

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

**2012/HP/0466**



**BETWEEN:**

**KENNEDY PHIRI**

**PLAINTIFF**

**AND**

**JANE MWAPE CHIKUYU**

**DEFENDANT**

**Before the Hon. Justice Mr. M.D. Bowa this 2nd day of March  
2020.**

*For the Plaintiff: Mr. M Kanga of Makebi Zulu and Company*

*For the Defendant: Captain F.B Nanguzyambo of F.B Nanguzyambo  
& Associates.*

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**JUDGMENT**

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**Cases referred to**

1. *James Mbewe & Potati Malunga vs. James Mwanza (2012) ZLR 88 vol 2*
2. *Fisoma Fe leisa Company Limited vs Mansa Municipal Council (2012) ZLR 437*
3. *Wesley Mulungushi vs. Catherine Bwale Muzi Chomba (2004) ZR96*
4. *Ndongo vs. Moses Mulgango Roostico Banda (2017) ZLR vol*
5. *Sablehand Zambia Limited v. Zambia Revenue Authority (2005) ZR. 109 (SC)*
6. *Kabika vs. Malamo SCZ Appeal no 175/200*

7. *Base Property Development Limited and Neggie Nachilima Chileshe Appeal no 211 of 2015*
8. *Mwenya and another vs. Kapinga (1988) ZR 23*

**Legislation referred to**

*The Lands and Deeds Registry Act Cap 185 of the Laws of Zambia*

By writ of summons and statement of claim dated 4<sup>th</sup> May 2012, the Plaintiff took out an action against the Defendant seeking the following reliefs:

1. *A declaration that ownership of the property known as Lot/Chitina/6 Mkushi was fraudulently acquired by the Defendant and therefore null and void*
2. *An order that ownership of the said property be restored to Kennedy Phiri who bought the same from the original owner one Luke Kapya now deceased*
3. *A further order that Certificate of Title number 27847 issued to the Defendant be cancelled and a new title deed be issued to the Plaintiff*
4. *Cost of the suit and any other order the court may deem fit.*

The Defendant as administrator of estate for the initial Defendant Mirriam Chiseka Nachalwe filed a defence and counterclaim dated 13<sup>th</sup> August 2014 denying the claim and putting the Plaintiff to strict proof. In her counterclaim the Defendant prays for the following:

1. *An order declaring that the late Mirriam Chibeka Nachalwe is the rightful and legal owner of property known as lot/Chitina/6 Mkushi District Council in Muchinga Province of the Republic of Zambia.*
2. *An order/declaration that the cancellation of the deceased Certificate of Title No. 27847 was irregular null and void*
3. *An order that the ownership of the property be restored back to the deceased names and subsequently the Administratrix of the estate.*
4. *An order/declaration that the transaction on the farm by the Plaintiff with whosoever is illegal null and void.*
5. *Costs and other relief the court may deem fit.*

At trial the Plaintiff testified as PW1. He gave his profession as a mechanic resident at house B677 Chelstone extension in Lusaka.

His evidence was that in the year 1997 he was in Mkushi District and received a visitor named Cecilia Kapya. She was the wife to the late Luke Kapya, owner of farm number Chitina 6 Mkushi. He knew Mr. Kapya whom he described as his friend.

Mrs. Kapya approached the Plaintiff for help stating that she needed money to cultivate the farm. Mr. Kapya was reportedly unwell at the time. The Plaintiff told Mrs. Kapya to sit down with her family to consider the possibility of selling him the farm altogether. He later agreed to buy the farm but told the Kapya's that he first had to travel to Mkushi to see the status of the farm.

The Plaintiff thus went to Mkushi District Council and confirmed the farm was there. He traveled back to Ndola where Mrs. Kapya was staying. He was given documents from the council for submission to the Ministry of Lands. A Mr. Steven Kaunda, Mrs. Kapya's relative sanctioned the submission. Other documents were submitted to the survey department for a sketch map. Mkushi Council also gave him a letter to take to the Kabwe Regional Office. The Council later gave him a recommendation letter to submit to

Ministry of Lands, minutes of Council meetings and a sketch map for farm number 6 Chitina.

