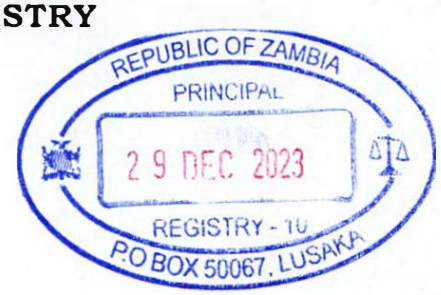
IN THE HIGH COURT FOR ZAMBIA **2017/HP/0758**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(*Civil Jurisdiction*)



BETWEEN:

SIMATAA SUNDANO	**1ST PLAINTIFF**
WILSON MAZYOPA	**2ND PLAINTIFF**
COLLINS KUPAPAALA	**3RD PLAINTIFF**

AND

JUDITH SATA	**1ST DEFENDANT**
MUHAMMED SHABIR AHMED LULAT	**2ND DEFENDANT**

BEFORE THE HONOURABLE MRS. JUSTICE M. C. KOMBE

For the Plaintiffs:	*Ms. C. Mweemba & Mr. M. Kalifungwa- Messrs. Thandwe Legal Practitioners*
For the 1st Defendant:	*Mrs. I.M. Kunda, SC – Messrs. George Kunda & Co.*
For the 2nd Defendant:	*Mr. R. Ngulube – Messrs. Tembo Ngulube & Associates.*

J U D G M E N T

Cases referred to:

1. **Pilcher v. Rawlins [1872] 7 Ch. 259.**
2. **James Mbewe and Potati Malunga v. James Mwanza (2012) 2 Z.R. 87.**
3. **Moses Milambo (Administrator of the estate of Alfred Siandavu) and one other v. Florence Mweemba (CAZ Appeal No. 009/2020).**

4. Jane Mwenya and another v. Paul Kapinga (1998) Z.R. 17.
5. Edith Nawakwi v. Lusaka City Council and another (Appeal No. 26 of 2001).
6. Trans-Continental Limited and Andrew Robb v. Donald McIntosh and Eric Routledge (SCZ Appeal No.126/2012).
7. Stickney v. Keeble (1915) AC 386.
8. Wesley Mulungushi v. Catherine Bwali Chomba (2004) Z.R. 96.
9. Gideon Mundanda v. Timothy Mulwani and The Agricultural Finance Co. Ltd and S.S.S. Mwiinga (1987) Z.R. 29.
10. Zambia Consolidated Copper Mines v. Katalayi and Chilongo (2001) Z.R. 28.
11. Finance Bank Zambia Limited and Rajan Mahtani v. Simataa (SCZ Appeal 11/2017).
12. Zambia National Building Society v. Ernest Mukwamataba Nayunda (SCZ No. 11 of 1993).
13. Construction and Investment Holdings Limited v. William Jacks and Company Zambia Limited (1972) Z.R. 66.
14. Sobek Lodges Limited v. Zambia Wildlife Authority-2008/HP/668.
15. Philip Mhango v. Dorothy Ngulube and Others (1983) Z.R. 61.

Leaislation and other material referred to:

1. Bryan A Garner, Black's Law Dictionary.
2. The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.
3. Ng'ambi S.P and Chungu C. Contract Law in Zambia (2nd Edition) Juta and Company, 2021.
4. Mudenda F.S, Land Law in Zambia: Cases and Materials, UNZA Press, 2007.

The Plaintiffs claim against the Defendants the following reliefs:

1) *A declaration that the Plaintiffs are bonafide purchasers and owners of 5 acres of the land situate at Farm No.396a/A/1/M/1, Lusaka in the Lusaka Province of the Republic of Zambia.*
2) *An order for the cancellation of the Certificate of Title with respect to Farm No. 396a/A/M/1 held by the 2nd Defendant.*
3) *An order of specific performance of the agreement for the sale of 5 acres of Farm No.396a/A/M/1 by the 1st Defendant.*
4) *Damages for breach of contract against the 1st Defendant.*
5) *Any other relief as the court deems fit.*
6) *Interest*
7) *Costs.*

1. INTRODUCTION

In the statement of claim that accompanied the writ of summons the Plaintiffs averred that they were joint purchasers of five (5) acres of land situate at Farm No.396a/A/1/M/1, in Lusaka from the 1st Defendant.

The 1st Defendant was the title holder and owner of Farm No.396a/A/M/1, measuring ten (10) acres situate in Lusaka while

the 2nd Defendant was the purported purchaser of the land situate at Farm No.396a/A/1/M/1.

It was averred that in or about 2011, the Plaintiffs herein entered into a contract for the sale of a portion of the property situate at Farm No.396a/1/M/1, Lusaka with the 1st Defendant herein. The initial agreement was for the sale of three (3) acres of land which was subsequently increased to five (5) acres at the purchase price of K50,000.00 per acre. This was following the advice given to the Plaintiffs by their then advocates Messrs. Chilupe and Permanent Chambers that the Lusaka City Council would not permit the sub-division of land which was less than five (5) acres. It was mutually agreed between the Plaintiffs and the 1st Defendant that the Plaintiffs would purchase an additional two (2) acres of land at the purchase price of K50,000.00 per acre.

A written contract was subsequently executed between the Plaintiffs and the 1st Defendant for the sale of the said piece of land and it was agreed that payment for the said land would be made in instalments between 2011 and 2013. The total consideration of K205,000.00 was paid to the Plaintiff, pursuant to the contract of sale.

The Plaintiffs further averred that the initial acreage of land owned by the 1st Defendant was ten (10) acres. At the time of the execution

of the contract of sale, the 1st Defendant did not possess a Certificate of Title with respect to the said piece of land and it was therefore agreed between the Plaintiffs and the 1st Defendant that the subdivision of the five acres would be done once the Certificate of Title with respect to the said land was obtained and the balance of the purchase of price would be paid once the cadastral survey diagrams for the sub-division had been obtained by the 1st Defendant. The purchasers in addition paid K14, 404.00 for legal fees, survey diagrams and state consent fees bringing the total amount paid to K219,404.00.

The Plaintiffs averred that unknown to them, the 1st Defendant had proceeded to obtain the Certificate of Title with respect to the said land. The 2nd Defendant then purportedly proceeded to purchase the entire ten (10) acres of land from the 1st Defendant notwithstanding the Plaintiffs rights to the land and without carrying out a thorough due diligence process.

Further, in or about November, 2016 the Plaintiff learnt from their advocates Messrs. Chilupe and Permanent Chambers that the Certificate of Title with respect to the said land had been obtained from the Ministry of Lands in or about 2015 and released to the 1st Defendant. The Plaintiffs subsequently contacted the 1st Defendant

who confirmed receipt of the Certificate of Title from Messrs. Chilupe and Permanent Chambers to effect the subdivision of the Plaintiffs five (5) acres.

The Plaintiffs then made several follow ups with the 1st Defendant for the Certificate of Title which yielded no results. On a subsequent visit to the land, the Plaintiffs found a sign for the sale of the said piece of land and discovered that it was in fact the 2nd Defendant that had placed the sign.

A search at the Ministry of Lands was then conducted which showed that the land was registered in the name of the 2nd Defendant. The Plaintiffs contacted the 1st Defendant who offered to refund them the monies paid plus interest and other related costs. As a result, the Plaintiffs had suffered loss and damage.

The 1st Defendant filed her Defence in which she denied the contents of paragraph 1 of the statement of claim and averred that she did not consent to the sale of five (5) acres of the land. With regard to paragraph 3 of the statement of claim, she averred that the 2nd Defendant purchased the property after having paid the full purchase price.

She averred that sometime in February 2011 she borrowed K10,000.00 from her friend by the name of Gertrude Shanzi which was to be repaid within a month. She failed to pay on time and the said Gertrude Shanzi told her that she had added interest and that the 1st Defendant would have to pay her the sum of K45,000.00 instead of K10,000 which she had borrowed. Gertrude Shanzi introduced her to the 1st Plaintiff Simataa Sundano as a money lender. The 1st Plaintiff requested for security and was informed by Gertrude Shanzi that the 1st Defendant had a plot which she could give as security. The 1st Plaintiff had explained to the said Shanzi that the property had been acquired by the 1st Defendant's husband who had title put in her name as he was leaving the country for further studies at the material time.

It was averred that the 1st Plaintiff informed the 1st Defendant that he did not work alone and that his friends would also add some money to pay the required amount which by then had come to K45,000.00. She averred that the K50, 000.00 was given to Gertrude Shanzi who got K45, 000.00 for herself and gave her K5, 000.00 to give to the 1st Defendant.

