

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

2016/HP/0309

BETWEEN:

NICHOLAS SMITH LWANDA



PLAINTIFF

AND

OLIVER CHILUFYA

1st DEFENDANT

ARNOLD CHILESHE

2nd DEFENDANT

LASTON MWABA

3rd DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 1st DAY OF
DECEMBER, 2017**

For the Plaintiff

*: Mrs I.M. Kunda, George Kunda and
Company*

For the 1st Defendant

: Mr M. Nzonzo, SLM Legal Practitioners.

For the 2nd and 3rd Defendants : In person

J U D G M E N T

CASES REFERRED TO:

- 1. Basley V Clarlson 1681 3 LEV 37**
- 2. Hadley V Baxendale 1854 EWHC 70**
- 3. Nawakwi V Lusaka City Council and another Appeal No 26 OF 2001**
- 4. Tall Fellow Horton Wishimanga V NIEC Appeal No 50 of 2011**
- 5. Banda V Mwanza ZMHC 72 2011**
- 6. Nsansa Educational Trust V Musamba 2010 Vol 1 ZR 458**

LEGISLATION REFERRED TO:

- 1. The Constitution of Zambia, Act No 2 of 2016**
- 2. The Town and Country Planning Act, Chapter 283 of the Laws of Zambia**
- 3. The Lands Tribunal, Act No**

4. *The Penal Code Chapter 87 of the Laws of Zambia*
5. *The Law Reform (Miscellaneous Provisions) Act, Chapter 74 of the Laws of Zambia*
6. *The High Court Rules, Chapter 27 of the Laws of Zambia*
7. *The Judgments Act, Chapter 81 of the Laws of Zambia*
8. *The Urban and Regional Planning Act No 3 of 2015*
9. *The Housing (Statutory and Improvement Areas) Act, Chapter 194 of the Laws of Zambia*

OTHER WORKS REFERRED TO:

1. *Megarry and Wade, The Law of Real Property, 6th edition, London, Sweet and Maxwell*
2. *Roy Corde, Commercial Law, 2nd Edition, London and Dublin Butterworths, 1995*

The Plaintiff commenced this action by way of writ of summons claiming;

1. *Damages in the amount of K57, 000.00, being monies spent on building the house and the wall fence which the Defendant demolished.*
2. *An injunction restraining the Defendant whether by himself, his agents or whomsoever from further encroaching on the Plaintiff's Plot No 1951/20 Kanyama and constructing thereon.*

According to the statement of claim filed, the Plaintiff is the owner of Plot No 1951/20 Kanyama, which he obtained from the Kanyama Constituency, Lusaka West Land Allocation Committee, while the Defendant is the owner of Plot No 1951/19, a neighbouring plot with the Plaintiff's.

That the Plaintiff built a wall fence around his plot, and a three roomed house up to window level. It is stated in the statement of claim that on 4th January, 2016, the 1st Defendant attempted to demolish the Plaintiffs house on the plot, but the Plaintiff stopped him. However on 10th January, 2016, the 1st Defendant without any lawful authority or reason

brought down the wall fence and the house that he had built on the plot, and had threatened to extend his plot into the Plaintiff's plot.

In the defence filed on 16th May, 2016, the 1st Defendant admits being the owner of Plot No 1951/19, but adds that the same plot comprises four plots including 1951/20. His defence is that he was sold the plot on 10th October, 2011 by the Kanyama West Land Development Committee and that the Plaintiff bought the same on 5th June, 2011, after he had bought it, and that the Plaintiff only paid for it on 4th January, 2016.

That it is the Plaintiff that has encroached on the 1st Defendant's land, and for that reason, he had good reason or authority to bring down the wall fence and house constructed, being the beneficial owner of the land. Further that a scrutiny of the Plaintiff's documents shows that he has not completed payment for the property, as he is yet to settle the sum of K34, 000.00. Therefore the Plaintiff is a trespasser on his land. The 1st Defendant counterclaims;

1. *That he be declared the rightful owner of Plot No 1951/19 Kanyama which consists of four plots, and that he had already bought the plot when the Plaintiff purchased Plot No 1951/20, which is one of the plots on Plot No 1951/19.*
2. *A declaration that the purported sale of the property to the Plaintiff by the Kanyama West Land Development Committee was irregular, null and void.*
3. *An order that an occupancy licence be issued in favour of the 1st Defendant in respect of the subject property.*
4. *Damages for inconvenience and taking up possession of the property by the Plaintiff.*

5. *Mense profits from the date the Plaintiff took possession of the property to date.*
6. *Any other relief that the court may deem fit.*
7. *Costs.*

The 2nd and 3rd Defendants filed their defence on 29th November, 2016 in which they deny that the Plaintiff is the owner of Plot No 1951/20, and that Plots No 1951/19 and 1951/20 belong to the 1st Defendant, the same having been sold to him by the two Defendants. The 2nd and 3rd Defendants also deny any knowledge of the 1st Defendant having demolished the wall fence and house that the Plaintiff constructed on the property that he bought, and further allege that the Plaintiff was sold a different piece of land on which he built a two roomed structure and which is occupied by a caretaker.

Their defence is that the Plaintiff moved onto the 1st Defendant's land which was only demarcated and sold after the September, 2011 elections, and therefore the documents pertaining to ownership of the land that the Plaintiff has produced which are dated 5th June, 2011 are fraudulent, as at that date the land belonged to the Zambia Army. The 2nd and 3rd Defendants further deny that the Plaintiff was sold the land before the 1st Defendant as there was no land to be sold prior to the September, 2011 elections. Therefore the Plaintiff does not know his property, and his claims are untenable. That it is their defence that the 1st Defendant is the rightful owner of Plot No 1951/19 and 1951/20, as they as owners sold him the said four in one plot.

In the defence to the 1st Defendant's counter claim filed on 26th July, 2016, the Plaintiff denies the claim that the 1st Defendant's plot 1951/19 extends to the Plaintiff's plot No 1951/20, and that the 1st Defendant is

the beneficial owner of Plot No 1951/19 which consists of four plots in one. The Plaintiff further denies that claim that at the time he bought his plot the 1st Defendant had already purchased it from the Kanyama West Land Development Committee, and he is therefore the beneficial owner of the property.

That the 1st Defendant has contradicted himself by acknowledging the part payment made by the Plaintiff, and at the same time deny that he is the rightful owner of the plot. It is the Plaintiff's defence that he acquired Plot No 1951/20 lawfully.

At the trial the Plaintiff testified and called two witnesses, and each of the Defendants also testified, and the 1st Defendant called one witness, while the 2nd and 3rd Defendants did not call any witnesses. The first witness was the Plaintiff. He told the court the he bought the plot in issue being No 1951/20, on 5th June, 2011, and after he constructed a wall fence and a three roomed house it was demolished.

As to whom the money for the plot was paid to, the Plaintiff's evidence was that he paid K36, 000.00 to Chileshe, Mwaba and Olallo, and an agreement was signed on a yellow Kanyama Constituency Committee paper, and a balance of K11, 000.00 was to be paid. The Plaintiff further in his testimony stated that he paid another K15, 000.00, and he was given another yellow paper for the Kanyama Constituency, and was told that the amounts paid were not written on those documents, and that only the owner of the plot is indicated. He stated that he had signed on the document, as did Arnold Chileshe as Chairman.

With reference to page 16 of his bundle of documents, the Plaintiff testified that it is the document that Arnold Chileshe, Olallo and Lastone Mwaba had given him when he paid K15, 000.00, and that page 17 dated 5th June, 2011 was given to him when he paid the first amount of K36,

000.00 to the same gentlemen. That Arnold Chileshe had signed on that document as Chairman, but he could not recall the person who signed as Secretary.

