, and resolved to vacate the Plaintiff's property. However, on 7<sup>th</sup> June, 2012, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants recanted their decision and instead claimed that the Plaintiff's father had given the land to the Church as a gift.

The Plaintiff states that he evicted the Defendants and their caretakers from his land, but without authority, they returned to his property and continued to occupy it. The Plaintiff avers that the 5<sup>th</sup> and 6<sup>th</sup> Defendants are not bona fide purchasers for value with notice neither are they his tenants. The Plaintiff states that the Defendants' continued trespass has impeded his quiet enjoyment of the property.

The Defendants settled a Composite Defence. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants aver that they do not know that the Plaintiff is the registered proprietor of Subdivision No. 5 of Subdivision C of Farm 175a, Lusaka. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants aver that they have no legal capacity to represent Mutuwa SDA Church.

The 4<sup>th</sup> Defendant avers that in late 1994, the deceased, persuaded three families to establish Mutuwa SDA Branch at his farm No. 175a, Lusaka. The 4<sup>th</sup> Defendant states that at a meeting held in 1995, the deceased in the presence of his wife and other family members told the congregation that he had given the Church 25 acres of land as a gift and to appreciate what the Lord had done for him. The deceased also told the congregation that he desired a permanent Church structure to be built on the land as well as a clinic, school and community centre.

The 4<sup>th</sup> Defendant states that the deceased served as its Building Committee Chairman and obtained building approval for the permanent structure from the SDA Lusaka Central Church. The deceased also facilitated land sales of 10 acres to the 5<sup>th</sup> Defendant at K16,000,000.00 and 7 acres to the 6<sup>th</sup> Defendant at K21,000,000.00 on behalf of the Church.

The 4<sup>th</sup> Defendant avers that the Plaintiff acted as his father's agent in the transactions and the deceased never disclosed at the time of giving it land that it belonged to the Plaintiff. Further, the Plaintiff, in 1995, up to the time of his father's demise never challenged the decision. The 4<sup>th</sup> Defendant states that the Plaintiff is estopped from enforcing his alleged rights over its land.

The 4<sup>th</sup> Defendant avers that the Plaintiff maliciously revoked its worship rights and in the process, destroyed 16 Church benches and 2 ½ acres of mature cotton, which was ready for sale, without a Court Order. Further, at a meeting held on 13<sup>th</sup> May, 2012, and not amicably conducted, the Plaintiff and his Advocates forced the 4<sup>th</sup> Defendant to sign a vacation notice under duress and mistake, but it revoked the notice on 7<sup>th</sup> June, 2012.

The 4<sup>th</sup> Defendant avers that the Plaintiff's title deed in respect of Subdivision 5 of Subdivision C of Farm No. 175a, Lusaka was obtained by fraud and lists the following particulars:

- (i) *Filing the Deed of Transfer on 3<sup>rd</sup> October, 1996, in the Lands Registry when there was a caveat in force placed by the*

Commissioner of Lands on 30<sup>th</sup> September, 1993, and still subsisting till 7<sup>th</sup> January, 2004.

- (ii) *Filing the Deed of Transfer by the Plaintiff, which the deceased was not aware of till his death.*
- (iii) *Failure to disclose or inform the deceased that the piece of land he had given as a gift to the 4<sup>th</sup> Defendant in 1995, belonged to the Plaintiff by Deed of Transfer dated 3<sup>rd</sup> September, 1996.*
- (iv) *Failure to inform the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants, while the deceased was still living that the land belonged to the Plaintiff.*
- (v) *Failure to disclose to any member of his family that the deceased transferred 25 acres of land to the Plaintiff.*

The 4<sup>th</sup> Defendant prayed to the Court to dismiss the Plaintiff's claims with costs and to declare the Deed of Transfer filed on 3<sup>rd</sup> October, 1996, void. It also prayed to the Court to cancel the Title Deed held by the Plaintiff for Subdivision 5 of Subdivision C of Farm No. 175a, Lusaka and to stop him from enforcing rights he slept on from 1996.

In the counterclaim, the 4<sup>th</sup> Defendant avers that the Plaintiff confirmed at a meeting held in February, 2012 that the deceased gave the Church 25 acres of land as a gift and would not disturb it.

