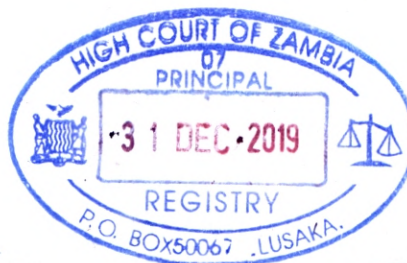


**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**

2014/HP/0756

*(Civil Jurisdiction)*



**BETWEEN:**

**NEW TRAMPO MOTORS LIMITED**

**1<sup>ST</sup> PLAINTIFF**

**CHARLES KACHINGA SIMBILE**

**2<sup>ND</sup> PLAINTIFF**

**AND**

**CHRISTABEL CHIKOTI SIMBILE**

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

**HERMINDER SINGH BHANDHAIR**

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

**ALI JABER**

**3<sup>RD</sup> DEFENDANT**

**HASSAN DAKA**

**4<sup>TH</sup> DEFENDANT**

*Before the Hon. Lady Justice B. M. Majula on 31<sup>st</sup> day of December, 2019.*

*For the Plaintiffs : Mr. L. Mayembe & Ms. N. Liswaniso, both of Messrs. KBF & Partners.*

*For the Defendants : Ms. M. C. Kaoma of Messrs. KMG Advocates*

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

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**Cases referred to:**

1. *Phillips vs Copping* (1935) 1 KB 15
2. *Sithole vs State Lotteries Board* (1975) ZR 106
3. *Patel and Another vs Monile Holding Company Limited* (1993-94) ZR 20
4. *Sable Hand Zambia Limited vs Zambia Revenue Authority* (2005) ZR 109

5. *Charles Kajimanga vs Marmetus Chilemya Appeal 50/2014*
6. *Nkongolo Farm Limited vs Zambia National Commercial Bank Limited And Others (2005) ZR 78 (SC)*
7. *Clementina Banda Emmanuel Njanje vs Boniface Mudimba (2010/HP/A39)*
8. *Masuaso Zulu vs Avondale Housing Project Limited (1982) Z.R. 172*
9. *Khalid Mohamed vs The Attorney General (1982) ZR 49*

## **Introduction**

The plaintiffs commenced this action against the defendants, on 15<sup>th</sup> May, 2014, by way of writ of summons and statement of claim. The endorsement as appears on the summons is for the following reliefs;

- “(a) A declaration that the 2<sup>nd</sup> Plaintiff is the rightful owner of property known as F/369a/62 Makeni Lusaka.*
- (b) An injunction restraining the 1<sup>st</sup> Defendant either by herself or through her agents from interfering with the running of the business affairs of the 1<sup>st</sup> Plaintiff company or further selling F/369a/62 Makeni Lusaka.*
- (c) Damages for fraud, loss of business and inconvenience, mental anguish and distress suffered by the plaintiff at the hands of the Defendants.*
- (d) Interest and Costs*

The defendants responded by way of a memorandum of appearance and defence.



## **Summary of Pleadings**

In the statement of claim, it was averred that the 1<sup>st</sup> plaintiff is a company incorporated under the Companies Act while the 2<sup>nd</sup> plaintiff is a co-administrator of the estate of the late Elvis Simbile. He is also a Director and Shareholder in the 1<sup>st</sup> plaintiff Company.

It was also stated that the 1<sup>st</sup> defendant is the surviving spouse and co-administrator of the estate of the late Elvis Simbile while the 2<sup>nd</sup> defendant was the owner and seller of F/369a/62 Makeni, Lusaka.

Further the 3<sup>rd</sup> and 4<sup>th</sup> defendants are intending purchasers of the said property. On 24<sup>th</sup> May 1995, the late Elvis Simbile in his capacity as one of the Directors of the 1<sup>st</sup> plaintiff contracted with the 2<sup>nd</sup> defendant to purchase F/369a/62 Makeni, Lusaka at the price of K7,000,000.00 (unrebased).