It was also the Plaintiff's evidence that when he was given the document at page 16 of his bundle of documents, Arnold Chileshe had told him that the document is given to enable change of ownership. He identified the 2nd Defendant as Arnold Chileshe, and the 3rd Defendant as Lastone Mwaba. Still in his evidence, the Plaintiff testified that after he paid the K36, 000.00 to the 2nd and 3rd Defendants, as well as Olallo, he went to South Africa where he stayed for three months, as he had problems.

It was stated that on his return, the Plaintiff found that his plot which was four in one had been demarcated in the middle, and he had called the 2nd Defendant who told him that he could not get a four in one plot, and told him that the demarcated two in one plot had been sold to the 1st Defendant. That he had told him that he had paid for more than half of the size of the plot, but he was not assisted. The Plaintiff stated that he then went to see the Senior Chairman whose name he could not recall, who was annoyed and told him that he should not have dealt with the 2nd and 3rd Defendants.

The senior chairman told him not to pay the balance remaining, explaining that he would follow up the matter, and the senior chairman went to the property in issue without the Plaintiff. That he was called to go to the property, and there he found the 2nd and 3rd Defendants as well as Olallo and the dispute was discussed. He went on to state that the 2nd Defendant had told the senior Chairman that the demarcated two in one plot had been given to the 1st Defendant, and the Plaintiff was asked to leave so that they could discuss the matter.

Later the Plaintiff was called to go to the office and there he was told that the people on the ground were children and they had erred. He was asked to get the two plots, and his neighbor gets the other two, and that he should pay the remaining K11, 000.00 to the office. It was the Plaintiff's evidence that the 2nd, and 3rd Defendants as well as Olallo were agreeable, and he paid K1, 000.00 on 2nd January, 2012 in the 2nd Defendant's presence, and the balance of K10, 000.00 was paid at the office in the presence of the entire committee.

That thereafter he was given authority to build, and was told that two alternative plots would be found for him. He testified that he constructed a five course wall fence, and that the 1st Defendant also built his. That in the area demarcating the two plots the Plaintiff constructed a five course wall and the 1st Defendant told him that he was delaying to complete it, and that he would therefore complete it.

The Plaintiff told the court the 1st Defendant had red blocks, while he had concrete ones, and he told the 1st Defendant that the blocks would not tally, and they each completed their wall fences. Further in his evidence, the Plaintiff testified that in December, 2015, on a date he could not recall, the five course and three roomed house were demolished, and he went to see the Senior Chairman Mr Kayula, and the Secretary Mr Musukwa. That the 2nd and 3rd Defendants as well as Mr Olallo were called, and the Vice Secretary Mr Juba and others he did not recall were also present.

That in that meeting the 2nd and 3rd Defendants as well as Mr Olallo had explained that the elders from the district had said that the Plaintiff should move and the 1st Defendant would get the entire piece of land. That the Plaintiff was told that the problem had been sorted out and that he had to pay K20, 000.00 for renewal of the land which was reduced to

K15, 000.00 after he complained that he had no money. The Plaintiff told the court that he paid K5, 000.00 in the presence of Mr Kayula, the 2nd and 3rd Defendants and Mr Juba, and he identified the document at page 22 of his bundle of documents as the document that was signed when he paid the money.

The document is dated 4th January, 2015, and it was stated that it was signed by the Plaintiff, Musukwa the Vice Secretary, the 3rd Defendant as Youth Chairman, Olallo Mwanza as Branch Chairman, and the 2nd Defendant as Ward II Secretary. He went on to testify that a week later the 2nd Defendant called him over payment, and he had told him to go and collect K3, 000.00 from the bricklayer, and that three days thereafter the 3rd Defendant had also called asking the Plaintiff why he had paid the 2nd Defendant when he was the owner of the plot.

That when the Plaintiff went to the plot two days later the 3rd Defendant had gone there and collected K3, 000.00, and the Plaintiff also paid K4, 000.00 to Mr Musukwa and Mr Kayula, as they were in a car, stating that they were going for a meeting. The Plaintiff clarified that the 2nd Defendant was paid through the youths, while the 3rd Defendant was paid in person. However only one document was written by the youths to acknowledge receipt of the monies paid.

Still in his testimony, the Plaintiff told the court that he then proceeded to complete the building, and he bought iron sheets, but two days before he could start roofing, they blocked the entrance to his property and the Plaintiff took photographs, and rushed to Kanyama police where he found the Criminal Investigations Officer (CIO), Chilepa. That the CIO gave him police officers to go with to the plot, and they found people constructing at the entrance of his plot where had wanted to put a gate. He stated that the police officers removed the blocks, and they entered

the plot, and they found that the wall demarcating the Plaintiff's from his neighbours' had been demolished, as well as the three roomed house.

It was stated that the bricklayers who were on site were taken into police custody, and when the 2nd Defendant was phoned, he said that he was busy and he only showed up some days later, while the 1st Defendant cut the line when he was phoned. That the 3rd Defendant's phone went off, and Ollalo said he was in Mungwi. Further in his testimony, the Plaintiff testified that the 2nd Defendant was locked up when he went there, and that the 1st Defendant also later appeared, and police released him and the 2nd Defendant on police bond.

He also stated that the next day was phoned and told the Defendants were wrong, and that they would pay for the malicious damage, and that he could continue building. He added that he was also asked to avail Kayula and Musukwas numbers, and that when the two went there, and he was offered K30, 000.00 by the 1st Defendant, and that he would be found land elsewhere. The Plaintiffs evidence was that he refused that offer on account of the fact that he had paid K150, 000.00 over the plot as evidenced at pages 28 and 29 of his bundle of documents. He stated that he was not given a letter to repossess the plot, and that the house was destroyed after he had finished building it. He asked to be paid the K57, 000.00 that he had spent to construct the house and costs.

When cross examined by Counsel for the 1st Defendant, the Plaintiff testified that he had signed contracts for the sale of the land with the 2nd Defendant and his secretary, which were at pages 16, 17, 19 and 22 of his bundle of documents. He told the court that the land is for Kanyama Consituency, and he expressed ignorance that prior to the 2011 general elections the land had belonged to the Zambia Army. When referred to pages 16 and 17 of his bundle of documents the Plaintiff testified that

the documents were contract and ownership forms on which the 2nd Defendant had signed as Chairman whilst they were about five metres from the land. He agreed that the documents do not describe the property number.

The Plaintiff's evidence when referred to page 19 of the Defendant's bundle of documents was that the 2nd Defendant was not a witness to the document although the document states so. That the vendor's name on the document is indicated as Peter Mwape, and the Plaintiff acknowledged that the signature for the 2nd Defendant on page 19 was different from the ones at pages 16 and 17. He also stated that the 2nd and 3rd Defendants did not sign as witnesses on the document at page 22.

It was also the Plaintiff's testimony that the document at page 8 of his bundle of documents is a letter of sale which he had signed as buyer, and he had paid K20, 000.00 to Loveness Mushanga for Plot No 1951/20 and that the agreement is dated 17th February, 2016 and not 2011. He testified that he had dealt with Loveness Mushanga over the plot and not the 2nd Defendant, but denied that he was lying when he testified that he dealt with the 2nd Defendant.

Over how much he had paid for the plot, the Plaintiff testified that he paid K36, 000.00 to the 2nd and 3rd Defendants as well as Olallo, and K11, 000.00 to the ward, K20, 000.00 to Loveness Mushanga, K15, 000.00 to Ward II, and K1, 000.00 to the 2nd Defendant on behalf of Mr Mwape, bringing the total to K83, 000.00.