Due to desperation, she was made to sign documents acknowledging payments which were made in small amounts purported to be

payments towards the purchase of the premises in issue. The total amount paid in instalments was K205, 000.00 and the Plaintiffs added a sum of K295, 000.00 as interest and demanded for the refund of K500, 000.00. The 1st Defendant was made to sign an agreement with regard to the refund of K500, 000.00 on 24th January, 2017.

She denied the contents of paragraph 5 and 6 of the Statement of claim and averred that the initial acreage to be given to the Plaintiffs was one (1) acreage and later increased to two (2) acres.

She denied the contents of paragraph 7 and 8 of the statement of claim and averred that she was made to sign the said agreement believing that the acreage was two 2. That since there was a dispute regarding the premises, the Plaintiffs decided to exercise their option of demanding for the refund of the amounts paid in accordance with a clause in the said agreement.

Further, that the total amount given to her was K205,000.00 and not as alleged. She admitted paragraphs 12 and 13 of the statement of claim and averred that she sold the premises to the 2nd Defendant for value with the view of refunding the Plaintiffs the amounts owed to them.

The 1st Defendant confirmed receipt of the Certificate of Title but denied that she was in the process of instructing lawyers to effect the subdivision of the Plaintiffs five acres.

The 1st Defendant denied paragraph 20 of the statement of claim and that the Plaintiffs were owners of the five acres of land. She also denied that they were entitled to an order for specific performance of the agreement for the sale of five acres of Farm No.396a/A/1/M/1 or for an order of cancellation of the Certificate of Title issued in respect of the said property held by the 2nd Defendant.

In the 2nd Defendant's Defence and counter claim filed into Court, he averred that he was the legal and beneficial registered owner of the subject property known as subdivision No.1 of Subdivision M of subdivision No.1 of Subdivision Farm No.396a, Lusaka.

Regarding paragraph 12 of the statement of claim, he averred that he conducted a search at the lands and Deeds Registry prior to purchasing the subject property and the same revealed that the 1st Defendant obtained the original Certificate of Title in her name on 16th March, 2012.

He admitted the contents of paragraph 13 of the Plaintiff's statement of claim in so far as it stated that he purchased the entire ten acres

of land from the 1st Defendant, but vehemently denied that he did not conduct a thorough due diligence process.

He added that not only did he conduct a search at the Lands and Deeds Registry, but that he also had sight of the Certificate of Title and carried out a physical inspection of the subject property prior to purchasing the same. The physical inspection established that the subject property was for the 1st Defendant and this was fortified by the presence of a caretaker for the 1st Defendant who only vacated the premises, after it was purchased by the 2nd Defendant.

He averred that the Plaintiffs in their prudent quest to protect their purported interest should have lodged and registered a caveat upon discovering that the 1st Defendant had collected the original Certificate of Title from their mutual Advocates, Messrs. Chilupe and Permanent Chambers.

That the Plaintiffs and the 1st Defendant subsequently executed an agreement dated 24th January, 2017, wherein the 1st Defendant agreed to refund the Plaintiffs the part payment of the consideration of the price which she received together with interest thereon, which total sum translated to K500, 000.00.

The Plaintiffs entered into a written agreement with the 1st Defendant dated 24th January 2017, wherein it was agreed that the 1st Defendant would refund the Plaintiffs the part payment of the consideration price together with interest. The total amount agreed to be refunded by the 1st Defendant was K500,000.00.

Further, by an undated letter from the Plaintiffs' advocates, a written demand was made against the 1st Defendant for the payment of the said K500,000.00 together with other damages arising from breach of contract, which totaled the sum of K730,000.00.

When he was about to enter into a contract of sale of the subject property with prospective purchasers, namely, Noman Patel and Nabeel Patel at the consideration price of United States of American Dollars Two Hundred and Ten Thousand (USD 210,000) only, that was when he discovered that the Plaintiffs had wrongly registered a caveat on the subject property. As a result, the prospective purchasers, by their advocates letter dated 4th April, 2017, withdrew from the proposed purchase of the subject property, thereby causing the 2nd Defendant suffer loss and damage.

In the premises, the 2nd Defendant had suffered special damages in consequence of the Plaintiffs having wrongly registered a caveat on the subject property.

Particulars of special damages

1) *Loss of business and /or profits to be assessed by the Deputy Registrar.*
2) *Refund of legal fees paid to the 2nd Defendant's advocates for work done in the sum of K20,000.00 for the aborted conveyancing transaction.*

The 2nd Defendant therefore counter-claimed for the following reliefs:

1) *An order for removal of caveat wrongly registered by the Plaintiffs against the subject property.*
2) *Special damages for loss of business and or profits to be assessed by the Deputy Registrar.*
3) *Refund or legal fees paid to the 2nd Defendant's Advocates for work done in the sum of K20,000.00 for the aborted conveyancing transaction.*
4) *General damages for mental torture, distress and embarrassment.*
5) *Any other relief the Court may deem fit just and equitable in the circumstances.*
6) *Interest on any damages found due and costs.*

The Plaintiffs filed into Court a Reply and Defence to the counter claim in which it was averred that they were the owners of five acres of the property situate at Farm No.396a/A/1/M/1, Lusaka.

Regarding paragraph 5 of the counterclaim, the Plaintiffs averred that they purchased five acres of the property situate at Farm 396a/A/1/M/1, in or about 2011 and way before the 2nd Defendant acquired any interest therein. That the caveat was therefore rightly registered against the said property when the Plaintiffs discovered the 2nd Defendant purported interest therein, having acquired their interest in five acres before the 2nd Defendant.

In relation to paragraphs 6 and 7 of the counter claim, the Plaintiffs averred that following the discovery of the 1st Defendants purported sale to the 2nd Defendant of the property herein, the 1st Defendant undertook to refund the Plaintiffs the monies paid for the purchase of the said land, with interest, failing which the Plaintiffs would retain their rights to the said property.

The Plaintiffs denied that the 2nd Defendant had suffered any loss or damage as alleged or at all.

2. PLAINTIFFS EVIDENCE

At the hearing, the Plaintiffs' first witness **PW1** was **SIMATAA SUNDANO** a Business man aged forty-two (42) years of Plot 29539 Chalala, Woodlands in Lusaka.

His testimony was that he was in Court because the 1st Defendant sold his land to the 2nd Defendant Mr. Mohammed which he bought from her in the year 2011. The said land was in Makeni and measured five acres. He was introduced to the 1st Defendant by a lady called Gertrude Shanzi and that at the time he was told that the 1st Defendant was selling three acres of land in Makeni at K50,000.00 per acre. He got interested and contacted his friends, the 2nd and 3rd Plaintiffs who also got interested. They decided to buy the land jointly. The 1st Defendant informed them that the documentation relating to the said land was with her lawyers Messrs. Chilupe and Permanent Chambers.

Within the same period, they met at the firm together with the 1st Defendant, the 2nd Plaintiff and the 3rd Plaintiff in the presence of Mr. Lungu from Messrs. Chilupe and Permanent Chambers who confirmed the documentation. He showed them ten acres drawing and explained that they would still need to delink that land from the parent title and then subdivide it. They also agreed that Mr. Lungu would act for him and the other Plaintiffs and also the 1st Defendant

and that the parties would meet their own costs. It was also agreed that a sale agreement would be drawn upon the purchaser paying 50% to the 1st Defendant. The agreed purchase price for three acres was K150, 000.00. They also agreed that they were free to make first payment to the 1st Defendant by cash and the 1st Defendant had to acknowledge all the payments given to her.

He paid the first payment of K75, 000.00 to the 1st Defendant in instalments in April and she acknowledged receipt. Then he also paid K20, 000.00 in April and a K5, 000.00 in May making a total of K25, 000.00.

He stated that the acknowledgement agreement had a narration which explained the purpose of the payment and that there was a part for acknowledgement by 1st Defendant and a witness. The instalment payments were three for K75,000. Upon that payment they contacted the lawyers so that the contract could be signed. It was signed on 11th April, 2012. The witness identified the acknowledgements in the Plaintiffs bundle of documents.

He further told the Court that prior to signing of the sale agreement, they also paid legal fees. In September 2007 they paid K7, 900.00 and on actual day when they signed the agreement they paid K6, 000.00 to Messrs. Chilupe and Permanent Chambers.

After the contract was signed the said firm promised to keep them updated on the subdivision through correspondences. The first correspondence was in January, 2012, then March, 2012 and November 2012. The firm urged them to continue making payments for as long as they were acknowledged and documentation was kept.

