

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

2018/HP/1455

BETWEEN:

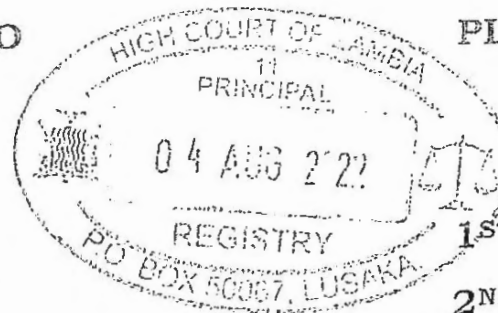
BISHOP EMMANUEL MILINGO

PLAINTIFF

AND

ZAMBIA HELPERS SOCIETY

DELUX DERICK CHILUMBU



1ST DEFENDANT

2ND DEFENDANT

BEFORE HON. JUSTICE ELITA PHIRI MWIKISA

FOR THE PLAINTIFF: MR C. BANDA (SC), MR B. KASOTE & MS. S. PHIRI
OF MESSRS CHIFUMU BANDA & ASSOCIATES
FOR THE 1ST & 2ND DEFENDANTS: MR M.C. SITALI OF MESSRS ELLIS &
COMPANY

JUDGMENT

Cases Referred To:

1. *Charles Kajimanga v Marmetus Chilemya* [2016] ZMSC 189
2. *Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & Others* (2005) ZR 138
3. *Hanif Mohammed Bhura (Suing pursuant to a Power of Attorney) v. Yusuf Ibrahim Issa Ishmail* Appeal No. 146/2013
4. *Attorney General vs. Marcus Kampumba Achiume* (1983) ZR 1
5. *Sablehand Zambia Limited v. Zambia Revenue Authority*
6. *Smith Sawila v Attorney General and Another* Appeal No.1 of 2019

7. *Anti-Corruption Commission v Barnnet Development Corporation Limited* (2008) 1 ZR 69
8. *Corpus Legal Practitioners v Mwanandani Holdings Limited* SCZ Judgment No.50 of 2014
9. *Charles Mambwe and Others v Mulungushi Investments Limited (in liquidation) and Another* Selected Judgment No. 36 of 2016
10. *Philip Mutantika and Another v Kenneth Chipungu* SCZ Appeal No.94 of 2012
11. *Joe's Earthworks and Mining Limited v Flame Promotions and Promoters and Another* 2017/HP/0262
12. *Lusaka West Development Company Limited and Others v Turnkey Properties Limited*
13. *Barclays Bank v ERZ Holdings Ltd and Others* (2012) ZMSC

This matter was commenced by way of writ of summons supported by a statement of claim dated 27th August, 2018. The amended writ of summons and statement of claim are dated 24th June, 2020. The Plaintiff pleaded that he is and was at all material times the registered owner of Subdivision B of Farm No. 456a, Lusaka and Subdivision C of Farm No. 456a, Lusaka, (hereinafter referred to as the properties) while the 1st defendant is a body corporate established under the Land (Perpetual Succession) Act, Chapter 186, of the Laws of Zambia. The Plaintiff's claim was that in about 2010, he was unlawfully expelled from the Board of the 1st defendant contrary to the Constitution of the 1st defendant. It was also pleaded therein that the 1st defendant also prepared and completed Deeds of Gift (deeds) relating to the properties without

the consent of the Plaintiff. The Plaintiff stated that the 1st defendant, without the authorization of the Plaintiff, registered the deeds on 5th May, 2003, and on 17th January, 2010.

That by virtue of his expulsion and the fraudulent transfer of his property, the Plaintiff commenced an action in the High Court to challenge the fraudulent deeds and the purported transfer of ownership of the properties to the 1st defendant.

The particulars of the fraud were as follows:

- (i) The Plaintiff did not sign the deeds that purported to transfer the property to the 1st defendant. The Plaintiff had no intention of gifting his properties to the 1st defendant.
- (ii) The 1st defendant, without the consent of the Plaintiff procured the preparation and execution of the deeds with the intention to deprive the Plaintiff of his property.

The Plaintiff further pleaded that unknown to the Plaintiff, the matter was referred to mediation and through a Mediation Consent Settlement Order dated 18th September, 2015, the 1st defendant and 2nd defendant executed the Mediation Consent Settlement Order, which stated that the properties would remain registered in the 1st defendant. The Plaintiff narrated that the Mediation

Consent Settlement Order further provided that the Plaintiff would remain as Trustee of the 1st defendant and would be granted accommodation in Woodlands with liberty to request that title to the house be registered in his name.

The Plaintiff pleaded that the 2nd defendant was not given any consent or authorization to settle the allegations and had no authority to act on behalf of the Plaintiff at the Mediation and that the 2nd defendant disguised himself as having authorization to represent the Plaintiff and the consequence of his presence and consent to the settlement resulted in the Plaintiff losing his properties to the 1st defendant. That in the premises, the Mediation Consent Settlement Order is null and void.

The Plaintiff now claims:

An order setting aside the Mediation Consent Settlement Order of 15th September, 2015, on grounds that the said settlement was made without the consent of the Plaintiff and the Plaintiff did not execute the said agreement; an order that the expulsion of the Plaintiff as Trustee of the 1st defendant is null and void; an order that the deeds of gift relating to the remaining extent of Subdivision B of Farm No. 456a, Lusaka and Subdivision C of Farm No. 456a, Lusaka are null and void because the said deeds were fraudulently

executed and registered; an order of cancellation of certificates of title relating to Subdivision B of Farm No. 456a and Subdivision C of Farm No. 456a, Lusaka on the grounds that they were registered on deed of gift procured by fraud; costs of and incidental to this action; and any relief that the Court may deem fit.