The 2<sup>nd</sup> plaintiff asserts that he made available the sum of K7,000,000.00 which was paid in two installments in April and May 1995. He went on to state that the property was purchased as a business premises for the 1<sup>st</sup> plaintiff which has continued to carry on its business. After the demise of Mr. Elvis Simbile, the 1<sup>st</sup> defendant claimed ownership of the property and also demanded for rentals from the 1<sup>st</sup> plaintiff. He went on to state that this prompted him to conduct a search at Ministry of Lands where he discovered that the 2<sup>nd</sup> defendant fraudulently proceeded to assign the property into the 1<sup>st</sup> defendant's name without his consent.

In the defence, in traversing the plaintiff's claims, the 1<sup>st</sup> and 2<sup>nd</sup> defendants stated thus; the property was initially offered to the deceased in 1995 but however the contract could not be concluded owing to a boundary dispute between the 2<sup>nd</sup> defendant and York Farms. After the dispute was resolved, the 2<sup>nd</sup> defendant offered the property to the deceased at K30,000,000.00 (unrebased) due to appreciation in value of the land. On account of the fact that the deceased did not have money to purchase the property, it was agreed that the property should be sold to the 1<sup>st</sup> defendant who was the wife of the deceased. The purchase was subsequently financed by Zambia National Building Society (ZNBS) as employers to the 1<sup>st</sup> defendant to whom the original certificate of title was deposited.

### **Plaintiff's Evidence**

The matter commenced trial on 12<sup>th</sup> May, 2015. The first witness on behalf of the plaintiffs was Mr. Charles Kachinga Simbile who was also the 2<sup>nd</sup> plaintiff in this matter. He stated that he had been deprived of his dues by the defendants as he was a 50% shareholder in the 1<sup>st</sup> plaintiff company; a company that he had incorporated together with his young brother, the deceased. It was his testimony that in 1995 the deceased informed him of the availability of the land known as F/369a/62 Makeni, Lusaka which was owned by Mr. Herminder Singh.

He worked jointly with his young brother in business, social and family matters so that when there was a decision to acquire property, the deceased would consult him. When it came to the property in



issue, his young brother approached him and due to financial problems the latter was going through at his place of work, the 2<sup>nd</sup> plaintiff agreed to disburse some funds to him to purchase the land. According to this witness the land was at the cost of K7,000,000.00 and the said payment was made in two instalments. He said in the first instalment, he paid the sum of K5,000,000.00 in 1995 and the last instalment of K2,000,000.00 in May 1995. It was his evidence that as he was based in the Copperbelt, it was convenient for his younger brother who was based in Lusaka to handle the transaction.

It was also his further testimony that because of the relationship he shared with the deceased, he had no problem with the contract of sale being in the brother's name, as they had already agreed on the intention of the transaction. The 2<sup>nd</sup> plaintiff's role was to provide the finances. He stated that his young brother on both occasions travelled to the Copperbelt with Mr Martin Lukwasa for the collection of instalments which were later paid to Mr Herminder Singh. Mr. Charles Simbile referred the court to page 12 of the plaintiff's bundle of documents which he recognised as a contract of confirmation that Mr. Herminder Singh had indeed sold subdivision 62 of Farm 369a Lusaka to his young brother Mr. Elvis Simbile. It was also his testimony that his brother did not take possession of the plot until the last instalment was paid.

Furthermore, it was Mr. Simibile's evidence was that they could not proceed with any change of title because they learnt that there had been a long-standing dispute with York Farms concerning the

boundary for the property. He stated that there had never been a tenancy agreement between the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> or 2<sup>nd</sup> defendant.

In cross examination, the 2<sup>nd</sup> plaintiff confirmed that he had no relationship whatsoever with Trampo Motors apart from shadow financing where his brother would, on a number of occasions, call on him to help resolve monetary issues the company would be having. In 2011, he learnt through some workers at York Farms that Mrs. Christabel Simbile was claiming ownership of the land in issue. He stated further that because of the relationship he and his brother shared he did not get any written document to show that he gave the purchase price to his young brother.

The second plaintiff witness (PW2) was Mr. Martin Lukwasa. It was his testimony that the late Elvis Simbile was his childhood friend. At the time the property in issue was purchased, it was owned by Mr. Herminder Singh. He was informed by Elvis Simbile that his brother Charles Simbile had instructed him to find some land.