He further told the Court that there was a variation to their agreement in that when the lawyers contacted Ministry of Lands Surveyor Generals office, he was advised that the land could not be subdivided below five acres. They were advised to increase the acreage to five which they did at the price of K50,000. 00 per acre. This meant that they had extended payment. They continued making payments up to 2015. Out of the K250,000.00 sale price, they paid K205,500.00 and also paid legal fees, survey fees totaling to K14,404.00 so the total payment was K219,204.00

In 2016, they went to see their lawyer from the firm, to inform him that they had made a considerable payment and to find out how far they had gone with processing of title. He requested for proof of payment. In a letter dated 30th September, 2016 they indicated how much they had paid. He acknowledged receipt and wrote to the 1st Defendant for her confirmation and she also confirmed in a letter.

He stated that they asked the lawyers to go ahead with the subdivisions. They were told that the title had been processed in the name of the 1st Defendant sometime back and that he could not go ahead and subdivide their five acres because the 1st Defendant and her husband collected the title for safe keeping and promised to bring it back.

They were later informed by their lawyer that he had called for the title and the 1st Defendant responded in writing with a copy to them that she had enclosed the title. However, the lawyer denied having received the title.

Around early January 2017, the lawyers called for a meeting between the vendor and the purchasers. In that meeting, the 1st Defendant revealed that she and her husband had sold the property. Upon hearing that, lawyers excused themselves that they could no longer represent them in that transaction and advised that they seek independent legal representation. They were also given options of remedies they had.

PW1 told the Court that they engaged the 1st Defendant and she offered to compensate them with interest. She offered to pay K500, 000.00 refund plus interest within a period of twenty- eight (28) days. They accepted the offer with condition that she made the payment

failure to which they would commence legal action. The agreement was communicated to Messrs. Chilupe and Permanent Chambers in writing. An agreement for settlement was drawn up which was signed by the 1st Defendant, 2nd Plaintiff and the 3rd Plaintiff.

After 28 days lapsed, the Plaintiffs contacted the 1st Defendant. She told them that she was unable to pay as the husband had used all the money. They issued the 1st Defendant with a demand notice of seven (7) days when she failed to respond. A report was also made to the Police Service Headquarters Anti-Fraud.

PW1 testified that they went with the police to Makeni and found a poster that the land was for sale. They called the sales agent and after meeting the sales agent they called the 2nd Defendant. The police summoned the 1st and 2nd Defendant to their offices at Force Headquarter. The 1st Defendant did not attend the meeting but the husband, Mr. John Chanda was present. The 2nd Defendant in that meeting explained how he acquired the land and showed documentation. He stated that he had never met the 1st Defendant personally but he dealt with Mr. Chanda in all the transactions and that he paid a payment through a company owned by the 1st Defendant's husband Company called Delta Tracking.

After that, they did a search at Registrar of Companies and they found that Mr. Chanda was a Director and Shareholder of Delta Tracking. He explained that they placed a caveat on the property and decided to take court action.

PW1 denied the counter- claim by the 2nd Defendant because the land in question was their land long before he bought the land. Therefore, any damages which he claimed should be on 1st Defendant because she was the one who sold him their land.

During cross examination by State Counsel Mrs. I. Kunda, on behalf of the 1st Defendant, he told the Court that he had known Gertrude Shanzi a year before the incident happened. PW1 denied having known Gertrude Shanzi by virtue of being a money lender and that he had never been a money lender. He stated that he was not aware that the 1st Defendant had obtained a loan of K10, 000.00 from Gertrude Shanzi. He came to know Gertrude Shanzi because she had sold him a plot in Woodlands, Chalala before and that she was the one who introduced him to the 1st Defendant.

He further told the Court that the first payment was received by the 1st Defendant and that she was with Gertrude Shanzi. For the other payments, the 1st Defendant would sometimes go with her relatives,

one of them was Kenya Chibesakunda. The other payments she would collect them on her own.

In relation to the documents at pages 1 -2 of the Plaintiffs' bundle of documents, he stated that Gertrude Shanzi signed as a witness on his behalf and the 1st Defendant. That even on page 10 of the Plaintiffs' bundle of documents, it was Gertrude Shanzi who had signed as witness for both parties.

On page 1 and pages 10 to 11, 23 to 27 the acknowledgments were for 1 acre each. On pages 28 and 29, they were for 2 acres each. On page 30 it was for 7th June, 2014. He explained that at page 31, the acknowledgement was 1 acre in respect of the 3rd Plaintiff, page 32 for two acres dated 21st June, 2014 and page 33 for two acres in respect of the 2nd Plaintiff.

In further cross examination he told the Court that he bought the plot jointly with his colleagues and that he was the one who used to prepare the documents of acknowledgement on behalf of the 2nd and 3rd Plaintiff. That the agreement for sale on page 16 of the Plaintiffs bundle of documents was prepared for all parties and that they were supposed to pay K150, 000.00.

He told the Court that he paid the K150, 000.00 when the agreement was signed, leaving a balance of K75, 000.00. He stated that the letter at page 40 of the 1st Defendant's bundle of documents dated 16th November, 2016 was from Messrs. Chilupe and Permanent Chambers, addressed to him and he admitted that there was a balance outstanding.

He explained that when they went to the lawyers, and upon discovering that the land was sold, they were disappointed and were given three options. The first option was to demand a refund of money with interest, the second one was to seek legal redress and the third to report the matter to the police for criminal action. The 1st Defendant pleaded and offered to refund the money with interest and the parties agreed on condition that she did not default. He stated that this agreement was reduced to writing as shown by the document at page 37 of the 1st Defendant's bundle of documents. The 1st Defendant was the one who offered the Plaintiffs to refund and that was why she acknowledged.

In further cross examination he told the Court that the acknowledgement of debt was not as a result of the letter at page 37. That letter at page 37 was addressed to Messrs. Chilupe and Permanent Chambers after they had agreed and they advised the

lawyer that the 1st Defendant undertook to pay in two equal instalments and that they did not mention taking of possession of the property.

He admitted that he was the one who placed a caveat on the property sometime on 24th March, 2017 before he commenced Court proceedings and after he failed to receive the money after the demand. He stated that they did not consult the 1st Defendant about placing a caveat but they consulted legal minds and this was after they became aware that it had been sold to a third party. That they did so to protect their interests.

When cross examined by learned counsel Mr. Ngulube, PW1 confirmed that the contract of sale was executed on 11th April, 2012, and not 2013. He identified the agreement for sale at pages 16 to 33 of the Plaintiffs bundle of documents. That the date of 9th October, 2013 was not the correct date, it was inserted by the lawyer. He added that they were not aware that by 9th October, 2013, the original title had been issued to the 1st Defendant, they only discovered later.

He further identified the Lands Register at page 44 of the Plaintiffs bundle of documents relating to the same subject property. He confirmed to the Court that according to entry No.2 in the Register, the Certificate of Title had already been issued by 16th March, 2012.

That prior to the 2nd Defendant purchasing the property, they did not place a caveat and there were no entries in the Register which suggested that the Plaintiffs had an interest in the property.

He told the Court they were not at liberty to place a caveat and they were ably represented by a lawyer but it was clear there was no title. That what they knew was that there was a parent title and the 1st Defendant had started the process of obtaining title and that they would be updated. The lawyers never explained to the Plaintiffs why they had not placed a caveat and if they had placed a caveat it would have been difficult for the 2nd Defendant to buy the property.

In further cross- examination, PW1 stated that when they bought the property, they did not put up a structure or appoint a caretaker to keep the property because the land had not yet been demarcated.

By 17th January, 2017, Messrs. Chilupe and Permanent Chambers had excused themselves from acting for the Plaintiffs but they had an interest in matter and that the firm acknowledged that the sale of the property had aborted. The letter on page 41 of the 1st Defendants bundle of documents was addressed to Messrs. Chilupe and Permanent Chambers and copied to the Plaintiffs where the 1st Defendant had acknowledged that the sale had aborted.

The witness further stated that the acknowledgement of debt on page 42 of the bundle of documents came after the sale had aborted and that it made reference of a refund of K500, 000.00. He stated that he had however not included the K500, 000.00 refund as a claim because the agreement was breached and in arriving at that agreement, they put a condition that if she breached, they would go to Court.

He stated that they could not sue her for a refund because they agreed not to do so as per letter at page 39 of the Plaintiff's bundle of documents. That the 1st Defendant owed them land and not money.

He confirmed that the caveat was placed after the property had been sold to the 2nd Defendant and that he was aware that at the time they placed a caveat, the 2nd Defendant was about to sell the property to a third party. The witness confirmed that the document at page 25 of the 2nd Defendant bundle of documents was a proposed sale. He admitted that as a result of the caveat, the proposed buyers refused to agree with the transaction.