Still on who sold him the land, the Plaintiff told the court that initially the 2nd, 3rd Defendants and Olallo had told him that the land was theirs, and later Loveness Mushanga and Mr Musafili had told him that the land did not belong to three, and that they had bought it in 2009, and that

there was a docket to show that Loveness Mushanga had sold the land to Mr Musafili. However the 2nd, 3rd Defendants and Olallo had troubled Mr Musafili over the plot and had requested Loveness Mushanga to refund him what he had paid for the plot. The Plaintiff had further testified that Mr Musafili had shown him the documents from the police and Sheila of Kanyama Constituency had confirmed the position in the 2nd Defendant's presence.

However the 2nd Defendant had told him that the land was his, and that he had sold it to Peter Mwape whom he said that the Plaintiff should give him K1, 000.00 so that he could stop making noise. It was also stated that Ward II also claimed that they owned the land, and that the 2nd Defendant worked for them, and demanded that the Plaintiff pays K15, 000.00 for renewal assuring him that there would be no problems. His evidence was that the 2nd and 3rd Defendants were members of Ward II Committee.

The Plaintiff further in cross examination stated that page 18 of his bundle of documents does not relate to Plot No 1951/20. He stated that he did not see the 1st Defendant demolish his structures, but that he witnessed his servants do so. He agreed that he had not produced receipts to show much he had spent on the materials used to construct on the plot, and he went on to state that the size of the Plot No 1951/20 was 17X35. When shown the document at page 17 of his bundle of documents, the Plaintiff stated that it was 50X50.

He explained that he had only bought one plot in the area which was supposed to be 25X25, but that it reduced to 17X35 when his neighbor encroached on it. The Plaintiff also in cross examination testified that the plot was 50X50 when he bought it, and when it was cut, it became 25X25, and 17X35 when encroached on. He told the court that it was

demarcated twice, and that he started constructing on it in June, 2011 when he bought it.

When cross examined by the 2nd Defendant, he maintained that the 2nd, 3rd Defendants and Olallo had dealt with him over the plot before the Patriotic Front (PF) came into power, and that before the elections he had put up a three course wall fence and the three roomed house. He also stated that before the PF came into power people had put up wall fences in the area but no one had constructed. That the 2nd and 3rd Defendants had told him that the remaining space was theirs after the 1st Defendant encroached on his land, and that the 2nd Defendant had told him to get some of land so that he does not lose out. That thereafter the owner of the land went and got some, and he remained with 17X35.

He denied any knowledge of the land that has a two roomed structure occupied by a caretaker. He also denied having gone to the cells when the 2nd Defendant was arrested, and asked him to pay K15, 000.00, and sign documents saying that the land belonged to the Plaintiff.

The Plaintiff when cross examined by the 3rd Defendant stated that he paid the 3rd Defendant money in the presence of the 2nd Defendant and Olallo about fifty metres from the plot, and at the Ward II office. That the K6, 000.00 was paid to the 3rd Defendant at the ground, and the K11, 000.00 was paid at the office. He further testified in cross examination that he knew the 3rd Defendant when he was looking for a plot in Garden House, and that the 3rd Defendant had signed some but not all of the documents. He stated that the Chairman signs on the ownership form. The Plaintiff told the court that the Committee told him that the land was theirs having belonged to the MMD, and that he had made a mistake to deal with the youths on the ground.

He stated that he was surprised that the 1st Defendant wanted to get the land as he had not finished paying for it, and that he would be given an alternative piece of land. He denied having reported the 2nd and 3rd Defendants to the police, stating that the 1st Defendant was responsible for his problems.

In re-examination the Plaintiff stated that to his knowledge the document at page 19 of his bundle of documents was a contract. That it made reference to K1, 000.00 being paid by him, and that it was sold by the 2nd Defendant and the Committee, and that the 2nd Defendant had at the bottom of that document signed as having received the money. That he had signed the document at page 22 of his bundle of documents as having paid money, but that the vendor and purchaser were not indicated on those documents.

He also stated that Loveness Mushanga and Bright Musafili had found him at the police, and had told him that the land did not belong to the 2nd, 3rd Defendants or Olallo, and that there was a docket at the police over the said land. He further explained that Loveness Mushanga had also told him that she owned the land, and had sold it to Bright Musafili. That the Plaintiff had paid her as she had told him that the land was his, and that the sale agreement between Loveness Mushanga and Bright Musafili is dated 11th June, 2012, after he had paid the Defendants and the Committee.

He expressed ignorance over ZAF having owned the land saying a lot of people had land in the area. That he was given the document at page 17 of his bundle of documents by the 2nd Defendant on 5th June, 2011 who had signed as Chairman, after he paid K6, 000.00. He also stated that the 2nd Defendant gave him the document at page 16 of his bundle of documents on 17th July, 2011 when he paid K15, 000.00. That at the

time his wall fence and structure were demolished, the 3rd Defendant was a Youth Committee member.

PW2 was Juba Yalenga. It was his testimony that in 2012 he was Vice Secretary of the Ward 11 Kanyama Constituency, and that the Committee had assigned the youths to go into Garden House to assist with the problem of the plots, including the Buffer Zone. It was explained that the Buffer Zone is close to Mumbwa Road near Spar Mumbwa Road. PW2 told the court that sometime later they received reports and complaints that the youths were not doing things properly, and the Plaintiff was among those that went to his office to complain.

That thereafter the Mens Committee went to the Buffer Zone and interviewed the youths as to what was going on. He went on to explain that the 2nd Defendant was the Youth Secretary, while the 3rd Defendant was the Youth Treasurer, and the two had told them that the plot the Plaintiff had complained about was four plots that had been divided into two. That the Plaintiff and the 1st Defendant were each given a two in one plot, and that as the Committee had assigned the youths to deal with the problem of the plots, it was agreed that the plots for the Plaintiff and the 1st Defendant should remain the way they were.

PW2 had in his evidence also stated that the Plaintiff had explained that he had been charged K40, 000.00 for the plot, and had paid K36, 000.00, and they told him to pay K11, 000.00 to the office, bringing the total to K47, 000.00. PW2 testified that the next day the Plaintiff went and paid K1, 000.00 and he received it and signed for it, stating that the money was part of the surcharge fee of K11, 000.00, for not having dealt with the Ward. He identified the document at page 20 of his bundle of documents as the said document that he signed, and that it indicates

that the money was paid for a 25X50 m² plot. In conclusion PW2 testified that thereafter his parents fell sick in Lundazi and he left.

When cross examined, PW2 told the court that in 2011 he was still Vice Secretary of Ward 11, Kanyama Constituency. That in the absence of the Secretary, he as Vice Secretary was supposed to sign the ownership forms. He testified that he did not sign any documents for this matter.

When referred to page 3 of the Defendant's bundle of documents, PW2 testified that he was familiar with it, stating that is issued to purchasers of plots in Garden House. That the 2nd Defendant as Youth Secretary signed that document as Chairman, but PW2 stated that he was not familiar with who signed as Secretary. He however testified that the document was issued to Oliver Chilufya, and that he was aware that Oliver Chilufya was allocated land by the Committee.

He stated that the ownership form at page 17 was for the Plaintiff, and the 2nd Defendant had signed as Chairman on that document, and that he did not know who signed as Secretary, as it was not their Secretary Mr Kapandula's signature. Whilst stating that the PF came into power in 2011, and the Committee was only started work on 23rd September, 2011, PW2's evidence was that the Committee was formed in 2010 when they were in the opposition. However that before 23rd September, 2011, the Committee could not issue land, and therefore as at 5th June, 2011 they had no mandate to do so.

He agreed that the document at page 3 of the Defendant's bundle of documents was issued when the Committee had the mandate to do so. That the youths had through the discussions that they had with them informed the Committee that they had issued the land to the Plaintiff in January, 2012, but they did not avail any documents to support the

claim. He stated that the plot was a four in one that is, 50X50 in size, adding that it should have been a 25X50.