The 1st and 2nd defendants, on the other hand, entered conditional memorandum of appearance dated 10th September, 2018, and later a defence dated 11th October, 2018. The defendants averred that the Plaintiff was not the registered owner of the properties herein as they were under a deed of gift transferred to the 1st defendant by the Plaintiff himself. That the Plaintiff voluntarily gifted the properties to the 1st defendant. It was also averred that the issue of the deed of gift was at some point a subject of criminal investigations but that no one has ever been arrested for the same because there was no fraud as alleged.

The defendants averred that contrary to the assertion that the Plaintiff was at all times a Trustee and Chairman of the Board of the 1st defendant, the Plaintiff ceased to be a member of the 1st defendant having been so removed or expelled by the Board of the 1st defendant.

The defendants also denied the allegation that the 2nd defendant had no authority to sign for or on behalf of the Plaintiff as the authority was expressly given to him as well as to the Plaintiff's former advocates, Messrs O.M.M Banda and Associates. It was also averred that the Plaintiff is not in a state of mind to commence this action and that the defendants shall accordingly make an application to have the Plaintiff's mental state examined by qualified personnel. That on the basis of the forgoing, the Plaintiff was not entitled to the reliefs claimed.

When the matter came up for trial on 30th November, 2020, PW1, the Plaintiff herein, told the Court that he founded the 1st defendant and that he is currently still running it. PW1 testified that he also created the sisters of the Redeemer.

PW1 stated that the 1st defendant was autonomous and that it did not have any other trustees apart from him. In this vain, he stated that he knew Chiwara Phiri, the Chairman of the 1st defendant but that he did not know Majula (both Phiri and Majula signed as trustees on the deed of gift). PW1 referred to the deed of gift relating to the remaining extent of Subdivision C of Farm No. 456a, Lusaka, at page 10 of the Plaintiff's bundle of documents and testified that he did not remember giving the property to the 1st

defendant as a gift and further that he did not sign the said document as shown at page 14 of the Plaintiff's bundle of documents. Further that there is no signatory of the notary public on the same document.

In relation to the affidavit of confirmation of signature at page 22 of the defendants' supplementary bundle of documents, PW1 told the Court that the said affidavit is dated 7th April, 2011, and that he did not know anything about it. He testified that he did not recall Bertone signing the deed of gift. PW1 was referred to the letter at page 21 of the defendants' supplementary bundle of documents and testified that the said letter dated 21st July, 2010, shows that he questioned the validity of the deeds of gifts. Further that the said letter questioning the validity of the deeds was written before the affidavit of confirmation of signature dated 7th April, 2011.

PW1 also told the Court that the deed of gift at page 25 of the Plaintiff's bundle of documents is between the Plaintiff and 1st defendant and that it relates to the remaining extent of Subdivision C of Farm No. 456a, Lusaka. PW1 testified that he did not recall giving the said property as a gift. That the said deed was also

signed by Phiri and Majula as trustees but that the two were not trustees.

PW1 further testified that he was not aware of the Mediation Consent Settlement Order at page 30 of the Plaintiff's bundle of documents and that he was also not aware that the 2nd defendant signed on his behalf. PW1 also denied signing the gratuitous loan between him and the 1st defendant.

In relation to the expulsion, PW1 testified that he was never expelled from the 1st defendant except that he had multiple duties.

Under cross-examination, PW1 testified that he was never expelled from the 1st defendant. PW1 also testified that the 2nd defendant is his cousin. PW1 testified that he was not aware of the mediation settlement and that he did not remember the 2nd defendant signing a Mediation Settlement Order in his favour.

PW1 testified that he was ignorant of the email purported to have been from him dated 4th June, 2014, at page 3 of the defendants' bundle of documents. He however, conceded that he sent the email at page 22 of the defendants' bundle of documents to his then lawyer, Mr OMM Banda although he was still not aware of the mediation. PW1 testified that the 1st defendant did not illegally

obtain the farm from him and that he did not remember a meeting taking place on 17th December, 2002 at Auga Farm. When referred to the Minutes of the extra ordinary Board meeting held on 17th December, 2002, at Auga Farm, PW1 testified that he did not attend that meeting although his name appeared on those present at the meeting. That he has never chaired a meeting as the founding President of the 1st defendant. PW1 also stated that he did not recall uttering the words at page 16 paragraph 3.1.1 of the defendants' supplementary bundle of documents.

PW1 also told the Court that he did not know Cardinal Tarcisio Bertone and that he did not have personal dealings with him. In relation to the letter to Bertone at page 21 of the defendants' supplementary bundle of documents, PW1 testified that if he would prove it, he would. In relation to the affidavit of confirmation of signature, PW1 told the Court that it was the first time he was coming across the said document.

PW1 testified that he did not derive any benefit from the mediation settlement order. He also stated that he never maintained the services of OMM Banda as his lawyer and that he did not give OMM Banda any instructions to act on his behalf. Further that he has never gone to any meeting with the defendants and OMM Banda.

PW1 testified that he could not remember attending the urgent Board meeting on 16th June, 2016, as shown at page 25 of the defendants' supplementary bundle of documents. PW1 further stated that he did not remember whether those meetings took place or not.

In re-examination, PW1 testified that he did not attend any Court proceedings and further that the 2nd defendant did not show him the mediation order before signing it. In relation to the question whether the 1st defendant illegally got the farm from him, PW1 testified that he did not transfer ownership of the farm to the 1st defendant. That the email at page 3 of the defendants' bundle of documents is dated 4th June, 2014, which is a date earlier than the Mediation Consent Settlement Order at page 31 of the Plaintiff's bundle of documents which is dated 18th September, 2015.

PW1 testified that he challenged the affidavit of Bertone through his letter dated 21st July, 2010. Further that the said affidavit of confirmation of signature was sworn before a notary public.

