

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Divorce Jurisdiction)
BETWEEN:

2017/HP/0879

EDDAH MULENGA NAMBAO



PLAINTIFF

AND

THERESA BANDA MITI

1ST DEFENDANT

LOECARDIA MITI

2ND DEFENDANT

Before Honourable Mr Justice M.D. Bowa on 7th of August 2020.

*For the Plaintiff: Mr K.M Simbao appearing with N. Nambao from Mulungushi
Chambers*

For the Defendant: Mr L. Mungambata of Legal Resources Chambers

JUDGMENT

Cases referred to

- 1. Anti-Corruption Commission v. Barnet Development Corporation Limited (2008) ZR. 69 (SC).*
- 2. Sithole v State Lotteries Board (1975) Z.R.106*
- 3. Sablehand Zambia Limited v. Zambia Revenue Authority (2005) ZR. 109.*
- 4. Base Chemicals vs. Zambia Air Force & Attorney General SCJ no 9 of 2011*
- 5. Sobek Lodges Ltd vs. Zambia Wildlife Authority (2011) 2 ZR p235*
- 6. Lenton Holdings vs. Moyo (1984) ZR p55*

Legislation referred to

*The Lands and Deeds Registry Act Cap 185 of the Laws of Zambia.
Sections 33, 76, 81 & 82*

The Plaintiff commenced this action by writ of summons and statement of claim dated 2nd June 2017. By her statement of

claim the Plaintiff avers that she is the registered owner of property known as stand 826 of stand 5836 Kamwala/Kabwata Lusaka. The 1st Defendant is described as the Plaintiff's step daughter born from her late husband Martin Zachary Miti Kalukusha.

It was averred that the property was first registered in the name of the Plaintiff's husband and together they developed a structure to window level. They run out of money to complete the building so in October 2005, Mr. Miti offered the property to the Plaintiff for purposes of obtaining a loan from her employers. In furtherance of the agreement the property was assigned to her and she proceeded to obtain a loan from her employers.

It was averred further that following Mr. Miti's death, the 1st Defendant was appointed administratrix of his estate and a dispute has arisen over the property. The Plaintiff therefore claims:

- 1. A declaration that she is the legal owner of the property.*
- 2. An order that the Defendant as administratrix of the estate of the late Mr. Kalukusha has no right to administer the Plaintiff's property.*

3. *An order that the property be valued as developed up to wall plate level and the value to be distributed to the beneficiaries.*
4. *An injunction restraining the Defendant from interfering with the Plaintiff's property.*
5. *Further or other relief as the court may deem just and expedient.*
6. *Costs*

The 1st Defendant entered appearance and filed a defence and counterclaim dated 9th June 2017. She averred that her late father owned the property in issue which to date remains duly registered in his names. She disputed the Plaintiff's averment that she was married to her father. She further disputed that the property was ever offered to the Plaintiff or that it was eventually assigned to her. Fraud is specifically pleaded and set out over the manner of acquisition of Certificate of Title No. 5794 issued to the Plaintiff by the Lusaka City Council.

The 1st Defendant conclusively denies that the Plaintiff is entitled to any of the reliefs sought. In her counterclaim she claims for:

- (i) *An order declaring that Certificate of Title bearing number 5794 in the Plaintiff's possession was fraudulently obtained and is therefore null and void abinitio.*
- (ii) *A declaratory order that stand No 826 of stand 8536 Kamwala/Kabwata Lusaka belongs to the estate for the late Martin Zachary Miti Kalukusha and is therefore to be administered by the lawful appointed Administrator of his estate.*
- (iii) *An order of injunction restraining the Plaintiff from intermeddling in the estate of the late Martin Zachary Miti Kaluckusha whether by herself or her agents.*
- (iv) *An order compelling the Plaintiff to render an account and surrender all rentals found due that she had been unlawfully collecting from stand No. 826 of stand 8536 Kamwala/Kabwata Lusaka.*
- (v) *Any other relief the court may deem fit.*
- (vi) *Interest.*
- (vii) *Costs.*

By consent order dated 1st December 2017, one Loecardia Miti was joined to the proceedings as 2nd Defendant. The Plaintiff filed in a claim against the 2nd Defendant upon joinder dated 15th

December 2017 seeking an order that the said Defendant do remove the caveat placed on the disputed property.