It was also PW2's evidence that he worked with the 2nd Defendant in the Committee for six years, and when referred to pages 2, 15, 19 and 22 of the Plaintiffs bundle of documents he stated that the signatures on the said documents were similar and but were different from the ones at pages 3 and 17 of the Defendant's bundle of documents.

When cross examined by the 2nd Defendant, PW2 testified that the 2nd Defendant was Youth Secretary, and he was thereafter promoted to Vice Chairman. He stated that he was aware that a Task Force was formed in Garden House which comprised youths from the constituency and the ward. He went on to state that the party had asked them to desist from allocating land and signing documents, and that the Residents Committee comprised mainly MMD members. PW2 agreed that the land in issue fell under the Zambia Army and that is why it was a buffer zone. That before the PF came into power, it was open with no developments.

The evidence of PW2 when cross examined by the 3rd Defendant was that the Plaintiff had told the Committee in the 3rd Defendant's presence that he gave the 3rd Defendant K36, 000.00, and the 3rd Defendant did not deny. He stated that when they heard that Gerry Chanda had given the land, the Committee had risen up, and that when the Plaintiff paid K11, 000.00, the 3rd Defendant was suspended. He agreed that thereafter the Constituency Chairman had called him and scolded him.

PW2 in re-examination told the court that when the PF came into power they were not allowed to sign documents in order to avoid complications, and they resorted to backdating them.

The last witness called by the Plaintiff was Elizabeth Tembo. She testified that she used to work for the Plaintiff, and she was assigned to bury a ditch at his plot. That in January 2016 when she went to work she found two men breaking the wall fence, and that as she knew them, she greeted them, stating that they lived at the neighbouring plot to the Plaintiff's. She named the two men as George and Martin, and that they were found at the 1st Defendant's plot.

PW3 went on to state that when she asked them what was going on as they were breaking the wall fence that the Plaintiff had built, they did not respond and she left and called the Plaintiff. That the Plaintiff went to the plot and took photographs of the damage that had been done to the wall fence using his phone, and thereafter went and reported the matter to the police. It was PW3's evidence that she was summoned to go the police station the next day where she explained what had happened.

That after a day when she went back to the Plaintiff's plot she found that the house that he had constructed there had also been demolished, and she again phoned the Plaintiff who went and took photographs of the demolished house and he went to the police. PW3 explained that the Plaintiff later returned to the plot with police officers as she was at her house which is separated from the Plaintiff's plot by a road.

Further in her testimony, PW3 told the court that she saw the police officers break the blocks that had been placed at the entrance to the Plaintiff's plot, and they told the Plaintiff that he could continue building. She stated that the Plaintiff bought building materials, and started rebuilding the house but after three days even that structure was demolished. That when she went back to the Plaintiff's plot to check, she found a white vehicle and another parked at the 1st Defendant's gate, and four men came out of the Plaintiff's yard and got into the white

vehicle. It was stated that the 1st Defendant then came out of his gate and they left. PW3 identified the 3rd Defendant as being among the four men that came out of the Plaintiff's plot stating that his name is Kelvin.

When cross examined by Counsel for the 1st Defendant, PW3 testified that she did not know the plot number for the Plaintiff's plot, and that she did not know how the Plaintiff and the 1st Defendants acquired their plots. She stated that she did not see the 1st Defendant demolish the Plaintiff's structures.

PW3 in cross examination by the 2nd Defendant told the court that he was Mr Chileshe who was found at the gardens in Garden House. She expressed ignorance that he allocated plots in the area, stating that she only knew Kelvin and Olallo as the people that did.

It was PW3's evidence when cross examined by the 3rd Defendant that she knew him, and that he used to be found with Olallo, and that they were cadres. On being asked what the 3rd Defendant was doing at the Plaintiff's plot, PW3 answered that she just saw him come out, and he did nothing.

The first defence witness was the 1st Defendant. In his evidence he stated that after 2011 elections the 2nd and 3rd Defendants had approached him and told him that they had four plots for sale going at K10, 000.00 each. He testified that the 3rd Defendant had two plots which he bought, and that he also bought the other two plots from the 2nd Defendant.

On the size of the plots that he bought, the 1st Defendant stated that each plot measured 20X20. He further testified that each of the other two Defendants provided letters of sale for the properties, and the agreements were entered into on 10th October, 2011, and each of the parties signed the same. He identified the documents at pages 1 and 2 of the

Defendant's bundles of documents as the said letters of sale. They were produced in evidence and marked 'P1' and 'P2'.

The 1st Defendant still in his defence testified that upon payment of the purchase price he was given an ownership form which is at page 3 of the Defendant's bundle of documents. It was produced in evidence and marked 'P3'. He stated that 'P3' does not describe the property that he bought, and that when he bought the land, his neighbours were Mr Maimbo and Mrs Chirwa. That they had peace until January 2016 when someone encroached on his land and he called the 2nd Defendant who informed him that the person had also encroached on Mrs Chirwa's land, and he was chased by the Committee. The 2nd Defendant had told the 1st Defendant that the plot was his, and that he would use the youths to bring down the structure on the plot, and it was brought down.

He denied that the Plaintiff had built a wall fence at the plot, testifying that he had used pan bricks to develop Plot No 1951/19, and he had demarcated off the other plot using the said pan bricks as there was a shortage of land. The 1st Defendant's evidence was that he told his boys to demolish the wall fence and that the Plaintiff had no problem, as he knew that the land and the wall fence were his, and he did not report the matter to the police.

On the numbers for the plots, the 1st Defendant testified that Mr Mwenya had taken the numbers for the plots, and he bought Plot No 1951/19 from the 3rd Defendant, and Plot No 1951/20 from the 2nd Defendant. That he had left this plot bare as he developed the other one, stating that the said plot had a lot of ditches. The 1st Defendant also testified that Mrs Chirwa had left a four to five course wall fence and he built on top, and he was then told that his bricklayers had been taken to the police.

When he called the 2nd Defendant and informed him of the development, the 2nd Defendant told him that he would find out what had happened, and he was locked up by the police. It was stated that the 1st Defendant was called to go to the police after three days, and he was detained for fifteen minutes then released. He was told that the Plaintiff had complained to the police.

The 1st Defendant was not cross examined by the 2nd and 3rd Defendants. When cross examined by Counsel for the Plaintiff, the 1st Defendant denied having known the 1st and 2nd Defendant's before. That Koloko had introduced the two defendants to him as being Committee members who had been given a portion of land. He went on to state that he did not find out the structure of the Committee from the main Committee, or if the two Defendants had authority to sell the land, as the land was allocated to them as individuals. He stated that the two had told him so.

The 1st Defendant testified that he was unaware that the two had received money from other people for the same plots, or that the sale of the plots by youths was illegally done, and that this was brought to the fore through the media.

When referred to page 22 of the Plaintiff's bundle of documents, the 1st Defendant testified that he was not aware that the two Defendants got money from the Plaintiff for the same piece of land. That each plot that he was sold measured 20X20, and two measured 20X40, and that he was given only one ownership form which is at page 3 of the Defendant's bundle of documents. That the document states that plot was four in one.

The 1st Defendant further in cross examination testified that he knew the Chairman who had signed on the document, stating that he is Mr Kondowe. That Mr Kondowe is still his neighbor, but he could not state if

Mrs Chirwa had sold her land. He denied that the Plaintiff had ever been his neighbor. The 1st Defendant denied that the Plaintiffs evidence that the 2nd and 3rd Defendant had said that the Plaintiff should give him a two in one plot was true. He agreed that he brought down the Plaintiff's structure, saying that it was constructed on his property.

He further stated that he had first constructed on Plot No 1951/19 and had put a wall fence in between that plot and 1951/20, as he was told that if he left it as one, it would be encroached on as it would be a bigger piece of land. He also told the court that the Plaintiff had put a structure on Plot No 1951/20 after the matter was in court.