PW2, Kafula Ng'andu, a peasant farmer from Mapepe, Chilanga, testified that he became a Board member of the 1st defendant in 2009. PW2 testified that at that time he became Board member,

the discussions the Board was having were related to land issues and amendments to the 1st defendant's Constitution; particularly Articles 6,7,17,26 and 28. That the said Articles were very crucial Articles to the powers of the Plaintiff so much so that if amended, the Plaintiff's powers would be removed as President of the 1st defendant. PW2 testified that the executive powers of the Plaintiff went to the Sisters of the Redeemer even though the said Sisters of the Redeemer were created by the Plaintiff.

PW2 also testified that one Joseph, a PAMO (an organisation which was sending funding to the 1st defendant) representative based in Italy, came back from Italy with a Deed of Gift to Zambia although the said Deed was not notarised in Italy. That Joseph then proceeded to amend the 1st defendant's Constitution when the Plaintiff was excommunicated by the Roman Catholic Church in Rome. PW2 testified that the 1st defendant is a non-denominational organisation and therefore did not belong to the Catholic Church. However, that Joseph was trying to have the Plaintiff removed from his position in the 1st defendant organisation on the basis of the excommunication. He also testified that when the Constitution was amended, the Plaintiff was expelled from the 1st defendant and

that this was confirmed by the extra ordinary General Meeting of 10th July, 2010. That the Plaintiff sued the 1st defendant in 2011.

PW2 told the Court that there are two portions of land at the 1st defendant. That one piece of land accommodates a school, hospital and supermarket while the other piece of land accommodates Auga Farm which is owned by the Plaintiff.

PW2 stated that the Deed of Gift at page 25 of the Plaintiff's bundle of documents is the one that was brought from Italy. He testified that the Plaintiff could not have signed the said Deed because at the time he had been in South Korea for three months. Therefore, that the signature on the Deed of Gift was forged.

Under cross-examination, PW2 testified that the Deed of Gift at page 25 of the Plaintiff's bundle of documents came from Italy although he did not have proof before Court that it did. When put to him that the said document was prepared by Mulungushi Chambers, PW2 maintained that the document was not signed in Italy and that it came with Joseph.

PW2 also conceded that he was not a handwriting expert to know whether the Plaintiff's signature was forged and further that he

was not given a report by a handwriting expert in relation to the said Deed of Gift.

PW2 also told the Court that he had evidence that the Plaintiff was in Italy when the document was signed but that the said document was not before Court. Further, PW2 conceded that he did not see Joseph hand the document to the Plaintiff but that the Board Chairman informed them to that effect and that he has the Minutes to that effect although the same are not before Court.

On the other hand, DW1, Derrick Delux Chilumbu, told the Court that the Plaintiff is his uncle. DW1 testified that he and the Plaintiff were corresponding through email from as far back as 2012-2013. It was DW1's evidence that he together with the Plaintiff's lawyers at the time, informed the Plaintiff, through email, that there were prospects of mediation to the case. DW1 testified that after the Plaintiff sent the email at page 22 of the defendant's bundle of documents, the Plaintiff's lawyers and the 1st defendant's lawyers drew up a Consent which DW1 signed on behalf of the Plaintiff. That the Plaintiff's lawyer also signed the Mediation Settlement Order on behalf of the Plaintiff while Chiwera Phiri and Counsel Kennedy Kaunda signed on behalf of the defendants. DW1 testified

that once the Mediation Settlement Order was signed, it was communicated to the Plaintiff.

DW1 went further to testify that after execution of the Mediation Settlement Order, there were a series of events; namely that the Plaintiff came back to Zambia to take up his position as the founder President. DW1 told the Court that the founder President held two meetings with the 1st defendant as shown by the Minutes dated 23rd July, 2016. That the Plaintiff was first on the attendance list and that DW1 was in attendance as nephew to the founder President.

DW1 testified that the Woodlands house is still in the possession of the Plaintiff and that it is particularly being held by his wife Maria although the title deeds are still in the name of the 1st defendant.

Under cross-examination, DW1 testified that he was asked to represent the Plaintiff although he did not attend any mediation proceedings but just signed the Mediation Settlement Order. He testified that he was not aware that the party or representative should be in attendance during mediation proceedings. It was DW1's further evidence that it was the obligation of the Plaintiff's lawyer to attend the mediation proceedings. That he signed the

Mediation Settlement Order because its contents were in the interest of the Plaintiff. DW1 told the Court that there was no Power of Attorney empowering him to sign the Mediation Settlement Order on behalf of the Plaintiff.

When referred to the Deed of Gift, DW1 testified that he could not state whether the Plaintiff was in Italy but that he recalled that the Plaintiff went to Korea. DW1 testified that according to the letter addressed to his Grace Bartone, the Plaintiff was in Korea in 2010 and not in Italy. DW1 testified that the Deed of Gift at page 29 of the Plaintiff's bundle of documents does not have a notary public to signify that it was signed outside jurisdiction. DW1 told the Court that the gratuitous loan for use at page 55 particularly in paragraph 3 shows that the Agreement was for an initial period of 3 years. DW1 testified that the Deed of Gift dated 27th January, 2010, shows that the 1st defendant was the tenant. That he was not aware whether the agreement was terminated or not.

In relation to the 1st and 2nd defendant's defence that the Plaintiff was not in a state of mind to commence the action, DW1 testified that that was just an opinion and that he did not tell his lawyers to say that in his defence.