According to this witness, when the land was found, Elvis Simbile and Charles Simbile passed a resolution as shareholders of the 1<sup>st</sup> plaintiff to purchase the land in issue. Money was to be sourced from Charles Simbile and that's how they travelled to the Copperbelt on two occasions to collect money in order to purchase the said land. He confirmed having seen the letter Mr. Singh had written acknowledging receipt of the K7,000,000.00.



In cross examination, he testified that Mr. Elvis Simbile did not confide in him regarding whether or not he had given the property to his wife. He confirmed that he had sight of the document at page 12 of the plaintiff's bundle of documents showing that the 2<sup>nd</sup> defendant had sold the land in issue to Mr. Elvis Simbile. He further asserted that the amount disbursed by Mr. Charles Simbile was K7,000,000.00 and that he was present on two occasions when the money was given to the deceased. The two brothers were the ones buying the property but Mr. Charles Simbile provided the funds.

The plaintiff's third witness (PW3) was Shadrack Daka. He testified that he was a former employee of York Farms. On a date he could not recall but in 2011 he was instructed by his boss Mr. Tom Varkey to attend to a dispute concerning the boundary for York Farm. He was told to engage the owners of the neighbouring land to initiate a discussion to resolve the long-standing dispute. The first meeting was successful and attended by Fred Mbonabi, Tom Varkey and John Henderson from York Farms and Charles Simbile, Christopher Simbile, Kingsley Simbile and Mr. Lungu. They were, however, unable to meet again as a new owner had come onto the land recognised as Mrs. Simbile.

### **Defence Evidence**

The first defence witness (DW1) was Mrs. Christabel Chikoti Simbile who introduced herself as the widow of Mr. Elvis Simbile. Her testimony was that on 20<sup>th</sup> April 2003 she was offered to buy property known F/369a/62 Makeni, Lusaka by Mr. Singh, the 2<sup>nd</sup>

Defendant herein. After the offer was made, she approached her employer who thereafter surveyed the land and decided to pay the purchase price direct to Mr. Singh. In addition, she stated that before her husband died Mr. Elvis Simbile owned a company called Trampo Motors. She stated that on 16<sup>th</sup> December 2008 after her husband died the 2<sup>nd</sup> plaintiff Mr. Charles Simbile took the keys and started trading from there.

When cross examined Mrs. Simbile confirmed that Mr. Elvis Simbile and Charles Simbile were very close. When showed the document on page 12 of the plaintiff's bundle of documents she recognised Mr. Singh's signature and also confirmed that the property in that letter was the property she alleged to own. When asked if she knew that her husband had purchased the said property, she stated that he was only offered.

When asked to confirm that the word offered did not appear on the said letter on page 12 of the plaintiff's bundle of document she admitted. She agreed with counsel for the plaintiff that Trampo Motors had traded on the land now in issue from 1995. When asked to confirm that from 1995 there was no lease agreement between Trampo and Mr. Singh she stated that she had authorised Trampo motors to operate from there. When further bolstered that in the year she was purporting to have bought the land no lease agreement between her and Trampo existed, she chose not to comment. In conclusion she stated that she was an employee of ZNBS and could easily access all the documents she placed in her bundle.



The 2<sup>nd</sup> defence witness was Mr. Herminder Singh who testified that he owned the property a long time ago and later opted to sell it. He also alluded to the fact that there was a long-standing dispute with his neighbours, then York Farms who alleged that he had encroached into their land. When showed the letter at page 12 of the plaintiff's bundle of documents, it was his testimony that he wrote it and gave it to a friend of his, Mr. Elvis Simbile who agreed to buy it. After the land dispute was resolved with York Farms, the property was then offered at K30,000,000.00 and that the agreement was to be in the wife's name because the payment was coming from the building society. He referred to page 12 of the plaintiff's bundle of documents, he stated that the document was just written to Mr Elvis Simbile because they were friends.

In cross examination, he confirmed that Trampo Motors only moved to his premises in 1995. And that they moved after having paid the purchase price which was K7,000,000.00. He confirmed that he had no lease agreement in his documents and had failed to produce it. When questioned on the developments on the land he responded that he gave permission although he did not have proof. He denied having knowledge of the payment of K7,000,000 and also that Mr. Simbile had financed that payment.