At trial, the Plaintiff testified that she was married to the late Mr. Miti in 1989. She referred the court to an affidavit of marriage sworn by the deceased as proof of that fact on page 1 of her bundle of documents. It was her evidence that she and her husband acquired some land in Kamwala site and service from the Lusaka City Council. Mr. Miti retired in 1996 and received K11, 000,000 as his pension dues.

The money was not used right away but channeled to an investment from which they received a return of 1,000 per month for six months. After the 6 months had lapsed, they got back their K11, 000, 000 and sat down to plan for its use. They found a contractor who gave them a bill of quantities for the supply of blocks, cement and sand up to wall plate level. The couple started the building project but lost some money through some con men in the process. This was money meant for the roofing. Her husband was thus left stranded as he only had a monthly pension of K50.

In 2002, he offered the property to the Plaintiff to buy as she was still in employment. This was a verbal offer. She testified further that Mr. Miti subsequently wrote an offer letter in 2004 at page 5 of her bundle of documents. She accepted the offer and wrote to The Public Service Pensions Fund (PSPF) to apply for a loan. She was granted a facility of K20, 000 and gave Mr. Miti K14, 000 of that money. They then continued with the building. Her husband subsequently died in 2006. She carried on with the construction works and roofed the structure on her own.

The Plaintiff explained that as a condition for the grant of the loan, PSPF had requested for a title deed. She gave them the title deed which was then in her late husband's names. PSPF was to then facilitate the change of ownership after the loan was settled. Other documents submitted included the LAZ contract of sale duly signed by her husband on page 11 of her bundle of documents. The special conditions of that contract indicate that the legal officer of PSPF acted for both vendor and purchaser. The other document submitted was an assignment from Mr. Miti to her on pages 16-19 of her bundle of documents.

The Plaintiff testified further that she started servicing the loan and redeemed it in 2012. Reference was made to page 26 of her

bundle of documents explained to be a document from PSPF confirming the repayment. Further that on page 27 of the bundle is a general receipt dated 08th November 2011 indicating the amount paid was K22, 000,000.

Following the settling of the loan, she went to PSPF to check on the title deed. She was informed that the Fund had challenges as it was attending to a lot of documents and the title had not been changed. The Plaintiff therefore requested for the release of the relevant documents so that she could make her own arrangements to process the title with her lawyers.

She was accordingly availed the title deed, the application for States consent to assign, a copy of the vendors NRC, the assignment and original receipts for the payments. She handed over all these documents to her lawyers Mulungushi Chambers and they proceeded to facilitate the change of ownership into her names.

Not having enough money to complete the building project, she later decided to use the title deed to get a mortgage from Zambia National Building Society. (ZNBS) The Plaintiff explained that she borrowed the money with one Chansa Njeleshi and Mwamba

Njeleshi whom she involved as next of kin in the event of failure to pay the loan to take over repayment.

It was the Plaintiff's further testimony that in 2016, her step daughters called for a meeting at which the then completed house at the plot in issue was the subject of discussion. They wanted to know how the house was to be treated. She explained to them that their father had sold that property to her. Further that since she had accepted them to be her daughters when their father married her, she considered the property to be family property. As there were tenants in the house, she informed her daughters that she would be willing to assist anyone who would need help from the rentals.

To her dismay, her brother in law and the children could not believe that she had bought the property. She was then served with a summons from the Boma Local Court for an action instituted by her step daughters. The Parties appeared before the Boma Local Court twice and were advised to try and resolve the issue as a family. She accepted this advice.

On the day set for the family meeting to resolve the matter, she received a report or account of the administration of the late Mr.

Miti's estate prepared by the 1st Defendant. The Plaintiff did not accept the report. After that the parties could not reconcile.

It was her further evidence that the question of whether she was married to the late Mr. Miti or not as averred in the 1st Defendant's defence was not the issue that is before the court. That the case was about the property which she maintained was hers. She added that the mortgage she obtained from ZNBS is still subsisting and she is yet to redeem it using the money from the rentals to service the loan.