DW2, Sister Prisca Mantega, told the Court that she is a Board Member of Daughters of the Redeemer and has been one from 2002 to 2009, and then from 2014, to the time of trial. She testified that in 2002, she attended the Board Meeting in which the Plaintiff indicated his desire to give his land to the 1st defendant as shown at page 4 of the defendants' supplementary bundle of documents. That the Plaintiff was in attendance as well as other Board Members. DW2 further stated that the purpose of the extraordinary meeting dated 2nd December, 2003, was to finalise the transfer of the title deed from the Plaintiff to the 1st defendant.

It was DW2's evidence that the deed at page 29 of the Plaintiff's bundle of documents was signed by Arch Bishop Bertone, the Plaintiff and Mr Majula. DW2 testified that she met Arch Bishop Bertone when he came to Zambia. She also stated that the affidavit of confirmation of signature of the Plaintiff shows that the Plaintiff signed the documents.

DW2 also told the Court that the 2nd defendant was at the core of the mediation and that he was there at the mediation and signed the mediation documents.

Under cross-examination, DW2 testified that she remembered the mediation process. She also stated that by 17th December, 2002,

the Plaintiff had not yet handed over the title deed. DW2 remained silent when asked where at page 5 paragraph 3 of the supplementary bundle of documents the plans from the 1st defendant were mentioned. That as at 2nd December, 2003, the land was in the hands of the 1st defendant. DW2 testified that the Plaintiff had certain apprehensions of issuing title deeds to two groups, the daughters of the redeemer and the brothers of St. John Baptist. That the title was given to the 1st defendant and that to hear that there were to be two title deeds between two groups caused apprehension in him which confirms that he gave the gift to the 1st defendant.

DW2 told the Court that she was not there when the Deed of Gift was signed and that it could have been in Zambia or Italy. That in 2002, 2003, the Plaintiff was in Rome and that she was not sure where he was at the time of the signing of the Deed of Gift.

DW2 also stated that the Deed of Gift at page 10 of the Plaintiff's bundle of documents is not dated and the stamp thereon is cancelled. Further that between the two deeds, the 2010 one was registered at Ministry of Lands.

It was DW2's evidence that the Affidavit of Confirmation of signature dated 7th April, 2011, was done long after the Plaintiff

had left the Church. She testified that it was not true that the Catholic Church wanted to grab the property from the Plaintiff and leave him destitute. DW2 stated that she was aware that the Plaintiff challenged the affidavit of confirmation of signature.

In re-examination, DW2 testified that the 2nd defendant is the key person in the whole process of mediation as he received a lot of correspondence from the Plaintiff instructing him (2nd defendant) to settle the matter outside Court.

I have carefully considered the pleadings, the evidence on record and the written submissions made by State Counsel, for the Plaintiff. The Plaintiff herein has alleged fraud and it is trite that the standard of proving an allegation of fraud is higher than the civil law standard of proof. In the case of **Charles Kajimanga v**

Marmetus Chilemya [2016] ZMSC 189¹, the Supreme Court held

that:

“An allegation of fraud must not only be clearly and distinctly alleged but it must also be clearly and distinctly proved by evidence. The standard of proving an allegation of fraud is higher than the civil law standard of proof.”

Therefore, the Plaintiff herein has a duty to prove his case on a standard higher than a mere balance of probability. I will first

consider the third and fourth claims raised, namely; an order that the deeds of gift relating to the remaining extent of Subdivision B of Farm No. 456a, Lusaka and Subdivision C of Farm No. 456a, Lusaka are null and void because the said deeds were fraudulently executed and registered; and an order of cancellation of certificates of title relating to Subdivision B of Farm No. 456a and Subdivision C of Farm No. 456a, Lusaka on the grounds that they were registered on deed of gift procured by fraud.

In relation to the claims above, the Plaintiff herein testified that he did not sign the deeds in issue. The Plaintiff referred the court to the letter to his eminence Cardinal Tarcisio Bertone dated 21st July, 2010, at page 21 of the defendants' supplementary bundle of documents and testified that he wrote the said letter. The said letter reads as follows:

"Your eminence,

Asking for your blessing. I am writing to bring before your eminence a serious matter. I just received copies of two 'Deeds of Gift' in which it is stated that I am giving away around 700 hectares of my land to the Zambian Helpers Society. Your eminence is mentioned as the witness of these two documents. I have never signed these documents and I do not remember having ever asked your eminence to be a witness.

The first document is dated 5th of October 2003 and the second document is dated 27th January 2010. I believe that in 2003, your eminence was Archbishop of Genoa, at which time it would have been difficult for me to see you since I was in

Rome. Furthermore, as I was in Korea in 2010, Your eminence and I could not possibly have signed these 'Deeds of Gift' from Italy, as mentioned in the documents.

Please assist me in clarifying this issue. I firmly believe that your eminence never signed the 'Deeds of Gift.' Unscrupulous people have taken advantage of my absence in Zambia to seek to appropriate my land. I need my land as I seek to develop it with the goal of assisting the poor and needy in Zambia."

This letter was not objected to by the defendants. In the case of

Anderson Kambela Mazoka & Others v Levy Patrick

Mwanawasa & Others (2005) ZR 138², the Supreme Court

stated that:

"Thus, in a case where a defence and or in our view, any matter not pleaded is let in evidence and not objected to by the other side, the Court is not and should not feel precluded from considering it. In our considered opinion, the Respondent having not objected to the evidence immediately it was adduced, this Court is not precluded from considering that evidence."

I therefore find that the said letter was sent to Cardinal Bertone showing that the Plaintiff herein as far back as 2010, was denying having signed the said deeds. The Plaintiff's testimony is consistent with his defence that at the purported time of execution of the said deed of gift on 27th January, 2010, he was in Korea as evidenced by the letter to the Commissioner of Lands dated 5th June, 2017, at page 34 of the Plaintiff's bundle of documents.