The defence final witness was Mr. Hassan Daka (DW3). His testimony was that he received information of an advert selling farm F/369a/62 Makeni, Lusaka. That he was interested and thereafter engaged lawyers, Mwack and Partners, for the conveyance. A search

was done and there was no registered encumbrance on the land. After that he purchased the land at the sum of K130,000.00.

In cross examination he was asked whether he knew if there had been a valid contract between Mr. Elvis Simbile and Mr. Singh, his answer was in the negative. He was further asked if he knew whether his lawyers and the 1<sup>st</sup> defendant's lawyer were in constant communication and he agreed.

### **Plaintiffs' Submissions**

The summary of the submissions on behalf of the plaintiffs is that the document at page 12 of the bundle of documents does satisfy the requirements of section 4 of the Statute of Frauds and qualify as a valid contract of sale. Mr. Mayembe pointed out that section 4 of the Statute of Fraud requires that a document should contain the names of the parties to the contract of sale of land, the description of the subject matter as well as the nature of the consideration. Counsel submitted that the parties in the document are Mr. Herminder Singh and Mr. Elvis Simbile. The description of the subject matter is Farm No 396A and the consideration is K7,000,000.00.

On the second issue it was submitted that time was not a factor as no mention was made in the contract of sale at page 12 of the plaintiffs bundle of documents. It was argued that no further warning was issued to rescind the said contract. He therefore contended that at the time that Mrs. Simbile entered into a contract, there was in existence a valid contract between the deceased and Mr. Singh.



As regards the third issue, I was implored to examine the testimony of Mr. Lukwasa, Mr. Charles Simbile and that of Mrs. Simbile who according to counsel confirmed that the brothers were very close and would help each other financially. It was spiritedly argued that the fact that Mr. Charles Simbile financed the transaction is unassailable.

On the fourth issue of whether the defendants may be said to be bona fide purchasers for value without notice counsel called in aid the learned authors of **Snell's Equity** who state that the purchaser must have obtained the legal interest after giving consideration without notice either actual, constructive or imputed. It was contended in this case that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants should be deemed to have had constructive notice in that there was constant communication between the plaintiff's lawyers and the 1<sup>st</sup> and 2<sup>nd</sup> defendants' lawyers.

On whether a single administrator can sell property forming part of the estate without the knowledge of a co-administrator I was referred to section 20 of the Intestate Succession Act, which provides as follows:

*Where there are several administrators, their powers may, in the absence of any direction to the contrary contained in the letters of administration, be exercised by the majority of them.*

According to counsel, the import of this provision is that when there is more than one administrator, a single administrator cannot

sell property forming part of the estate without the consent of the other. It was firmly argued that the contract of sale between the 1<sup>st</sup> defendant to the 3<sup>rd</sup> and 4<sup>th</sup> defendants was therefore invalid.

On the issue of fraud, it was submitted that the 1<sup>st</sup> and 2<sup>nd</sup> defendant entered into a fraudulent agreement with intention of deceiving Mr. Charles Simbile and other beneficiaries.

### **Defence Submissions**

On behalf of the defendants Ms. Kaoma filed detailed written submissions the summary of which was that although the 1<sup>st</sup> plaintiff is a party to the action; it did not adduce any evidence to support its claims which were endorsed on the writ of summons. She accordingly urged the court to dismiss the whole action by the 1<sup>st</sup> plaintiff and condemn it to pay its portion of costs.

Turning to the 2<sup>nd</sup> plaintiff on his claim to be declared the legal and beneficial owner of subdivision 62 of Farm 396a Lusaka, counsel argued that this was a mischievous afterthought which should not be entertained by the court. The reasons for his submission were that the document appearing at page 12 of the plaintiffs' bundle of documents on which the 2<sup>nd</sup> plaintiff seeks to rely is a total nullity as it purports to transfer the whole of farm 396a Lusaka.