The Plaintiff testified further that the 2nd Defendant placed a caveat on the same property on 6th January 2017 on page 8 of the Defendant's bundle of documents. She prayed that the court should declare the property in issue to be hers and that the caveat be lifted. She expressed her willingness to assist the Defendant's financially as she, in her words, is their mother. She added that the 1st Defendant had harassed the tenants. She therefore prayed for an injunction to restrain the said Defendant from continuing to do so. She also prayed for costs for the action.

When cross examined, the Plaintiff insisted she was offered the property by Mr. Miti and that she accepted the offer. She

acknowledged that she did not have any document before court to confirm that she paid her husband. She further accepted that she had advanced the affidavit on page 1 of her bundle of documents as proof that she was married to Mr. Miti.

She accepted that the assignment lodged in her favour was dated 30th November 2012 and that by that date her husband had already passed on. The Plaintiff did not know how the numbering of the entries in the memorials of the title deed was done but agreed that the font looked different. Further that one entry was faded whilst the other 2 were distinctly clear.

Cross examined further, the Plaintiff admitted that the Certificate of title was first issued to her husband. Further that there was an offer from the Lusaka City Council to her husband dated 23rd September 1991 prior to the title being issued.

When re-examined, the witness explained that PSPF had been administering the property from 2006. Further that it was that office that prepared the assignment. According to the assignment she had paid a total of K20, 000,000 Kwacha to the vendor. She testified further that the title deed issued was from the Council and she was not involved in its preparation at all which was

about as much as she could say regarding the entries in the memorials pointed to in cross examination.

PW2 was Robert Kalwizi a Senior Assistant Compliance Officer at ZNBS. His evidence was that the matter before court involved property 8261/8536 Kamwala/Kabwata. In this regard that in May 2013, ZNBS received an application for a mortgage from Mwamba Njeleshi, Chanda Njeleshi Chansa and Edna Nambao. The loan was for K100, 000 for construction works on the property in issue.

Upon receipt of the application, a search was conducted at Lusaka City Council to establish if the property existed, who the legal owner was and whether there were any registered encumbrances. The Council advised through the endorsed search form that the property vested in Edna Mulenga Nambao and it had no encumbrances. On that basis, ZNBS proceeded to process the application.

However, on account of the fact that the combined income was not enough to service the loan sought, the approved amount was K83, 500. The money was disbursed to the 3 Applicants who

surrendered the original title and proceeded to register the mortgage interest at Lusaka City Council.

He added that upon registration, ZNBS uplifted the title from the Council and the registered mortgage deed. The title is currently in the custody of the building society pending redemption of the loan. He explained that when approving a construction mortgage the surveyors go on the ground to do an assessment and attach a value of works to be done. Further that it is not possible that the society would dispense funds without such a survey being done as this is a requirement. He concluded that the ZNBS also has the original mortgage deed.

The third witness for the Plaintiff was Gina Malumba Chilukwa a Senior Loans Officer and accountant at the PSPF. She testified that the fund disburses loans to members of the public service. It was her evidence that Eddah Nambao is a client of the Fund. She applied for a mortgage loan in 2005. After all the documents in support of the loan were submitted, the loan was approved in October 2005 and was paid to the vendor. The documents were provided by both the vendor and the purchaser.

She testified further that the property was in the name of Mr. Z Miti. A photocopy of the Certificate of Title and clearance from the Council confirming this was also provided. PSPF satisfied itself that Mr. Miti was the seller as the names in the contract, the ID provided and clearance letter were all the same. She identified letters on page 6 and 7 of the Plaintiff's bundle being an offer letter from Mr. Miti to Eddah Nambao and a letter from Lusaka City Council addressed to PSPF respectively.

PW3 testified further that due diligence is done to ensure that the vendor of the property is the actual owner and that there are no encumbrances. She referred the court to pages 40-45 of the Plaintiff's bundle which she stated was a photocopy of a Certificate of Title relating to stand 826 of 8536 in the name of Mr. Miti at the time the application was being processed. The loan was disbursed as applied and the money was collected by Mr. Miti.

The witness testified further that after the sale there was supposed to be a change of ownership effected to Miss Nambao. PSPF paid for the consent to assign, property transfer tax and other rates relating to the property. Further that there was a contract of sale evidencing the sale on page 13 of the Plaintiff's

bundle of documents at a purchase price of K20 million. The document was signed by both parties and witnessed by a PSPF employee one Simanta Patrick a loan officer personally known to the witness. The other was Emmanuel Simenda a loans assistant who was witness on behalf of the buyer.