He took the documents to Mulungushi house at the Ministry of Lands and submitted them to the Lands officer. The papers were checked and confirmed to be in order. He was then told to return after 6 months. 6 months on, he went back to the Ministry and was informed the offer letter had come out. He was asked to pay K268. The Plaintiff was also informed that some documents were missing. In particular the sketch maps, and receipts for monies he had paid earlier, were not on the file. On advice from the Ministry, the Plaintiff went to Mkushi District Council to check for the documents. A gentleman named Richard Mukumeno attended to him and told him that a lady from Lusaka informed the Council that she had negotiated with the Plaintiff to give her the farm. The Plaintiff refused ever having done such a thing or knowing who this mysterious lady was.

He travelled back to Lusaka to inquire from the Ministry of Lands how the issue was to be resolved. He was informed the papers were still being searched for. The Lands officer he saw confirmed that

the land was appearing in their system although it was registered in the names of one Mirriam Nachalwe. However the open file indicated Luka Kapya as being owner. Taken aback by this discovery, the Plaintiff impressed on the Ministry to resolve the issue. In the interim Mrs. Cecilia Kapya and her children allowed him to start cultivating the land. By that time Mr. Kapya was very ill. The Plaintiff explained that he paid a total of K4, 500,000 for the land to Mrs. Kapya.

The Plaintiff recalled that there was a caretaker at the farm by the name of Elipha Phiri. Mr. Phiri left the farm as he was uncomfortable living next to a forest reserve. There was a committee in the area that subsequently helped the Plaintiff find a caretaker to take care of the land.

When cross-examined, the Plaintiff testified that it was his position that Mirriam Nachalwe fraudulently obtained the farm. Her name was not on the file at the Lands and Deeds Registry although it did appear in the system. It was Luka Kapya's name that what was on the file. As far as he was concerned, the open file is the one that was more important as it feeds the system. Cross examined further

PW1 testified that the documents that he had described were not in his bundle of documents. He added that the letter of offer in Mr. Kapya's name is dated 1997.

He denied having any knowledge about the farm being repossessed by Mkushi District Council and when referred to page 2 of the Defendants bundle of documents showing a letter of such repossession, the Plaintiff expressed ignorance about the existence of this letter. He maintained that it was not on the file at the Ministry. Further that Mkushi council never showed him this document.

He confirmed that that the Lands print out showed Miss Nachalwe's names in extent of 250 hectares as registered owner of the land. He testified further that he executed a contract of sale for the land with Mr. Kapya but did not have the document before the court. He contended that he lost it and he has a police report to this effect. The assignment was also lost as was his driving licence and national registration card. He acknowledged that he was aware the title for the property in issue, was in the year 2004 issued in Mrs. Nachalwe's names. The Plaintiff testified further, that he sued Mrs.

Nachalwe on 20<sup>th</sup> July 2012. He was unaware that she had already died by then or that that was the reason she did not reply to the summons he had filed. The Ministry was also unaware of her passing as far as he knew.

He disagreed that the Ministry proceeded to cancel the certificate of title on his instructions and in spite of his alleged knowledge of her death. The Plaintiff agreed he was given a Certificate of Title in his name thereafter and that he has since sold the farm. In response to the court's point of clarification, the Plaintiff testified that he first came to learn about Miss Nachalwe's passing in 2013.

The witness was not re-examined.

PW2 was Cecilia Kabunda Kapya a marketeer at Soweto market. Her evidence was that she and her husband Mr. Luka Kapya owned a farm in Mkushi area. Her husband fell ill at some point. The family thus sat down to discuss what to do with the farm and decided to sell it as they had no money. This was sometime in 1997. PW2 travelled to Mkushi to see Mr. Kennedy Phiri (the Plaintiff). She told him that her husband was selling the farm and asked if he was interested in buying it. The Plaintiff expressed interest in acquiring



the farm. She went back to Ndola and told her husband about the meeting she had with The Plaintiff. Later Mr. Phiri visited them at their house where negotiations for the price of the farm were held. Both Mr. and Mrs. Kapya agreed to sell the farm at K4500, 000 unrebased currency. This was in 1998.