In re-examination, the 1st Defendant clarified that the matter was reported to the police when the structure was demolished.

DW2 was Tewmwani Kondowe. It was his testimony that the Kanyama Constituency Development Committee was selected by the people to deal with the issue of the plots, and was formed sometime back during the Movement for Multi Party Democracy (MMD). That their Committee assumed office when the PF came into power in September 2011, and he was Chairperson of the Committee for one year from October 2011. DW2 told the court that as Chairperson he would oversee the sale of the plots, and he also explained the procedure for one to buy a plot.

He told the court that when someone wanted to buy a plot they would identify a plot for them and upon payment, change of ownership would be done after seeing both the seller and the purchaser. Over the plot in issue being No 1951/20, DW2 testified that it was allocated when the Member of Parliament Gerry Chanda gave land to the PF members. That the said plot belonged to Kennedy Chileshe whom he identified as the 2nd Defendant, and that thereafter the 1st Defendant bought the land from him, and he was issued a Kanyama Constituency Development

document to change ownership. He identified the document at page 3 of the Defendant's bundle of documents as the said ownership form, stating that he signed it in sections A and C. He denied any knowledge of the documents at pages 16 and 17 of the Plaintiff's bundle of documents.

This witness was not cross examined by the 2nd and 3rd Defendants. In cross examination by Counsel for the Plaintiff, DW2 agreed that there was another Committee in place when they took over, which also had power to allocate land. He stated that he was not the only person who could sign on the ownership forms as the Secretary could also do so, and that in his absence the Vice Chairperson could sign. He however stated that during the period of his tenure, the Vice Chairperson did not sign any ownership forms.

When referred to pages 16 and 17 of the Plaintiff's bundle of documents, DW2 stated that he could not recognize the signatures for the Chairperson and Secretary on the said documents. That during his tenure the Vice Chairperson was Mr Kabaso, and that Juba Yalenga was not there. He expressed ignorance that from 2012 Juba Yalenga was Vice Secretary, and that he accepted advance payment from the Plaintiff for the plot. He denied knowing Bernard Nzalwe. It was further his evidence that he knows the 2nd Defendant as Kennedy Chileshe, and that he knew him when the PF came into power, and he was Youth Secretary when he was Chairperson. DW2 said that he was unaware if the 2nd Defendant sold land in his absence.

DW3 was the 2nd Defendant. In his defence he stated that he knew the Plaintiff after the 2011 elections after he was assigned to go to Garden House area in an area called the Buffer Zone to safeguard it, as the area MP had stated that a secondary school and a clinic should be built there, and that the remaining land would be given to the youths as

empowerment. DW3 further testified that there were no structures at the place, and the Plaintiff had approached him and had asked for a four in one plot, and he was allocated land outside the Buffer Zone. However the MP told them that the land that was allocated to the Plaintiff would be used to construct a clinic.

That it was then that the 2nd Defendant asked the Plaintiff if he could get a two in one plot after the road. He stated that the Plaintiff built a two roomed house and a wall fence, and they agreed on a purchase price of K40, 000.00, and he paid K6, 000.00. He drew a sketch map showing the location of the plots in the area. Still in his defence, the 2nd Defendant testified that he then moved the Plaintiff to the other side, and told him that he would pay for the two in one plot only, as others were also affected.

The 2nd Defendant told the court that he had a plot next to the 3rd Defendant's but he declined to give it to the Plaintiff, who then went to the land that they had given to Mrs Chirwa. That when they stopped him from getting that land, the Plaintiff went to the Ward and gave them money, and the bosses at the Ward went to the ground, and he was written a suspension letter. However the Constituency revoked the suspension when he appealed. He went on to state that the 1st Defendant bought the two in one plot from him, and he gave him a letter of sale.

That from there, there was no confusion until 2016 when the 1st Defendant built on a plot bought from the 3rd Defendant, and he wanted to start constructing on the plot that the 2nd Defendant had sold him. It was his evidence that the bricklayers were taken to the police, and he was summoned by Kanyama police, and locked up for four days. He further testified that on the fourth day, the Plaintiff and police officers

told him to get money, and then sign that the plot belonged to the Plaintiff, but he refused to do so, and he was released on police bond.

In cross examination by Counsel for the 1st Defendant, the 2nd Defendant testified that the document at page 1 of the Defendant's bundle of documents was a contract of sale signed with the 1st Defendant. He stated that the Buffer Zone was originally owned by the Zambia Army, and that when he went there it had no developments on it.

When referred to pages, 2, 19 and 22 of the Plaintiff's bundle of documents, the 2nd Defendant stated that the document at page 2 was not for the sale of 1951/20 but for groceries that were collected from Mulenga of Chibolya Compound, and not the Plaintiff. He further stated that it could even be seen from the document that Mulenga's name had been erased on the said document.

He told the court that the document at page 19 was for a plot in Makeni Villa that the Plaintiff sought ownership for, and that Peter Mwape who works at Intercity Bus Terminus got the money. As regards the document at page 22, the 2nd Defendant testified that it was for the two in one plot that the Plaintiff bought at K10, 000.00, and paid K6, 000.00, and built a two roomed house on it, and which was on rent. He also stated that he allowed the office to get K5, 000.00 to cater for the two in one plot, and he was therefore surprised to hear the Plaintiff deny that he had no plot there.

The 2nd Defendant also testified that he was just a witness to the transaction at page 22 on 4th January, 2015, and he did not get any money for it. He stated that he does not know the persons who signed the documents at pages 16 and 17 of the Plaintiff's bundle of documents, and it was further his evidence that when land is sold, the Residents Development Committee is automatically approached and they get five

percent of the purchase price paid, and that is why they stamp the documents, and not the party. When referred to page 3 of the Defendant's bundle of documents, the 2nd Defendant told the court that it was signed by Mr Kondowe, the Chairperson of the Residents Development Committee and not him.

When cross examined by Counsel for the Plaintiff, the 2nd Defendant agreed that he sold the Plaintiff land, and he also agreed that page 22 of the Plaintiff's bundle of documents has no plot number, but added that it is not for the plot that he sold to the 1st Defendant. He also agreed that the document at page 1 of the Defendant's bundle of documents does not have a plot number, and he attributed this to the numbers having been allocated after the sale.

He agreed to having received the money indicated at page 19 of the Plaintiff's bundle of documents, but explained that he took the same to Peter Mwape. He denied that the money was part payment to him, saying that he was just a witness. That the money was for a plot in Makeni Villa. The 2nd Defendant further testified that PW2 lied when he said that the K1, 000.00 was paid for Plot 1951/20 as a balance, as the Plaintiff only paid K6, 000.00.

That he signed the document at page 22 of the Plaintiff's bundle of documents for a plot in the Buffer Zone, but not for Plot No 1951/20 stating that it was for a two in one plot on the other side of the road. He denied having sold Plot No 1951/20 to the Plaintiff, and showing it to PW2. He however agreed that he was selling plots, as he was in power.

The last defence witness was the 3rd Defendant. His defence was that after the PF won the elections in 2011, he was the Vice Treasurer, and the Committee through the MP Gerry Chanda sent the youths to protect the land so that Michael Chilufya Sata secondary school could be built,

as well as Mama Betty Kaunda clinic. It was stated that they were given plots after they secured the land, with him being given a two in one plot, as was the 2nd Defendant.

Further in his defence the 3rd Defendant told the court that when the main Committee heard that they were given plots, they rose up and wanted to grab the plots from them, and there was a fight. That after the main Committee was defeated, he was suspended, and he saw the Constituency Chairperson who stated that the he had collected K11,000.00.