The Defendant counterclaimed:

- (i) Damages for trespass to the 4<sup>th</sup> Defendant's land.**
- (ii) Damages for unlawful eviction of the Church and the 4<sup>th</sup> Defendant's care taker from the house exposing the property to risk.**
- (iii) Damages for mental torture, embarrassment and inconvenience.**

- (iv) **Special damages for destruction of 4<sup>th</sup> Defendant's sixteen benches, 2½ acres of cotton field at picking stage and other church items estimated at K10,000.00.**
- (v) **Any other relief the Court may deem fit.**
- (vi) **Costs of proceedings.**

The 5<sup>th</sup> Defendant avers that his sale agreement with the deceased was genuine and supported by a consideration of K16,000,000.00 paid in three installments. He had no notice that the Plaintiff was the owner of the land because the deceased gave the Church 25 acres of land as a gift. The 5<sup>th</sup> Defendant states that the deceased told him that his money would be used to complete the Church structure.

The 5<sup>th</sup> Defendant states that the deceased asked him to contact the Plaintiff for land survey and fixing of beacons after the sale. Further, the deceased told him that he would secure his title deed. The 5<sup>th</sup> Defendant states that in February, 2012, he met the Plaintiff who proposed to sell him the 25 acres of land given to the Church, but he declined. The 5<sup>th</sup> Defendant states that the Plaintiff threatened to revoke the deceased's gift because it had no supporting documents and lacked capacity to meet property transfer costs.

Eventually, the Plaintiff repossessed the land and asked the 5<sup>th</sup> and 6<sup>th</sup> Defendants to get back their money, which they declined. The 5<sup>th</sup> Defendant prayed to the Court to dismiss the Plaintiff's claims with costs.

The 6<sup>th</sup> Defendant avers that the deceased told the Board that he had given the Church 25 acres of land as a gift. The deceased was also the 6<sup>th</sup> Defendant's Land Acquisition Committee Chairman. It purchased 7 acres of land at K21,000,000 from the Church through the deceased's efforts. The 6<sup>th</sup> Defendant states that the deceased never disclosed at any time that the land belonged to the Plaintiff. It prayed to the Court to dismiss the Plaintiff's claims with costs.

The Plaintiff called two witnesses. **PW1** was **Stars Mulomba Mweemba**, the Plaintiff's biological mother who testified that the deceased demarcated land to all his children. The Plaintiff was given Subdivision No. 5 of Subdivision C of Farm 175a, where Mutuwa Seventh Day Adventist Branch is located.



According to PW1, the Church was given permission to use the premises in 1995, by the deceased and on a temporal basis. The reason behind the deceased's overture was that he wanted to congregate at a place near his home. PW1 testified that the deceased asked the Plaintiff if the Church could use his property and he agreed to the temporal arrangement on the understanding that no permanent structure was ever to be built constructed.

It was PW1's evidence that in 2010, the Plaintiff asked his parents to pay his ground rent. They later sent the receipts to the Plaintiff who discovered that they had made payments on the wrong property, Subdivision 8, which belonged to the Phiri family. PW1 stated that they later found the Plaintiff's title deed confirming that he owned the land in dispute. The Church Treasurer and Company leader were informed of the development and never reacted. PW1 stated that the deceased died in 2011 and the Plaintiff only returned to Zambia in 2012.

In **cross-examination**, PW1 stated that she was aware that the Plaintiff had a title deed for his property, which he acquired in 1996. The Church was not aware that the farm belonged to the Plaintiff and it was only invited to use the Plaintiff's farm on a

temporal basis. PW1 testified that she was not aware that the deceased had given the Church a gift of 25 acres of land but it allowed it to congregate on the property. PW1 stated that she and the deceased held positions in the Church and the Satellite Cooperative Society.

The witness was not **re-examined**.

**Choongo Hamanyati Mweemba** testified as **PW2**. His testimony was that his parents subdivided the farm to all their children and the title deeds were processed in 1996, following a letter written by the deceased to the Commissioner of Lands in 1995 on the subdivisions. PW2 stated that he and the deceased signed a Deed of Transfer, which was lodged with the Ministry of Lands on 3<sup>rd</sup> October, 1996.

PW2's evidence was no different from that of PW1 on his parents request in 1995, to host the Church on his property on a temporal basis. Also, that no permanent structure was to be erected on his property. PW2 stated that after he returned from the USA, he met Elder Kasakula and told him that he was the

owner of the property. In response, Elder Kasakula told him that the deceased had given the land to the Church as a gift. PW2 stated that he showed Elder Kasakula the title deed and asked the Church to vacate his property. At a meeting held on 23<sup>rd</sup> May, 2012, the Church agreed to vacate PW2's property but later recanted its decision.