The Plaintiff then left stating he was going to look for money to pay. On the 27<sup>th</sup> June 1998, Mr. Kapya died. Mr. Phiri came through later during that year to make the payment. Sometime later, PW2 learnt from the Plaintiff that the farm was repossessed from him. She had moved to Namwala at the time. She testified that she had not seen any document to show that the farm had been repossessed from her husband.

Cross-examined PW2 testified that she was present when her husband initially bought the farm. The documentation evidencing the sale was kept by her husband. She testified that he bought the land from the Council though she was unaware how much he paid. She further did not know if her husband had been called for any interviews by the Council. She recalled that he would tell her he was in the process of getting the land. She believed Mkushi Council

had all the documentation relating to the farm. She was unaware what stage he had reached towards obtaining the title.

She testified further that she was not aware there was a letter from the council advising the farm had been repossessed for alleged failure to comply with the conditions of the offer. She was not in a position to tell if her husband obtained the title before the family moved to Ndola. She testified further that she did not receive the notice of repossession referred to her on page 2 of the Defendants bundle of documents. She noted that the letter was addressed to her husband and she was in Ndola at the time.

She testified further that there were some documents evidencing the sale to the Plaintiff although she did not have the documents before court. She testified that the sale took place over 21 years ago so she didn't have any documents. She did not know who Mrs. Nachalwe was or that she died. She insisted that Mr. Phiri was given a contract of sale.

There was no re-examination.

PW3 was Japhet Chilambe a farmer resident in Chitina catchment scheme. His evidence was that he settled at his present address in 1994. In 1996, he was chosen to be Secretary in the Chitina Catchment Development Committee. The Committee was involved in development activity in the area and keeps records for the scheme.

He informed the court that as Secretary and person in custody of all the records he knew all the farmers in the catchment scheme. He explained that this was how he came to know Kennedy Phiri the Plaintiff herein. He recalled that in 1997, Mr. Phiri approached him and said he was buying the farm from Mr. Luka Kapya. In 1998, Mr. Phiri told him his son Alipher Phiri would come to settle on the farm. Noticing some months had passed and the said Alipher had not settled on the farm, he inquired what was going on and Alipher stated his wife was reluctant to move there as she considered the area a bush.

Sometime in 2007 a Mr. Lombanga bought a farm and requested PW3 to find a caretaker to look after the farm. He therefore sourced 2 caretakers. One to settle on Mr. Lombanga's farm and the other a

Mr. Kelvin Ngulube, to settle on the Plaintiff's farm. He clarified that Mr. Ngulube had actually approached him and requested to stay at the Plaintiff's farm which he observed was unoccupied at the time. PW3 later called The Plaintiff and informed him about the arrangements he had made and that it would be up to him to agree on terms with Ngulube. The Plaintiff was happy with this arrangement and stated he would talk to Mr. Ngulube upon his visit to the farm.

When cross examined, the witness testified that the committee did not keep any records of the farms. It only kept a record of the farms and the owners as known by the committee. He accepted that it was true the council is an agent for the allocation of farms on behalf of the Ministry of Lands. He agreed that the records at the council are a true record of the farmers that stay on the farms.

He testified further that he knew the late Mr. Kapya. As far as he aware farm Chitina 6 was given to Mr. Kapya by the Council and he obtained a Certificate of Title for it. He insisted that Mr. Phiri did buy the farm from Mr. Kapya and that he showed PW3 documentation pertaining to the sale. He did not know what the

purchase price was and was unaware the farm was repossessed from the Kapyas. He testified further that he had not heard anyone by the name of Mirriam Nachalwe. He confirmed knowing who Kelvin Ngulube was and that he was the one who put him on the Plaintiff's farm. There was no one staying on the farm between 1998-2008. He confirmed further that Mr. Ngulube was still staying at the farm.