Furthermore, during cross-examination DW1, when referred to the deed of gift dated 27th January, 2010, testified that he could not state exactly whether or not the Plaintiff was in Italy but that he could recall that the Plaintiff went to Korea. This corroborates the evidence that during the time the deed of gift was being executed, the Plaintiff was in Korea as shown above. DW1 also conceded that since according to the letter to Cardinal Bertone, the Plaintiff was in Korea at the time of execution, the deed of gift was supposed to be notarized to signify that it was signed outside jurisdiction but that the one on record was not notarized. DW2 on the other hand, told the Court that she was not sure where the Plaintiff was at the time of signing of the 2010, deed of gift. This entails that the Plaintiff has provided evidence that he was not in Italy at the time of execution of the deed of gift while the defendants' witnesses are not certain where the Plaintiff was at that time. The defendants have thus not provided proof to disregard the Plaintiff's assertions. The defendants' evidence on this issue is mainly premised on the affidavit of confirmation of signature at page 22 of the defendants' supplementary bundle of documents as well as the Minutes of the meetings that the Plaintiff is alleged to have attended. A perusal of the affidavit of confirmation of signature, was dated 7th April, 2011.

This was about nine months after the Plaintiff sent a letter to Cardinal Bertone stating that he did not sign the documents.

A perusal of the affidavit of confirmation of signature, reads inter alia as follows:

"I Cardinal Tarcisio Bertone, resident in the Vatican City State, states as follows:

- 1. that my full names are TARCISIO BERTONE;**
- 2. that I reside in VATICAN CITY STATE;**
- 3. that I am a Cardinal of the ROMAN CATHOLIC CHURCH and I am the SECRETARY OF STATE of His Holiness Pope Benedict the 16th;**
- 4. that I am a citizen of the VATICAN CITY STATE**
- 5. that in February 2003 I countersigned as witness two documents being Deeds of Gifts to Zambian Helpers Society by the then Archbishop EMMANUEL MILINGO on the Remaining Extent of Subdivision B of Farm No. 456a Chipongwe, Lusaka and the Remaining Extent of Subdivision C of Farm No. 456a, Lusaka in Zambia which the then Archbishop EMMANUEL MILINGO signed;**
- 6. that the said EMMANUEL MILINGO signed the documents in my presence and in the presence of Cardinal GIOVANNI CHELLI and Father ENRICO PEPE at the Pontifical Council for Migrants and Itinerants at San Callisto Palace in Rome, Italy;**
- 7. that the contents of this my affidavit of confirmation of signature are true in every way."**

A scrutiny of the letter reproduced above shows that Cardinal Bertone deposed that in 2003, he countersigned, as a witness, two deeds of gifts in relation to the properties in issue. However, the evidence shows that only one of the two deeds was executed in 2003, while the other was executed on 27th January, 2010, but

both were alleged to have been signed by Cardinal Bertone. As shown, the affidavit of confirmation of signature, was drafted in 2011, but Cardinal Bertone in the said affidavit only referred to deeds of gifts signed in 2003, and there was no mention of the deed of gift signed in 2010, a year before he signed the said affidavit. Since the defendants have exhibited only two deeds of gifts dated 2003, and 2010, the question that comes to mind is therefore which other deed did Cardinal Bertone sign in 2003, as stated in the affidavit of confirmation of signature? The record does not show any other deed apart from one said to have been executed in 2003, and the other in 2010. It is therefore difficult to appreciate the evidence given in the affidavit of confirmation of signature, as it contradicts the evidence on record.

In addition, both deeds on record relate to only the remaining extent of Subdivision C of Farm No.456a Lusaka. This can be seen on the covers at page 10 and 25 of the Plaintiff's bundle of documents respectively. In fact, the Schedules at pages 13 and 28 of the same bundles are drafted in exactly the same terms. They are drafted in part, as follows:

"ALL THAT piece of Land in extent 180.3598 hectares more or less being The Remaining Extent of Subdivision C of Farm No. 456a situate in the Lusaka Province of the

Republic of Zambia which piece of land is more particularly delineated and described on Diagram Number 60 of 1956 EXCEPT and RESERVED all minerals oils and precious stones whatsoever upon or under the said land."

This schedule is describing the same land as both deeds are drafted in the exact same way even though the dates are 7 years apart. I thus find that the deeds of gift on record, alleging to transfer the two properties to the 1st defendant, only related to the Remaining Extent of Subdivision C of Farm No. 456a and did not include the Remaining Extent of Subdivision B of Farm No. 456a as alleged in paragraph 1 of the defendants' pleadings as well as the affidavit of confirmation of signature.

In the case of **Hanif Mohammed Bhura (Suing pursuant to a Power of Attorney) v. Yusuf Ibrahim Issa Ishmail Appeal No. 146/2013³**, the Supreme Court referred to the case of **Attorney General vs. Marcus Kampumba Achiume (1983) ZR 1⁴** at page 14 and stated that:

"Based on what has been discussed above I find that the Deed of Gift was not executed by the defendant as the purported donor. The plaintiff has thus failed to prove his case on the authenticity or validity of the Deed of Gift relied upon. On the other hand, the defendant has proved that the purported signature on the Deed of Gift did not belong to him in line with the expert evidence of PW3".

In the case of *Sablehand Zambia Limited v. Zambia Revenue Authority*⁵, SCZ Judgment No. 20 of 2003 it was held that:

1. "Where fraud is an issue in the proceedings, then a party wishing to rely on it must ensure that it is clearly and distinctly alleged.....

In casu the plaintiff has specifically pleaded fraud in his pleadings as evidenced at paragraph 8 of the statement of claim. In the *Hanif Mohammed Bhura* case, the Supreme Court found that the Learned Judge in the court below was on firm ground to order cancellation of the title deed and order rectification of the register in relation to the property in view of among other things that the court looked at the documents presented to it by the expert and came to its own conclusion. That it was not in dispute that the Appellant did not witness the execution of the deed of gift in issue, neither was the witness who is alleged to have witnessed the execution of the deed of gift, called as a witness and the doner did not testify.

In casu, however, the purported deed of gifts were executed by someone who had no Power of Attorney from the plaintiff, hence the said deeds of gifts having no legal effect as they were fraudulently executed and as testified by PW2 they were brought

by one Joseph from Italy and that the plaintiff was in Korea at that time such that he could not have signed them.

In relation to the other defence that the Minutes on record show that the Plaintiff herein desired to give his land to the 1st defendant, the defendants mainly relied on pages 4,10 and 16, of the defendants' supplementary bundle of documents. I note that the Plaintiff denied having been present at the said meeting even though the minutes show otherwise. PW2 infact told the court that the reason why the plaintiff was removed from the 1st defendant's Board is because he was excommunicated from the Catholic Church and that PW2 believed that the plaintiff's signature on the deeds of gift was forged even though he did not produce any evidence to that effect after being challenged that he was not a handwriting expert.

A perusal of the Minutes of the extra ordinary board meeting dated 17th December, 2002, at AUGA farm, shows that the Plaintiff was present. According to paragraph 3 of the said Minutes, the Plaintiff, in his address stated that he was ready to hand over the title deeds to the land in Chipongwe to the 1st defendant. The said Minutes in the same paragraph at page 5 of the said bundle show that the Plaintiff stated that he had agreed to transfer title deeds

of the farms to the 1st defendant and that the 1st defendant should let him know in advance the plans so that they could be analysed in line with the 1st defendant's philosophy of helping the poor. The Plaintiff was also said to have stated that care must be taken in distributing the said pieces of land. At page 10 of the said Minutes, at paragraph 7.4, it was stated that it was resolved that the transfer of the title deeds would not be effected until the Ndilila case had been settled.

The defendants also made reference to the Minutes of the extraordinary meeting held on 2nd December, 2003, particularly in paragraph 3.1.1 at page 16 of the defendants' supplementary bundle of documents where it was stated as follows:

"The President stated that he had certain apprehensions over the issuing of title deeds to the Sisters and Brothers. Firstly there was a question of moral entity, it was feared that ZHS as a moral entity directed by the Board may be overpowered by DOR and BJB who are personal appropriation.

The second question was how far would the DOR and BJB maintain the expectations of ZHS. What would they contribute to ZHS? What would ZHS gain from their presence? There was a possibility that they would aspire and work towards their own self-reliance at the expense of ZHS."

In paragraph 3.1.2 of the said Minutes it was stated as follows:

"in response to the Archbishop's sentiments, the following points were raised:

b) It was noted that the DOR and the Brothers were also foundations of the Archbishops who had a moral obligation over them and as such it was a humble appeal from the two congregations to be considered for title deeds.

3.1.3. "It was finally resolved that the Brothers and Sisters would be allocated land and title deeds upon putting in writing a pledge of their commitment to work with ZHS to the President copied to the ZHS Board."

It is clear from the said Minutes that the Plaintiff intended and agreed to transfer title to the 1st defendant. However, I am of the considered view that there were condition precedents which needed to be satisfied first before this could happen. This can be inferred from the paragraphs reproduced above. I note that some of the conditions therein were in relation to the Brothers and Daughters of the Redeemer (DOR) however this goes to show that before the Plaintiff could allocate the land, he needed to be satisfied that it was all to the benefit of the vision he had for the 1st defendant. DW2 conceded under cross examination that the plaintiff had certain apprehensions in issuing title deeds to the two groups, namely the DOR and Brothers of St John the Baptist.

Furthermore, in as much as the Plaintiff agreed or intended to transfer land to the 1st defendant, the 1st defendant has not produced any proof, apart from the purported deeds of gift, to show that the Plaintiff actually went through with the transfer. I find that according to the Plaintiff's evidence in the letter to Cardinal

Bertone and DW1's evidence that, the Plaintiff was in South Korea at the time the 2010, deed of gift was executed, meaning that the Plaintiff could not have been in Rome as suggested by the affidavit of confirmation of signature by Bertone. Furthermore, there is no deed of gift in relation to the Remaining Extent of Subdivision B of Farm No. 456a as shown above contrary to the pleadings as well as the affidavit of confirmation of signature.

In light of the reasons given above, I am of the considered view that the Plaintiff herein has proved on a higher standard of probability that the purported deeds of gift on record were fraudulently executed. Section 34(1)(c) of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia provides as follows:

"No action for possession, or other action for the recovery of any land, shall lie or be sustained against the Registered Proprietor holding a Certificate of Title for the estate or interest in respect to which he is registered, except in any of the following cases, that is to say:

(c) the case of a person deprived of any land by fraud, as against the person registered as proprietor of such land through fraud, or against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;"

The Supreme Court in the case of *Smith Sawila v Attorney General and Another Appeal No.1 of 2019⁶*, referred with approval to the case of *Anti-Corruption Commission v Barnnet*

Development Corporation Limited (2008) 1 ZR 53⁷ where it was held that while under Section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of land by a holder of a certificate of title, Under Section 34 of the Act, a certificate of title can be challenged and cancelled for fraud or for reasons of impropriety in its acquisition.

In the same case of **Smith Sawila v Attorney General and Another supra**, the Supreme Court also made reference to the case of **Corpus Legal Practitioners v Mwanandani Holdings Limited SCZ Judgment No.50 of 2014⁸**, and stated that in that case, it held that a person alleging fraud or any other impropriety, with regard to the issuance of a certificate of title, must challenge the same through a court action and prove the allegations of fraud or other impropriety, as the case may be, to obtain a Court order for the cancellation of the affected certificate of title by the Registrar of Lands and Deeds. In the case of **Smith Sawila v Attorney General and Another supra**, the Supreme Court also stated as follows:

"The only misdirection on the part of the learned Judge, which sadly for the appellant does not affect the outcome of the appeal, is that the judge, instead of ordering the

cancellation of the certificate of title, personally cancelled it.

As we said in the *Corpus Legal Practitioners* case, it was for the Registrar of Lands and Deeds to effect the actual cancellation of the certificate of title. Accordingly, we reverse the cancellation of the certificate of title. Instead, we make an order for the cancellation of the certificate of title for reasons of impropriety in its acquisition."

As guided by the Supreme Court in the case cited above, I accordingly order the cancellation of the certificates of title that were entered in relation to the properties in issue in the name of the 1st defendant, on account of fraud in their acquisition.

I will now move on to the first claim raised. The first claim made by the Plaintiff herein is for an Order setting aside the Mediation Consent Settlement Order on ground that the said settlement was made without the consent of the Plaintiff and that the Plaintiff did not execute it. The question herein is therefore whether or not the Plaintiff's Advocate then, had authority or consent of the Plaintiff to enter into the Mediation Consent Settlement Order that the Plaintiff is urging the Court to set aside.

The record shows a Mediation Consent Settlement Order relating to Cause 2014/HP/1384 between the Plaintiff and the Trustees of the 1st defendant. The Supreme Court in the case of *Charles Mambwe and Others v Mulungushi Investments Limited* (in

liquidation) and Another Selected Judgment No. 36 of 2016⁹,

had occasion to explain court annexed mediation. It stated as follows:

"It is by definition, a process by which a trial court refers the parties to a neutral third party called, a mediator, to help them resolve their dispute. The said neutral third party plays a facilitative role by merely providing a forum for the parties to explore options for settling their disputes. The process is party driven and as such, the parties structure the agreement that they finally come up with."

The Supreme Court in the same case went further to state that:

"On the other hand, the Rules on Court annexed mediation in Zambia, Under Order 31 of the High Court Rules, compel a party to attend before a mediator and any settlement reached is binding upon the parties and final. As such no appeal lies against such settlement...."

As such binding and final order, a mediation settlement order, signed by a mediator and the parties, marks the end of the proceedings. The order cannot be subject to appeal, interpretation or review, nor can the proceedings from which it arises be re-opened."

Order XXXI Rule 8 of the HCR provides as follows:

- (1) *"The parties shall attend mediation either in person or with a legal representative."*

Rule 16 of the HCR goes further to provide that:

- (1) *"The purpose of referring proceedings to mediation is to assist the parties reach an agreement in good faith on a fair and efficient resolution or partial resolution of their dispute."*

(2) In order to give effect to sub-rule (1), the parties to proceedings that have been referred to mediation shall participate in the mediation in good faith, and shall-
(b) make all reasonable efforts to attend every mediation session in person or through a legal representative....”

Pursuant to the above cited provisions, I am of the considered view that a mediation can be attended by the party or by the legal representative or both. Therefore, the Plaintiff's Advocate can represent the Plaintiff and sign to bind the Plaintiff. The argument in casu is that the mediation settlement was made without the consent of the Plaintiff and further that the Plaintiff did not sign the said Agreement. The said mediation settlement order at pages 30 to 31 of the plaintiff's bundle of documents was signed by the 2nd defendant for and on behalf of the plaintiff when in fact there was no Power of Attorney to enable the 2nd defendant act on behalf of the plaintiff. In fact, DW2 conceded under cross examination that the plaintiff did not sign the mediation settlement order as he was not around or present at the signing ceremony.

A perusal of the email at page 22 of the defendants' bundle of documents states as follows:

“Dear Dr. O. Banda.

Thank you for information.

I was 50 days in Italy. Came back just yesterday night.

Though I don't understand what is mediation, please let Mr Delax Chilumbu represent me at your advice."

The Plaintiff admitted to sending the said email. However, in cross-examination, the Plaintiff testified that he was still not aware of the mediation and further during cross examination stated that he never maintained the services of Dr Banda as his lawyer and that Dr Banda was never given any instructions to act on the Plaintiff's behalf.

In the case of **Philip Mutantika and Another v Kenneth Chipungu SCZ Appeal No.94 of 2012¹⁰**, the Supreme Court opined as follows:

"We, must re-iterate our position that a party who is represented by a lawyer is not excused from attending Court. In the case of Ram Auerbach vs Alex Kafwata, we observed that litigants have a duty to attend Court and that litigants default in attending Court at their own peril....

It is our further considered view that the Appellants should have been more concerned as their foremost duty and interest ought to have been the prosecution of their Appeal....

Although it has also been argued and spiritedly so, if we may say, that the Appellants should not be prejudiced by the default of their Counsel and/or his negligence or incompetence, our firm position has always been that the relationship between a party and his lawyer is of no concern of the Court as that is a private matter which has nothing to do with the Court. Hence, it cannot be used as a ground for ordering restoration of an Appeal that was dismissed due to the absence of the Appellants and their legal Counsel....

In July Danobo T/A Juldan Motors vs Chimsoro Farms Limited, we took the position that if at all the Appellant would suffer any prejudice by the stand that we took of dismissing the Appeal, then he may have recourse to his legal Counsel who did not handle his appeal properly...it is up to them to seek recourse from their legal Counsel."

Pursuant to the above case, it is a cardinal principle of our legal practice that a lawyer is the alter ego of their clients. Thus, the relationship between a party and their lawyer is private and of no concern to the Court. However, in the case of **Joe's Earthworks and Mining Limited v Flame Promotions and Promoters and Others** 2017/HP/0262¹¹, my learned sister, Justice Newa cited the case of **Lusaka West Development Company Limited and Others v Turnkey Properties Limited**¹² as follows:

"Although, quite clearly, the authority of counsel conducting litigation cannot be regarded as limitless when it comes to negotiating a compromise or a settlement and although Counsel would in the ordinary course, take instructions from the client, we are satisfied that in this case counsel did have the authority of the Managing Director of the third Appellant who equally had ostensible authority on behalf of the third Appellant to give instructions to Counsel."

Judge Newa then went on to state that:

"What can be taken home from that case, is that the authority of Counsel in conducting litigation on behalf of a client, cannot be regarded as limitless once they have been retained, and therefore Counsel is required to take instructions from the client. In this case, the evidence shows that DW1 as

Counsel for the Plaintiff had to take instructions on what was to be agreed upon in the Consent Order, as can be seen from the e-mail at page 4-5 of the Plaintiff's bundle of documents.

...Therefore to state that by reason of ostensible authority, the 2nd Defendant, should not be held liable would be unjust. The case of *Neale v Gordon Lennox* referred to by the Plaintiff in its submissions, shows the Court's disapproval or rejection of a principal being bound by unauthorised acts of learned Counsel. The Court in that matter also expressed its displeasure at Counsel acting against its client's instructions."

Although the matter in casu is not on all fours with the **Joe's Earthworks case supra**, I am of the considered view that the email at page 22 of the defendant's bundle of documents, shows that there was a lawyer-client relationship between the Plaintiff and his then lawyer, Dr Banda. I however, do not think that the email amounted to Counsel getting instructions from the Plaintiff in relation to the mediation. It is clear that the Plaintiff stated that he did not know what mediation was and asked that the 2nd defendant represents him at Dr Banda's advice. I am of the considered view that Dr Banda still needed to get instructions from the Plaintiff on what was to be agreed upon in the said settlement order because it was going to be binding on the Plaintiff. The Plaintiff has argued that the said settlement order was made without his consent and no evidence has been produced by the defendants to rebut the said assertion. In the case of **Charles Mambwe and Others v**

Mulungushi Investments Limited (in liquidation) and Another
Supra, the Supreme Court had this to say:

"As regards the objective or rationale for court annexed mediation...It also ensures that the parties have resort to a process in which they play a major role in structuring their settlement in accordance with terms and conditions they can abide by."

Further as shown above, Order XXXI of the HCR provides that the purpose of referring parties to mediation is to assist the parties reach an agreement in good faith on a fair and efficient resolution of their dispute. That in order to achieve this, the parties to the mediation are mandated to participate in the mediation in good faith. Without instructions on how to proceed with the mediation, I find that an agreement that is fair could not be reached.

Further, I am mindful of the law that the Mediation Settlement Consent Order cannot be subject to appeal, interpretation or review, nor can the proceedings from which it arises be re-opened. Even if I were to find that the Plaintiff herein did give consent or authority to his Lawyer to act as an agent on his behalf in the said settlement, I would still hold the view that the agreement in relation to the property in issue be set aside due to fraud perpetuated by the defendants. I therefore find that the plaintiff has proved fraud in the case in casu.

I am of the considered view that the principles applicable to a Consent Judgment are applicable to a Mediation Consent Settlement Order. A Consent Order can only be set aside on grounds of fraud, illegality, misrepresentation and other factors that vitiate a contract and pleadings in such instances are not only desirable but necessary. In the case of *Barclays Bank v ERZ Holdings Ltd and Others* (2012) ZMSC¹³ the Supreme Court stated:

“It is trite that a party seeking to set aside a Consent Judgment has to commence a fresh action. In addition, a party seeking to impugn a Consent Judgment has to establish that the Consent Judgment was obtained by fraud or that that party was not a party to those proceedings.”

In this case, a fresh action was commenced to set aside the Mediation Consent Settlement Order. I am therefore of the considered view that this case is peculiar in that the property subject of the Mediation Consent Settlement Order herein, was fraudulently acquired as highlighted earlier in the judgment. As such, it will not be in the interest of justice to allow the property fraudulently acquired from the Plaintiff, to remain registered in the 1st defendant's names. It is on this basis that I order that the

Mediation Consent Settlement Order of 15th September, 2015, be and is hereby set aside.

The second claim raised by the Plaintiff was for an order that the expulsion of the Plaintiff as trustee of the 1st defendant was null and void contrary to the constitution. The Plaintiff pleaded that he was unlawfully expelled from the Board of trustees of the 1st defendant contrary to the Constitution. The defendants on the other hand, pleaded that the Plaintiff ceased to be a member of the 1st defendant a long time ago having been expelled by the Board of the 1st defendant. However, during examination in chief and cross-examination, the Plaintiff herein testified that he was never expelled by the 1st defendant. PW2 however, testified that the plaintiff was expelled from the Board of the 1st defendant after the constitution was amended and that this was after the plaintiff was excommunicated from the Catholic Church. DW2, under cross examination maintained the position that the plaintiff was still President of the 1st defendant's Board. In view of the above, I order that the expulsion of the plaintiff as trustee of the 1st defendant is null and void, as there were contradictions in DW2's testimony under cross examination, in that she mentioned that the plaintiff was still the President of the 1st defendant's Board, whereas the

defendants pleaded in paragraph 3 of their defence that the plaintiff ceased to be a member of the 1st defendant a long time ago having been so removed or expelled by the Board of the 1st defendant.

All in all, the Plaintiff succeeds in all his claims as stated in his statement of claim for the reasons already mentioned above.

I award costs to the plaintiff to be taxed in default of agreement.

Leave to appeal is granted.

Dated at Lusaka the 4th day of August, 2022

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ELITA P. MWIKISA
HIGH COURT JUDGE