In relation to page 12 of the 2nd Defendants bundle of documents, he stated that the document was an assignment for 1st Defendant to 2nd Defendant and the price at which the 2nd Defendant bought the property was K1, 460,000.00. He admitted that the 2nd Defendant

was going to make profits looking at the price at which he was going to sale the property. He also agreed that since the agreement between the 2nd Defendant and Patel did not proceed, the 2nd Defendant did not benefit. However, he denied that the liability to pay was on the Plaintiffs for having placed the caveat.

In re-examination, he explained that initially, each Plaintiff was supposed to get one acre and that upon advice from the Surveyor General's Office, he bought an extra acre to make two and the 2nd and 3rd Plaintiffs remained with one acre.

Regarding the payments, he told the Court that the 1st and 2nd Plaintiffs would contact the 1st Defendant when they raised the money and the money would be paid and the 1st Defendant would acknowledge receipt. He told the Court that they did not pay the whole amount because it was agreed that the balance be paid upon transfer of title of the property.

That marked the close of the Plaintiffs case.

3. THE DEFENDANTS' EVIDENCE

The Defendant's first witness **DW1** was **JUDITH MUSONDA SATA** aged forty-eight (48) years old, a housewife of Plot 11769 Olympia Extension in Lusaka.

Her testimony was that in February 2011, she borrowed a K10, 000.00 from her friend Gertrude Shanzi. She was unable to pay back the money within one month and her friend put interest on it, which came to K20, 000.00. The friend told her that she had a pressing issue and so she was introduced her to PW1 who was a money lender.

When they went to PW1's office at Ridgeway Campus, she told her that PW1 was interested in buying the land that she had. That Gertrude knew about the land because she also stayed in Makeni where the land was located. At the office, Gertrude waited to get money from PW1 and they discussed the issue of the land. PW1 then told her that he could pay K50, 000.00 per acre. She was selling the land at K80, 000.00 per acre. She agreed to get the money because Gertrude had even shifted from her place and was staying with her. PW1 gave her K50, 000.00 and Gertrude got a K45, 000.00. She remained with K5, 000.00.

She explained that PW1 told her that he had two friends whom he did business with and so he could not buy the land alone. PW1 introduced his two friends to her the following month. PW1's friends

stated that they would pay through PW1 but she was not sure how much they had paid. She used to sign for each payment and she would indicate the person who paid and the amount paid.

She identified the acknowledgements of receipt of payment in the 1st Defendant's bundle of documents. At pages 13 to 30, the acreage was one and two and there was nowhere here it was indicated five acres.

She further stated that when her husband came, he told her that there was someone who wanted to buy the land in Makeni. That she had never taken the Plaintiffs to the same land and that at the time the Plaintiffs were buying the land, it had no title until 2013. The title was held by the person they had bought the land from as he had obtained a mortgage. She stated that she did not tell the husband about the Plaintiffs until after sometime and that he did not tell her about the person who wanted to buy the land either until later.

The 1st Defendant testified that she was told to go and sign documents at Messrs. Tembo Ngulube and Company. That was when she knew the buyer as Mr. Mohammed Lulat, the 2nd Defendant. They signed the contract of sale and the acreage was ten (10).

After that, she informed PW1 that the land had been sold. She had told her husband that the Plaintiffs had paid the money after they

signed the contract of sale but she could not remember when exactly they signed. The Plaintiffs asked for a refund but she could not remember when.

She also stated that the document dated 24th January, 2017 at page 34 of the Plaintiffs bundle of documents was an acknowledgement of debt of K500, 000.00 which document must have been prepared by Messrs. Chilupe and Permanent Chambers because it was only taken to her for signing by PW1. The amount came to K500,000.00 because they told her that she had taken time to give them the documents and she agreed.

She identified the demand for a refund dated 10th February, 2017 at page 33 of the Plaintiffs bundle of documents and that she did not pay the increased amount of K500,000.00. The failure to pay was the reason why she was brought to Court. That the agreement at page 34 referred to the abortive sale, which meant that she had to refund them as the land had not been sold to them.

During cross examination, DW1 told the Court that Messrs. Chilupe and Permanent Chambers acted for her and the Plaintiffs in the transaction for the sale of the land. She did not dispute any of the documents from the law firm which had been exhibited in the bundle of documents.

She further stated that she signed a contract of sale between herself and the Plaintiffs on 9th October, 2013 as at page 7 of the 1st Defendant's bundle of documents. She further signed an acknowledgement of debt at page 34. That the land she sold to the Plaintiffs measured four acres, each acre cost K50, 000.00 and she received K205, 000.00.

She confirmed that she was the registered owner of the property and before it was sold to the 2nd Defendant, she had never met him. That she accompanied her husband who was a Director in Delta Trucking to Messrs. Tembo Ngulube and Associates. However, she was not sure how much the 2nd Defendant paid for the sale as the money was paid in her husband's Company account. She admitted that there was no evidence before Court that she gave the instructions for the money to be paid in her husband's account. That she did not refund the Plaintiffs after money was received from the 2nd Defendant.

She further stated that she signed the contract with the 2nd Defendant on 20th May, 2015 but continued to exchange letters between the Plaintiffs and Messrs. Chilupe and Permanent Chambers as if title had not been obtained but she was aware that she could not sale the same piece of land to two people.

When cross examined by counsel Ngulube, she told the Court that she had agreed to refund the Plaintiffs the sum of K500, 000.00. However, there was no claim for a refund of that amount by the Plaintiffs.

In re-examination, she explained that the contract of sale was prepared in 2013 but it was not witnessed.

On the allegation that she was corresponding with the law firm after signing the contract of sale with the 2nd Defendant, she told the Court that the correspondence referred to was dated 2011 and the contract of sale was dated 2015.

DW2 was **MUHAMMED SHABIR AHMED LULAT,** a property Developer in Real Estate Business aged fifty-eight (58) years old of House No. 397A, Kafue Road in Makeni.

He told the Court that sometime in May, 2015 an agent took him to a piece of land in Makeni. He liked the place and enquired from the caretaker who the owner of the land was. He was told it belonged to the Chanda family. There was a simple structure for the caretaker and a small poultry farm. The witness identified the said structure at page 38 of the 2nd Defendants bundle of documents. The caretaker

told him that Mr. Chanda had been away in America and recently returned.

He stated that the agent organized a meeting with Mr. Chanda the following day somewhere near Leopards Hill Cemetery. When they met Mr. Chanda, he showed him the Certificate of Title bearing Judith Sata's names. Mr. Chanda told him that Judith was his wife and would have no objections signing any documents relating to the piece of land. After discussions, they agreed on the sale at the price of US$200,000 for ten (10) acres which came to K1, 460,000.00.

He further told the Court that they agreed to use one lawyer for the transaction, Messrs. Tembo Ngulube and Associates and that legal fees would be paid by the 2nd Defendant. A day or so later, they met at the said law firm and agreed that a draft contract of sale be drawn.

He explained that he carried out a search at the Lands and Deeds Registry which revealed that there was no caveat registered on that property and that the title was in Judith Sata' s names. He identified the search for the land at page 2 of the 2nd Defendant's bundle of documents. He then proceeded to instruct Messrs. Tembo Ngulube & Associates to proceed with the contract of sale and both parties signed on 20th May, 2015. He identified the contract of sale at pages 3 to 9 of the 2nd Defendant's bundle of documents. He paid the

contract price almost immediately via different cheques to Delta Tracking Company as per contract of sale.

After he paid the purchase price, the Certificate of Title was issued to him and vacant possession was given immediately. He stated that the document at pages 17 to 22 of the 1st Defendant's bundle of documents confirmed that title was in Muhammad Shabir Ahmed Lulat's name.

Sometime early in 2017 he decided to use an agent to sell the same property. The agent put up a poster on Makeni Road. Sometime in March, 2017 two brothers namely Nabeel Patel and Norman Patel showed interest in the property. Unfortunately, as they were showing interest, he received a call from the Police Headquarters, Fraud Squad. Two days later he got a call out and went to Police Headquarters with his Certificate of Title. He gave a few details of the transaction and the police could not do much because title was in his name.

He testified that the two brothers were represented by Messrs. Christopher Russel and Co. They agreed to draw a draft contract of sale and the agreed price was US$200,000. He identified the contract of sale and stated that the brothers changed lawyers to Solly Patel. He later received a bomb shell from the Patels that there was a caveat

registered on the property and Solly Patel wrote to Mr. Tembo Ngulube. He identified the said letter at page 31 of the 2nd Defendant's bundle of documents. Upon receipt of the letter, he called Mr. Chanda and told him about the caveat. He also identified the caveat at page 1 of the 2nd Defendant's bundle of documents.

He also identified the document at page 33 of the 2nd Defendant's bundle of documents which was a letter from his lawyer to Messrs. Thandwe Legal Practitioners. He stated that to his knowledge, the caveat had not been removed.

