

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2018/HP/1934

(Civil Jurisdiction)

BETWEEN

ADMINISTRATOR GENERAL

*(Suing in the capacity as personal representative
of the late Goodson Mulenga Chilambe)*



PLAINTIFF

AND

NEW FUTURE FINANCIAL COMPANY LIMITED 1st DEFENDANT

MAJORY CHILAMBE 2nd DEFENDANT

ATTORNEY GENERAL 3rd DEFENDANT

Before the Honourable Lady Justice C. Lombe Phiri in Chambers

*For the Plaintiff: Mr Hamanyati - Assistant Senior State Advocate -
Administrator General*

For the 1st Defendant: Mr. M. Bah - Messrs Nkulukusa & Company

For the 2nd Defendant: Mr P. Chiteta - National Legal Aid Clinic for Women

*For the 3rd Defendant: Mrs C. Agalasia and Mrs B. Kafunya - Assistant Senior
State Advocate – Attorney General’s Chambers*

JUDGMENT

CASES REFERRED TO:

- 1. George Banda v Betile Phiri and four others (2018) (Court of Appeal
No.113 of 2018)**

2. **Joyce Ndavuka Gondwe v Christine Ziwolile Ngwira (SCZ Appeal No. 37 of 2015)**
3. **Gibson Tembo v Alizwani SCZ Judgment No. 6 of 1996**
4. **Nora Mwaanga Kayoba & Alizani Banda v Eunice Kumwenda Ngulube & Andrew Ngulube (2003) ZR 132**
5. **Edith Nawakwi v Lusaka City Council and Another (Appeal No. 26 of 2001)**
6. **Anti-Corruption Commission v. Barnett Development Corporation Limited (2008) Vol. Z.R 69**
7. **Clementina Banda, Emmanuel Nyanje v Boniface Mudimba [2011] ZMHC 116**
8. **Nkongola Farm Limited v Zambia National Commercial Bank Limited, Kent Choice Limited (In receivership), Charles Haruperi (2005) ZR 78 (S.C)**
9. **RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & KG (UK Production) [2010] UKSC 14**
10. **Kalusha Bwalya v Chardore Properties and Ian Chamunora Nyangwe Haruperi (SCZ Appeal No.222/2013)**
11. **Holmes Limited vs. Buildwell Construction Company Limited (1973) ZR 97**
12. **Magic Carpet Travel and Tours v Zambia National Commercial Bank Limited (1999) ZR 61**
13. **Khalid Mohammed v The Attorney General (1982) ZR 49**
14. **Wilson Masauso Zulu u Avondale Housing Project (1982) ZR 172**
15. **Galunia Farms Limited v National Milling Company Limited (2004) Z.R 1**

- 16. Rating Valuation Consortium & DW Zyambo & Associates (suing as a firm) v Lusaka City Council & Zambia National Tender Board (2004) Z.R 109**
- 17. Printing and Numerical Registering Company v Simpson [1875] L.R. 19 E.Q. 62.**
- 18. Colgate Palmolive (Z) Inc. v and Chuka and Others (Appeal No. 185 of 2005) (unreported)**
- 19. Anti-Corruption Commission v Barnet Development Corporation Limited (2008) ZR Vol.1 69**
- 20. Sithole v State Lotteries Board (1975) ZR 106**
- 21. Sablehand Zambia Limited v Zambia Revenue Authority (2005) ZR 1093**
- 22. Abewe Company Limited v Hadow Mupele Moonga (SCZ/8/230/2004)**
- 23. Rajan Patel v Attorney General (SCZ 14 /2002)**
- 24. Audrey Wafwa Gondwe v Supa Baking Limited (in liquidation) and Vu Akubat (SCZ Judgment No. 9 of 2001)**

LEGISLATION REFERRED TO:

- 1. Financial Intelligence Centre Act No. 46 of 2010**
- 2. Lands and Deeds Registry Act Cap.185 of the Laws of Zambia**
- 3. Lands Act Cap.184 of the Laws of Zambia**
- 4. High Court Act Cap.27 of the Laws of Zambia**

OTHER MATERIALS REFERRED TO:

- 1. B. Garner, Black's Law Dictionary 8th Edition Thompson Publishers**
- 2. G. Monahan on Essential Contract Law**
- 3. Fredrick.S. Mudenda, Land Law in Zambia, 2007 UNZA Press**
- 4. Halsbury's Law of England 4th Edition**
- 5. John Mc Ghee QC, Snells Principles of Equity, (London, Thomson Reuters (Legal) Limited, 2008)**
- 6. Roy Goode, Commercial Law, 2nd Edition, (London and Dublin Butterworths, 1995)**