He denied knowing the Plaintiff, stating that he was surprised that the Plaintiff had mentioned him in this matter, alleging that the Plaintiff had called him and wanted to corrupt him. He further testified that he had approached the 1st Defendant who told him that he was looking for an eight in one plot together with his business partner, but a four in one for himself. The 3rd Defendant explained that he had then told the 1st Defendant that his neighbor being the 2nd Defendant had a plot, and that is how the two had met the 2nd Defendant, and the 1st Defendant was sold both the 2nd and 3rd Defendants land.

Further in his testimony, the 3rd Defendant testified that the Plaintiff has nine plots in Garden House, and they have none, and he could not sell him any more land. That the land the Plaintiff claims belongs to the 1st Defendant.

When cross examined by Counsel for the 1st Defendant, the 3rd Defendant agreed to having signed the document at page 22 of the Plaintiff's bundle of documents, stating that he signed it because of the noise. It was stated that the Plaintiff was being troubled by Ollalo over the plot on the other side that had an outstanding balance to be paid, and Ollalo was threatening not to allow him to build if he did not pay.

That Ollalo was called and paid the money for the two in one plot on the other side, not Plot No 1951/20.

In cross examination by Counsel for the Plaintiff, the 3rd Defendant agreed that the document at page 22 of the Plaintiff's bundle of documents does not indicate the plot number or that it was for a plot on the other side of the Buffer Zone. He stated that he knew the Plaintiff on 4th January, 2016 after he took a complaint. It was further the 3rd Defendant's evidence that the document at page 22 of the Plaintiff's bundle of documents indicates that he was Youth Chairman, and he told the court that before that he was Vice Secretary.

The parties also filed submissions in which the Plaintiff referred to the learned authors of ***Megarry and Wade, The Law of real Property, 6th edition, London Sweet and Maxwell, 2000*** at page 99 which states that in order for one to acquire title to real property, they must show that value must have been given. That this position was verified by Hon Mr Justice Matibini as he then was, in the case of ***BANDA V MWANZA ZMHC 72 2011***.

Therefore having given value for Plot No 1951/20, the Plaintiff is the legal owner of the said property. That this evidenced from the testimony of the Plaintiff that he bought the land at K47, 000.00, and PW2 the Vice Secretary at Ward II Kanyama Constituency acknowledged that the Plaintiff paid K36, 000.00 to the 2nd and 3rd Defendant, and the balance of K11, 000.00 to the Committee. Further that the Ruling of the court dated 6th April, 2016 demonstrates that the Plaintiff established title to the said property.

Reference was made to the case of ***NAWAKWI V LUSAKA CITY COUNCIL AND ANOTHER APPEAL No 26 OF 2001*** where it was stated that a purchaser ought to make enquiries that a prudent purchaser would

make. It was submitted that page 1 of the Defendant's bundle of documents is a contract of sale between the 2nd Defendant and the 1st Defendant dated 10th October, 2011, while at page 8 of the Plaintiffs bundle of documents is a contract of sale between Loveness Mushanga and the Plaintiff for Plot No 1951/20 dated 17th February, 2016.

That at page 16 of the Plaintiff's bundle of documents is an ownership form from Kanyama Constituency Committee to the Plaintiff dated 5th June, 2011 signed by the Plaintiff and the 2nd Defendant. It was submitted that these documents show that the 1st Defendant bought the property after the Plaintiff had done so, and had he conducted due diligence, he would have discovered that the Plaintiff had an interest in Plot No 1951/20.

It was also the Plaintiff's submission that going by Article 43(2) of the Constitution of Zambia, Act No 2 of 2016 which states that "**a citizen shall endeavor to foster national unity and live in harmony with others**", the 1st Defendant had acted against the spirit of the said article. That at page 21 of the Defendant's bundle of pleadings which is the further affidavit to the affidavit in opposition to the ex-parte summons for an interim injunction shows that the 1st Defendant agreed to having demolished the wall fence and three roomed house, and offered to pay K30, 000.00.

With reference to Section 22(11) of the Town and Country Planning Act, Chapter 283 of the Laws of Zambia, the Plaintiff's submission was that the document at page 5 of the Plaintiff's bundle of documents is a letter authored by the Plaintiff for a recommendation to the Lusaka City Council so that he could erect a wall fence and a three bedroomed house. Therefore he had followed procedure to obtain permission from the Lusaka City Council to develop the land, and if the 1st Defendant was

aggrieved, he should have gone to the Council and questioned why they had approved his building plan rather than demolish the structures.

Section 4 (1) (a) of the Lands Tribunal Act, No 39 of 2010 was also referred to which section empowers the Land Tribunal to determine disputes pertaining to land under the Lands Act, the Lands and Deeds Registry Act, and the Housing (Statutory and Improvement Areas) Act or any other law. That the provision stipulates that land disputes should be presented before the tribunal, rather than taking matters into ones hands, as the 1st Defendant did in this matter. That ignorance of the law is no defence as provided in Section 7 of the Penal Code, Chapter 87 of the Laws of Zambia.

Therefore the 1st Defendant has no excuse for his actions. On the consequences of breaching the contract of sale, the Plaintiff relied on the case of **HADLEY V BAXENDALE 1854 EWHC 70** where Baron J stated that ***“where one party to a contract breaches it, the damages which the other party ought to receive in respect of such breach should be such as may fairly and reasonably be considered either arising naturally, according to the usual course of things, or such as may be supposed to have been in contemplation of both parties at the time they made the contract, as probable result of breach of it.”***

The other case relied on with respect to the claim for damages were **NSANSA SCHOOL EDUCATIONAL TRUST V MUSAMBA 2010 VOL 1 ZR 458**, as well as **Roy Corde Commercial Law, 1995, 2nd Edition, London and Butterworths 1995** at page 60 which states that ***“the law of the common law is that only the legal owner of goods or one who has been authorised or otherwise held as entitled to dispose of them can make a disposition which will be effective to deprive the legal owner of his title or encumber to pursue his property into the***

hands of an innocent purchaser for value and assert proprietary rights over the proceeds and proceeds of his property”.

That applying the principle of “*nemo dat quod non habet*”, ownership of the property had passed to the Plaintiff when the 2nd and 3rd Defendants sold it to the 1st Defendant. The case of ***BASLEY V CLARLSON 1681 3 LEV 37*** was also relied on which stated that walking on the land without permission or refusing to leave when permission had been withdrawn or throwing objects onto land all fell as examples of trespass to land. It was stated that in this case the 1st Defendant trespassed on the Plaintiff’s land through his servants.

As regards the interest payable on the damages due to the Plaintiff, Order 36 Rule 8 of the High Court Rules, Chapter 27 of the Laws of Zambia, Section 2 of the Judgments Act Chapter 81 of the Laws of Zambia and Section 4 of the Law Reform (Miscellaneous Provisions) Act, Chapter 74 of the Laws of Zambia were referred to. That the case of ***TALL FELLOW HORTON WISHIMANGA V NIEC Appeal No 50 of 2011*** held that interest be paid by the respondent at the average short term deposit rate per annum prevailing from the date of issue of the writ to the date of judgment, and thereafter at the current bank lending rate as determined by the Bank of Zambia.

The 1st Defendant in his submissions asked the court to note the inconsistencies in the Plaintiffs evidence when viewed against the documents that he relied on. That page 16 of the Plaintiffs bundle of documents is a document showing that a 50X50, four in one plot was sold to him on 17th July, 2011, while page 17 is an ownership form dated 5th June, 2011 in respect of the same property.

Then at page 8 is a contract of sale between the Loveness Mushanga and the Plaintiff dated 17th February, 2016. However the 1st Defendant had

shown that he bought the property from the 2nd Defendant on 10th October, 2011 and was even issued with an ownership form as evidenced at pages 1 and 3 of the Defendant's bundle of documents. It was also submitted that the land in question was reserved for Zambia Army called the Buffer Zone, and was only available for alienation after the PF came into power and formed government after September, 2011. Therefore there is no way that the Plaintiff could have been allocated the land prior to September, 2011 as evidenced at pages 16 and 17 of his bundle of documents.