PW2 testified that there was an arrangement between the deceased and the Commissioner of Lands, whereby the latter agreed to register the six subdivisions created by the deceased. The parties also agreed that one of the properties was sold to pay ground rent. To secure the arrangement, the Commissioner of Lands placed a caveat on the land and which was withdrawn after the payment of ground rent.

PW2 testified that the deceased registered the Deed of Transfer with his full knowledge and signed it. He prayed to the Court to declare him the legal and registered owner of Subdivision 5 of Subdivision C of Farm 175a, and to remove the Defendants from his land. He also prayed for damages and costs.

In **cross-examination**, PW2 stated that he knew that the 5<sup>th</sup> and 6<sup>th</sup> Defendants bought land from the 4<sup>th</sup> Defendant and not the deceased. He denied that he ever assisted the 5<sup>th</sup> Defendant to secure a title deed at the deceased's request. PW2 also denied that the 1<sup>st</sup> Defendant and Secretary of the 6<sup>th</sup> Defendant asked him to honour his father's gift. PW2 was not aware that his father was a Church elder because he was away in the USA. He did not know if his father facilitated the land sales between the 4<sup>th</sup>, and 5<sup>th</sup> and 6<sup>th</sup> Defendants. PW2 was not aware if the deceased had relinquished his interest in the 25 acres of land.

In **re-examination**, PW2 told the Court that he did not know how the 5<sup>th</sup> and 6<sup>th</sup> Defendants acquired their property.

The Defendants called four witnesses. **Nottingham Kaulu Hamaundu** testified as **DW1**. His evidence was that in 1995, his uncle, the deceased pioneered the opening of Mutuwa SDA Branch at his farm. His uncle called him for a meeting at his house and PW2 was in attendance. The deceased told DW1 that after consulting his wife and children namely, Munamukuni, Chona, Mwiindilila, Buumba, Mutinta, Lweendo, Choongo and Makhondo,

he had decided to give the Church 25 acres of land as a gift. DW1 testified that the deceased and PW1 showed him the land, and the deceased later disclosed the gift to the congregation.

DW1 testified that the deceased collected the building plans for the permanent Church structure from the SDA Central Church. Afterwards, construction begun but the Church ran out of money. At the deceased's instigation, the Church sold some land to the 5<sup>th</sup> and 6<sup>th</sup> Defendants. The deceased directed that the money realized from the sale was to be paid to the Church because he had relinquished his interest in the property.

DW1 stated that PW1 attended the meetings on the sale of land and that the first portion was sold to the 5<sup>th</sup> Defendant (Gerald Tembo). According to DW1, Gerald Tembo bought 10 acres of land valued at K16,000.00. In 2010, the Church sold 7 acres of land to the 6<sup>th</sup> Defendant at K21,000.00. DW1 testified that the deceased told him that he could not process title because the Commissioner of Lands had placed a caveat.

DW1 further testified that he only came to learn of PW2's interest in the property at a meeting convened by the Administrator General's office. DW1 stated after that meeting, he, Elder Kasakula and Max Mwantula went to check on the Lands Register at the Ministry of Lands and discovered that the Commissioner of Lands had lodged a caveat on the property on 30<sup>th</sup> September, 1993, which was removed on 9<sup>th</sup> January, 2004. According to DW1, they did not understand how PW1's title was issued. DW1 stated that he concluded that PW2 fraudulently obtained title when a caveat was still in existence.

In **cross-examination**, DW1 stated that the Church's land was surveyed by Mr. Mudenda. The land size on PW2's Certificate of Title was 9.8266 hectares. DW1 testified that the deceased owned the land given to the Church. DW1 stated that the deceased transferred land to himself, when the caveat was still in force.

DW1 testified that as at 3<sup>rd</sup> October, 1996, PW2 had a Certificate of Title for the disputed property. DW1 stated that Subdivision No. F/175a/C was transferred from the deceased to

Mwanantuba Davison Brightson on 7<sup>th</sup> February, 1997, and whilst the caveat was in existence. DW1 told the Court that he was not present when the Deed of Transfer between PW2 and the deceased was prepared. He added that PW2 was in Zambia when the congregation began to build the permanent structure.

The witness was not **re-examined**.