1. INTRODUCTION

1.1 The plaintiff commenced this action on 7th November 2018, by way of writ of summons and statement of claim. The plaintiff's claims were as follows:

- 1. A declaration that the sale of property subdivision No. 423 of Subdivision 4 of Farm No. 378a by the 2nd Defendant to the 1st Defendant was unlawful and fraudulent and thus must be set aside.*
- 2. An Order that Certificate of Title No. 45328 and Certificate No. 27149 issued to the 1st and 2nd Defendants in relation to property Subdivision No. 423 of Subdivision 4 of Farm No. 378a be cancelled.*
- 3. Possession of Property Subdivision No. 423 of Subdivision 4 of Farm No. 378a by the concerned beneficiaries.*
- 4. Payment of damages for mental anguish and distress*

5. *Any other relief the Court deems fit*

6. *Costs*

- 1.2** It was stated in the statement of claim that the Plaintiff sued as personal representative of the late Goodson Mulenga Chilambe, who died intestate on 13th January 1986, having been granted letters of administration by the Registrar of the High Court on 4th November 2015. It was further stated that the appointment as administrator was made pursuant to the Administrator General's Act.
- 1.3** It was also stated that the 1st Defendant is and was at all material times a Limited Company incorporated in Zambia and having its registered office at Lusaka pursuant to the provisions of the repealed Companies Act, Chapter 388 of the Laws of Zambia. It was further stated that the 2nd Defendant is the eldest daughter and beneficiary of the deceased estate. Whereas the 3rd Defendant is sued pursuant to section 12 of the State Proceedings Act, Chapter 71 of the Laws of Zambia.
- 1.4** It was stated that the deceased having, died intestate, was survived by a spouse and four (4) children namely Humphrey Chilambe, Morgan Chilambe, Majory Chilambe and Adam Chilambe as beneficiaries of his estate. It was further stated that as beneficial owner, the deceased left behind stand No. F/387a/A/ 423 Avondale, Lusaka (the property) which is vested in the Plaintiff as personal representatives.

- 1.5 It was further stated that in 2015, the Plaintiff made an attempt to vest the property into all the beneficiaries where the 2nd Defendant would hold the property in trust for the other four beneficiaries. However, this was untenable as the 2nd Defendant had reversed her decision to have the property vested in her.
- 1.6 It was also stated that the Plaintiff, by a letter dated 24th August 2016 to the Commissioner of Lands, demanded for the cancellation of an earlier application to vest the property in the 2nd Defendant in trust for the other beneficiaries.
- 1.7 It was further stated that upon withdrawal of the caveat which was registered on the property on 26th January 1994, the 2nd Defendant proceeded to have the property unlawfully conveyed to herself and a certificate of title issued to her on 15th November 2016.
- 1.8 The Plaintiff stated that following a search on the Lands and Deeds registry it was discovered that ownership of the subject property had been transferred to the 2nd Defendant under questionable circumstances under Certificate of Title No. CT 27149. It was further stated that the process of reverting the property to the deceased's estate proved futile as a further search at the Lands and Deeds Registry revealed that the 2nd Defendant had placed a caveat on the property and mortgaged it to a financing company.
- 1.9 The Plaintiff stated that on dates unknown but after obtaining a mortgage, the 2nd Defendant attempted to leave the country after

fraudulently obtaining money from the financial institution, upon pledging the property of the estate as collateral, thus defeating the administration of justice as the Plaintiff was attempting to clear the property of any encumbrances.

1.10 It was stated that the 2nd Defendant sold the property without due authorization of the Administrator General at the contract purchase price of \$33,580.00. The Plaintiff further stated that the search conducted at the Lands and Deeds Registry revealed that the 2nd Defendant assigned the deceased property to the 1st Defendant on 21st June 2018 at the consideration of US \$33,580.00. That the 1st Defendant was subsequently issued with a certificate of title No. CT 45328 on the said date.

1.11 It was also stated that the 1st Defendant neglected or ignored to ensure that the property was without encumbrances therefore they did not qualify to be a bona fide purchaser for value without notice. The Plaintiff averred that the 2nd Defendant on 11th July 2017 received US\$33,580.00 through her Zanaco Bank Account No. 5162358100196 from the 1st Defendant as full and final payment.

1.12 The Plaintiff averred that the 2nd Defendant had constantly intermeddled in the administration of the deceased estate and is liable to the Plaintiff for her acts of interference with the deceased assets and as should deliver or account for all the monies received by her in respect of the sale of the deceased property.