It was her further evidence that the legal counsel from the Fund prepared the assignment. The loan was paid back as per document on pages 27- 28 of the Plaintiff's bundle, in 2011. However the assignment was not registered though PSPF were in the process of doing so at the time. She clarified that the process took long because of the number of customers that they had to deal with.

After the loan was redeemed, the Plaintiff instructed the Fund to release the title to Mulungushi Chambers by letter dated 17th September 2012 so that she could complete the change of ownership herself. After receipt of the instruction, the title deed was released to the Plaintiff.

In cross examination the witness testified that funds for the facility were disbursed on 21st October 2005 and signed for by Mr. Miti. Pressed further on this payment she acknowledged that

she did not have any document to confirm the collection by Mr. Miti before court.

When referred to the assignment on page 17 of the Plaintiff's bundle of documents, she accepted that the statement that the money was paid by the date of the document was incorrect. She explained that according to the procedure PSPF has adopted, the documents are signed before the money is paid. She confirmed telling the court that both parties signed the assignment but admitted she was not present when they did so.

The witness was not re-examined and that was the close of the case for the Plaintiff.

The 1st Defendant testified as DW1. Her evidence was that on 7th April 2006 her father Mr. Martin Zachary Kalukusha Miti passed on. The family decided to appoint her as administrator of the estate. The Plaintiff was asked what property her father had left. The whole family was in agreement that his estate comprised a house in Kabwata and the monthly pension he was receiving from PSPF. She explained that the Plaintiff was living with her father at the time of his death.

She later sat down with the Plaintiff in the presence of Mike Njeleshi her son from her first marriage, to discuss the property. It was agreed that the money coming from the rentals would be used to pay school fees for her younger brother Kalukusa Miti and sister Konkola Miti who were still in school. The 1st Defendant was already married at the time and the other siblings were also independent. The concern was therefore about the welfare of the youngest siblings that her father had with the Plaintiff.

Following this agreement, the money started going towards the schools fees. Later in 2011, the Plaintiff called the 1st Defendant and one of her sisters to visit her at Chaisa basic school where she informed them she was getting married a few days from then. She also told them that the house in Kabwata would be shared between the Defendant and other offspring from her father's first marriage. This was also to include her 2 siblings Kalukusa and Konkola Miti .

Further that the flats that she had built from her retirement money would be shared amongst her children from her first marriage. The Plaintiff also said that she would call the whole

family to inform them about her decision. The 1st Defendant and her sister were elated to hear this.

True to her word, the Plaintiff got married a few days later. However she did not inform the family about her decision over the property like she said she would. Later in 2016, the 1st Defendant called for a meeting at an uncle's house to see the way forward over the property.

Present at that meeting was the Plaintiff, her uncle Mr. Miti, her sister Leocardia Miti (the 2nd Defendant) and Kalukusha Miti her step young brother. She recounted that it was not a good meeting. The court learnt that the Plaintiff was bitter and proceeded to inform the family for the first time that she had bought the house in Kabwata before their father died. No resolution was reached at that meeting.

DW1 later went to the Council to verify the Plaintiff's claims. The Council office informed her that according to their records, the property belonged to Mr. Miti. The Council also advised her that since she was administrator she could start the process of applying for a title deed.

Later in that year her uncle called to tell her that the Plaintiff had presented a letter of sale purportedly from her father for the property. She looked at the document and disputed her father had signed it. She was later advised to place a caveat on the property which was eventually done by one of her sisters.

The family also engaged a private investigator to investigate the property in dispute. After he carried out his work he reported that the property still belonged to their late father. In 2017, the 1st Defendant in the company of other family members visited the property. She took with her the order of appointment as administrator, her father's death certificate and a letter to instruct the tenants in occupation of the house to be paying the rental into an FNB account in Chilenje. The tenants did not start paying as requested. DW1 learnt that the Plaintiff and her son Mike Njeleshi threatened the tenants with eviction if they paid the money to the named account.

When referred to the Certificate of title on pages 40-42 of the Plaintiff's bundle of documents, DW1 asserted that the Council advised that it did not have a record of such a title. She added that the assignment relied upon by the Plaintiff shows that it was executed by her father on 30th November 2012 in spite of the

fact that he died in 2006. Further that as administrator she ought to have been present when the assignment was being lodged but was not informed about it.