He stated that he filed a counter claim against the Plaintiffs seeking relief as he was about to sign a contract with potential buyers which resulted in loss of business of US$10,000. He explained that he could not proceed with any transaction and was seeking removal of the caveat. When he purchased the property, he did his due diligence and there was no caveat by the Plaintiffs in 2011.

He further told the Court that the title for Judith Stata was issued on 16th March, 2012 and the Plaintiffs' caveat was placed on 24th March, 2017. That he would not have entered into a contract if there was a caveat registered.

In cross examination, he told the Court that the first time he met Judith Sata was at the time of execution of the contract. He did not conduct a search regarding the Directors and Shareholders of Delta Trucking. Even if he did not conduct a search, he proceeded to make payment in Delta Tracking because that was what they had agreed.

There was no re-examination and that marked the close of the 2nd Defendant's case.

4. SUBMISSIONS

The parties filed written submission which I have taken into account when arriving at this decision. I will not replicate what is in the submissions suffice it to mention that I will be referring to them as and when it is necessary.

5. FINDINGS ON PLAINTIFFS CLAIMS

This dispute relates to a portion of the property situate at Farm No.396a/A/1/M/1. The Plaintiffs herein seek a declaration that they are bonafide purchasers and owners of five acres of the land situate at Farm No.396a/A/1/M/1 Lusaka in the Lusaka Province of the Republic of Zambia. Therefore, they seek an order of specific

performance of the agreement and for the cancellation of the Certificate of Title held by the 2nd Defendant.

The 2nd Defendant on the other hand contends that he is the legal and beneficial registered owner of the subject property in extent of ten (10) acres. That prior to purchasing the property, he conducted a search at the Lands and Deeds Registry which revealed that the 1st Defendant obtained the original Certificate of Title in her name on 16th March, 2012.

In his counter claim, he therefore claims *inter alia* for an Order for removal of the caveat wrongly placed by the Plaintiffs against the subject property, special damages for loss of business and profits and a refund of the legal fees paid to the 2nd Defendant's advocates for the work done in the sum of K20,000.00 for the aborted conveyancing transaction.

From the evidence on record, the following facts are not in dispute:

(i) The 1st Defendant entered into an agreement with the Plaintiffs for the sale of a portion of land at Farm No.396a/A/1/M/1, Lusaka on 9th October, 2013.

(ii) The Plaintiffs paid K205,000.00 towards the purchase of the said property.

(iii) The 1st Defendant also entered into an agreement with the 2nd Defendant on 20th May, 2015 for the sale of ten (10) the same property that was sold to the Plaintiffs.

In this regard, the question I have to determine is who is the owner of property No.396a/A/1/M/1, Lusaka?

The Plaintiffs claim is premised on the agreement that they entered into a binding contract with the 1st Defendant for the sale of the property. While the Plaintiff does not dispute that she entered into an agreement with the Plaintiffs, she disputes that it was for five acres but for four acres.

According to the Plaintiffs, the initial agreement was for the sale of three (3) acres of land which was subsequently increased to five (5) acres at the purchase price of K50, 000.00 per acre. That this was as a result of the advice given to them by their advocates Messrs. Chilupe and Permanent Chambers at that time that Lusaka City Council would not permit the sub-division of land which was less than five acres.

In terms of the evidence, PW1 stated that the parties agreed to purchase three acres. The first payment of K75, 000.00 was paid in instalments to the 1st Defendant who acknowledged receipt. That

K20, 000.00 was paid in April and a K5, 000.00 in May making a total of K25, 000.00.

After they were advised to increase the acreage to five, the agreement was varied and this meant that the payment was extended. They then continued making payments up to 2015. Out of the K250, 000.00 sale price, they paid K205, 000.00. With legal costs and survey fees, the total paid was K219, 204.00.

He also stated that the documents at page 1, 10, 23, 24, 25, 26, 27, 30 and 31 were acknowledgments for one (1) acre each. At pages 28 and 29, 32 and 33 they were for two (2) acres each. The aggregate of the acreage was five (5) acres when considered. That the remaining balance to be settled was K25, 000.00 which was to be settled on exchange of title deed as per sale agreement.

As I have stated, the 1st Defendant has disputed the acreage sold. She contends that she believed the agreement was for one (1) acre which was later increased to two (2) acres and not five (5) acres as alleged.

In her evidence in Court during cross examination she stated that the land she sold to the Plaintiffs was measured four (4) acres, each acre cost K50, 000.00 and she received K205, 000.00

It is clear from the above evidence that there are disparities on the exact acreage that was sold to the Plaintiffs. In one breath, the 1st Defendant contends that she only agreed to sell two acres to the Plaintiffs and in another breath, she admitted that she sold four acres of land to the Plaintiffs at the price of K50,000.00 and admitted to have received K205,000.00 for the supposed sale of the four acres.

In resolving this disparity, I have carefully considered the evidence adduced by PW1. He stated that the acknowledgement agreement had a narration which explained the purpose of the payment and that there was a part for acknowledgement by the 1st Defendant, the purchaser and a witness. That the payments in installments were made in three instalments for K75, 000.00. Upon that payment they contacted the lawyers to go and sign the sale agreement which was signed on 11th April, 2012.

I have carefully looked at all the acknowledgement receipts signed by the 1st Defendant and they all include a narration of the purpose of the payment. The receipts at pages 28, 29, 30, 32 wherein the purchaser was the 1st Plaintiff, the acreage indicated was two (2) and not one (1) and for the receipt at page 33 for the 2nd Plaintiff, the acreage was also two (2) and not one (1).

In this regard, I do not accept the 1st Defendant's allegation that she was made to believe she was signing only for two acres as the acreage on whose account the payment was being made were clearly stated in the receipt.

It was PW1's further evidence that after signing the contract, Messrs. Chilupe promised to keep them updated on the subdivision through correspondences. The first correspondence was in January 2012, then March 2012 and November 2012. The firm urged them to continue making payments for as long as they were acknowledged and documentation was kept.

He told the Court that in 2016, they went to see their Lawyer at the firm to inform him that they had made a considerable payment and to find out how far they had gone with processing of title. He requested for proof of payment of which in a letter dated 30th September, 2016 they indicated how much they had paid. He acknowledged receipt and wrote to the 1st Defendant for her confirmation which he also confirmed in a letter.

This evidence is supported by the letter at page 34 of the Plaintiff's bundle of documents in which the Plaintiffs indicated they had concluded payments to the 1st defendant for the five (5) acres and

were remaining with a balance of K25, 000.00 to be settled on exchange of title deed as per sale agreement.

In her letter dated 22nd November, 2016 at page 37 of the Plaintiffs bundle of documents, the 1st Defendant writing to Messrs. Chilupe and Permanent Chambers advised that the position regarding the payments by the purchasers was correct and was in line with their letter dated 30th September, 2016. As stated, in that letter, the Plaintiffs had also indicated the acreage as five (5) and not three (3) and she did not raise any objection to the acreage indicated therein.

It is for this reason that I accept the evidence of PW1 and I find that:

(i) The parties initially agreed to the purchase of three (3) acres of land.

(ii) The acreage was increased to five (5) acres of land and not four (4) as contended by the 1st Defendant.

(iii) The Plaintiffs in total paid an amount of K205,000.00 as shown in the document at page 38 of the Plaintiffs bundle of documents and the balance outstanding was K25,000.00.

Having made the above findings, I shall proceed to consider whether the Plaintiffs are entitled to the reliefs sought in the statement of claim.

1. *An Order of Specific Performance.*

The first relief sought by the Plaintiffs is a declaration that they are the bona fide purchasers of the property in question and also an order for an order for specific performance because they contend that the 1st Defendant agreed to sell the property in question to them and she had not fulfilled her obligation. They also seek an order to cancel the 2nd Defendant's Certificate of Title.

The 1st Defendant on the other hand has argued that the Plaintiffs are not entitled to this relief as the agreement between them was aborted or repudiated.

The 2nd Defendant's defence is also that the Plaintiffs are not entitled to this relief because he is a bona fide purchaser for value of the property in issue.

In view of the Defence by the 2nd Defendant, I find it prudent to consider whether the there is merit in the defence raised by the 2nd Defendant as the success or failure has a bearing on the reliefs sought by the Plaintiffs.

What then does this doctrine of bona fide purchaser for value without notice entail?