- 1.13 The Plaintiff further averred that the 2nd Defendant's efforts to engage the 1st Defendant to correct the anomaly in the issuance of the certificate of title and the sale, all proved futile as the 1st Defendant had been adamant in refusing to comply with the request.
- 1.14 The Plaintiff also stated that at trial they would show that the 1st Defendant is not a bona fide purchaser for value without notice of any encumbrance. Further that it would be in the interest of justice that the 1st Defendant is restrained from taking possession or carrying out any developments on the deceased's property.
- 1.15 The Plaintiff stated that they had since instituted a suit against the Defendants challenging the sale and ownership of the property by the 1st Defendant. It was further stated that the 2nd Defendant had repeatedly threatened the stay of other beneficiaries on the said property and intended on repeating the unlawful act. Also that the other four beneficiaries have for a long time suffered at the hands of the 2nd Defendant who has consistently intermeddled in this estate and has on several occasions obstructed the due administration of justice at the expense of the other beneficially entitled persons. It was stated that by reason of what had been stated the four beneficiaries have suffered damage, distress and mental anguish. The Plaintiff claimed as aforesated.

1.1 1ST DEFENDANTS DEFENCE

1.1.1 It was stated in the 1st Defendant's Defence the 1st Defendant admits the property was bought for a consideration of US\$33,580 and the property assigned to the 1st Defendant by the 2nd Defendant on 21st June, 2018. It was further stated that the 1st Defendant would aver at trial that the property was bonafide as there were no encumbrances on the property at the time the contract was executed. It was further stated that the 1st Defendant was diligent in ensuring that the property in question had no encumbrances and proceeded to carry out an exhaustive search at the Ministry of Lands which showed that the 2nd Defendant was the bona fide owner of the land in question. It was further stated that the 1st Defendant had no notice of any encumbrance as there was no caveat at the time of purchase and there was no restriction notice on the land record.

1.1.2 The 1st Defendant stated that the 2nd Defendant was partly paid in cash and the balance paid through her ZANACO account. It was further stated that the 1st Defendant only became aware of encumbrances after being informed of the 2nd Defendant's actions by Simon Mwansa Kapwepwe Police sometime in September 2018.

1.1.3 It was stated that it was not in the interest of justice for the 1st Defendant to be restrained from taking possession or carrying out developments on the property in question as it

was a bona fide purchaser for value without notice and that the 1st Defendant was not aware of any other suit against the Defendants.

1.1.4 It was stated that the 1st Defendant denies each and every allegation in the Plaintiff's statement of claim as if the same had been set out in their defence and denied seriatim.

1.2 2nd DEFENDANT'S DEFENCE

1.2.1 The 2nd Defendant in her defence filed on 5th September 2019, stated that she was made to believe that the certificate of title relating to the property was vested in her as the beneficial owner. It was stated that the deceased, prior to his death, had some time in 1982 gifted some of his assets to his children. That the 2nd Defendant was gifted the property in dispute therefore when her siblings and mother gave consent to the vesting of the property in her she believed that this was done to formalize her gift.

1.2.2 It was further stated that when the cancellation letter was received by the Ministry of Lands, the title to the property had already been issued to the 2nd Defendant who reasonably believed that the Certificate of Title was being issued to her as beneficial owner and not in trust for her siblings.

1.2.3 It was also stated that the 2nd Defendant denied unlawfully conveying the property into her names and that she would at trial rely on the letter from the Administrato General addressed to Ministry of Lands instructing them to issue title in her names. The 2nd Defendant stated that she would show at trial that the transfer of the property to her on Certificate of Title No. CT 27419 was not quesitonable as she followed all the required legal procedures to obtain the certificate of title which took over a period of two (2) years.

1.2.4 The 2nd Defendant denied that she ever attempted to leave the country but only moved from the property in dispute to Chamba Valley in Lusaka to allow for renovations at her house on the property. The 2nd Defendant further stated that she did not sell the property in dispute. She stated that on or around 11th June 2016 she applied for a loan of \$33,580.00 from the 1st Defendant and only received the sum of K120, 000.00, deposited into her ZANACO Bank Account. It was stated that the transaction was a loan and not a sale as the 2nd Defendant had pledged the property in dispute as collateral. It was averred that the 1st Defendant through its officers and or agents fraudulently assigned the property to themselves by proceeding to forge or fraudulently obtain the 2nd Defendant's signature on an assignment and proceeded to register the assignment at the Ministry of Lands.