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

The Defendant testified as PW1. Her evidence was that she had an elder sister named Mirriam Nachalwe. She was working in Chipata as a Magistrate and died on the 2<sup>nd</sup> of February 2012. The Defendant was appointed administrator of her estate and was issued an order of appointment as administrator in Chipata. She went through the inventory of her late sister's assets and also visited Ministry of Lands where she discovered that farm No 6 Chitana/8417 had a judgment registered against it and the farm was repossessed from her sister. She inquired what she was to do as she had the Certificate of Title that had been left by her sister.

She was advised to go back to court where she discovered that the Plaintiff Mr. Kennedy Phiri had sued her sister over the farm. This was 3 months after her demise.

Her search revealed that The Plaintiff claimed that the farm was his and not the late Nachalwe's. Judgment in default was entered in his favour. It was however her testimony that the farm does not belong to Mr. Phiri and it was her prayer that it be reverted back to the deceased estate. She testified that she had the legitimate documentation that can be confirmed at Mkushi council. The late Nachalwe told the family that the land initially belonged to Mr. Kapya who failed to meet the conditions given by the Council. The land was therefore re-advertised and the departed Nachalwe applied for it. She duly attended the interviews in 2002 and was allocated the land. The title in her name came out in 2004.

It was her further testimony that there is a Mr. Kelvin Ngulube who lives on the farm. She went on to testify that the title that was issued to the late Nachalwe was cancelled in 2012. Mr. Phiri had argued that he is the one who had the right records at the Ministry of Lands. The records at the Ministry now show that the land is in

the Plaintiff's names. It was her evidence that there is a white man currently staying at the farm named Jeremiah. The Plaintiff sold him the farm and he is the one who has full control on the farm. He keeps cattle, cultivates the land and burns charcoal.

The court was further informed that there is no harmony between Mr. Jeremiah and Kelvin Ngulube who is still staying on the land on behalf of the Defendant's family. She prayed that the farm be reverted to the deceased estate.

When cross examined the Defendant disagreed that Mr. Kapya owned the farm at some point. As far as she was concerned he did not have the documents to show ownership. She testified that she neither had a copy of the advert she referred to in her earlier testimony nor of the council minutes. Kennedy Phiri was the deceased neighbour at the farm. She personally went to see the farm in 2012 and that was the point she discovered he was her sister's neighbour.

She accepted filing on defence and counter claim in this matter. When referred to paragraph 5 of her defence, she disputed its contents stating those were not her instructions to her lawyer.

According to her, her instructions were that there was no person staying at the farm and not that it was occupied by a Mr. Phiri as suggested in the paragraph. She insisted that Mr. Phiri had commenced this action on the 4<sup>th</sup> of May 2012 after her sister had already died. She confirmed that the printout from lands showed that her sister's title was cancelled. She testified further that she was not in possession of a letter of offer in the late Nachalwe's names from the Ministry of Lands.

When referred to the letter on page 2 of the Defendant's bundle, DW1 testified that the letter confirms the re-possession. She disagreed that it was merely a recommendation to the Ministry of lands to repossess the land.

Re-examined the Defendant testified that Mkushi council availed her the document on page 2 of the Defendant's bundle of documents and confirmed it as the basis the land was repossessed from Lucas Kapya and for re-advertising the land.

DW2 was Kelvin Ngulube resident of farm No 6 Chitina scheme in Mkushi. His evidence was that in 2002 Mr. Chilambe (PW3) went to see him and told him there was someone looking for caretakers, in



the area. The caretakers being sought were for Mr. Rodwell Lombenga's farm. DW2 stayed at this farm until 2010. He was not being paid so decided to leave the farm in June 2010. He then met Mrs. Mirriam Nachalwe. She was looking for a person to stay at her farm. She was working in Chipata at the time which was far away and asked that he stayed at the farm. She asked him to accompany her to the Council to inform them that he had been appointed her caretaker. This was done and she left.