In addition that a look at the memorials of the title deed shows that the font used in the first line of entries is faint and different from the second and third entries. Further, that the entries are not flowing in sequence. Notably that the entries are listed,

8586/8261

8536/826/3

8536/826/4

That distinctly missing is entry 8536/826/2 which she expected to see. When referred to the assignment and page 19 of the Plaintiff's bundle of documents, DW1 contended that although her father's name appeared on the document the appended signature was not his.

She testified that for her counterclaim she prayed that the court nullifies the title deed and declares that the house belongs to Mr. Martin Zachary Miti. Further she prayed that the court restrains the Plaintiff from interfering with her work as administrator of

her father's estate. She added that the Plaintiff should pay back all the rentals that were collected on the house.

When cross examined DW1 testified that her position was that the Plaintiff's purported acquisition of the property was fraudulent. She maintained that the signature presented as her father's was forged. Further that the existence of the title deed is also a result of a forgery as the Council do not have a record of such a document. She however stated she was not aware if there was a forgery at PSPF.

Asked who forged the title deed, DW1 stated she did not know who did it. Further that she did not report the forgery to the police in spite knowing that it is a crime. She agreed that the Plaintiff does not work at the Council .Further that it was the Council that prepared the title in this case.

She testified further that the investigator did not disclose when the forgery took place. When referred to the letter dated 13th October 2005 from the Council on page 6 of the Plaintiff's bundle, the Defendant agreed it stated there were no encumbrances on the property.

She agreed that the first entry in the memorials of the title deed referred to was done in 1993 whilst the bottom ones were done in 2013. She thus agreed that the typing was done almost 10 years apart but nonetheless expected the font and print to be the same. She testified further that she had not presented to the court a sample of what she claimed was supposed to be Mr. Miti's proper signature. She maintained that the problem she had with the assignment is that it was registered after her father had died and further that she was not informed about the registration in spite of her being administrator.

She testified further that she did not know that documents prepared by lawyers are undated until they are ready for registration. She was unaware that the Plaintiff obtained a mortgage from building society or that she is the registered owner of the property in dispute.

Cross examined further the witness acknowledged that her father and the Plaintiff were husband and wife. She added that they separated before Kalukusha was born but they never divorced. She further accepted that the pensions fund did recognize the Plaintiff as the surviving spouse.

In re-examination DW1 testified that she did not see how lodging a complaint to the police would benefit her. That was the reason she did not file a complaint and was also the position taken after discussing the matter as a family.

DW2 was Francis Ngenda Sipalo a private investigator. He testified that he was approached by the 1st Defendant on behalf of her family on a date he could not recall. They wanted him to find out if property number 826 of stand number 8536 Kabwata was on title and in whose name it was. He was also asked to find out from PSPF if the Plaintiff was receiving a pension for the late Zacharia Miti. He went to the Ministry of Lands and at the time of his inquiry established there was no record on the property. This was between December 2016 and January 2017.

At the Lusaka City Council registry, he found a folder on the property containing some documents. One of these was an offer letter to the late Mr. Z.L Miti, the other a notification for payment of service charges. There was no tile at the time of the inquiry. He asked the registry staff if there was any other file or documentation pertaining to the property in issue and was informed there was none.

He confirmed the letter of offer he saw at the Council to be the one on page 2 of the Defendant's bundle of documents. He subsequently met the Miti family and informed them about his findings at the Council. He also advised them to place a caveat on the property to secure their interests. As far as he was aware, the caveat was eventually placed after the paying of rates. According to his findings the property was in Mr. Miti's names.

When referred to the contract of sale, lodgment schedule, and assignment on pages 11, 14 and 15 respectively in the Plaintiff's bundle of documents, DW2 stated he did not see any of these documents on the file at the time of the inquiry. He further did not see the receipt from the Council or State's consent to assign on pages 21 and 24 of the bundle as well. He testified that the file was very thin and had only 2-4 papers in it.

In cross examination, DW2 maintained that the property was not on title when he carried out his investigations. He acknowledged that the document on page 40 of the Plaintiff's bundle of documents is a title in Mr. Miti's names issued by Lusaka City Council. Further that the title is dated 18th February 1993 and the offer letter was given to him in 1991. He insisted that none of the documents referred to him were on the file at the council.