- 1.2.5** It was admitted that the 1st Defendant neglected or ignored to ensure that the property was without incumberances therefore, they cannot be bonafide purchasers for value without notice.
- 1.2.6** The 2nd Defendant denied having intermeddled or interfered in the administration of the estate of the deceased and was not liable to deliver or account for the sale of the deceased property as there was no sale. It was also averred that the 2nd Defendant was not adverse to the reversal of the sale and the property being vested back in the deceased's estate.
- 1.2.7** The 2nd Defendant stated that she had never threatened the stay of other beneficiaries on the property. She stated that she had always acted under the impression that she was entitled to the property as a beneficial owner of the property following the gift from the deceased which she has now come to believe was not valid.
- 1.2.8** The 2nd Defendant further stated that the sale ought to be set aside due to fraudulent acts of the 1st Defendant. The particulars of the alleged fraud were itemised as follows:
- i. On 6th July 2017, the 2nd Defendant applied for a loan of \$33,580.00 equivalent to K299,198.00, from the 1st Defendant which was to be repaid

within 6 months. The 2nd Defendant signed a purported contract of sale pledging the property in dispute as collateral.

- ii. It was a term of the loan agreement that the 2nd Defendant would receive K179, 198.00 in cash and K120, 000.00 via bank transfer.
- iii. On 12th July 2017, the 1st Defendant only deposited the sum of K120, 000.00. That when the 2nd Defendant went to the 1st Defendant's offices to enquire about the balance of K179,198.00 she was advised that the accountant known as "Yvonne" had travelled to India. The 2nd Defendant was asked to follow up with the 1st Defendant after two months.
- iv. When the 2nd Defendant went back to the 1st Defendant's offices after two months, she was informed that their documents showed that she had received K 179,198.00 in cash and that K120, 000.00 was deposited into her Zanaco Bank Account therefore she had received the total sum of K299, 198.00 from the 1st Defendant which had to be repaid as per agreement or the property now in dispute would be foreclosed.
- v. The 2nd Defendant wrote a letter of demand to the 1st Defendant demanding that she be paid the balance of K179,198.00 as per the loan agreement but the 1st Defendant proceeded to foreclose the

property without any Court Order. Further an assignment relating to the property in dispute was lodged which was not signed by the 2nd Defendant.

- vi. The 2nd Defendant stated that the 1st Defendant forged the 2nd Defendant's signature or fraudulently obtained the 2nd Defendant's signature on the assignment.
- vii. The 2nd Defendant stated that it would be averred at trial that there are currently 9 houses on the land in dispute which are valued above the sum of \$33,580.00 which the 1st Defendant alleged the property was sold for.

1.3 3RD DEFENDANT'S DEFENCE

1.3.1 The 3rd Defendant filed its defence on 25th January 2019. It was stated that the third defendant not aware of the appointment of the Plaintiff as the personal representative of the deceased as no order of appointment was registered on the Lands Register.

1.3.2 It was further stated that the deceased was never the title holder of the property as the process to convey the property to the deceased from the Avondale Housing Project had only reached the consent to assign stage on 10th June 1982.

- 1.3.3** It was further stated that the 3rd Defendant only became aware of the deceased's death on 26th January 1994 when the deceased's children namely Goodson Chilambe, Stephen Chilambe and Joseph Chilambe placed a caveat on the property in question claiming a beneficial interest in the property as children of the deceased.
- 1.3.4** It was also stated that the caveat was withdrawn on 29th January 2014 by the deceased children themselves and the property was thereafter registered in the names of the 2nd Defendant on 15th November 2016 in line with all legal procedures.
- 1.3.5** The 3rd Defendant stated that the 1st Defendant placed a caveat on the property as an intended purchaser on 17th January 2018 and the same was withdrawn on 21st January 2018 by the 1st Defendant.
- 1.3.6** The 3rd Defendant further stated that a duly executed deed of assignment by the 1st and 2nd Defendant was lodged on 15th June 2018 by parties and registered on 21st June 2018 together with the properties certificate of title, consent to assign, withdrawal of caveat, certificate of incorporation, the 2nd Defendant's national registration card, a Zambia Revenue Authority Tax Clearance Certificate and Form DR 53, together with all other documents legally required to be present for conveyance purposes by the 3rd Defendant.

1.3.7 It was stated that the 3rd Defendant acted lawfully in the execution of its duties as far as the property transfer was concerned and the issues herein were clearly between the Plaintiff, the 1st and 2nd Defendant.

1.4 REPLY TO 1ST DEFENDANT'S DEFENCE

1.4.1 In reply to the 1st Defendant's defence, it was stated that the 1st Defendant was neither a bona fide purchaser for value without notice nor did the 1st Defendant provide valuable consideration for the property. It was further averred that the 1st Defendant acted fraudulently in depriving the deceased's estate of F/378a/A/423.

1.4.2 It was also stated that other legal considerations such as the presence of the other beneficiaries residing at the premises ought to have put the 1st Defendant on notice that there were in existence interested persons.