The farm was in a bush and he started clearing the land. In the year 2012, he saw a vehicle arrive with 2 men. One was Caucasian, the other black. He came to know the White man as Mr. Winfred James. They told DW2 to vacate the farm as they bought it from Mr. Phiri. Mr. Winfred left his employee there to start work at the farm. Later in 2014, a vehicle arrived at the farm and was full with people. A lady disembarked from the vehicle and identified herself as the young sister to Nachalwe. This was DW1. He explained that Mrs. Nachalwe had left him there as caretaker. DW1 asked him not to move out as she needed to verify the status of the land with the Council.

Mr. Whitefield subsequently sued DW2 demanding that he be evicted from the farm. He currently has cattle and goats and is farming on the farm.

When cross-examined the witness testified that he moved to Mr. Lombagani's farm in 1993 and eventually to Mrs. Nachalwe's farm in 2001. He did not know of Mr. Phiri until he met him in 2019. As far as he was aware, Mr. Phiri's farm was far away from the land in dispute.

The witness was not re-examined and that was the case for the Defendant.

In her submissions, the Defendant argues that the Plaintiff has failed to prove his case and the Defendants claims should on the other hand be allowed. I was invited to note that at the time of commencement of this action on the 4<sup>th</sup> of May 2012, the then cited Defendant Mirriam Nachalwe was already dead. That she had died whilst in employment. It was contended further that the Plaintiff's farm at Mkushi neighboured the Defendants farm. Therefore that it was not farfetched to assume that the Plaintiff endorsed the Defendant's address as unknown and quickly obtained a judgment

in default of appearance and defence in 2012. That it was on the strength of the said judgment that the Plaintiff proceeded to have the Certificate of Title No. 27847 in respect of farm 6 Chitina settlement issued in his favour.

That even though a litigant is granted leave for substituted service, the same is not capable of being served upon a dead person. In this regard that Miss Mirriam Nachalwe died in February, 2012 thus the order for leave for substituted service dated 11<sup>th</sup> June 2012 was null and void and without any effect, a fact that the Plaintiff in Defendants view, must have known. It was submitted further that the substituted Defendant and duly appointed Administrator had the judgment in default set aside in early 2013 and proceeded to file her defence and counter claim.

It was the Defendants contention that the Plaintiff's title should be cancelled for fraud and the property be restored to the Administrator and entitled beneficiaries of the deceased estate. In submitting on why in her view the Plaintiff had failed to prove his case, the Defendant argued that the late Nachalwe duly followed and complied with all the legal and procedural requirements

relating to the land in dispute that this was after the same land had been properly repossessed from Mr. Kapya.

Based on the above, the Defendant submitted that it was therefore wrong and erroneous for the Commissioner of lands to have cancelled Nachalwe's title merely on registration of a default judgment against a deceased proprietor. It was submitted further that there was no impropriety on the part of the late Nachalwe in the procedure used to acquire farm No. 6 Chitina Mkushi through the Council who are the designated and authorized agents of the Commissioner of Lands pursuant to land circular No. 1 of 1985 clause 3. That in light of the above circular, Mkushi Council cannot be faulted for re-possession of farm No. 6 Chitina from Kapya for failure to pay the requisite fees. Thus that even if PW1 believed in the validity of his purchase of the farm from Kapya, in essence there was nothing he was purchasing in that Kapya had no interest by then in the said farm.

Further that the Plaintiff cannot rely on the doctrine, of a bonafide purchaser of a legal estate for value without notice as the Plaintiff did not act in good faith. The Defendant argued in this regard that

the Plaintiffs act of suing a dead person was unconscionable conduct that forfeits the privilege of a bona fide purchaser in the eyes of equity. It was further submitted that had the Plaintiff property conducted due diligence he would have discovered that the late Kapya was not the registered proprietor of farm No. 6 Chintina Mkushi. Reliance was placed on the case of **James Mbewe & Potati Malunga vs. James Mwanza**<sup>1</sup> in support of this proposition.