It was further argued that the attempt by the 2<sup>nd</sup> plaintiff to try and enforce the said document under the Statute of Frauds is therefore a quest to have the court sanction an illegality. In support



of this proposition, my attention was drawn to the case of **Phillips vs Copping**<sup>1</sup> where Scrutton LJ held as follows:

*“It is the duty of the court when asked to give judgment which is contrary to a statute to take point, although the litigants may not take. Illegality once brought to the attention of the court overrides all questions of pleadings including an admission made therein.”*

It was argued further that the 2<sup>nd</sup> plaintiff, as of September 2013, considered the property in issue to be that of the deceased. To support this assertion, counsel referred me to the documents at pages 4, 5 and 6 of the 1<sup>st</sup> defendant’s bundle of documents. For ease of reference, the document at page 4 of the bundle read in part as follows:

*“your client has fraudulently changed the ownership of plot no F/339/62 Makeni, Lusaka from the name of the late Elvis Simbile into her name without the knowledge or consent of the plaintiff.”*

It was submitted that the only person who can rely on the document at page 12 of the plaintiffs’ bundle using the Statute of Frauds is actually the deceased to whom it was addressed. Counsel accordingly called upon the court to dismiss the claim by the 2<sup>nd</sup> plaintiff to be declared the legal and beneficial owner of the property.

Moving on to the claim for damages for fraud, Ms. Kaoma submitted that the settled position of the law is that allegations of fraud must not only be clearly and distinctly alleged but must also

be clearly and distinctly proved by evidence at a standard higher than the civil law standard of proof. As authority for this position, learned counsel referred me to the cases of ***Sithole vs State Lotteries Board*<sup>2</sup>; *Patel and Another vs Monile Holding Company Limited*<sup>3</sup>; *Sable Hand Zambia Limited vs Zambia Revenue Authority*<sup>4</sup>; and *Charles Kajimanga vs Marmetus Chilemya*<sup>5</sup>.**

It was submitted that in the present case, the totality of the evidence led by the three plaintiff witnesses does not point to any fraud on the part of the defendants.

On the question of damages for loss of business, mental anguish and distress suffered by the plaintiff at the instance of the defendants, it was submitted that the plaintiffs are not entitled to this award for the reason that they did not demonstrate a breach of tort or contract. Ms. Kaoma further argued that the plaintiffs failed to prove any loss or injury suffered as a result of such breach.

On the issue of whether or not the 3<sup>rd</sup> and 4<sup>th</sup> defendants are bona fide purchaser of value without notice, it was contended that the 3<sup>rd</sup> and 4<sup>th</sup> defendants purchased the property in good faith without any notice of any equitable interest. I was therefore urged to find in favour of the 1<sup>st</sup> defendant in line with her counter claim.

### **Findings of Fact**

I have considered the evidence and the spirited submissions by counsel. The facts which are not in dispute are that the deceased Elvis Simbile and the 2<sup>nd</sup> defendant entered into a contract of sale for



a property known as Subdivision 62 of Farm 369a Lusaka in 1995. The initial sale price for the said property was K7,000,000.00, however, the contract was stalled owing to a boundary dispute that existed between the 2<sup>nd</sup> defendant and the adjoining neighbour York Farms Limited. I accept the evidence of the 2<sup>nd</sup> defendant that he did not receive any payment at the time to allow the boundary dispute be resolved conclusively.

The boundary dispute was eventually settled in 2004 and the sale price was revised to K30,000,000 in view of the appreciation in the value of the land. It has also been established that the property was then offered to the deceased's wife Christable Simbile who paid the purchase price through her employer, Zambia National Building Society. A certificate of title was subsequently issued to the 1<sup>st</sup> defendant. Later the property was sold to the 3<sup>rd</sup> and 4<sup>th</sup> defendants.

### **Issues for determination**

Having outlined the findings of fact, it is my view that the following issues arise for my determination:

1. Whether the 2<sup>nd</sup> plaintiff is the legal and beneficial owner of the property known as subdivision 62 of Farm No. 396a Lusaka as alleged.
2. Whether the said property formed a part of the estate of the deceased Elvis Simbile.
3. Whether there was any fraud on the transaction between the 1<sup>st</sup> and 2<sup>nd</sup> defendant.