1.4.3 It was further stated that the 1st Defendant proceeded to collude with the 3rd Defendant's agents at the Ministry of Lands to issue a certificate of title to the property in question to an unknown party as shown on the Lands and Deeds printout dated 4th February 2019 in the name of China Hua Shun Zambia Investments Company Limited.

1.4.4 The Plaintiff lastly stated that the only recourse the 1st Defendant had was to recover whatever monies it

advanced to the 2nd Defendant from the said 2nd Defendant.

1.5 REPLY TO 3RD DEFENDANT'S DEFENCE

- 1.5.1** In reply to the 3rd Defendant's defence, it was stated that the 3rd Defendant was fully cognisant of the Plaintiff's appointment as personal representative of the deceased's estate, as the said 3rd Defendant was a co-Respondent in the High Court decision of **Evaline Chilambe vs. The Administrator General and the Attorney-General 1991/HP/1097**, wherein the Court ordered that the property in dispute, should vest in the deceased's widow, and her four children.
- 1.5.2** It was further averred that despite the deceased not being the title holder of the property in question, once the transaction with Avondale Housing Project was completed, it conferred a legal and equitable interest in the deceased and his heirs.
- 1.5.3** It was also stated that there was ongoing communication between the Plaintiff and the Ministry of Lands which indicated that the 2nd Defendant was not the beneficial owner of the property, but merely a trustee on behalf of the other beneficiaries. Further, that it was therefore disingenuous for the 3rd Defendant to claim that the said registration of the 2nd Defendant as the beneficial owner was in line with all legal procedures.

1.5.4 It was stated that the 3rd Defendant's agents at the Ministry of Lands were either negligent or fraudulent by colluding with the 1st and 2nd Defendants in facilitating the culminating purported sale of the subject property, despite prior warnings by the Plaintiff. Especially that the 2nd Defendant was never a beneficial owner of the property.

2 TRIAL

2.1 At trial both the Plaintiff and Defendants called 2 witnesses each.

2.2 **Humphrey Chilambe** was the Plaintiff's first witness (PW1). He testified that the Plaintiff had been administering the estate since 1987 following the deceased death on 15th January 1986. He further stated that the Plaintiff was reinstated in 2015 to administer the property in question. PW1 further testified that he, Evelyne Chisambo Chilambe (PW2), Marjory Chilambe, Morgan Chilambe and Adam Chilambe were all beneficiaries of the estate and lived at the property in question.

2.3 PW1 also testified that at the time of his father's death, his father had two wives – one in Kaputa and his mother. He stated that a dispute arose between the two families regarding the sharing of rentals for the Avondale house, subject of this matter. PW1 testified that the issue was settled in court, where his mother succeeded on her claim. He stated that the Court ordered that title for the Avondale property be registered in his mother's name. However, following deliberations in the family they agreed that

DW2 would represent the family at the Ministry of Lands and that the property should be registered in her name.

- 2.4** PW1 testified that before the Plaintiff could process title in PW2's name, the 2nd Defendant was elected as a family representative and the Plaintiff was informed of this decision on 15th of November 2015. PW1 testified that the Plaintiff wrote a letter to the Ministry of Lands directing them to place the property in the 2nd Defendant's name. Further that by letter, in response, the Plaintiff was informed that the Ministry of Lands could not process title in the 2nd Defendant's name because the documents were invalid.
- 2.5** PW1 testified that on 24th August 2016 the Plaintiff was approached and informed that all the beneficiaries should be placed on the title therefore the Plaintiff proceeded to inform the Ministry of Lands to cancel their earlier request to register the property in the name of the 2nd Defendant. PW1 further testified that the family later came to learn that title deeds had been issued in the 2nd Defendant's name.
- 2.6** PW1 testified that the Plaintiff instituted civil proceedings having discovered that the 2nd Defendant had mortgaged the property to the 1st Defendant. PW1 further testified that attempts to resolve the issue with the 1st Defendant proved futile. PW1 beseeched the Court in obtaining new title to the property and undoing the 2nd Defendant's actions as the same were fraudulent and without the consent of the administrators and family.