It was further submitted that the Plaintiff had failed to bring the land committee members who signed his ownership forms but the 1st Defendant had called DW2 a past Chairperson of the Committee who signed the ownership form at page 3 of the Defendant's bundle of documents.

That no evidence had been tendered to prove that the 1st Defendant demolished the Plaintiffs structures, and the Plaintiff had failed to show proof that indeed the structures were demolished by way of photographs. Further that the sketch map drawn by the 2nd Defendant before the court shows that the structures that the Plaintiff made reference to do not relate to Plot No 1951/20.

Therefore the Plaintiff had not proved his case, but that the 1st Defendant had on a balance of probabilities demonstrated that he is a bonafide purchaser for value, without notice of the Plaintiff's claim to the property. That the documents in the Plaintiff's possession were backdated to show that he had a prior interest than the 1st Defendant when he transacted only in February, 2016, long after the 1st Defendant had done so when the land was available for allocation by the Kanyama West Land Allocation Committee.

That page 4 of the 1st Defendant's bundle of documents shows that he has substantially developed the property, and it was prayed that the court finds in his favour, and declares him the bonafide purchaser of the property and grants him possession of the same, and awards him damages for inconvenience as the injunction which was granted to the Plaintiff has an undertaking to pay the said damages. That the said damages be assessed by the Deputy Registrar if not agreed by the parties, and that the Plaintiffs claims be dismissed with costs.

I have considered the evidence and the submissions. The Plaintiff claims damages in the amount of K57, 000.00 being the money that he spent on constructing the house and the wall fence that the 1st Defendant demolished, as well as an order of interim injunction restraining the Defendants whether by themselves or their agents from further encroaching on Stand No 1951/20 Kanyama.

From the evidence on record, it is clear that after the 2011 elections and the Patriotic Front (PF) took over the governance of the country, there was land that was sold in Kanyama Constituency among, them the plot in issue No 1951/20. Both the Plaintiff and 2nd Defendant claim ownership of the said plot, with the Plaintiff alleging that he bought it from the 2nd and 3rd Defendants, as well as the Committee, and the 1st Defendant alleging that he bought it from the 2nd Defendant.

It is on record that the 2nd and 3rd Defendants allege that they were given the land by the area MP Gerry Chanda after they safeguarded the area. Both PW2 and DW2 who were members of the Resident Committee that is charged with dealing with the sale of plots in the area, although DW2 denied knowing PW2, testified that when land is sold in the area the Committee issues ownership forms to the purchaser. PW2 agreed that as a Committee they had heard that the MP Gerry Chanda had given the

youths plots in the area, and stated that as a Committee they had risen up. DW2 on the on the other hand just acknowledged that the said MP did indeed give the youths plots, but DW4, the 3rd Defendant verified PW2's evidence that the Committee rose up when the youths were given the land, and there was a fight.

This evidence shows that there was confusion when the youths were given the land by the MP. However the question is whether the MP had power to give the youths the land. The evidence of both PW2 and DW2 is that the land was initially owned by the Zambia Army, and was called the Buffer Zone. It is not clear if the Zambia Army surrendered the land, but what is evident is that the land was sold by both the youths and the Residents Development Committee.

The starting point is who has power to allocate land?

Section 3 of the Lands Act, Chapter 184 of the Laws of Zambia provides the following;

“3. (1) Notwithstanding anything to the contrary contained in any other law, instrument or document, but subject to this Act, all land in Zambia shall vest absolutely in the President and shall be held by him in perpetuity for and on behalf of the people of Zambia.

(2) Subject to subsection (4) and to any other law, the President may alienate land vested in him to any Zambian.

(3) Subject to any other provisions and procedures relating to alienation of land, the President may alienate land to a non-Zambian under the following circumstances:

- (a) where the non-Zambian is a permanent resident in the Republic of Zambia;*
- (b) where the non-Zambian is an investor within the meaning of the Investment Act or any other law relating to the promotion of investment in Zambia;*
- (c) where the non-Zambian has obtained the President's consent in writing under his hand;*
- (d) where the non-Zambian is a company registered under the Companies Act, and less than twenty-five per centum of the issued shares are owned by non-Zambians;*
- (e) where the non-Zambian is a statutory corporation created by an Act of Parliament;*
- (f) where the non-Zambian is a co-operative society registered under the Co-operative Societies Act and less than twenty-five per centum of the members are non-Zambians;*
- (g) where the non-Zambian is a body registered under the Land (Perpetual Succession) Act and is a non-profit making, charitable, religious, educational or philanthropic organisation or institution which is registered and is approved by the Minister for the purposes of this section;*
- (h) where the interest or right in question arises out of a lease, sub-lease, or under-lease, for a period not exceeding five years, or a tenancy agreement;*
- (i) where the interest or right in land is being inherited upon death or is being transferred under a right of survivorship or by operation of*

law;

(j) where the non-Zambian is a Commercial Bank registered under the Companies Act and the Banking and Financial Services Act; or

(k) where the non-Zambian is granted a concession or right under the National Parks and Wildlife Act.”

This power to allocate land has been delegated to the Commissioner of Lands. The land in issue in this matter is in Kanyama area, which by virtue of Section 4 of the Housing (Statutory and Improvement Areas) Act, Chapter 194 of the Laws of Zambia and which was repealed by the Urban and Regional Planning Act No 3 of 2015, was declared as an improvement area under Statutory Instrument No 34 of 1999.

The provisions of the repealed Housing (Statutory and Improvement Areas) Act laid down the procedure for alienation of land that fell under it. These provisions were saved in Section 76 of the Urban and Regional Planning Act No 3 of 2015, which states that;

“76. (1) Any acts, orders and conditions lawfully done, given or imposed under the provisions of the Town and Country Planning Act, the Housing (Statutory and Improvement Areas) Act or under the provisions of any planning scheme, zoning scheme or zoning plan prepared under those Acts before the commencement of this Act shall remain in force and be deemed to have been lawfully done, given or imposed under this Act, but shall not, in respect of anything done prior to the commencement of this Act, give rise to claims for compensation under this Act.”

Section 38 of the Housing (Statutory and Improvement Areas) Act, Chapter 194 of the Laws of Zambia states that;

“38. Subject to the provisions of this Act, and notwithstanding anything to the contrary contained or implied in any written law or any document, a council may in an Improvement Area, with the approval of the Minister-

(a) subdivide the land;

(b) in accordance with the specifications prescribed by the National Housing Authority erect any building or effect any improvement on any piece or parcel of land;

(c) carry out the construction and maintenance of roads, pathways, waterworks, drainage, sewerage and other works for public amenity as it may deem necessary or desirable.”

Therefore only the Council with the approval of the Minister can subdivide land in Kanyama. It is a matter of common knowledge that the Council acts in the housing and statutory improvement areas through the elected councilors, and that there are Residents Development Committee that perform the functions. Going by this the MP had no jurisdiction whatsoever to allocate land to any person in the area in issue unless he was a member of the Residents Development Committee that agreed to so give the youths the land, or with the consent of the Resident’s Development Committee if he was not a member of the Committee.

The evidence on record shows that the Residents Development Committee did not give any such consent, and the resultant effect is that chaos ensued as can be seen from the evidence of the Plaintiff which went unchallenged that he was sold the land by the 2nd and 3rd

Defendants acting with a person called Ollalo, then a woman called Loveness Mushanga also claimed ownership of the property. The Plaintiff was also asked to pay her money, as well as to another person called Mwape, and that he even paid money to some youths on the 2nd Defendant's behalf.