It was submitted that it was grossly irregular for the Commissioner of Lands to grant a 99 year lease to the Plaintiff without any efforts being made to have site of the current inspection report of farm No. 6 Chintina. Reliance was placed on the case of **Fisoma Fe Leisa Company Limited vs Mansa Municipal Council**<sup>2</sup> in support of this proposition.

Reliance was also placed on section 54 of the Lands and Deeds Registry Act Cap 185 of the Laws of Zambia to argue that fraud vitiates a Certificate of Title which is what the position established was in this case.

It was submitted further that where real property is the subject of sale there is need for the sale to be evidenced by a written contract of sale as per holding of Silomba J.S in the case of **Wesley Mulungushi vs. Catherine Bwale Muzi Chomba**<sup>3</sup>. That the Plaintiff failed to produce a contract of sale for the farm in issue or let alone any document to attest what transpired between Kapya and himself. I was also referred to the case of **Ndongo vs. Moses Mulgango Roostico Banda**<sup>4</sup> in which it was held that a mere contract of sale of land does not per se transfer ownership of land to the buyer. Further that mere payment towards the purchase price does not transfer ownership to the buyer. That much more is required by way of formal registration and payment of statutory fees to the relevant authorities. Therefore, that the verbal purchase of farm 6 Chintina as purported by PW1 in 1998 did not transfer per say any ownership to the Plaintiff nor was the alleged sale to Mr. Jeremiah.

It was contended in closing that whereas the Plaintiff in his pleadings had alleged fraud on the part of the late Mirriam Nachalwe which he had failed to prove, to the contrary it is the

Plaintiff who had been fraudulent in his dealings with farm No. 6 Chitina Mkushi. I was urged to dismiss the Plaintiff's claims and to uphold the Defendant's counterclaims by an order cancelling the Plaintiff's Certificate of Title for fraud and restituting the property back to the deceased estate and its lawful beneficiaries.

I have carefully considered the evidence before me and the filed submissions. By his originating process the Plaintiff contends that the ownership of the property in issue was fraudulently obtained by the late Mirriam Nachalwe and hence null and void. He thus seeks on order that the property be restored into his name and the Certificate of Title issued to the Defendant to be cancelled and a new one issued in his name.

The Defendant disputes this claim and in her counterclaim contends that the late Nachalwe met all the requirements when acquiring the land and title in issue. She averred further that when her sister passed away she discovered that the Plaintiff had fraudulently obtained a judgment in default which he registered with the Commissioner of lands. Her prayer in her counterclaim is therefore that the late Mirriam Nachalwe be declared the rightful

council officials that she had claimed he sold her the property. This is hardly evidence to the required degree of fraud.

I accept that the Plaintiff did enter into negotiations for the purchase of the property with the Kapya's. There is however no written evidence of an actual sale of the land by way of contract of sale or assignment as the case may be. Curiously, the Plaintiff contends he lost all the documents relating to the sale. Irrespective of whether this is true or not, the question remains could the late Luke Kapya pass good title to the Plaintiff granted the evidence that the property was repossessed from him by the the Mkushi District Council?

The Latin maxim "***nemo dat quod non habet***" expressing the equitable principle that "a person who sells property can confer no better title than he himself has" is applicable in this case. In ***Kabika vs. Malamo***<sup>6</sup> the Supreme Court reaffirmed the position that a party who does not own property cannot pass good title to anyone. Simply put that a party can only pass on as good a title as he or she possesses.



I would agree with the Defendant's submission that Mr. Kapya did not have good title as the property was at offer stage and evidence before me is that he failed to meet the terms of the offer leading to the repossession of the land. There is further no evidence that the late Luke Kapya was ever granted title for the property. What is apparent which I accept as fact, is that following the land being repossessed, the property was offered to the late Nachalwe and title subsequently issued in her name.