- 2.7 When cross-examined **PW1** confirmed that a caveat was placed on the property and later removed in 2014. **PW1** stated that he found out that the 2nd Defendant had mortgaged the property following a search at the Ministry of Lands but had no evidence of this before the Court.
- 2.8 **PW1** confirmed that his family sat down and agreed to place the property in the name of the 2nd Defendant following the caveat that was removed in 2014. He, however, maintained that another caveat was placed in 2017. According to **PW1**, the 1st Defendant should have known that the family decided that the property should not have vested in the 2nd Defendant following a letter written to the Ministry of Lands and a police call out in 2018.
- 2.9 **PW1** testified that they had approached the administrators with all their concerns regarding the manner in which the property was registers and he assumed that any faults herein were that of the administrators.
- 2.10 When re-examined **PW1** clarified that he discovered that the property was mortgaged after his young brother went to pay for water bills. That he discovered that the property was registered in the 2nd Defendant from the 2nd Defendant to China Hua Shun Zambia Investments Company Limited and not the 1st Defendant.
- 2.11 **Evelyne Chilambe Sambo** was the Plaintiff's second witness (**PW2**). She testified that she was the wife to the deceased. She testified that the house she currently lived in belonged to the late Mr Goodson Chilambe, who passed away in 1986. She testified

that the property was acquired in 1982 from Mr Michael Chilufya Sata at the time he was selling houses in the area. She further testified that she stayed at the house with her children. She stated that Humphrey Chilambe pays rent, Morgan Chilambe was renting somewhere and Adam Chilambe had built a house in the same yard.

2.12 PW2 testified that sometime between 2016 and 2017 some Chinese nationals went to the property and began taking photos. She stated that when she confronted them and told them she was the owner of the property they pointed at the 2nd Defendant, Majorj. **PW2** further testified that the Chinese nationals and the 2nd Defendant said nothing to her about the incident. She stated that she was currently staying well with her children. **PW2** stated that she wanted the property reclaimed.

2.13 There was nothing asked in cross-examination.

2.14 Feng Shenghu was the Defendant's first witness (**DW1**). He testified that he was a manager in the 1st Defendant company. He further testified that the company's core business was giving loans, and buying and selling property. **DW1** testified that he had met the 2nd Defendant at the beginning of July 2017 when she needed money. **DW1** stated that the 2nd Defendant was advised that the property she intended to pledge as security was insufficient for the amount of money she wanted. He stated that she was then given an option to sell the property and buy it back within a credit period.

2.15 DW1 testified that a search was conducted at the Ministry of Lands which revealed that there was no mortgage or caveat on the property. He further testified that the 2nd Defendant accepted to sign the contract of sale and the deed of assignment and to obtain consent to assign from the Ministry of Lands. DW1 testified that the full purchase price was paid to the 2nd Defendant and a caveat was placed on the property as intending purchaser.

2.16 DW1 testified that the purchase price agreed was USD\$33,000.00 which was paid in full in July 2017. DW1 further testified that he discovered there was a problem in 2018 when he received a call out from Avondale police station. DW1 further testified that the property was currently vested in the 1st Defendant's parent company namely China Huashun Zambia Investment Company Limited although they did not have possession of the property. DW1 informed the Court that the 2nd Defendant has not paid back the money she got.

2.17 When cross-examined DW1 confirmed purchasing the property in July of 2017 and that their chairman viewed the property before purchasing the property in the presence of the 2nd Defendant. DW1 further confirmed paying USD\$33,000.00 about K299,000.00 equivalent in cash and through the 2nd Defendant's Bank account.

2.18 When re-examined DW1 clarified that when the chairman had gone to view the property, there was no need to be accompanied by any other person apart from the 2nd Defendant as a search at the

Ministry of Lands revealed the property was in the 2nd Defendant's name.

2.19 The 2nd Defendant, Majory Chilambwe Banda, a pastor by profession, was the second witness for the Defendants (DW2). She testified that on 6th July 2017 she approached the 1st Defendant to borrow money in the sum of ZMW300,000.00 to build a house on the property in question. DW2 testified that on the same day she was requested to sign documents in relation to her request to borrow money. She stated the agreement was that she would pay back the money in six (6) months. DW2 stated that she recalled that part of the documents she signed was a stipulation that in the event that she defaulted the 1st Defendant would take the property inclusive of the houses that were on the property.

2.20 DW2 further testified that a week after signing the documents she called the 1st Defendant to inform them that she had not received the money. She stated that on the same day, 12th July 2017, she discovered that her account had been credited with ZMW120,000.00. DW2 testified that she then called the loan officer namely Yvonne who advised her to withdraw some of the money and go to their office so that the balance could be paid to her. DW2 testified that she withdrew the money and went to the 1st Defendant's office, where a photo of her was taken while holding the money. She stated that it was promised to her that the balance of ZMW179,000.00 would be paid into her account.

- 2.21** DW2 also testified that about a week later she received a call from the same loan officer informing her that there was a change of management in the 1st Defendant company and she needed to explain herself. DW2 testified after repeated inquiries with 1st Defendant in 2018 she threatened to take them to the police.
- 2.22** DW2 testified that she was later availed a receipt with her signature stating that she obtained ZMW179,000.00 in cash and that ZMW120,000.00 was deposited into her account. DW2 further testified that she went straight to Simon Mwansa Kapwepwe Police Station and reported the matter.
- 2.23** DW2 also testified that when they engaged the 1st Defendant to complete the payment, they just discovered that the property had been conveyed to a different entity than the 1st Defendant. According to DW2 she never signed the receipt and maintained that the only money she received was money that was paid into her Zanaco account. DW2 beseeched the Court to return the property to her.
- 2.24** When referred to the 2nd Defendant's bundle of documents at page 1 DW2 testified that the same was a receipt that she was given a year later showing that ZMW120,000.00 was deposited into her ZANACO account. According to DW2, the said receipt had several discrepancies like two dates and the money she applied for.

- 2.25** DW2 testified that she did not receive the balance of ZMW179,000.00 and maintained that she only received ZMW120,000 through her ZANACO account which could be seen from her bank statement appearing at pages 2 to 16 of the 2nd Defendants Bundle of Documents.
- 2.26** When cross-examined DW2 confirmed that the property initially belonged to the deceased. DW2 further confirmed that a discussion was had at the Administrator General's office that she would hold the property in trust on behalf of the family. DW2 stated that she was not aware of a reversal of the earlier decision.
- 2.27** Upon further cross-examination DW2 confirmed that her handwriting appeared on the Contract of Sale exhibited at at page 4 of the 1st Defendant's bundle of documents. She also confirmed signing the Deed of Assignment at page 7 of the same bundle.
- 2.28** DW2 stated that she asked the 1st Defendant why a contract of sale was being executed. She further stated that she was told everyone who came to borrow money was asked to sign the document so that in the event that they failed to pay back the money within the agreed period the contract would take effect.
- 2.29** DW2 confirmed signing certain documents on 6th July 2017 and leaving them with the 1st Defendant. She also confirmed leaving the certificate of title and all other documents she had signed. DW2 confirmed that she called the 1st Defendant on 12th July 2017 and only then was money deposited into her account. DW2 denied that

she attended to the 1st Defendant on 11th July 2017. She maintained that the money was only deposited in her account on 12th July 2017. She further stated that the receipt was availed to her one year later showing that she signed for the money on 11th July 2017.

2.30 DW2 confirmed obtaining a loan in July of 2017. She stated that she however only received ZMW120,000.00. She further testified that she kept pursuing the 1st Defendant for the balance. She stated that she kept on being told that the management of the institution had changed until a year later she decided to report the matter the police.

2.31 DW2 testified that she did not decide to act because her family realised that she had sold the property and thereby concocted a story. DW2 maintained that the record at the Police revealed that she reported the matter to the police even before her family knew.

3 SUBMISSIONS

3.1 At the close of the trial, the Plaintiff, 1st and 3rd Defendant filed submissions.

3.2 The Plaintiff submitted that there was ongoing correspondence between the Plaintiff and the Commissioner of Lands (represented by the 3rd Defendant) who issued a certificate of title to the 2nd Defendant without any explicable reason as appearing at pages 14 to 15 of the Plaintiff's bundle of documents. It was submitted that the 3rd Defendant was culpable for its negligence by issuing a certificate of title to the 2nd Defendant.

- 3.3 The Plaintiff submitted that it was not in dispute that the property was registered in the name of the deceased. Also that the issue in dispute was the conveyance of the property from the deceased to the 2nd Defendant who had fraudulently obtained the certificate of title solely in her name as the beneficial owner.
- 3.4 The Plaintiff pointed out that the 1st Defendant's defence was anchored on the notion that it was a bone fide purchaser for value without notice of any encumbrance. Reference was made to **Black's Law Dictionary** ⁽¹⁾ as to the definition of bona fide purchaser. It was submitted that a bone fide purchaser for value without notice was protected under **Sections 33, 58 and 59 of the Lands and Deeds Registry Act.**
- 3.5 It was submitted that **Section 33 of the Lands and Deeds Registry Act** provided that a certificate of title was conclusive evidence of ownership of land and that **Section 58 of the Lands and Deeds Registry Act** protected a person who purchased land from a registered proprietor save for instances of fraud as per **Section 34 (1) of the Lands and Deeds Registry Act.**
- 3.6 It was submitted that the 1st Defendant did not qualify to enjoy the protection of **Sections 33, 58 and 59 of the Lands and Deeds Registry Act** because it was not a bona fide purchaser for value without notice of other interests. It was contended that the underlying transaction between the 1st Defendant and the 2nd Defendant was not a sale, but a loan which the 1st Defendant's sole

witness confirmed. It was submitted that the property was pledged as collateral.