DW3 was Leocardia Miti the 2nd Defendant. She testified that in between July and December 2016 the Miti family and the Plaintiff had a disagreement over property 826 of 8536 Kamwala site and service. According to DW3, the family believed the property belonged to their late father Mr. Z. Miti. However the Plaintiff informed the family that their father had sold the property to her before he died.

The family decided to verify what she had said and engaged the services of a private investigator to do a thorough check at the Lusaka City Council. The investigator did his work and shared his findings. There was no documentation or information showing that the property was sold or transferred to the Plaintiff. As far as DW3 was concerned the property was still in her father's names. The family was advised to place a caveat on the property to protect it. DW3 therefore went to the Council offices on 6th January 2017 and placed the caveat after paying K265.73.

Cross examined, DW3 testified that as far as she knew her father built a house with the Plaintiff when he was with her. She denied having any knowledge about his being swindled. She further denied ever being approached by the Plaintiff to obtain a loan from ZNBS. She testified that she was not aware that the

building society cannot give a loan if a property is not in the name of an applicant. She agreed that if the property in issue is not in her father's name, it does not form part of his estate and consequently that she cannot be a beneficiary. Further that the caveat in such event must be removed.

The witness was not re-examined and that was the close of the case for the Defendants.

I have carefully considered the evidence before me. The dispute in this matter centers on stand number 826/ 8536 Kabwata and whether as pleaded, it belongs to the Plaintiff having being sold to her by her late husband Zachariah Miti or if the property falls within in his estate.

The Plaintiff led evidence giving a history of the acquisition of the property jointly with her husband and how they started to develop it together to the point where they run out of money. A decision was made to take advantage of the Plaintiff being in employment in the public service at the time with attendant access to loans from the PSPF.

There is evidence of her applying for a K20 million(unrebased)loan which she obtained in furtherance of a

contract of sale between herself and the late Mr. Miti in 2005. PW3 gave credible evidence of the due diligence that PSPF have to undertake before advancing a loan to a member. She explained that this is done to ensure that the property being sold belonged to the vendor and achieved by checking records pertaining to title, the identification of the seller and the existence of a contract of sale.

She testified that in this case, PSPF established from the Council that the property was in Mr. Miti's names and that he was the vendor as confirmed from the identification card and contract of sale exhibited in the Plaintiff's bundle of documents. An explanation was also given of how the title deed for the new owner was to be processed and the cause for the delay in obtaining it. I have no reason to discount this evidence.

There was further evidence from a second financial institution in ZNBS through PW2 who testified that a loan of K85, 000 was granted to the Plaintiff and 2 others on the strength of a title deed in her name and after it too conducted its due diligence. The court learnt that the loan is still running and the title deed is presently in the possession of ZNBS. This evidence was also credible and unshaken in cross examination.

Based on the above it is arguable that the Plaintiff has cause to claim she has a valid Certificate of Title and by virtue of the provisions of section 33 of the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia such possession is prima facie proof of ownership. In the case of **ACC vs. Barrnet Development Corporation Limited**¹ the Supreme Court made clear that this presumption can only be rebutted upon proof of fraud or questionable manner of acquisition whereupon such title can be cancelled.

This indeed was the position taken by the 1st Defendant in her defence and counter claim. Fraud is specifically alleged in the manner of transfer also on account of the fact that at the time of the alleged transfer Mr. Miti had already died. **In Sithole v State Lotteries Board**² the Supreme Court emphasized that the standard of proving such fraud is higher than a balance of probabilities. This position has been restated by the Supreme Court in among other notable cases **Sablehand Zambia Limited vs. ZRA**³ and **Base Chemicals vs. Zambia Air force and Attorney General**⁴

The Defendants evidence of the alleged fraud is premised on DW2's report to the effect that none of the documents relied upon

by the Plaintiff were on the Council record at the time of his inquiry. Notably that there was no contract of sale, State's consent to assign , assignment or certificate of title on what was described to be "a thin file". Further that the title deed had different print, font size and sequence of numbering in the memorials. It was further suggested that the contact of sale was forged as the 1st Defendant in particular disputed her father's signature in the document.

I cannot accept that the mere absence of the documents on the file proves there was a fraud. It only shows there were none at the time of the search not that they did not exist. There is no evidence to show any of the documents exhibited and now relied upon by the Plaintiff was forged. The 1st Defendant accepted in cross examination that the memorials were typed on different dates and in all probability by different equipment which would logically explain the differences observed. Importantly it was also acknowledged that the title deed was issued by the Council and not the Plaintiff who had no role in its issuance.

I do not accept the evidence lead by the 1st Defendant disputing Mr. Miti's signature on the letter of offer for the simple reason that this was not pleaded in her defence and counterclaim. The

Defence counsel did raise objection on the flow of such evidence on this account and I stated I would rule on the issue after reviewing the totality of the evidence before me. Having done so, I would therefore dismiss the evidence as an afterthought.

There is also a plausible explanation for the delay in the registration of the assignment which in this case was done after Mr. Miti had died but earlier endorsed by himself. PW3 explained that in terms of the procedure adopted by PSPF the vendor would be expected to sign the assignment even before the disbursement of the funds. Further that they delayed in completion of the change of ownership because of the bulk of applications they had to deal with. I wholesomely accept this evidence and have no reason to discount it.

It was further suggested that the late Miti and the Plaintiff were never married. I accept the Plaintiff's submission that the case before me has nothing to do with the subsistence or otherwise of a marriage than it is the existence of an agreement of sale of the property in dispute. I find that there was a valid agreement by which the late Miti sold the property to the Plaintiff entitling her to a declaration of ownership. In any event, during the pain of cross examination, the 1st Defendant acknowledged there was a

marriage that subsisted between her father and the Plaintiff that was not formerly dissolved.

Moving on, the Plaintiff also claimed against the 2nd Defendant the lifting of the caveat placed on the property. It is trite that caveats can be lifted by the court pursuant to section 81 and 82 of the Lands and Deeds Registry Act Cap 185 of the Laws of Zambia. The law seeks to protect a party with an interest in land as defined in section 76 of the Act from adverse claimants registering an interest in the land through the placement of a caveat. An aggrieved party such as the registered proprietor or other interested person may challenge the placement of the caveat through an application to the High Court for its removal.

In ***Sobek Lodges Ltd vs. Zambia Wildlife Authority***⁵, Matibini J as he was then duly observed that although the originating proceedings in an application for the removal of a caveat is at the instance of an applicant, section 81 of the Lands and Deeds Registry Act shifts the burden of showing why a caveat should not be removed on to the Respondent.

Further, In the case of ***Lenton Holdings vs. Moyo***⁶, the Supreme Court held that to be effective a caveat must disclose the interest

claimed. In other words, the Respondent must be able to demonstrate the interest he has in the property as defined under section 76 of the Act and then go further to show cause why the caveat should not be removed.

The challenge offered by the 2nd Defendant was premised on her belief that the property was in her late father's names. Evidence before me and my subsequent finding establishes that is that it is not in his names. Having not found any basis to cancel the Certificate of title in the Plaintiff's names and further there being no established interest on the part of the caveator to protect, I find that this is a proper case in which the court can order that the placed caveat be lifted.

On the whole therefore I find that the Plaintiff has proved her case on the balance of probabilities. I enter judgment in her favour and make the following declaration/s and orders.

1. I declare that the Plaintiff is the legal owner of SD 826 of stand 5836 Kamwala/Kabwata Lusaka
2. I declare that the 1st Defendant as administratrix of the estate of the late Kalukusha has no right to administer the property as it does not fall under the deceased estate.

3. I grant an injunction restraining the Defendants from interfering with the Plaintiff's property.

4. I direct that the caveat placed on the property by the 2nd Defendant be lifted forthwith.

The Plaintiffs prayer for an order that the property be valued as developed up to wall plate level and the value to be distributed to the beneficiaries is inconsistent with her established right and ownership of the property. She can choose to do so out of her own will but the court cannot grant a compelling order on account of what I perceive will clearly be a conflicting position with my findings.

Invariably it follows that I dismiss the Defendants counterclaim in toto as there is no basis to set aside the Certificate of title as held above. Costs follow the event to be taxed in default of agreement.

FR *Ayva*
Dated at Lusaka this day of 2020.



JUDGE