**DW2** was **Mubanga Kasakula**. He repeated DW1's evidence on how Mutuwa SDA Branch was established in 1995 and the gift of 25 acres given by the deceased to the Church. Also, how the deceased collected the building plan from the SDA Central Church.

DW2 testified that on 13<sup>th</sup> May, 2012, the Church held a business meeting to resolve the differences over the deceased's gift. PW1, PW2 and their Advocates attended the meeting. Instead of an amicable resolution, PW2 and the others forced the Church leadership to sign a printed resolution under duress, which was prepared by PW2 and his Advocates.

DW2 testified that on 7<sup>th</sup> June, 2012, the Church revoked its decision to vacate the property, but was subsequently evicted by

PW2 on 23<sup>rd</sup> June, 2012. PW2 left with 16 Church benches and destroyed cotton fields at picking stage. According to DW2, by a Court Order, the Church returned to the premises. His evidence was no different from the events at the Administrator General's office and the findings at the Ministry of Lands. DW2 prayed to the Court to dismiss the Plaintiff's claims and to grant the 4<sup>th</sup> Defendant the reliefs sought in the counterclaim.

In **cross-examination**, DW2 stated that the SDA Church is administered by Registered Trustees. He objected to being sued because he had no legal capacity to represent the Church but gave evidence by virtue of his appointment by the Lusaka Conference. DW2 told the Court that the deceased verbally gave the Church 25 acres of land. The Lands Register showed that the land belonged to the Plaintiff and land could not be subdivided without the owner's consent.

DW2 testified that the Deed of Transfer was not forged and did not know who lodged it. He added that if there was any fraud on the registration of title, the Commissioner of Lands should have



lodged a complaint. DW2 stated that PW2 proposed to offer the Church an alternative piece of land, and the Church accepted.

In **re-examination**, DW2 stated that a caveat has the effect of barring future transactions on land.

**DW3** was **Gerald Chapendeka Tembo** who testified that he knew PW2 in 1993 when he acted as his father's agent in the sale of Sub 6/175C, Lusaka. He testified that the deceased approached him in 2006, on behalf of the 4<sup>th</sup> Defendant to sell him land. According to DW3, he executed a contract of sale on 9<sup>th</sup> September, 1993 with the deceased, for 10 acres of land valued at K16,000,000.00.

DW3 testified that he settled the purchase price in three installments and this was confirmed by receipts. DW3 told the Court that the deceased referred him to Mr. Mudenda, for land surveying, but the duo never met. DW3 was later on referred to PW2 by the deceased over the land survey. PW2 asked him to see Mr. Muyambango at the Ministry of Lands, who was of no help.

According to DW3, when PW2 returned to Zambia, he met him at the deceased's farm, where PW2 offered to sell him 25 acres of the land. DW3 refused the offer because he was aware that 7 acres of land had been sold to the 6<sup>th</sup> Defendant while the rest belonged to the Church. DW3 testified that at a later meeting in 2012, at Cross Roads Shopping Mall, PW2 told him that he intended to repossess the 25 acres of land. In response, DW3 placed a caveat on the land to protect his interest.

DW3 stated that PW2 acted dishonestly because he knew that the deceased gave the Church 25 acres of land as a gift. He prayed to the Court to dismiss the Plaintiff's claim and to declare the Defendants as the rightful owners.

In **cross-examination**, DW3 testified that he did not possess a title deed for his property. However, he had title for another piece of land, which was sold to him by the deceased, namely, Subdivision 6 of Farm 175a/C. DW3 testified that the deceased acted as the Church's agent in the sale transactions. DW3 did not conduct a search on the Lands Register, before he bought the land

nor request the deceased for the Certificate of Title. He could not recall the farm number, which he placed the caveat on.

In **re-examination**, DW3 testified that he purchased Subdivision F/175a/C from the deceased and was told where the land is located. He first dealt with the deceased in 1993 and trusted him like his father.

**Jonathan Michelo Chizuni** testified as **DW4**. His evidence was that the 6<sup>th</sup> Defendant bought land from Mutuwa SDA Branch through the deceased. The deceased was an executive member of the Church, as well as the 6<sup>th</sup> Defendant's Board member.

According to DW4, the deceased told the 6<sup>th</sup> Defendant Board in 2005, that he had given Mutuwa SDA Church 25 acres of land as a gift. The deceased also stated that the money from the land sales would be used to complete the Church building. DW4 testified that he was the Secretary/Treasurer of the 6<sup>th</sup> Defendant at the time and he wrote a letter to the Church in which it offered to buy land.