4. Whether the 3<sup>rd</sup> and 4<sup>th</sup> defendant are *bona fide* purchasers for value without notice.

**Claim for a declaration that the 2<sup>nd</sup> plaintiff is the legal owner**

I propose to address the first issue, which is related to the 2<sup>nd</sup> plaintiff's claim for a declaration that he is the legal and beneficial owner of the subject property. It is trite law that where there are competing interests in a piece of land and as rightly submitted by the defendant's counsel, for a person to be declared the legal and beneficial owner of property, that person must satisfy the court on either one of the following:

1. *That he has a certificate of title registered in his name;*
2. *That he has a contract of sale or any document evidencing the sale which is in his name;*
3. *Proof of payment for acquisition of the said property; or*
4. *Any other document showing his legal or beneficial interest in the property.*

In *casu*, to prove his claim for the declaration, the 2<sup>nd</sup> plaintiff is relying on the fact that he availed the deceased K7,000,000.00 as money which was meant for the purchase of the property in issue. His evidence was that he was present in the meeting at which Mr Singh offered the property to the deceased. Subsequently he and the late Elvis Simbile drove to Chibombo where the 2<sup>nd</sup> plaintiff gave some money for the 1<sup>st</sup> payment with respect to the purchase of the property which amount was K5,000,000.00. The next payment he



claims he was present when he travelled with Elvis to collect the final payment of K2,000,000.00 and he was present when this amount was handled over to Mr Singh. Unfortunately, there was a wrangle over the land and that is how title was not obtained.

The problem over the land continued for 10 years. He admitted that Elvis had informed him that he was getting money from Building Society and went ahead despite the disapproval of Mr. Lukwasa (PW2). He did state that Elvis never confessed on the dealings Christabel had with Mr. Singh, further that he had surrendered the old title deed to his wife.

The 2<sup>nd</sup> plaintiff is further contending that he is the legal and beneficial owner of the subject property on the basis of the document appearing on page 12 of the plaintiff's bundle. It was also submitted regarding the said document by his counsel that it constitutes a valid contract of sale as it satisfies section 4 of the Statute of Frauds 1677.

Looking at the document appearing at page 12 of the plaintiff's bundle in light of the law, it is my considered view that there is nothing whatsoever to show that the 2<sup>nd</sup> plaintiff acquired any proprietary rights with respect to subdivision 62 of Farm No. 396a Lusaka. The document is not written in his name and there is no proof that when the document was executed it was being done in his favour.

On the other hand, there is evidence of cheque payments prepared by ZNBS to the 2<sup>nd</sup> defendant on behalf of the 1<sup>st</sup> defendant

(see pages 17 to 20 of the 1<sup>st</sup> defendant's bundle). This confirms the evidence of the 1<sup>st</sup> defendant that she is the one who paid for the purchase of the land in issue. I am therefore satisfied on the basis of the documentary evidence on record that the 1<sup>st</sup> defendant purchased the property in issue and is therefore the legal owner.

The assertion that it was the 2<sup>nd</sup> plaintiff who purchased the land in issue cannot hold water for the reasons advanced in the preceding paragraphs. Therefore, the claim for a declaration that he is the legal owner of the said property cannot succeed and it is accordingly dismissed.

In light of this finding, I find it otiose to deal with the issue of whether or not the property formed part of the deceased's estate.

**Whether there was any fraud on the transaction between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant**

The plaintiffs have alleged that the 1<sup>st</sup> defendant fraudulently changed ownership of the property which does not belong to them into the 2<sup>nd</sup> defendant's name without the consent of the 2<sup>nd</sup> plaintiff who is the co-administrator of the deceased estate. It is trite law that where fraud is alleged, it must be precisely alleged and distinctly proved on a standard higher than a balance of probabilities. I find solace on this position in the case of ***Nkongolo Farm Limited vs Zambia National Commercial Bank Limited And Others***<sup>6</sup> where it was stated that:—



*“were a party relies on any misrepresentation or fraud...he must supply the necessary particulars of the allegation in the pleadings. Fraud must be precisely alleged and strictly proved. There is no presumption of fraud...”*

The principle was also elucidated in the case of **Sable Hand Zambia Limited vs Zambia Revenue Authority**<sup>4</sup> where it was held:–

*“Where fraud is an issue in the proceedings, then a party wishing to rely on it must ensure that it is clearly and distinctly alleged. The party alleging fraud must equally lead evidence so that the allegation is clearly and distinctly proved.”*