The learned authors of Black's Law Dictionary define '*bonafide purchaser for value without notice*' at page 1430 as:

> **"Someone who buys something without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities claims, or equities against the seller's title; one who has in good faith, paid valuable consideration for property without notice of prior adverse claims."**

The essential features of a bona fide purchaser for value without notice as laid out in **Pilcher v. Rawlins** (1) have been analyzed in a plethora of cases including the case of **James Mbewe and Potati Malunga v. James Mwanza** (2). The said features can be summarized as follows. A purchaser must:

a) **Act in good faith**
b) **Be a person who acquires an interest in property by grant rather than operation of law;**
c) **Have given value for the property;**
d) **Generally, have obtained the legal interest in the property; and,**
e) **Have had no notice of the equitable interest at the time he gave his consideration for the conveyance."**

It is clear from the above that a bonafide purchaser for value must have had no knowledge of prior interests in the property. According

to the Court of Appeal in the case of **Moses Milambo (Administrator of the estate of Alfred Siandavu) and one other v. Florence Mweemba** [3], it is for the person raising the defence that he is a bonafide purchaser for value without notice to assume the burden of proving that he paid the purchase price in good faith without notice actual or constructive of the other party's claims.

In terms of actual and constructive notice, Fredrick S. Mudenda, the learned author of the book entitled Land Law in Zambia: Cases and Materials stated at page 246 the following:

> **(a) Actual Notice – A purchaser has actual notice of all matters that have been brought to his attention but not facts that have come to his attention by way of rumours.**
>
> **(b) Constructive Notice- A purchaser is under obligation to undertake full investigation of title before completing his purchase. He can only plead absence of notice if he made all usual and proper enquiries. If he does not do so or is careless or negligent, he is deemed to have constructive notice' of all matters he would have discovered.**

It was further stated that:

> **"A person has constructive notice of all facts of which he could have acquired actual notice had he made those inquiries and inspections which he ought reasonably to have made, the standard of prudence**

being that of a man of business under similar circumstances. The purchaser should inspect the land and make inquiries as to anything which appears inconsistent with the title offered by the vendor." (Underlining mine for emphasis only)

The learned authors of Cheshire's Modern Law of Real Property explained one of the objectives of investigating title as follows:

"One object of investigating title is to discover whether the land is subject to rights vested in persons other than the vendor, and the equitable doctrine of notice orders that a purchaser is bound by any right which he would have discovered had he made the ordinary investigations as sketched above. Again if he fails to make inquiries of third persons who happen to be in possession of the land, he is affected with the notice of all equitable interests held by them as for example, an option to purchase the fee simple that has been granted to a lessee already in possession."

In this regard, the Supreme Court in the case of **Jane Mwenya v. Paul Kapinga** [4], found the purchaser not to be a bona fide purchaser for value without notice because when then the purchaser visited the premises, he found the respondent in possession of the property. This should have put the purchaser on inquiry as a prudent purchaser. He therefore had constructive notice and when he purchased the

property, his purchase was subject to the respondent's title or rights of the respondent.

Thus in the case of **Edith Nawakwi v. Lusaka City Council** (5), the Supreme emphasized the importance of making inquiries as prudent purchaser when it stated that:

> **"Ms. Nawakwi ought to have made inquiries and to have visited the place before going ahead with the purchase. She deliberately or carelessly abstained from making inquiries that a prudent purchaser would have made. Purchasing of real property cannot be taken as casually as purchasing household goods."**

Applying this doctrine to the 2nd Defendant, I have considered the pleadings and evidence adduced. In paragraph 5 of his Defence he averred that he conducted a search at Lands and Deeds Registry prior to purchasing the subject property and the same revealed that the 1st Defendant obtained the original Certificate of Title in her name on 16th March, 2012.

He further averred in paragraph 7 that not only did he conduct a search at the Lands and Deeds Registry but he also had sight of the original Certificate of Title and carried out a physical inspection of the subject. That the physical inspection established that the subject

property was for the 1st Defendant and this was fortified by the presence of a Caretaker for the 1st Defendant who only vacated the premises after he purchased it.

The evidence to support this assertion is that in May, 2015 an agent took the 2nd Defendant to a piece of land in Makeni. He liked the place and enquired from the Caretaker who the owner of the land was. He was told it belonged to the Chanda family. There was a simple structure for a Caretaker and a small poultry farm.

He told the Court that the agent organized a meeting with Mr. Chanda the following day somewhere near Leopards Hill Cemetery. That when they met, Mr. Chanda showed him the Certificate of Title bearing Judith Sata's names and Mr. Chanda told the 2nd Defendant that Judith was his wife and would have no objections signing any documents relating to the piece of land. After discussions they agreed on the sale at the price of US$200,000 for ten (10) acres which came to K1,460,000.00.

He explained that he carried out a search at the Lands and Deeds Registry which revealed that there was no caveat registered on that property and that the title was in Judith Sata' s names. He identified the search for the land at page 2 of the 2nd Defendant's Bundle of Document. He told the Court that he proceeded to instruct Messrs.

Tembo Ngulube & Associates to proceed with the contract of sale and both parties signed on 20th May, 2015.

During cross examination, no questions were put to the 2nd Defendant to challenge his evidence on how he conducted his due diligence in relation to the subject property. This piece of evidence therefore remains unchallenged.

I therefore find the evidence of DW2 relating to how he conducted his due diligence to be reliable and I find no reason to discount it.

From the evidence adduced therefore, it is clear that at the time the 2nd Defendant purchased the property, he was unaware of the Plaintiffs' claims relating to the subject property because the search at the Lands and Deeds Registry revealed that the 1st Defendant was the owner of the property. The results were in tandem with what Mr. Chanda told him that the title was in his wife's name.

While the Plaintiffs contend that there was no proof that the 1st Defendant was the wife to Mr. Chanda and no inquiry in relation to the actual owner of the property, the view I hold is that the argument would have carried some force if the 2nd Defendant never dealt with the 1st Defendant and if the contract was signed by another person other than the 1st Defendant. That would have put the 2nd Defendant

on an inquiry to investigate who the actual owner was and whether there were other persons who had claims on the property. However, the evidence is that he met the 1st Defendant and she was the one who executed the contract.

In addition, when the 2nd Defendant physically visited the plot, he was told by the caretaker that the land belonged to the Chanda's. If there was any adverse interest on the land, the caretaker would have known and the 2nd Defendant would have been put on notice in that regard. However, from the evidence adduced by the 1st Plaintiff, he admitted that he had not visited the plot physically and that they never registered a caveat on the property as intending purchasers. The 1st Defendant also stated that she never took the Plaintiffs to see the property.

Given the foregoing, it would have been difficult for the 2nd Defendant to have had any reason to suspect that there was to be an adverse claim or that he had actual or constructive notice that there were other persons who had interest in the land.

For these reasons I find that the 2nd Defendant has discharged the burden that he is bonafide purchaser for value without notice as the ingredients of proving the same have been satisfied.

What then is the effect of this finding?

As I have earlier stated, the Plaintiffs seek specific performance of the contract.

The learned author of the Black's Law Dictionary, defines specific performance at page 432 as follows:

> **"The rendering, as nearly as practicable, of a promised performance through a judgment or decree; specify, a court - ordered remedy that requires precise fulfilment of a legal or contractual obligation when monetary damages are inappropriate or inadequate.... In essence, the remedy of specific performance enforces the execution of a contract according to its terms ...."**

It is clear from the foregoing definition that the remedy of specific performance requires the enforcement of a contract according to its terms.

In this regard, the Supreme Court in the case of **Trans-Continental Limited and Andrew Robb v. Donald McIntosh and Eric Routledge** [6], held that:

> **"...specific performance is equitable relief given by the court against a defendant the duty of doing what he**

agreed by contract to do... the availability of the remedy of specific performance does not of itself import the existence of some equitable interest; all it imports is the inadequacy of the common law remedy of damages in the particular circumstances."

Regarding the granting of the relief for specific performance, it was stated in the case of **Stickney v. Keeble** [7] that:

"Indeed, the dominant principle has always been that equity will grant specific performance if under all the circumstances, it is just and equitable to do so."

In **Wesley Mulungushi v. Catherine Bwali Chomba** [8] the court held that:

"The court will decree specific performance only if it will do more perfect and complete justice than the award of damages."

I am further alive to the decision of the Supreme Court in the case of **Gideon Mundanda v. Timothy Mulwani and The Agricultural Finance Co. Ltd and S.S.S. Mwiinga** [9] where the Supreme Court adopted the view that damages cannot adequately compensate a party for breach of a contract for the sale of an interest in a particular piece of land or of a particular house, however ordinary. It was therefore the Court's view that the remedy of specific performance

should always be preferred to damages ***unless the circumstances of the case make it inappropriate to grant such remedy*** (underlined for emphasis).