The Plaintiff's evidence that he even had to pay money to the Committee in the amount of K11, 000.00 was not challenged by the 2nd and 3rd Defendants, which was a surcharge fee for having dealt with the youths, and not the Committee. While the 2nd Defendant denied that the money that he was paid by the Plaintiff was for Plot No 1951/20, and that he did not sign the documents at pages 16 and 17 of the Plaintiff's bundle of documents, he did not challenge the Plaintiffs evidence that he was with the 3rd Defendant and Ollalo when they gave the Plaintiff the document after he paid K15, 000.00, and that they gave the Plaintiff the document at page 17 of his bundle of documents after he paid K36, 000.00, and that he was given the document at page 22 of his bundle of documents when he paid K1, 000.00 out of K11, 000.00 charged by the Committee.

The 2nd and 3rd Defendants in fact signed the document at page 22 of the Plaintiffs bundle of documents with the 2nd Defendant signing as Ward 11 Secretary, and the 3rd Defendant as Youth Chairman. Their defence was that they signed the document as Ollalo was threatening not to allow the Plaintiff develop the plot that he bought from him, as there was a balance remaining unpaid. While the document does not state the plot number for the property that the Plaintiff was being allowed to develop, it supports the evidence given by both the Plaintiff and PW2 that the parties met at Ward Office to resolve the wrangles, and the document even has a Kanyama Constituency Ward 11 date stamp.

It must be noted that no plot number has been indicated on all the documents that were issued to the Plaintiff or the Defendant, and the allegations made by the Plaintiff can only be resolved against the defences raised by the Defendants on credibility. The Plaintiff testified that after he paid the K36, 000.00 to the 2nd and 3rd Defendants and a person named Ollalo, he left for South Africa where he stayed for three months as he had problems there. That when he came back, he found that his plot had been demarcated into two, and that when he called the 2nd Defendant who told him that the other half of the plot had been given to the 1st Defendant.

That that is how he had gone to the Ward Committee, and the 2nd and 3rd Defendants, and Ollalo were called to the plot, and thereafter it was resolved that the Plaintiff keeps half of the plot, and the 1st Defendant the other half. The 2nd and 3rd Defendants did not challenge the Plaintiff on this evidence when they cross examined him. The 3rd Defendant did however challenge the Plaintiff on whether indeed the Plaintiff did pay him any money, and the Plaintiff testified that it was in the presence of the 2nd Defendant and Ollalo. Therefore the defence by the 3rd Defendant that he did not deal with or know the Plaintiff cannot stand.

As to when the Plaintiff transacted with the 2nd and 3rd Defendant over the land in issue is not known as he stated that it was before the 2011 general elections on 5th June, 2011. However both PW2 and DW2 testified that it was not possible for the transaction to have taken place then, as at that time the land belonged to the Zambia Army. PW2 stated that as they were discouraged from signing documents to avoid problems, they had backdated the documents. This evidence was not challenged, and it is therefore credible.

Even the Plaintiff's evidence that after the 2nd and 3rd Defendant's sold him the land he went to South Africa, and on his return found that the land had been demarcated into two and the 1st Defendant had been given the other half was not challenged, and is therefore credible evidence. This goes to show that the 2nd and 3rd Defendants sold the land to the Plaintiff before they sold it to the 1st Defendant.

It consequently follows that even if the documents pertaining to ownership that were given to the Plaintiff were backdated, and he was untruthful about it, the fact is he was sold the land before the 1st Defendant. The 1st Defendant in the submissions made reference to the letter of sale of the land between Loveness Mushanga and the Plaintiff, which is at page 8 of the Plaintiff's bundle of documents, and which is dated 17th February, 2016. It shows that the Plaintiff was sold the land after he was.

The Plaintiff when cross examined by Counsel for the 1st Defendant and referred to the said document, testified that he had not lied when he had stated that he had dealt with the 2nd Defendant over the plot. But when re-examined he had clarified that Loveness Mushanga had found him at the police, and had told him that the plot belonged to her, and not the 2nd and 3rd Defendants. At no point in their evidence did the 2nd and 3rd Defendants raise any rebuttal evidence to the Plaintiff's evidence in that respect.

Therefore looking at the evidence as a whole, the 2nd and 3rd Defendants sold the plot to the Plaintiff, and took advantage of his absence to sell it to the 1st Defendant whom they now gave documents to show that they had legitimately sold him the land, when in fact they knew that they had already sold the land to the Plaintiff. Thus the document at page 3 of the Defendant's bundle of documents on its own does not establish that the

1st Defendant is a bonafide purchaser for value, without notice of the Plaintiff's interest in the land.

The evidence on record which is also undisputed is that the Residents Development Committee met the 2nd and 3rd Defendants together with the Plaintiff, and it was resolved that the Plaintiff keeps half of the plot which is No 1951/20, and the 1st Defendant keeps the other half being No 1951/19.

Consequently the claim by the 2nd Defendant that he had moved the Plaintiff to another piece of land on the other side of the road, on the Buffer Zone is without merit, as he has been unable to show the court that other than the plot in dispute, which he indicated on the sketch plan as being next to the 3rd Defendant's, which was sold to the 1st Defendant, there are no two other plots next to each other, that the Plaintiff and 1st Defendant are engaged in a dispute over. The plot in dispute is the one that the Plaintiff claims he bought from the 2nd and 3rd Defendant which was demarcated into two.

The Residents Developments Committee having resolved that the Plaintiff owned Plot No 1951/20, and the 1st Defendant Plot No 1951/19, the next question that arises is whether the 1st Defendant had lawful justification to demolish the wall fence and house constructed by the Plaintiff on Plot No 1951/20? In his defence the 1st Defendant testified that after he bought the plot, he was told that the Plaintiff had encroached on his land, and that the 2nd Defendant had told him that the Plaintiff had also encroached on Mrs Chirwa's land, and that they would use the youths to bring down the structure that the Plaintiff had put up.

That the 1st Defendant had then instructed his boys to bring down the wall fence constructed by the Plaintiff, and that there was no problem as the Plaintiff knew that the land belonged to him. That it was only when

he started developing the property that his bricklayers were apprehended by the police. However in re-examination he clarified that his bricklayers were apprehended by the police after the structure was brought down. In his submissions the 1st Defendant denied having demolished the structures, stating that the Plaintiff had not tendered any evidence in the form of photographs to this effect, and that no one saw him demolish.

In the defence filed, the 1st Defendant admitted having demolished the Plaintiff's structures, and PW3 is on record as having found the 1st Defendant's workers by the names of Martin and George demolishing the wall fence and she had reported to the Plaintiff, who in turn reported the matter to the police. That a day later she found that the house had been demolished, and that there was a vehicle there that the 3rd Defendant got into. The 1st Defendant having admitted that he demolished the structures cannot escape liability on the premise that he did not do so himself, as his workers were seen doing so. He has not pleaded lack of authority from him to do so, and even if there are no pictures to evidence the demolition, the fact is it was done.

The 1st Defendant had no justification to demolish the structures put up by the Plaintiff, as the Residents Development Committee had resolved that the Plaintiff could keep the property. What he needed to do was follow up with the 2nd Defendant to ensure that he was refunded any monies that he had paid to him for the plot. He took the law into his own hands, and he was therefore a trespasser, and he demolished the property. He is liable to pay the Plaintiff the cost of the structures demolished, and I accordingly find that the Plaintiff has proved his case on a balance of probabilities.

There is however insufficient or no evidence on record to show the value of the demolished structures, and I accordingly order that the same be

assessed by the Deputy Registrar. The amount found due shall attract interest at the average short term deposit rate from the date of the issue of the writ until judgment, and thereafter at the lending rate as determined by the Bank of Zambia until payment.

As for the 1st Defendant's counterclaim, this will fail as it has not been established that he is the owner of the plot in issue. The Plaintiff is also awarded costs to be taxed in default of agreement. Leave to appeal is granted.

DATED THE 1st DAY OF DECEMBER, 2017

 Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE