

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

2015/HP/0486

BETWEEN:

BRIGHT SICHINGA

PLAINTIFF

AND

**BRIAN MWEEMBA
AIYUB ISMAIL
NAJMUNISA AIYUB SADAR
ATTORNEY GENERAL**



**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT**

Delivered in open Court by the Hon. Mr. Justice Mathew L. Zulu, at Lusaka the 10th day of July, 2020

<i>For the Plaintiff:</i>	<i>Mr. J. Katati, Messrs. Dove Chambers</i>
<i>For the 1st Defendant:</i>	<i>Ms. T. Bulaka, Mesdames TMB Advocates</i>
<i>For the 2nd & 3rd Defendant:</i>	<i>Mrs. N.B. Chanda, Messrs. A. M. Wood and Co</i>
<i>For the 4th Defendant:</i>	<i>Ms. Kamwanga, State Advocate Attorney General's Chambers</i>

JUDGMENT

Cases referred to:

1. *Investrust Bank Plc v. Hearmes Mining and Trading Ltd and others(S.C.Z. Appeal No.137 of 2015)*
2. *Base Properties Development Ltd v. Neggie Nachilima Chileshe and others(S.C.Z Appeal No. 211 of 2015)*

3. *Anti Corruption Commission v. Barnett Development Corporation Ltd (2008) Z.R. 69.*
4. *Nkongolo Farms Ltd v. Zambia National Commercial Bank(2007) Z.R.149*
5. *Sablehand Ltd v. Zambia Revenue Authority(2005) Z.R. 109*
6. *Gibson Tembo v. Alizwani(S.C.Z Judgment No. 6 of 1996)*
7. *Mirriam Mbolela v. Adam Bota (Selected Judgment No. 26 of 2017)*
8. *Aubrey Kabwe(suing in his capacity as the administrator of the Estate of the Late Rosemary Mwanza) v. Charles Wilson Nkhoma(2012) Z.R. 14*
9. *Sailas Nzowani and others v. Flamingo Farms Ltd(Appeal No 90 of 2016)*
10. *Hanif Mohammed v. Yusuf Ibrahim Issa Ismail(Appeal No 146 of 2013)*
11. *Mackic Edwin and another v. Ranate Schempp(2006) Z.R. 148*
12. *Clementina Banda and another v. Borniface Mudimba (2011/HP/A39)*
13. *Benson Munganama v. Ngoma and another(S.C.Z Appeal No. 186 of 2015)*
14. *Zambia Consolidated Copper Mines v. Another and Chilongo (S.C.Z. Judgment No. 2 of 2011)*

Legislation referred to:

1. *The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia*
2. *The Intestate Succession Act, Chapter 59 of the Laws of Zambia*

Other materials referred to:

1. **Megarry and Wade, The Law of Real Property(3rd Edition) 1966,**

The backdrop to this action is that the plaintiff entered into contract with the 1st defendant on 19th December, 2012 whereby the latter agreed to sell to the plaintiff a subdivision of stand L 5622/M in Lusaka West at the price of K190, 000. The plaintiff paid the 1st defendant the total sum of K177, 500.00 leaving a balance of

K12, 500.00. However, the 1st defendant later refused to complete the transaction, thereby prompting the plaintiff to commence these proceedings on 1st April, 2015 against him claiming *inter alia* an order of specific performance and of an interim injunction restraining the 1st defendant from selling the property.

Simultaneously with the filing of the originating process, the plaintiff applied for an *ex parte* order of interim injunction which was granted on 1st April, 2015. On 21st April, 2015, the 1st defendant entered conditional appearance to the suit and subsequently applied to set aside the writ of summons for irregularity. By consent order dated 22nd June, 2015, the plaintiff and the 1st defendant agreed to the plaintiff amending his originating process. The amended writ was filed into court on 3rd September, 2015.

On 8th October, 2015, there being no opposition from the 1st defendant, the court confirmed the *ex parte* order of interim injunction pending the determination of the matter. On 3rd December, 2015, the plaintiff obtained a judgment in default of defence which was stayed on 15th February, 2016 pending the

determination of the application to set aside the default judgment. The judgment in default was set aside on 21st July, 2016. Several applications followed to set aside the order staying the execution of the default judgment and to reinstate the default judgment and for leave to issue contempt proceedings but the same were never heard.

On 17th November, 2017, the plaintiff applied to join the now 2nd and 3rd defendant to the proceedings. By consent order dated 14th December, 2017 the 2nd and 3rd defendant were joined to the proceedings. On 16th April, 2018 with leave of court, the plaintiff amended his pleadings and also joined the 4th defendant to the proceedings. The plaintiff in his amended writ of summons and statement of claim seeks the following reliefs.

- 1. An order for the cancelation of Certificate of Title No. CT 26378 relating to subdivision L.5622/M/B Lusaka;**
- 2. An Order for Specific Performance compelling the 1st Defendant to complete the transaction with the Plaintiff;**
- 3. Damages;**
- 4. Costs ;**
- 5. Any other relief that the Court may deem fit.**

The case pleaded by the plaintiff in his amended statement of claim is that prior to the commencement of the matter, he received a letter from the 1st defendant's advocates on 21st March, 2016 in which it was indicated that the contract of sale was frustrated as the mother and siblings of the 1st defendant had refused to allow the transaction. He then lodged a caveat on the property as an intending purchaser on 25th March, 2016. In August, 2016 he was informed that the 2nd and 3rd defendant's had been going to the property. He conducted a search at the Ministry of Lands and discovered that a certificate of title had been issued to the 2nd and 3rd defendant despite the existence of the caveat and the interlocutory injunction. He asserts that the 2nd and 3rd defendant obtained the certificate of title relating to the property fraudulently with the aid of the 1st defendant and the Registrar of Lands. He therefore, claims the reliefs in the writ of summons.

After joining the 2nd, 3rd and 4th defendants to the proceedings, the plaintiff applied for an interim order of injunction which was granted *ex parte* and confirmed in a ruling dated 7th June, 2018.

The 2nd and 3rd defendant filed into court their defence on 30th April, 2018. The 2nd and 3rd defendant admit that they are the registered owners of Subdivision B of Stand L. 5622/M. They assert that the alleged sale between the plaintiff and the 1st defendant does not affect their title as the entire property in dispute is 3.7387 hectares which is approximately 10 acres and they purchased a subdivision in the extent of approximately 5 acres. They state that any agreement made by the 1st defendant with any third party relates to the remaining extent.

The 2nd and 3rd defendants claim that they are in any event bona fide purchasers for value. They state that they entered into a contract with the 1st defendant for the purchase of a subdivision at the price of K 375,000 following an advertisement in the newspaper. They also made improvements to the 1st defendant's adjacent property at the value of K50, 000. That prior to the execution of the contract with the 1st defendant, they physically inspected the property and it revealed that there was no one on the land. They also carried out a search at the Ministry of Lands which revealed that there was a mortgage on the property but there was no caveat

as alleged by the plaintiff. The mortgage was later discharged and they subsequently obtained title to the land on 21st July, 2016. The 2nd and 3rd defendant state that they were only informed of the plaintiff's claim after the completion of the sale in December, 2016. They therefore, deny the allegations of fraud.

The 1st defendant filed into court his defence on 8th May, 2018. The 1st defendant states that he is not the owner of Stand no. 5922/M Lusaka, but the same was owned by Patrick Mweemba now deceased and is vested in him as the administrator. He admits that he entered into a contract for the sale of land with the plaintiff and that he received the total sum of K177, 500.00. He however, asserts that the contract was frustrated as he did not acquire the power of sale and the consent of the beneficiaries who consequently refused to complete the transaction. He asserts that had the plaintiff conducted a due diligence, he would have noticed that the property was vested in him by virtue of the order of appointment. He admits that the plaintiff placed a caveat on the land on 25th March, 2015 and that he also obtained an injunction on 1st April, 2015. The 1st defendant states that the property was sold to the 2nd and 3rd

defendants on the resolve of the beneficiaries and that at the time, there was no caveat on the property. He denies that there was fraud in the issuance of title to the 2nd and 3rd defendant and that the plaintiff was made aware of the status of the property and a refund was offered.

The plaintiff filed into court his reply to the 2nd and 3rd defendant's defence on 18th June, 2018. He asserts that his contract of sale with the 1st defendant relates to Subdivision B of Stand 5622/M and not the remaining extent. He states that the land he contracted to buy is 5 acres which is the size of the subdivision while the remaining extent is less than 5 acres. He further claims that the 2nd and 3rd defendant are not bona fide purchasers for value and that the transaction was illegal because of the injunction and default judgment ordering the 1st defendant to complete the sale.

The plaintiff also filed into court his reply to the 1st defendant's defence on 18th June, 2018. He asserts that the certificate of title to the property was at all material times in the names of the 1st defendant. He denies that the contract was frustrated and asserts that the 1st defendant had the power to sale and that the only

reason the 1st defendant changed his mind was because he entered into a contract with the 2nd and 3rd defendant for a higher purchase price.

The 4th defendant filed into court his defence on an unknown date. The 4th defendant admits that on 25th March, 2015 the plaintiff lodged a caveat on the Property as an intending purchaser. The state asserts that the Registrar of Lands did not act fraudulently and denies that the plaintiff is entitled to the reliefs sought.

In his reply dated 26th September, 2018, the plaintiff joined issue with the 4th defendant on his defence.

At trial, the plaintiff testified as the only witness in support of his case and he was PW1. He testified that on 13th December, 2012 the 1st defendant approached him at his office and offered to sale him land in the extent of 5 acres. He viewed the land and was satisfied that it was bare. On 19th December, 2012 he went to the Ministry of Lands and obtained a print out from the Land Register which showed that the 1st defendant was the owner of the land as at 3rd November, 2011. The Print out is at page 5 to 7 of plaintiff's bundle

of documents. PW1 testified that he later met with the 1st defendant who presented him with an offer letter at page 4 of his bundle of documents in which he offered to sell him land in the extent of 5 acres at a consideration of K190, 000.00. The sum of K150, 000.00 was agreed to be paid as the down payment and the remainder upon presentation of the certificate of title. PW1 testified that they also executed a contract which is at page 8 of the plaintiff's bundle of documents which stipulated that the 1st defendant was the beneficial owner of the property. After the execution of the contract, he paid the 1st defendant the total sum K177, 500.00.

It was PW1's evidence that around the 21st of March, 2015, he received a call from the 1st defendant asking that they meet. PW1 testified that at the meeting the 1st defendant gave the plaintiff a letter in which stated that his brother and sister declined to the sale of the land and as such he could not proceed with the transaction. PW1 testified that he immediately went to the Ministry of Lands on 25th April, 2015 and placed a caveat on the Property. He then issued process in this action on 1st April, 2015 and was granted an

injunction on even date. He later obtained a judgment in default of appearance and defence on 3rd December, 2015.

PW1 told the court that later on, when he went to view the land he found a chicken run after which he discovered that the land had been sold to the 2nd defendant. When he conducted a search at the Ministry of Lands he discovered that a caveat had placed by the former and the land had been sold to the same. His lawyers on record then wrote to the Registrar of Lands explaining the circumstances relating to the land and requesting for the cancellation of the certificate of title issued on the land. PW1 testified he sunk a bore hole on the land and he would send people to slash during the raining season but sometime in 2016 to 2017 his people were chased by the 1st defendant's brother. He denied that the land the 2nd and 3rd defendant bought is different from the land he was offered.

During cross examination PW1 confirmed that prior to purchasing the land he conducted a search at the Ministry of Lands and obtained a print out. He confirmed that there was an order of appointment as administrator in relation to the property. He

confirmed that the 1st defendant did not tell him he was merely an administrator of the Property. He confirmed that according to special condition 5, he was only supposed to take occupation of the property on making full payment and he did not pay the full price. He maintained that the 1st defendant gave him permission to sink a bore hole but it was not in writing. He confirmed that he had no interest in inquiring from the occupants of the house next to the land as he was aware that the 1st defendant was the owner of the land.

PW1 confirmed that on the print out at page 4 of the 2nd and 3rd defendants' bundle of documents issued on 20th March, 2015 the last entry was for a mortgage to Pulse Financial Services. He confirmed that on the print out issued on 31st August, 2016 at page 35 and that on 29th November, 2016, his caveat was not appearing. PW1 confirmed that at the time of the contract, the land was unsurveyed but it was marked with beacons with concrete and metal and they measured the land with the 1st defendant and it was 5 acres. He confirmed that after he lodged the documents for the caveat he did not follow up to see if the caveat had been entered.

PW1 confirmed that the injunction he obtained on 1st April, 2015 was between himself and the 1st defendant. He confirmed that he did not have a print out to show the injunction was registered at the Ministry of Lands. He also confirmed that he did not know whether the injunction was served on the 1st defendant. PW1 testified that he found out about the 2nd and 3rd defendant in 2016 or 2017 when he obtained a print out from Ministry of Lands. He confirmed that the land was bare but there was a borehole. He confirmed that he had no receipts for the borehole. He confirmed that he rejected an offer for alternative land.

During re-examination PW1 testified that the letter at page 22 of his bundle of documents shows that the 1st defendant's lawyers were served with the writ of summons, statement of claim and interim injunction.

This marked the close of the plaintiff's case.

The 1st defendant testified as the sole witness in his defence and he was DW1. He testified that the plaintiff approached him through his agent when he was selling land between November and December,

2012. He met with the plaintiff and he showed him the land he was selling which was not yet subdivided. He testified that the plaintiff then started counting using steps and indicated where the 5 acres ended but the 1st defendant advised that they engage a surveyor and they agreed to enter into negotiations. They agreed on the terms and conditions and entered into a contract on 19th December, 2012 and the plaintiff paid K177, 500.00 towards the agreed purchase price of K190, 000.00.

DW1 testified that between September and October, 2014, he cancelled the contract verbally because when he engaged the plaintiff to purchase the land, he was acting as administrator and he did not inform the family. He later met with the plaintiff who refused the cancellation. DW1 testified that in April, 2015 he entered into a contract with the 2nd and 3rd defendant after the family resolved to sell that piece of land based on the valuation report. He testified that the terms of the contract with the 2nd and 3rd defendant were that the purchase price was K375, 000.00 and the land sold was 5 acres. He testified that he engaged the plaintiff to purchase the property based on the valuation report or to give

him alternative land but this failed and he refused a refund. It was his evidence that he sat with the family and they agreed to proceed with the sale with the 2nd and 3rd defendant.

PW1 testified that the 2nd and 3rd defendant were not aware of the contract he had with the plaintiff because he considered the contract as having failed because they could not agree on any terms. He testified that the contract of sale was drafted by Victoria Dean acting on behalf of both parties and a surveyor was engaged to do a subdivision. Payments were made and title was issued to the 2nd defendant in 2016. He received a call from the plaintiff in December, 2016 calling for a meeting at Victoria Dean. At the meeting which was attended by himself, Mr. Sinkamba the lawyer representing the plaintiff and the plaintiff, he was informed about the injunction that had been obtained by the plaintiff pertaining to the piece of land that was sold to the 2nd and 3rd defendant. DW1 maintained that he did not see the injunction and that he only learnt about the default judgment at Victoria Dean in December, 2016. DW1 testified that he sunk the bore hole.

During cross examination, DW1 confirmed that the land he sold the 2nd and 3rd defendant is the same land he sold to the plaintiff. He confirmed that the reason the contract with the plaintiff was frustrated was because his brothers and sisters objected and insisted that a valuation be done. He maintained that the injunction only came to his attention in 2016 from Victoria Dean. He confirmed that the letter at page 22 of the plaintiff's bundle of documents was addressed to his then lawyers and they acknowledged receipt of the letter on 22nd April, 2015.

DW1 confirmed that the contract with the 2nd and 3rd defendant was entered into on 28th April, 2015. He testified that he used different lawyers for the contract with the 2nd and 3rd defendant because the plaintiff called him and told him his lawyers were no longer practicing. PW1 confirmed that there was an inconsistency between his statement at paragraph 11 of his defence and special condition 2 as one shows that he was selling as beneficial owner and the other as personal representative. He confirmed that the true position was that he was selling as personal representative. He confirmed that entry 7 on the print out at page 7 of the plaintiff's

bundle of documents shows an order of appointment as administrator by the Local Court and he confirmed that he was an administrator as at 19th October, 2011. He confirmed that the title was changed into his name as confirmed by the certificate of title at page 2 of the plaintiff's bundle of documents in November, 2011. He confirmed that the title was changed when he lodged the deed of assent.

On further cross examination by counsel for the 2nd and 3rd defendant, DW1 confirmed that he as well as his brother and sisters were beneficiaries of the estate of his late father. He confirmed that he did not inform the 2nd and 3rd defendant about the transaction with the plaintiff. He testified that he is still the owner of the remaining extent of the property which was about 4 acres.

This was the close of the 1st defendant's case.

The 2nd and 3rd defendant also tendered oral evidence in their defence. Their first witness was Ibrahim Aiyub Sadar and he was DW2. He testified that the 2nd and 3rd defendants are his parents. It was his evidence that he witnessed the contract of sale. From 2015,

his parents were looking for land until March, 2015 when they saw an advert in the newspaper. When they inspected the land, there was a small house on the right on which the 1st defendant's relative or brother was staying. DW2 testified that the following day, they met with the 1st defendant at their advocates' offices, Victoria Dean where the plaintiff produced a copy of the certificate of title. Thereafter their lawyers conducted a search upon which they were told there was a mortgage. They then agreed with the plaintiff on the purchase price of K375, 000.00, that the 1st defendant would clear the mortgage if they paid a down payment and that the certificate of title was to be deposited with their lawyers. On 20th April, 2015, the contract was drafted which was executed by the parties. DW2 testified that the 1st defendant was selling the land as the sole owner.

DW2 testified that the down payment of K100,000.00 was paid as confirmed by the letter at page 6 of the 2nd and 3rd defendant's bundle of documents and the other payments were made in installments. The survey was done in February and the consent was obtained in June, 2016. The property transfer tax was paid and

title was issued in July, 2016. It was his evidence that prior to the completion of the transaction he placed a caveat on the land in October, 2015.

DW2 told the court that his parents were not aware of any transaction on the property. They started building on the land but in November, 2016 his father received a call from the plaintiff stating that he owned the land. Subsequently the plaintiff produced an injunction and because Victoria Dean had represented both the 2nd and 3rd defendant and the 1st defendant and in the process of merging with AM Wood, they were referred to the lawyers on record.

During cross examination, DW2 confirmed that at the time of the contract between the 1st defendant and the 2nd and 3rd defendant, there was no caveat on the property. He confirmed in relation to entry 18 at page 40 of the plaintiff's bundle of documents that the same was made after title had been issued to the 2nd and 3rd defendant. He maintained that he became aware of the injunction in December, 2016 when the plaintiff called his father. He testified that they had built a chicken run, a three or four roomed property and a tank stand.

On further cross examination, DW2 confirmed that when he conducted the first search at the Ministry of Lands on 20th March 2015, there was no caveat on the land only a mortgage and when he conducted the second search on 31st August, 2016 after completion of the transaction, there was still no caveat.

The 2nd defendant testified as DW3. He testified that he saw an advert in the newspaper and told his son to call the number. They arranged to view the land and viewed it after it was cleared. He testified that he executed a contract of sale with the 1st defendant. When the certificate of title was issued, his son collected it, and moved to the property. The plaintiff then phoned him that the land was his. DW3 testified that the previous owner told him there was a borehole but there was no water as it had collapsed. It was his evidence that his son obtained the papers for the borehole which were in the names of the 1st defendant but the drilling company told them that the 6 months' guarantee had elapsed. It was his evidence that he was not aware of any transaction on the land prior to their transaction.

During cross examination, DW3 confirmed that the 1st defendant did not tell him about the transaction he had with the plaintiff.

This marked the close of the 2nd and 3rd defendant's case.

The State called one witness, Mutete Konda Chisupa a Registrar at the Ministry of Lands and she was DW4. She testified that some of her duties include registration of interest in land and she is also the custodian of the Land Register. She testified that Plot L5622/MN is in the name of the 1st defendant and that the 1st defendant became the owner of the land after a deed of assent in which he assented the property to himself. It was her evidence that previously, the property was registered in the name of Patrick Mweemba.

DW4 testified in relation to entry 18 of the Lands Register at page 39 and 40 of the plaintiff's bundle of documents, that the caveat was first lodged on 25th March, 2015 but it was only registered after 2016. That when the plaintiff first lodged the caveat it was queried and it was only registered after the query was answered. DW4 testified that the Lands and Deed Registry Act provides that the date it was lodged not the date it was registered should be

maintained hence though registered in 2016, the entry is dated 2015. She was not in support of the cancellation of the certificate of title relating to the subdivision of plot number 5622 because entry number 14 to 17 were legally done because though the caveat was lodged in 2015, it was only approved in 2016 after the query was answered. It was her evidence that the 4th defendant had no objection to an order of specific performance for the contract between the plaintiff and 1st defendant.

When cross examined, DW4 testified that there was a difference between lodging and registering a caveat. It was her evidence that a caveat can be successfully lodged when the initial documents seem to satisfy the lodgment but there could be reasons why the caveat is not registered. DW4 testified that she had occasion to look at their system to see why the plaintiff's caveat was only registered after 2016 and she discovered that it was queried in 2015 using a system called the integrated Land Management System. She confirmed that the practice is that the client is expected to go to the Ministry of Lands to check after 3 weeks or a month to see whether the documents have been registered. DW4 testified that she however

did not know what the query was as she would have had to retrieve the actual documents or the processing schedule but she could not find those documents.

DW4 confirmed that the defendant used the deed of assent to vest the property to himself as administrator. She confirmed that a caveat can still be registered where there is a mortgage. She testified that the land register is structured in such a way that it follows a chronological order and in this case the caveat was registered after the certificate of title had been issued to the 2nd and 3rd defendant. She confirmed that the plaintiff lodged his caveat on 25th March, 2015 while the initial search that was done by the 2nd and 3rd defendant was done on 20th March, 2015. In reference to the Registrar's certificate that must be issued, she confirmed that the same shows the status quo as at the date of the search and that if a person conducted a search on 20th March, it would not show a caveat that is registered later on. DW4 testified that the 1st defendant could have vested the property in himself as administrator or as a beneficiary.

This marked the close of the 4th defendant's case.

After the close of trial, the plaintiff filed into court his submissions on 6th September, 2019. The gist of the plaintiff's submissions so far as they are relevant to this case is that the 1st defendant's argument that the contract between the plaintiff and the 1st defendant has been frustrated as the mother and siblings could not give the necessary consent lacks merit as the certificate of title was in the name of the 1st defendant as beneficial owner and **section 54 the Lands and Deeds Registry Act** provides that the certificate of title is conclusive evidence that the person named therein is seised with the estate of interest specified therein.

Counsel further contends that the 1st defendant became a title holder of the property on 3rd November, 2011 following a deed of assent registered way before the registration of his order of appointment as administrator on 6th December 2011. He therefore, submits that the 1st defendant cannot claim to hold the property as administrator. Counsel for the plaintiff further contends that according to **Megarry and Wade, the Law of real property, 4th Edition at pages 537-538** a deed of assent operates as a conveyance whereby, the estate or interest vested in the deceased

which has devolved upon his personal representatives is vested in the person named. It is further espoused that if the property is vested in the wrong person, the purchaser is protected because the assent passes the legal estate and the innocent purchaser will have no notice of the beneficiaries' claim. Counsel therefore, contends that the 1st defendant became the legal owner of the property and he did not need the consent of anyone to assign the property to the plaintiff.

It is further argued that even if the 1st defendant sold the property as an administrator, according to **section 19(2) of the Intestate Succession Act**, he has the power to sale and the subsequent change of mind of his siblings cannot frustrate the contract. Counsel, further contends that to protect his interest, the plaintiff successfully lodged a caveat at the Ministry of Lands and subsequently obtained an injunction on 22nd April, 2015 which was served on the 1st defendant's advocates. The plaintiff also obtained a default judgment on 3rd September, 2015 but in contempt and disregard of the preceding documents, the 1st defendant with the help of the Registrar of Lands fraudulently sold the property to the

2nd and 3rd defendant. He also argued that the certificate of title issued to the 2nd and 3rd defendant was only issued on 22nd July 2016 when the plaintiff's caveat was registered in 25th March, 2015.

Mr. Katai further contends that contrary to DW4's evidence that the entries on the Land Register are entered in chronological order, the print out at page 35 to 40 of the plaintiff's bundle of documents shows otherwise and reference is made to **section 7 of the Lands and Deed Registry Act** on the date of registration of documents. It is therefore, argued that based on **section 79 of the Lands and Deeds Act**, while a caveat is in force, the registrar should not make an entry that would have the effect of charging or transferring of affecting the interest protected in the caveat. Counsel therefore, claims the reliefs in the statement of claim.

The 1st defendant filed into court his submissions on 14th January, 2020. The crux of the ephemeral submissions is that the 1st defendant acquired the property as an administrator of the estate of Patrick Mweemba. It is submitted that the 1st defendant registered the letter of appointment as administrator after which he registered a deed of assent to vest the property in himself. It is therefore,

argued that the contract between the plaintiff and the 1st defendant was frustrated because the plaintiff as an administrator of an estate cannot sale a property without a court order as stipulated by **section 19(1) of the Intestate Succession Act.**

Ms. Bulaka further contends that the 1st defendant needed the consent of the beneficiaries and that in conducting a due diligence the plaintiff should have been alive to the limits on the powers of an administrator and that they do not have absolute power to deal with the properties. Reference was made to the cases of **Investrust Bank Plc v. Hearmes Mining Trading¹, Base Property Development Ltd and Neggie Nachilima Chileshe (as administrator of the estate of the late Michael Dereck Chileshe and two others².**

Counsel contends that had the plaintiff conducted a due diligence, he would have understood the effect of the deed of assent and order of appointment as administrator and that the consent of the 1st defendant's mother and his siblings was necessary as well as a court order which is a *sine qua non* of a valid contract. It is therefore, argued that the contract is incapable of performance. It is further argued that the 2nd and 3rd defendant were bona fide

purchasers for value as they purchased a legal estate for value and had no notice actual or constructive of the plaintiff's claims.

The 2nd and 3rd defendant filed into court their submissions on 9th October, 2019. The kernel of their submissions is that the 2nd and 3rd defendant have a certificate of title relating to Subdivision B of Lot 5622/M. It is argued that according to **section 33 of the Lands and Deeds Registry Act** a certificate of title is conclusive from the date of issue notwithstanding the existence in any other person any estate or interest which but for part iii and iv of that Act would have priority and the holder shall except in case of fraud hold the land free from other encumbrances, liens and estate subject to encumbrances, liens or interest shown on the Certificate of Title or as may be notified on the folio of the register. It is further argued that a certificate of title is conclusive evidence that the person named is seised of the estate therein described from the date of such certificate and that it has been duly issued. See: **section 54 of the Lands and Deed Registry Act.**

Mrs. Chanda submits that a certificate of title can be vitiated if it is established that there is fraud or impropriety in its issuance by the

2nd and 3rd defendant. Counsel however submits that fraud must be specifically pleaded and the necessary particulars supplied. Counsel submits that the allegations of fraud must be proved at a higher standard than a mere balance of probabilities. Counsel submits that the plaintiff has not furnished the particulars of fraud and that in any event the plaintiff did not prove fraud to the requisite standard against the 2nd and 3rd defendant. See: **Anti Corruption Commission v Barnett Development Corporation Ltd³** and **Nkongolo Farms Ltd v. Zambia National Commercial Bank and others⁴** and **Sableland (Z) Ltd v. Zambia Revenue Authority⁵**.

Counsel submits that the 2nd and 3rd defendant are bona fide purchaser for value without notice and that only the fraud of the purchaser and not the vendor can vitiate a certificate of title. She submits that the 2nd and 3rd defendants have a legal interest in the property as they have a certificate of title to the land while the plaintiff has an equitable interest through the contract of sale. Counsel, submits that while legal rights are good against the whole world, equitable rights are good against all people but certain

people who are bona fide purchasers of a legal interest for value without notice and all those claiming under such a purchaser. Counsel relied on *inter alia* **section 34(1) of the Lands and Deeds Registry Act** and **Gibson Tembo v. Alizwani**⁶.

It is further argued that the plaintiff has not shown that there was bad faith by the 2nd and 3rd defendant when they purchased a legal estate. The purchase was for value and without notice of prior adverse claims as DW2 and DW3 visited the land which was bare. The 2nd and 3rd defendant also carried out a search at the Ministry of Lands which did not reveal any encumbrances and the plaintiff failed and or neglected to register the injunction and default judgment at the Ministry of Lands. It is therefore, argued that there was no way the 2nd and 3rd defendant could have known of the plaintiff's interest. Counsel for the 2nd and 3rd defendant also contend that specific performance cannot be ordered as there is no jurisdiction to inflict injustice on a third party in the name of doing justice for another party.

The state in its arguments filed into court on 16th September, 2019 submits that a certificate of title is conclusive evidence of ownership

of land which can only be revoked on the ground of fraud or other impropriety. Counsel, contends that the plaintiff has pleaded fraud but has failed to discharge the burden of proof. The 4th defendant also submits that the 2nd and 3rd defendant are bona fide purchasers of a legal estate for value without notice as they have satisfied the elements for that defence. Counsel submits that the plaintiff and the 1st defendant executed a valid contract for the sale of land. It is however, argued that as the 2nd and 3rd defendant are bona fide purchasers of the subdivision, the court should order specific performance of the remaining extent to do perfect justice.

I have considered the pleadings in this matter, the parties' bundles of documents, the oral evidence and the submissions of counsel for which I am indebted. The following facts are common cause. It is not in dispute that on 19th December, 2012, the plaintiff and 1st defendant executed a contract whereby, the plaintiff agreed to purchase land from the 1st defendant in the extent of 5 acres which land was a proposed subdivision of Stand 5622/M Lusaka West. The plaintiff paid the 1st defendant the sum of K177, 500,000 as down payment and the balance of K12, 500,000 was agreed to be

paid on transfer of title. The plaintiff therefore, became the owner of the land in equity upon execution of the contract. See: **Aubrey Kabwe (suing in his capacity as the administrator of the estate of the late Rosemary Mwanza) v. Charles Wilson**⁸.

However, before title could be transferred to the plaintiff, the 1st defendant informed the plaintiff that the contract had been frustrated because his mother and siblings had refused to consent to the sale. The plaintiff lodged a caveat on the Property on 25th March, 2015. The plaintiff also obtained an ex parte order of injunction on 1st April, 2015. It is also not in dispute that on 28th April, 2015, the 1st defendant and the 2nd and 3rd defendant entered into a contract for the sale of a proposed subdivision B in the extent of 1.8694 though the contract does not state whether the same is in square meters, acres or hectares. It is also not in dispute that the 2nd and 3rd defendant paid the agreed purchase price in the sum of K375, 000.00. A certificate of title was issued to the latter on 22nd July, 2016.

The first issue I shall consider is whether the land contracted to be sold to the plaintiff is the same land that was sold to the 2nd and 3rd

defendant. I note that the contract between the plaintiff and the 1st defendant did not describe the portion of the land agreed to be sold by reference to a sketch plan as the land to be sold was clearly a proposed subdivision. The 2nd and 3rd defendant contend that any agreement between the 1st defendant and the plaintiff for unsurveyed land relates to the remaining extent of the Property. Counsel for the 2nd and 3rd defendant also contends that the land the plaintiff purchased was unascertained.

The 1st defendant confirmed both in his evidence in chief and during cross examination that the land that was contracted to be sold to the plaintiff is the same land he subsequently sold to the 2nd and 3rd defendant. In the circumstances, though the contract of sale was devoid of a sketch plan showing which part of the land had been sold, the part agreed to be sold was clearly identified by the parties and it is the same land that was subsequently sold to the 2nd and 3rd defendant. I therefore, reject the 2nd and 3rd defendant's assertion that the land sold to the plaintiff was different to the land that was sold to them.

The second issue I shall consider is whether the contract between the plaintiff and the 1st defendant was frustrated as claimed by the 1st defendant. The 1st defendant contends that the contract between himself and the plaintiff was cancelled or frustrated as he did not have the power to sale the land as administrator without the consent of his siblings and mother. It is further argued that the contract was null and *void ab initio* as the 1st defendant did not obtain a court order which is a condition precedent to the sale of a property by a personal representative. The Supreme Court in the case of **Base Properties Development Ltd v. Neggie Nachilima Chileshe and 3 others**² referred to the case of **Mirriam Mbolela v. Adam Bota**⁷ where they held that **section 19(2) of the Intestate Succession Act** proscribes the sale of property (including real property) forming part of the estate of a deceased person without prior authority of the court. The Supreme Court guided that the statutory provision was intended to prevent administrators of estate of a deceased person from abusing their fiduciary responsibility by selling property forming part of such estate without regard to the interest of the beneficiaries and that prior authority of the court is *sine qua non* of a valid contract.

PW1 confirmed that when purchasing the property, the 1st defendant did not tell him that he was selling the land as an administrator. This evidence was unchallenged. A perusal of the contract of sale between the both the plaintiff and the 1st defendant and the latter with the 2nd and 3rd defendant reveals that the 1st defendant entered into the contracts as the beneficial owner of the land and not as a personal representative. The Print out at page 37 of the plaintiff's bundle of documents shows that the 1st defendant was appointed as administrator on 19th October, 2011 and he subsequently vested the property in himself via a deed of assent dated 3rd November, 2011. A certificate of title was also issued in favour of the 1st defendant on 3rd November, 2011.

The learned authors **Megarry and Wade in their book titled the Law of Real Property (3rd Edition) 1966 at page 547** state as follows:

The effect of the new machinery is that both the grant of probate and the written assent have a new character: they are essential documents of title, and if the land is subsequently sold the assent has the effect of overreaching the equitable interest declared by the will. In other words a bona fide purchaser for value from a post-

1925 devisee is not now concerned with the terms of the will: he is concerned only to see that the legal estate has devolved upon the personal representatives and that they have in turn vested it by assent or conveyance in the vendor. Unless the purchaser has evidence to the contrary, he cannot require the will to be disclosed; and even if the assent is in favour of the wrong person the purchaser is protected, for the assent passes the legal estate and the purchaser will have no notice of the beneficiary's claim.

In the light of the foregoing, I find that at the time of the sale of the land to both the plaintiff and the 2nd and 3rd defendant the 1st defendant was the beneficial owner of the land. It is for this reason that a certificate of title was issued in his favour and the same does not show that the land was vested in the 1st defendant as personal representative. It is consequently my finding that the 1st defendant did not need a court order or the consent of his siblings and mother in order to sell the land to the plaintiff as he was the beneficial owner of the land. I therefore, find that the plaintiff would be protected even if the property was wrongly vested in the 1st defendant as he would not have notice of the beneficiary's claims if any. Consequently, I find the purported cancelation of the contract

of sale between the plaintiff and the 1st defendant but the latter on the basis of the lack of consent from the 1st defendant's siblings and mother and a court order as invalid.

I shall now consider whether the plaintiff has made out a case for cancellation of the certificate of title issued to the 2nd and 3rd defendant. The Supreme Court has in a plethora of cases pronounced itself on the status of a certificate of title and the grounds on which it can be cancelled. In the celebrated case of **Anti Corruption Commission v. Barnett Development Corporation Ltd**³ the Supreme Court held that under **section 33 of the Lands and Deeds Registry Act** a certificate of title is conclusive evidence of ownership of the land by the holder of the certificate of title. However, it can be challenged and cancelled for fraud or reasons of other impropriety in its acquisition. In the case of **Sailas Ngowani and others v. Flamingo Farms Ltd**⁹, the Supreme Court, further held that other transgressions of the law such as circumvention of procedures prescribed in the law which would render the allocation of land null and void would equally be fatal and make the certificate of title liable for cancellation.

The plaintiff in paragraph 15 of his statement of claim asserts that the 2nd and 3rd defendant obtained the certificate of title to the land fraudulently with the aid of the 1st defendant and the Registrar of Lands. The Supreme Court in the case of **Nkongolo Farms Ltd v. Zambia National Commercial Bank Ltd**⁴ and others guided that a party must plead fraud stating particularities as provided by **Order 18 rule 8 (16) of the White Book**. However, the court when faced with serious anomalies and irregularities cannot turn a blind eye to such on the ground that it has not been pleaded. See: **Hanif Mohammed v. Yusuf Ibrahim Issa Ismail**¹⁰. I am therefore, guided that even if fraud is not pleaded, if the facts and circumstances show that there was fraud or if evidence is nonetheless introduced during trial which is not objected to showing that there was fraud, this court cannot disregard the same.

In the case in *casu*, though the plaintiff has alleged fraud, he has not given particulars of the fraud as has been rightly contended by counsel for the 2nd and 3rd defendant and the 4th defendant. In the submissions, counsel for the plaintiff argued that the certificate of title issued in favour of the 2nd and 3rd defendant was fraudulently

issued because there was a caveat on the property, an injunction and a default judgment at the time of the transfer. In the case of **Mackic Edwin and others v. Ranate Schempp**¹¹ the respondent lodged a caveat at the Ministry of Lands. Subsequently, the 1st respondent sold the land to the 2nd respondent and the assignment was registered at the Ministry of Land. Though the caveat was lodged, the same was not registered in the register.

It was argued by the 2nd appellant that since the caveat was not reflected in the register, there was nothing to stop the 2nd appellant from registering the assignment. The evidence before court showed that the caveat was duly approved by the Registrar of Lands. The Supreme Court observed that the issue was the non-registration of a caveat that was duly approved. The Supreme Court agreed with the respondent that the caveat was deemed to have been registered on the date the Registrar signed it. They found that failure to reflect it on the register was not fatal. The Supreme Court held that if the caveat had not been in place, there would have been nothing to prevent the 2nd appellant from registering the assignment from the 1st appellant as registered owner. However, since there was a caveat

in force, the registrar was barred from registering the assignment under **section 79 of the Lands and Deeds Registry**.

Coming to the case before me, though it is not in dispute that the plaintiff lodged a caveat on 25th March, 2015, DW4 testified that the caveat was only registered in 2016 or 2017 after a certificate of title had been issued to the 2nd and 3rd defendant as the same had been queried. **Section 18 of the Lands and Deeds Registry Act** provides that a memorandum signed by the Registrar shall be endorsed on any document registered stipulating the number of the document and position in the register and this shall be proof of due registration in the absence of sufficient evidence to the contrary. A perusal of the caveat at page 14 of the plaintiff's bundle of documents will show that the same was not registered or approved by the Registrar at the date it was lodged. PW1 also confirmed that it was registered in 2017 after he made a follow up at the Ministry of Lands after title had been issued to the 2nd and 3rd defendant. The print outs are at page 3, 35 to 40 of the 2nd and 3rd defendant's bundle of documents will confirm this fact.

I therefore, find that though the plaintiff lodged a caveat against the property on 25th March, 2015, the same was not approved or registered at the time the 1st defendant and the 2nd and 3rd defendant entered into the contract relating to the land and at the time the certificate of title was issued in favour of the latter. The argument of fraud on this against the 2nd, 3rd and 4th defendant on the basis of the caveat therefore, fails.

The plaintiff also argued that the certificate of title was issued in favour of the 2nd and 3rd defendant fraudulently due to the existence of an injunction dated 1st April, 2015 and the subsequent default Judgment. The record shows that injunction and the default judgment were obtained by the plaintiff prior to the joinder of the 2nd and 3rd defendant to the proceedings and there is no evidence that they were registered at the Ministry of Lands. In the case of **Gibson Tembo v. Alizwani**⁶, the Supreme Court when considering the cancellation of a certificate of title on grounds of fraud guided that if a wholly innocent purchaser acquires a certificate of title his right to the property is not affected by any fraudulent conduct of the vendor unless such conduct had resulted in the third party's

acquiring rights of which the purchaser has notice. In the latter case the purchaser would not of course be wholly innocent. I am satisfied that the plaintiff has not adduced evidence to the requisite standard that shows that there was fraud or impropriety on the part of the 2nd and 3rd defendant in the acquisition of the certificate of title to the land. I accordingly, dismiss the claims of fraud against the 2nd, 3rd and 4th defendants.

Lastly, counsel for 1st 2nd and 3rd defendant contends that the 2nd and 3rd defendant are *bona fide* purchasers for value of a legal estate without notice. As was aptly cited by counsel for the 2nd and 3rd defendant by referring to a passage in **Law of Real Property by Megarry and Wade, at page 119** equitable rights are good against all persons except a bona fide purchaser of a legal estate for value without notice and those claiming under such a purchaser. The elements of the defence of *bona fide* purchaser of a legal estate for value without notice are set out in *inter alia*; **Clementina Banda and another v. Borniface Mudimba**¹² and these are:

a) a purchaser must act in good faith;

- b) a purchaser is a person who acquires an interest in property by grant rather than operation of law. The purchaser must also have given value for the property;**
- c) the purchaser must generally have obtained the legal interest in the property; and**
- d) the purchaser must have had no notice of the equitable interest at the time he gave his consideration for the conveyance.**

On the facts before me, I find that the 2nd and 3rd defendant obtained the property in dispute by a grant and that they gave value for the property in the sum of K375, 000.00. I also find that they obtained a legal interest in the land as they have been issued with a Certificate of title to the land appearing at page 28 of their bundle of documents. The issue I shall consider is whether they had actual or constructive notice of the plaintiff's equitable interest in the property. From the facts before me, it is not in dispute that the plaintiff lodged a caveat on Plot L5622/M on 25th March, 2015 as is confirmed by the lodgment schedule at page 14 of the plaintiff's bundle of documents.

I also find that the 2nd and 3rd defendant's lawyers conducted a search at the Ministry of Lands on 20th March, 2015 prior to the execution of the contract between the 1st defendant and the 2nd and 3rd defendant but the same did not reveal that there was a caveat on the property. Further searches dated 31st August, 2016 and 29th November though the year is not legible did not show the caveat. The plaintiff testified that the caveat was only registered in 2017 when he made follow ups. The print outs are at page 3, 35 to 40 of the 2nd and 3rd defendant's bundle of documents.

DW4 testified that though the caveat was successfully lodged, it was queried and as such, it was not registered but upon registration it maintained the date it was lodged. Hence the caveat only appears in the print out after the certificate of title had been issued to the 2nd and 3rd defendant. In the circumstances, it is my finding that the land register did not show the existence of the plaintiff's caveat at the time the 2nd and 3rd defendant transacted with the 1st defendant until after a certificate of title had been issued.

I am alive to the decision of the Supreme Court in the case of case of **Munganama v. Ngoma and another**¹³ where they distinguished a general search under **section 22(1) of the Lands and Deed Registry Act** and an official search under **section 23 as read with regulation 13 of the Lands and Deeds Registry Act**. The Supreme Court held that for a search to be valid, it needs to comply with the provisions of **section 23**. The search that was conducted by the 2nd and 3rd defendant was not an official search and would thus be invalid as held by the Supreme Court.

However, during cross examination of DW4, when questioned by counsel for the 2nd and 3rd defendant on the registrar's certificate, she confirmed that the same would only show the status quo as at the date of the search and that it would not show a caveat that was not registered at the time of the search. In the circumstances, I am persuaded that the official search would still not have revealed the existence of the caveat prior to 2017.

Further, the evidence shows that the plaintiff obtained an ex parte order of interim injunction over the property in issue on 14th April, 2015. I find that the injunction and the originating process were

served on the 1st defendant's lawyers on 22nd April, 2015 a day after the 1st defendant entered conditional appearance to the suit. The 1st defendant through his lawyers was actively involved in the proceedings until July, 2016. In the meantime, the 1st defendant entered into a contract for the sale of the land with the 2nd and 3rd defendant and though the contract is not dated, DW1 testified that he entered into a contract for the sale of the land with the 2nd and 3rd defendant on 28th April, 2015.

I am therefore, disinclined to believe that the 1st defendant was not aware of the injunction. However, there is no evidence that shows that the 2nd and 3rd defendant knew about the existence of the injunction more so as the same was not registered at the Ministry of Lands. Further DW1 confirmed that he did not inform the 2nd and 3rd defendant of the transaction with the plaintiff. From the evidence before me, PW1 also confirmed and I find that the land in issue was bare at the time the 2nd and 3rd defendant purchased the property from the 1st defendant.

The plaintiff testified that he sank a borehole on the land. However, he could not produce evidence to that effect. DW3 testified that the

1st defendant told them that he drilled the borehole but he did not have the papers hence referred them to the drilling company. He testified that the papers bore the 1st defendant's name but his evidence in some respects bordered on hearsay evidence. DW1 also maintained that he sank the borehole. I am however, of the considered view that the existence of the borehole in itself could not amount to notice and the plaintiff has failed to show that he sank the said borehole.

On the totality of the evidence, I am of the considered view that there was no evidence that the 2nd and 3rd defendant had notice of the plaintiff's interest in the property. I am satisfied that the 2nd and 3rd defendant were bona fide purchasers for value of a legal estate without notice. I am guided by the decision of the Supreme Court in the case of **Zambia Consolidated Copper Mines v. Another and Chilongo**¹⁴ where they observed that there is no justification to inflict injustice on a third party in the name of doing justice for the appellant.

I therefore, dismiss the plaintiff's claim for cancellation of the 2nd and 3rd defendant's certificate of title. Further, as the land sold to

the plaintiff was a specific land which is properly vested in the 2nd and 3rd defendant, I cannot make an order of specific performance in relation to that Land. I therefore, find that this is an appropriate case where I can make an order for compensation. I therefore, order that the 1st defendant refunds the plaintiff the amount paid on the purchase price with interest from the date of writ to the date of Judgment at the short term deposit rate per annum and from the date of Judgment to the date the amount is paid at the current Bank of Zambia Lending rate. I further Order the 1st Defendant to bear the costs for the Plaintiff, and other defendants on account of his conduct in the transaction of this piece of land.

Leave to appeal is granted.

Delivered at Lusaka the.....^{for}.....day of July, 2020.



**MATHEW. L. ZULU
HIGH COURT JUDGE**