Further in the case of **Zambia Consolidated Copper Mines v Katalayi and Chilongo** (10), the Supreme Court refused to grant the relief of specific performance to the Respondents because there was an innocent third party who had overriding interests in the land. The Court held as follows:

> **"It was not possible without basis to ignore the rights of an innocent purchaser for value and who had no reason to suspect there was to be an adverse claim."**

It is evident from the foregoing that the remedy of specific performance renders as nearly as practicable the execution of the contract according to its terms. However, in the present case, while the contract of sale between the 1st Defendant and the 2nd Defendant was entered into after the Plaintiffs had executed the contract with the 1st Defendant, the 2nd Defendant proceeded to obtain title to the land in question before the Plaintiffs. Title had already passed to him.

Therefore, if the order of specific performance is granted, it would mean ordering that vacant possession of the subject property be

given to the Plaintiffs as per the terms of the contract of sale. However, I have found that the 2nd Defendant is a bonafide purchaser for value without notice. This make an order for specific performance impossible to attain. It is therefore my considered view that granting an order for specific performance would be inappropriate considering the circumstances of the case.

It is also worthy to consider the contention by the 1st Defendant that the Plaintiffs are not entitled to specific performance because the parties agreed to abort the initial contract. In other words, it is submitted that the contracted had been repudiated by the 1st Defendant when she communicated that the property in issue had been sold to the 2nd Defendant and this was accepted by the Plaintiffs when they agreed to be refunded the money in the amount of K500,000.00.

According to the learned authors of Contract Law in Zambia, a breach of contract occurs if:

> **"A party to a contract without lawful cause fails or refuses to comply with their obligations or perform what is due from them under the contract or performs their obligations in a defective manner. It may also occur where one party to a contract fails to comply with the terms of the contract."**

The same authors further state that where the breach is of a fundamental condition or where the term is central to the contract and renders the contract meaningless, the other party is entitled to repudiate their obligations under the contract. Repudiation may be of the whole and the party who is a victim of the breach has choices available once it is discovered that the contract will be breached. It is thus stated by the same authors that:

> **"The victim of the breach may continue with the contract and sue for damages, or repudiate their own obligations under the contract or indeed both repudiate and sue for damages... Where the party chooses to accept the repudiatory breach, they are entitled to terminate the contract. This election to accept the repudiation discharges the contract as it terminates. An act of accepting the repudiation requires no particular form. Evidence of an unequivocal overt act which is inconsistent with the subsistence of the contract may also be construed as acceptance of the repudiation and an indication that the innocent party intends to bring the contract to an end."** (Underlining mine for emphasis only).

What is discernable from the foregoing is that acceptance of the repudiation must be clear and communication of the acceptance is crucial. It is only after there has been communication by the innocent

party that the party in default will not be bound to perform the obligations.

Given the above exposition of the law, the evidence by PW1 was that in 2017 when they went to their lawyers to inform them that they had paid a substantial amount, the lawyer called for a meeting between the 1st Defendant and the Plaintiffs and in that meeting, the 1st Defendant informed them that her husband had sold the property to another person. Upon hearing that, the lawyer excused himself and stated that they could no longer represent them as the contract had been aborted. They were given options to choose from and the 1st Defendant agreed to compensate them and offered an amount of K500,00.00 which they accepted.

The agreement for settlement was reduced in writing and signed by all the parties.

In view of this evidence, it is clear to me that when the Plaintiffs where informed that the 1st Defendant's husband had sold the property, it meant that the 1st Defendant had breached a fundamental term of the contract and thus could not perform her obligation of giving vacant possession to the Plaintiffs.

The Plaintiffs also accepted the repudiation of the contract by entering into another contract wherein they accepted to be refunded the money by the 1st Defendant. By so doing, it meant that the contract had terminated.

In this regard, I accept the argument by the 1st Defendant that the Plaintiffs made an election not to enforce the contract which had been repudiated by the 1st Defendant rendering the contract terminated.

On this score, I find that the remedy of specific performance of the contract is not available to the Plaintiffs as accepted the termination of the contract.

I accordingly decline to grant the order of specific performance. The claim therefore fails.

2. *Declaration that the Plaintiffs are the bonafide purchasers and owners of five acres of land at Farm No. 396a/A/1/M/1 and an Order for cancellation of the Certificate of Title with respect to the said property held by the 2nd Defendant.*

I have made a finding that the 2nd Defendant is a bona fide purchaser for value without notice of Farm No. 396a/A/1/M/1. What this means is that the Plaintiffs' claims for a declaration that they are

bonafide purchasers and owners of the five (5) acres of the subject property and for an order for the cancellation of the Certificate of Title with issued to the 2nd Defendant have therefore failed.

3. *Damages for breach of contract.*

The Plaintiffs in the statement of claim further seek damages for breach of contract against the 1st Defendant.

Damages are a sum of money paid by a defendant to the claimant once liability is established in compensation for the harm suffered by the claimant. In the case of damages awarded for breach of contract, the purpose of the award is to compensate the claimant for the losses suffered as a result of the breach.

Thus, the Supreme Court in the case of **Finance Bank Zambia Limited and Rajan Mathani v. Simataa Simataa** (11) confirmed this position when they stated that damages in the law of contract are awarded for the purpose of putting the innocent party in the position in which they would have been had the contractual obligations been performed.

However, it is important to note that the award of both specific performance and damages for breach of contract relating to the sale

of land are alternative and not concurrent remedies and awarding both would unjustly enrich the claimant. In the case of **Zambia National Building Society v. Ernest Mukwamataba Nayunda** [12], the Supreme Court held that:

> **"The essence of damages has always been that the injured party should be put as far as monetary compensation can go, in about the same position he would have been had the he not been injured. He should not be in a prejudiced position not be unjustly enriched."**

I have taken the view that failure by the 1st Defendant to perform her obligations under the contract was not legally justifiable. She admitted under cross examination that she was aware that selling the same piece of land to two separate people was wrong.

From the evidence on the record, it is clear that the 1st Defendant breached the contract for the sale of the subject property and the Plaintiffs suffered loss which is loss of a bargain. The 1st Defendant cannot therefore escape liability on this score for her actions.

Under the circumstances, I find that an award for damages for breach of contract against the 1st Defendant is more appropriate as it is clear from the evidence that they suffered loss.

I therefore order damages for breach of contract to be assessed by the Deputy Registrar

In addition to the damages for breach of contract, I have found as a fact that the Plaintiffs paid the 1st Defendant an amount of K205, 000.00 for the purchase of the property which she failed to refund the Plaintiffs. The 1st Defendant has submitted at length that the Plaintiffs have not pleaded for the refund of this amount. Although the Plaintiffs have not pleaded for the refund of this amount, they pleaded for specific performance which I have found is impossible to attain.

However, this is a Court of law and equity. Since the claim for specific performance failed, I find that the Plaintiffs are entitled to a refund of K205, 000.00 being the amount they paid for the property as the 1st Defendant cannot benefit from this money as well as the money obtained from the second sale. She would be unjustly enriched when she was the party at fault.

The amounts on the damages and refund shall attract interest at short term deposit rate from date of writ of summons to the date of judgment and thereafter at a rate not exceeding the current bank lending rate as determined by Bank of Zambia from the date of the judgment until final payment.

4. FINDINGS ON THE 2ND DEFENDANT'S COUNTER-CLAIM

(i) Removal of a Caveat

The 2nd Defendant in his counter claim seeks an order for removal of the Caveat wrongly registered by the Plaintiffs against the subject property.

The 2nd Defendant pleaded in paragraph 8 of his counter claim that he was about to enter into a contract of sale with the prospective purchasers namely Norman Patel and Nabel Patel at the consideration price of USD 200,000.00, when he discovered that the Plaintiffs had wrongly registered a Caveat on the subject property.

In his evidence he explained that after agreeing to sell the property to the interested parties, he received a bomb shell from the Patels that there was a caveat registered on the property and Messrs. Solly Patel Hamir and Lawrence, their advocates wrote to Messrs. Tembo Ngulube & Associates.

This evidence is supported by the letter at page 31 of the 2nd Defendant's bundle of Documents in which the Intended Purchasers Lawyers, informed the 2nd Defendant about the existence of the caveat on the property and that their clients were not willing to enter

into any agreement until the caveat had been removed. That after receiving the letter, he called Mr. Chanda and told him about the caveat. He also identified the caveat at page 1 of the 2nd Defendant's Bundle of Documents.

The Plaintiffs in their defence to the counter claim averred that they purchased five acres of the property situate at Farm 396a/A/1/M/1, in or about 2011 and way before the 2nd Defendant acquired any interest therein. That the caveat was therefore rightly registered against the said property when the Plaintiffs discovered the 2nd Defendant purported interest therein, having acquired their interest in five acres before the 2nd Defendant.