In *casu*, the 2<sup>nd</sup> plaintiff did not adduce any evidence that the 2<sup>nd</sup> defendant fraudulently changed the certificate of title relating to the subject property to the 1<sup>st</sup> defendant. The plaintiff is relying on the document at page 12 of the plaintiffs’ bundle which in any event does not show that he was the purchaser of the property. Further in traversing the allegations of fraud, the 1<sup>st</sup> defendant led evidence to the effect that she was offered the property in issue on 20<sup>th</sup> April 2004 which she accepted on the same day. At that time the deceased was still alive until his demise on 16<sup>th</sup> December 2008. There is also a chronological paper trail in the 1<sup>st</sup> defendant’s bundle which starts with the offer from the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant, culminating in the issuance of a certificate of title.

On the totality of the evidence I am not persuaded that the allegation of fraud has been proved to the requisite standard in line with the **Sable** case. I am inclined to accept, however, the 1<sup>st</sup> defendant's assertion that she acquired the property as a legal and beneficial owner with the consent of the deceased who was the initial purchaser.

I now turn to consider whether the 3<sup>rd</sup> and 4<sup>th</sup> Defendant are *bona fide* purchasers for value without notice. In the case of **Clementina Banda Emmanuel Njanje vs Boniface Mudimba**<sup>7</sup> the Court held that:

*"Prior equitable interest in law can only be defeated by a bona fide purchaser for value without notice. The following requirements need to be fulfilled when relying on the doctrine of bona fide purchaser for value without notice:-*

*a purchaser must act in good faith;*

*must be a person who acquires an interest in property by grant rather than operation of law;*

*must have given value for the property;*

*must generally have obtained the legal interest in the property; and*

*must have had no notice of the equitable interest at the time he gave his consideration for the conveyance."*

In the present case, it is plain to see that the 3<sup>rd</sup> and 4<sup>th</sup> defendants bought land from Mrs. Christabel Simbile who at the time had a legal interest in the land. The transaction between the 1<sup>st</sup> defendant and the 3<sup>rd</sup> and 4<sup>th</sup> defendants, in my considered view was



in good faith in that there were no obvious encumbrances on the property at the time on the lands register appearing at page 1 of the 3<sup>rd</sup> and 4<sup>th</sup> defendants' bundle of documents. It is also quite inconceivable that they were aware of the 2<sup>nd</sup> plaintiff's purported claims considering that the transaction was done prior to the commencement of the action. On the totality of the evidence adduced, I find that the 3<sup>rd</sup> and 4<sup>th</sup> defendants are *bona fide* purchasers for value without notice.

In sum I find that all the plaintiffs' claims have not been proved to the requisite standard as provided for in the case of ***Masuaso Zulu vs Avondale Housing Project Limited***<sup>8</sup> and are accordingly dismissed.

Turning to the counter claim by the 1<sup>st</sup> defendant, I order that the 2<sup>nd</sup> plaintiff yields possession of subdivision 62 of Farm 369a Lusaka to the 1<sup>st</sup> defendant. Regarding other claims such as payment of all charges and statutory outgoings relating to the occupation and use of the property, the 1<sup>st</sup> defendant did not lead sufficient evidence regarding whether the plaintiffs were in occupation of the premises and using it. It is on this account that I find no basis upon which I can award these claims.

Pertaining to the claim for damages for loss of use of property, I decline the invitation to award the same as the claim was unsubstantiated. The onus was on the 1<sup>st</sup> defendant to prove her claim, failure to which she is not entitled to judgment. I align myself to this principle which has been articulated in a plethora of

authorities and one that springs to mind is that of ***Khalid Mohamed vs The Attorney General***<sup>9</sup>.

In the net result, I find the plaintiffs' entire case to be destitute of merit and I dismiss it. The 1<sup>st</sup> defendant's counter claim only succeeds to the extent that she is the legal and beneficial owner of the subject property. I accordingly order the 2<sup>nd</sup> plaintiff to yield vacant possession of the subject property to the 1<sup>st</sup> defendant.

Costs follow the event to be agreed; in default, to be taxed.

***Delivered at Lusaka on this 31<sup>st</sup> day of December, 2019***

.....  
*B. M. Majula*  
**HIGH COURT JUDGE**