At a meeting held on 5<sup>th</sup> August, 2005, at the deceased's home, between the Church and 6<sup>th</sup> Defendant, the terms of contract were agreed but the sale never materialised.

DW4 testified that in January, 2010, the 6<sup>th</sup> Defendant's financial position improved and it revived its offer to the 4<sup>th</sup> Defendant. A meeting was called to discuss the terms of sale where the 6<sup>th</sup> Defendant offered to buy 7 acres of land from the Church at K21,000,000.00. DW4 stated that the deceased signed the contract of sale on behalf of the 4<sup>th</sup> Defendant, together with the other executives. The deceased passed away in 2011, before completing the assignment.

DW4 testified that he was surprised to learn that PW2 was the owner of the property. He stated that the deceased was a very honourable man held in high esteem and could not make the mistake of selling land which was not his. He prayed to the Court to dismiss the Plaintiff's claims with costs.

In **cross-examination**, DW4 stated that he never asked the deceased for the Certificate of Title prior to the sale. He did not

conduct a search at the Ministry of Lands to establish the property owner. DW4 never doubted the deceased and believed what he told the 6<sup>th</sup> Defendant.

In **re-examination**, DW4 testified that the minutes of the 6th Defendant's meetings were signed by the Chairman and Secretary. DW4 stated that he did not conduct a search at the Ministry of Lands because he did not doubt the transaction and the deceased's integrity.

I am grateful to both Learned Counsels for their written submissions which will be taken into account in the Judgment.

I have earnestly considered the pleadings, evidence adduced and the submissions filed herein. The issue that arises for determination is, whether the Defendants acquired any propriety interest in Subdivision No. 5 of Subdivision C of Farm 175a. The facts of this case are substantially not in dispute and can be gleaned from earlier part of the judgment. They will not be reproduced for the sake of brevity.

I understand the Plaintiff's contention to be that he is the legal and registered owner of Subdivision C of Farm 175a Mwembeshi. As proof of his claim, he relies on the provision of section 33 of the Lands and Deeds Registry Act, which states that a certificate of title is conclusive proof of ownership of property. The Plaintiff also contends that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants are occupying his property without his consent.

In response, the Defendants avow that the Plaintiff fraudulently obtained his certificate of title because his father (the deceased) orally gave the Church the disputed land without reservation. The Defendants aver that the deceased announced the oral gift to the members of the SDA Mutuwa Branch and the 6<sup>th</sup> Defendant. They also contend that the subsequent land sales to the 5<sup>th</sup> and 6<sup>th</sup> Defendants were done with the full consent of the deceased.

On behalf of the Plaintiff, Learned Counsel submitted that the property in dispute was not capable of delivery, because the deceased never signed a deed or any other instrument where he transferred the land to the 4<sup>th</sup> Defendant.

Counsel referred me to section 7 of the Statute of the Frauds 1677 and Halsbury's Laws of England, where he submitted that a declaration of trust in land has to be made in writing and signed by the person who can make the trust. He further also referred me to section 61(1) of the Lands and Deeds Registry Act which provides that:

**"When land in respect of which a Provisional Certificate or a Certificate of Title has been issued, or any estate or interest in such land, is intended to be transferred, or any right of way or other easement is intended to be created, the Registered Proprietor may execute for the purpose of registration a deed of transfer in Form 6 in the Schedule with such modifications as the circumstances may require."**

Counsel cited the case of **Deventer v Rural Development Corporation Zambia**<sup>1</sup>, where it was held that:

**"In order to effect transfer of property, there must be some clear instrument of transfer, capable of registration, setting out the nature of the transaction as a sale, gift or whatever it may be."**

Counsel contended that since there was no deed or instrument of transfer, the 4<sup>th</sup> Defendant never acquired interest in the property and the gift was invalid. He added that the incomplete gift could be revoked at any time and the Court could not assist with its completion. Counsel argued that even if there existed an instrument

of gift, the same would be void for want of registration under section 4 of the Lands and Deeds Registry Act.

Counsel referred me to the case of **Nkongolo Farms Limited v Zambia National Commercial Bank, Kent Choice Limited and Charles Haruperi<sup>2</sup>**, where the Supreme Court adopted the following statement from paragraph 1219 Volume 16 Halsbury's Laws of England 4<sup>th</sup> Edition:

**"...the Court has never ventured to lay down as a general proposition, what constitutes fraud. Actual fraud arises, from acts and circumstances of imposition. It usually takes the form of a statement what is false or suppression of what is true. The withholding of information is not in general fraudulent unless there is special duty to disclose it."**

Learned Counsel submitted that the allegation of fraud which was based on the existence of a caveat placed by the Commissioner of Lands could not be the basis of proving the allegation. Further, the fact that the Plaintiff never disclosed his property rights to the Defendants was inconsequential.

Counsel argued that the Defendants ought to have demonstrated that an act or statement made by the Plaintiff amounted to fraud, which was not the case. Counsel submitted that the Plaintiff explained the circumstances of the caveat, which was



not placed for the benefit of the Defendants, but by the Commissioner of Lands to secure the payment of ground rent.

Counsel cited section 83 of the Lands and Deeds Registry Act which states that:

**"Any caveat may be withdrawn by the caveator or by his attorney or agent under a written authority, and either as to the whole or any part of the land affected, or the consent of the caveator may be given for the registration of any particular dealing expressed to be made subject to the rights of the caveator."**

Counsel submitted that the Defendants misconceived their allegation of fraud merely because the documents were entered on the Lands Registry whilst a caveat was subsisting. These documents were registered by the deceased and not the Plaintiff who was not blamed.

Counsel further submitted that the 5<sup>th</sup> and 6<sup>th</sup> Defendants could not claim to be bonafide purchasers for value without notice because the 4<sup>th</sup> Defendant never obtained title, and could not pass a better title and was restrained by the *nemo dat quod habet* rule. Counsel concluded with a prayer beseeching the Court to grant the Plaintiff the reliefs sought in his claim.

In rebuttal, Learned Counsel for the Defendants wondered why the Plaintiff who was aware of his proprietary rights in the disputed property from 1996 to 2012 did not inform the affected parties. He also wondered why the Plaintiff kept quiet over his property but acted as his father's agent in the land sale to the 5<sup>th</sup> Defendant.

Counsel submitted that the Plaintiff fraudulently obtained title because it was issued during the subsistence of a caveat, placed by the Commissioner of Lands. He stated that there was no letter produced in Court to show that the Commissioner of Lands had authorized the deceased to lodge a Deed of Transfer. Counsel further stated that in unexplained circumstances, the Deed of Transfer was filed on 3<sup>rd</sup> October, 1996 and on the same date that the Plaintiff was issued a certificate of title.

Counsel submitted that a plethora of authorities barred the Commissioner of Lands from dealing with property while a caveat was subsisting. He cited the case of **Rosemary Phiri Madaza v Awadh Keren Coleen**<sup>3</sup> as the authority for his preposition.

Counsel submitted that the caveat was only withdrawn on 27<sup>th</sup> January, 2004. Thus, the entries of 3<sup>rd</sup> October, 1996 purporting to transfer land and the subsequent issue of title were null and void. Counsel referred me to the case of **Anti-Corruption Commission v Barnnet Development Corporation Limited**<sup>4</sup>, where the Supreme Court held that:

**"Under section 33 of the Lands and Deeds Registry Act, a 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 or reasons for impropriety in its acquisition....So the statement that a certificate of title is conclusive evidence of ownership of land is only true when there is no challenge based on fraud."**

Counsel submitted that there was oral and documentary evidence which proved that the deceased gave the 4<sup>th</sup> Defendant a gift of 25 acres of land. He further submitted that the Defendants produced unchangeable documents in Court that bound the deceased and PW1 overtly to the gift of land, and the subsequent sale of portions to the 5<sup>th</sup> and 6<sup>th</sup> Defendants. Counsel added that the evidence of PW1 challenging the gift to the Church was unreliable, given that she was PW2's mother whose evidence needed to be corroborated by independent evidence.

Counsel referred me to section 4 of the Statute of Frauds 1677

which provides that:

**"No action shall be brought upon any contract for the sale or disposition of land unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person there unto by him lawfully authourised."**

Counsel further cited the case of **David Howes & 8 Others v Betty Butts Carbin** (*sued in her capacity as trustee of the estate of the late Butts*<sup>f</sup>), where he submitted that the law does not prescribe the form of the note or memorandum to establish an agreement on land in writing. Counsel submitted that the oral agreement made between the deceased and the 4<sup>th</sup> Defendant was consistent with the agreement contained in the various documents and satisfied the requirement of an agreement on land to be in writing.

Counsel further submitted that the 5<sup>th</sup> Defendant demonstrated that he bought his land from the deceased. The 6<sup>th</sup> Defendant established that the deceased facilitated its acquisition of land from the 4<sup>th</sup> Defendant. He argued that these Defendants were bonafide purchasers for value without notice and their contracts were enforceable at law.

Counsel cited the case of **Zambia Consolidated Copper Mines Limited v Eddie Katalayi and Max Sichilonga**<sup>6</sup>, where the Supreme Court stated that it is not possible without basis to ignore the rights of an innocent purchaser for value and who has no reason to suspect an adverse claim.

The Learned Author Fredrick S. Mudenda, in his book titled *Land Law in Zambia: Cases and Materials* at page 320 states that:

**"A contract for sale or other disposition of land or an interest in land is made in the same way as any other contract i.e. either orally or in writing. Although an oral contract for sale of land or disposition of any interest in land may be valid it will be unenforceable by either party unless either the statutory requirements of Section 4 of the Statute of Frauds, 1677 or the requirements of equity as to part performance have been satisfied..."**

In the case of **Mijoni v Zambia Publishing Company Limited**<sup>7</sup>, the Supreme Court had this to say:

**"It seems to us that it is now settled that for a note or memorandum to satisfy Section 4 of the Statute of Frauds, the agreement itself need not be in writing. A note or memorandum of it is sufficient provided that it contains all the material terms of the contract such as names or adequate identification of the parties. The description of the subject matter and the nature of the consideration....It has also been said that letters may themselves constitute the contract and the written order of it. It follows that whether there is a binding contract or not it must depend on the construction of the letters."**

This principle of law was reinforced in the case of **David Howes & 8 Others v Betty Butts Carbin** (*sued in her capacity as trustee of the estate of the late Butts*)<sup>5</sup>, where the Supreme Court held that:

**" In this appeal, following these two cases (Zambia Building and Civil Engineering and Contractors Limited v Georgopollos (1) and Wesley Mulungushi v Catherine Chomba (2)), we agree with Mr. Zulu that the receipts at pages 179 to 185 and 194 to 200, constitute a note or memorandum to satisfy section 4 of the Statute of Fraud 1677, so as to constitute contracts of sale of land to which they relate....the law does not prescribe the statutory form the note or memorandum must take."**

From the evidence adduced, all the Defendant witnesses testified that the deceased gave the Church a gift of 25 acres of land. The gift was announced to the members of SDA Mutuwa Branch in 1995 and the 6<sup>th</sup> Defendant's Board. The deceased decided to give the Church a gift so as to thank God for what he had done for him. DW1 further testified that the deceased told him that his wife and children all consented to the giving of the gift.

In mysterious and unexplained circumstances, a Deed of Transfer was entered on the Lands Registry on 3<sup>rd</sup> October, 1996, in which the deceased transferred the disputed land to PW2. With remarkable efficiency, the Ministry of Lands, issued PW2 a Certificate of Title on the same date. As these documents were

being entered on the Lands Register, there was no evidence adduced to show that the Commissioner of Lands as Caveator authorized their registration.

As rightfully argued by Learned Counsel for the Defendants, no document should have been registered during the subsistence of the caveat. The case of **Rosemary Phiri Madaza v Awadh Keren Coleen**<sup>3</sup>, is instructive and where the Supreme Court states that:

**“As we have already pointed out, there was a caveat placed by the appellant to prohibit any dealings in Stand No. 5548. So when an assignment of the Stand to the Respondent was executed no registration should have taken place unless the caveator consented.”**

From the evidence adduced, it is abundantly clear that the deceased and PW1 were active members of the 4<sup>th</sup> Defendant Church. In fact, they pioneered the establishment of SDA Mutuwa Branch at their farm. This fact was confirmed by PW1, DW1 and DW2. I have no reason therefore to disbelieve the evidence of DW1, DW2 and DW4 that the deceased gave the Church a gift of 25 acres of land.

On the other hand, I find PW1's evidence to be quite contrived. Having been largely involved in the 4<sup>th</sup> and 6<sup>th</sup> Defendant activities and being privy to the discussions on the sale of land; I expected her to be candid and more helpful to the Court. Rather, her evidence was selective and carefully crafted to mislead the Court. This is very unfortunate. PW2 never rebutted DW3's testimony that he acted as his father's agent in his sale transaction. Further, PW2 never challenged DW3's evidence that he threatened to revoke the gift made to the Church.

A closer examination of the documents produced at pages 9 to 23 of the Defendants Bundle reveals the following:

- 1) *The purpose of the meeting as shown in the minutes at page 9 was to complete the building works as suggested by Mr. Raymond Mweemba.*
- 2) *At page 10 the minutes of the Satellite Farmers Cooperative Society, the meeting was called to discuss the sale of 10 acres of land between the Cooperative and SDA Church. Mr. and Mrs. Mweemba attended the meeting and are listed in the minutes dated 5<sup>th</sup> August, 2005. Under resolution No. 1, it is recorded that: **"Mr. Mweemba declared no interest in the land and assured the Church that he had given the land without reservation and that the money would be paid directly to the Church."***
- 3) *Mr. Raymond Mweemba is copied in the offer letter between Mutuwa SDA Company and the Satellite Farmers Cooperative Society at page 13.*



- 4) *At pages 14 - 17, Mr. Raymond Mweemba and PW1 witnessed the receipt of various payments made by the 5<sup>th</sup> and 6<sup>th</sup> Defendants.*
- 5) *At pages 18-21, minutes of the Satellite Farmers Cooperative Society dated 17<sup>th</sup> February, 2010, show that Mr. Raymond Mweemba attended the meeting where the Board discussed the schedule of payments to the Mutuwa SDA Church.*
- 6) *At pages 22 -23, the acknowledgment receipts from the Satellite Farmers Cooperative Society show that Mr. Raymond Mweemba and Mrs. Stars Mweemba represented the Board on the sale of 10 acres of land.*

In my view, the documents read altogether, justify some reference, express or implied that the deceased's oral agreement to the Church was translated into some of memorandum, which was capable of constituting an agreement in writing. It met the test provided in section 4 of the Statute of Frauds 1677.

It mattered less that the different documents produced were not prescribed in a particular format but were sufficient for drawing a reasonable inference that the identity of the documents do constituted a note or some form of written memorandum, which is enforceable at law.

Accordingly, I hold that the 4<sup>th</sup> Defendant acquired equitable interest in Subdivision No. 5 of Subdivision C of Farm 175a, which

is enforceable at law. The Plaintiff's Deed of Transfer and Certificate of Title that were irregularly registered on Subdivision No. 5 of Subdivision C of farm 175a are null and void. Consequently, the Plaintiff's Certificate of Title is cancelled. The fact that the Defendants never registered their land interest is inconsequential given the outcome of my decision.

From the evidence adduced, the deceased sold DW3 10 acres of land on 3<sup>rd</sup> September, 2006. In consideration DW3 paid the deceased K16,000,000. The 6<sup>th</sup> Defendant bought 7 acres of land from the 4<sup>th</sup> Defendant at K21,000,000. The deceased facilitated the transaction. In both contracts of sale, I find that the deceased and PW1 overtly and purposefully participated as representatives of the 4<sup>th</sup> and 5<sup>th</sup> Defendants.

DW3 and DW4 both testified that they believed that the land belonged to the deceased who had capacity to dispose of it. He was also a man whom they held in high esteem and could not have made a mistake by selling them land. I am also satisfied that the Defendants did not know of PW2's interest in the property. I am

convinced that they are bonafide purchasers for value without notice and acquired propriety interest, which is enforceable at law. All in all, the Plaintiff has failed to prove any of his claims against the Defendants, I accordingly dismiss his action.

I find merit in the 4<sup>th</sup> Defendant's counterclaim which was not challenged by the Plaintiff. I also find that the Plaintiff had no right to trespass the 4<sup>th</sup> Defendant's property, to evict it, destroy its 16 benches and cotton fields. Accordingly, I award the 4<sup>th</sup> Defendant damages for trespass and unlawful eviction to be assessed.

I also award the 4<sup>th</sup> Defendant special damages for the destruction of 16 benches and the two and half acres of cotton valued at K10,000. The claims for mental torture, embarrassment and inconvenience have not been proved and are unsuccessful.

Costs are awarded to the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants to be taxed in default of agreement.

Leave to appeal is granted.

J36

Dated this 25<sup>th</sup> day of July, 2017.

*M. Mapani*

M. Mapani-Kawimbe

**HIGH COURT JUDGE**