When cross examined, PW1 told the Court they had no liberty to place a caveat as they were represented by a lawyer and what they knew was that there was a parent title and the 1st Defendant had started the process of obtaining title and that they would be updated. He explained that the lawyers never explained to the Plaintiffs why they had not placed a caveat. That he was aware that if they had placed a caveat it was going to be difficult for the 2nd Defendant to buy the property.

It is not in dispute that the Plaintiffs entered a caveat on the subject property when they discovered that the property had been sold to the 2nd Defendant.

Regarding placement of caveats, section 76 of the Lands and Deeds Registry Act provides as follows:

> **"Any person-**
>
> **(a) claiming to be entitled to or to be beneficially interested in any land or any estate or interest therein by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied, or otherwise howsoever; or**
>
> **(b) transferring any estate or interest in land to any other person to be held in trust; or**
>
> **(c) being an intending purchaser or mortgagee of any land; may at any time lodge with the Registrar a caveat in Form 8 in the Schedule".**

Further in the case of **Construction and Investment Holdings Limited v William Jacks and Company Zambia Limited** (13) Scott J, went on to pronounce the circumstances which give rise to the right to place a caveat over land as follows:

"Only if a person has or purports to have an enforceable interest in land may he be justified in interfering with the rights of the registered proprietor by lodging a caveat. The caveator 's cause for lodging a caveat is dependent upon his claim to be entitled to an interest in land and that "reasonable" in this sense means "justifiable"."

Similarly, in the case of **Sobek Lodges Limited v. Zambia Wildlife Authority** [14] it was held that:

"In deciding whether or not a caveat should be removed, a Court should bear in mind the provisions of section 76 of the Lands and Deeds Registry Act. That is the person intending to register a caveat must be entitled to the land; beneficially interested in the land; in the process of transferring some interest in land to some other person; or should be an intending purchaser, or mortgagee of the land in issue."

Section 81 of the Lands and Deeds Registry Act provides as follows:

"(1) Such Registered Proprietor or other interested person may, if he thinks fit, summon the caveator, or the person on whose behalf such caveat has been lodged, to attend before the Lands Tribunal, Court or Judge thereof to show cause why such caveat should not be removed.

It is clear from the above that what qualifies one to place a caveat is that the person must show that they are beneficially interested or that they have an enforceable interest in land justifying them to interfere with the rights of the registered proprietor.

It is also clear from section 81 of the Lands and Deeds Registry Act that the burden to show cause why the caveat should not be removed lies on the person who placed the caveat; the Plaintiffs in this case.

The Plaintiffs in their submissions have argued that they entered a caveat against the property in casu claiming an interest based on a contract of sale between themselves and the 1st Defendant with respect to the said property as well as the various acknowledgements of receipts that have been exhibited before the court showing and validating the Plaintiffs interest in the said land. That by lodging the caveat the Plaintiffs did not merely believe they had an interest in the said land but did in fact have documents evidencing an interest capable of sustaining an action before the Court. It was argued that there was no delay between the time of the lodgment of the caveat and the commencement of this action. That the caveat was not therefore wrongly placed as alleged by the 2nd Defendant.

The 2nd Defendant has argued in his submissions that the Plaintiffs registered the caveat almost two (2) years after the 2nd Defendant had purchased the subject property from the 1st Defendant.

It was submitted that relying on section 76 of the Lands and Deeds Registry Act, it was easier to discern that the Plaintiffs did not have a beneficial interest in the subject property at the time the caveat was registered. That the various correspondences between the Plaintiffs and the 1st Defendant appearing at pages 34 to 39 of the 1st Defendant's Bundle of Documents all pointed to the existence of a new agreement for refund of the consideration price and the associated damages. That the correspondence was exchanged between September 2016 and January 2017, before the Plaintiffs registered the caveat on 24th March, 2017. It was argued that at the time the Plaintiffs registered the caveat they no longer had an existing beneficial interest in the property.

It is contended that a party who wrongly registers a caveat should be condemned in damages.

Although the Plaintiffs had entered into a valid contract with the 1st Defendant, I have made a finding that the contract repudiated owing to the 1st Defendant's breach to complete the sale. The Plaintiffs accepted the repudiation and in that regard, the contract terminated

as they entered into another agreement for the 1st Defendant to refund the money paid. This is clear from the correspondence exchanged by the parties dated 12 January, 2017 at page 38 of the Plaintiffs bundle of documents and also the Acknowledgment of Debt at page 42 of the same bundle dated 24th January, 2017.

Given this state of affairs, it is clear therefore that at the time the caveat was entered on 24th March, 2017, the initial contract had terminated and there was no interest that the Plaintiffs had capable of sustaining an action for registering a caveat.

In the light of the foregoing, I agree with counsel for the 2nd Defendant and find that at the time the Plaintiffs registered the caveat they no longer had an existing beneficial interest in the property. Therefore, there was no justification or basis for them to have registered a caveat.

The net result of my finding is that that the Plaintiffs have not demonstrated any lawful cause as to why the caveat should not be removed and they are interfering with the rights of the registered proprietor.

I therefore order that the caveat entered by the Plaintiffs on Farm No. 396a/A/1/M/1 be removed forthwith.

(ii) Special Damages for loss of business/profit

The 2nd Defendant in his Counter claim also seeks the relief of special damages for loss of business and or profits to be assessed by the Deputy Registrar.

In the submissions, counsel for the 2nd Defendant submitted that evidence which was uncontroverted at trial showed that the 2nd Defendant had found buyers Norman and Nabeel Patel for the subject property and a draft contract was prepared as at pages 25 to 30 of the 2nd Defendants bundle of documents. That the draft contract showed that the property was being sold at USD210,000 and that the 2nd Defendant was going to make profit of USD10,000 if the transaction had gone through.

He urged the Court not only to award general damages as pleaded but also refer the matter to the Deputy Registrar for assessment of the special damages, if need be.

The Plaintiffs on the other hand contend that there is no loss that the 2nd Defendant has suffered because land appreciates in value. The land purchased in 2015 for US$ 200,000 was going to be sold to the Patels a year later for the sum of US$ 210,000. That the exchange

rate had increased and continued to increase. Thus no actual loss had been suffered as a result of the alleged abortive sale.

In the case of **Philip Mhango v. Dorothy Ngulube and Others** (15), Chief Justice Silungwe (as he then was) on the claim for special damages stated as follows:

> **"Any party claiming a special loss must prove that loss and do so with evidence which makes it possible for the court to determine the value of that loss with fair amount of certainty."**

The 2nd Defendant herein has in his bundles of documents shown a draft contract of sale between him and the intended purchasers for the subject property. The 2nd Defendant was selling the said property at the price of USD210,000.00 whereas he bought it at the price of USD200,000.00 bringing the profit he was supposedly going to make to USD10,000.

While it can be said that the 2nd Defendant could not benefit from the profit at that time of the intended sale, the view I have is that the 2nd Defendant cannot be said to have lost out completely on the profit because the letter from the lawyers for the intended purchasers at page 31 of the 2nd Defendant's bundle of documents was that the

The claim under this head falls under the category of special damages. On the authority of the ***Philip Mhango*** case, special damages must be proved with compelling evidence. There is no evidence that was adduced by the 2nd Defendant that the 2nd Defendant's advocates were paid K20,000.00.

In this regard, I find that the 2nd Defendant has failed to prove that he is entitled to this relief. It fails and so I order.

(iv) General Damages for mental torture, distress and embarrassment.

The 2nd Defendant in his counter-claim pleaded damages for mental torture, distress and embarrassment as he had been made to appear dishonest in the eyes of the prospective purchasers.

In his evidence, he didn't adduce any evidence to substantiate his claim for damages. I therefore find that the 2nd Defendant has failed to prove this claim. It therefore fails.

6. CONCLUSION

For the avoidance of doubt, in my final analysis, the Plaintiffs have failed to prove on a balance of probabilities that they are entitled to all the reliefs sought in the statement of claim. The Plaintiffs are

however, entitled to damages for breach of contract and a refund of K205,000.00 and interest against the 1st Defendant as indicated herein.

The 2nd Defendant's counter-claim also partially succeeds as he has proved that he is the bonafide purchaser for value without notice of Farm No. 396a/A/1/M/1 Lusaka and therefore entitled to an Order for removal of the caveat lodged by the Plaintiffs against the subject property. I order that the Plaintiffs remove the caveat forthwith. He has however failed to prove the other claims made herein. I make no orders as to costs considering the circumstances of this case.

Leave to appeal is granted.

DELIVERED AT LUSAKA THIS 29th DAY OF DECEMBER, 2023.

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
29 DEC 2023
M.C. KOMBE, J
P.O. BOX 50067, LUSAKA

.....

M.C. KOMBE
JUDGE