The Plaintiff being dissatisfied with the turn of events and having an interest in the property commenced an action against the Defendant claiming ownership and fraud. It is unclear whether the Plaintiff was unaware that the then Defendant Nachalwe had died at the time. One thing is clear from the evidence, he proceeded to obtain a judgment in default of appearance and defence and it was on this premise that the title issued to the late Nachalwe was cancelled.

The Defendant's claim of fraud is thus premised on the fact that the Plaintiff being the late Nachalwe's neighbour in Mkushi must have known about her passing and fraudulently commenced an action

and quickly obtained a default judgment knowing a dead person could not enter appearance and had title issued in his name.

As stated earlier, there is no concrete evidence of the Plaintiff's knowledge of the Defendant's demise. Suffice to state for present purposes that there is evidence the default judgment was set aside on 20<sup>th</sup> September 2013. The Plaintiff being fully aware of this development therefore should not have proceeded to obtain the title in his favour which is dated 10<sup>th</sup> of March 2014 and proceeded to dispose of the property to a third party. That smacks of fraudulent intent.

I further do not accept his evidence that he was unaware that the property had been repossessed. His own witness PW2 told the court that the Plaintiff called her to inform her that the property had been repossessed. He thus had actual notice of the status of the land and this removes him from even being remotely considered a bonafide purchaser without notice of any defect in title.

In the case of **Base Property Development Limited and Neggie Nachilima Chileshe**<sup>7</sup> the Supreme Court held at page J22 that:

***“Where a purchaser is aware or should have been aware of the equitable interest this affects their conscience and they are then bound by the interest”***

The court went on to cite its earlier decision in **Mwenya and another vs. Kapinga<sup>8</sup>** where it held that:

***“where a purchaser had notice of any other party’s interest in the property, that party cannot be a bonafide purchaser for value without notice”***

The Plaintiff as I have said had actual notice that the land had been repossessed and of the property being subsequently assigned to the late Defendant. I am thus prepared to find that his motive to have the default judgment registered and to push for title and sell the property was less than honourable in the circumstances. I decline to find that the property was fraudulently acquired by the late Nachalwe as prayed in the absence of any evidence to this effect and I find that no title passed from Luka Kapya to the Plaintiff as he did not have any title to pass in the first place.

I find that the Commissioner of Lands cancellation of the Certificate of Title No. 27847 issued to the Defendant was erroneous as the

decision was anchored on a default judgment which was subsequently set aside and there is no order subsisting ordering the cancellation of the title in terms of section 33 of the Lands and Deeds Registry Act. I instead find evidence supporting the Defendant's counter claim by virtue of her certificate of title which I accept pursuant to sections 33 and section 54 of the Lands and Deeds Registry Act and hold that she genuinely acquired the property in the absence of proof of impropriety in acquisition and make the following declarations and orders.

- i) I declare that the late Mirriam Chibeka Nachalwe is the rightful and legal owner of property known as lot/Chitina/6 Mkushi District Council in Muchinga Province of the Republic of Zambia.
- ii) I declare that the cancellation of the deceased Certificate of Title No. 27847 was erroneous as the default judgment was set aside and there is no order subsisting ordering the cancellation for fraud in terms of section 33 of the Lands and Deeds Registry Act.

- iii) I order that the ownership of the property be restored back to the deceased names and subsequently to the Administratrix of the estate.
- iv) I order rectification of the lands register to effect the above changes.
- v) The subsequent sale of the property by the Plaintiff to the disclosed 3<sup>rd</sup> party was of no legal effect as the Plaintiff had no tile to pass. The third party can follow up his claim for a refund from the Plaintiff as can the Plaintiff himself from the late Kapya's estate.
- vi) Costs will follow the event to be taxed in default of agreement.

Dated at Lusaka the 2<sup>nd</sup> day of March 2020



**HON. JUSTICE M.D BOWA**