- 3.7 It was further submitted that both the 1st and 2nd Defendant testified that the loan amount was US\$33,500.00 or ZMW300,000.00, which was also the purported amount paid by the 1st Defendant to the 2nd Defendant for the property in dispute, making such a transaction indicative of predatory lending where the financier makes the borrower sign a contract of sale.
- 3.8 It was also submitted that whether or not the balance of K179,198.00 was paid must be dealt with as it was against public policy for such large amounts of money to be paid in cash without a report to the Financial Intelligence Centre. The Court was referred to **Section 30 of the Financial Intelligence Centre Act**.
- 3.9 Reference was made to the Court of Appeal case of **George Banda v Betile Phiri and four others** ⁽¹⁾ regarding bona fide purchasers for value without notice. Further reference was made to the case of **Joyce Ndavuka Gondwe v Christine Ziwolile Ngwira** ⁽²⁾ on the description of fraud and the case of **Gibson Tembo v. Alizwani** ⁽³⁾ that only the fraud of the purchaser and not that of the vendor can vitiate a certificate of title.
- 3.10 It was submitted that on the strength of the cases of **Nora Mwaanga Kayoba & Alizani Banda v Eunice Kumwenda Ngulube & Andrew Ngulube** ⁽⁴⁾ and **Edith Nawakwi v Lusaka City Council and Another** ⁽⁵⁾, parties purchasing real property are

expected to approach such transactions with much more serious inquiries to establish whether or not the property in question has encumbrances.

- 3.11 It was further submitted that the 1st, 2nd and 3rd Defendants played a role in depriving the deceased's beneficiaries. Reference was made to **Section 21 of the Lands and Deeds Registry Act**, that registration would not cure any defect in any instrument registered or confer upon it any effect or validity other than that provided by the Act.
- 3.12 It was also submitted that while the 3rd Defendant was in ongoing communication with the Plaintiff it inexplicably registered the property in the name of the 2nd Defendant. The 2nd Defendant purported to pledge it to the 1st Defendant as collateral for a loan. The said pledge was cloaked as a sale, with a six (6) month repayment period in default the property reverting to the 1st Defendant. It was submitted that in view of the foregoing this is a proper case for the court to cancel any certificates of title issued by the 3rd Defendant in favour of the 1st and 2nd Defendants.
- 3.13 It was submitted that he who comes to equity must come with clean hands. It was stated that following the grant of the loan which was contrary to the **Financial Intelligence Centre Act**, the Court could not recognise the illegality. It was further submitted that declaring that there were no developments on the land was an attempt to evade payment of taxes and therefore fraudulent.

- 3.14 It was lastly submitted that the deceased's family had been residing at the property since 1986. It was stated that where a transaction is fraught with illegalities, such as in this case, the purchaser was not considered bona fide. Reference was made to the case of **Anti-Corruption Commission v Barnett Development Corporation Limited** ⁽⁶⁾ on the notion that a certificate of title can be challenged and cancelled for fraud.
- 3.15 The gist of the 1st Defendant's submission was anchored firstly on the equitable defence of bona fide purchaser for value without notice of encumbrance or fraud. Reference was made to **Section 13 of the High Court Act, Order 28 rules 1 and 2 of the High Court Rules** and the case of **Clementina Banda and Emmanuel Nyanje v Boniface Mudimba** ⁽⁷⁾ on the application of law and equity concurrently.
- 3.16 Further reference was made to the case of **Boniface Mudimba** ⁽⁷⁾ on the requirements to meet for one to rely on the doctrine of bona fide purchaser for value without notice. In addition reliance was placed on the text by **Fredrick.S. Mudenda, Land Law in Zambia**, on the doctrine of bona fide purchaser for value.
- 3.17 It was submitted that there was no fraud or sharp practices occasioned by the 1st Defendant in purchasing the property in question and no evidence of fraud was adduced. The Court's attention was drawn to the case of **Nkongola Farm Limited v**

Zambia National Commercial Bank Limited, Kent Choice Limited (In receivership), Charles Haruperi ⁽⁸⁾ on the requirement for fraud to be pleaded and particularised in a claimant's pleadings and that in the instant case, fraud was not alleged.

- 3.18 It was further submitted that the 1st Defendant gave valuable consideration for the purchase of the property. It was stated that the consideration must be sufficient but it need not be adequate and further stated that an agreement to which the consent of the party is freely given shall not be void or illegal solely because the consideration was inadequate.
- 3.19 It was also submitted that a bona fide purchaser must buy land without notice of any adverse claims as per the case of **Boniface Mudimba** ⁽⁷⁾ and that there must be no actual, constructive or imputed notice. It was stated regarding constructive notice that a purchaser was under obligation to undertake a full investigation of the title before completing his purchase.
- 3.20 Reliance was placed on the case of **Edith Zewlani Nawakwi v Lusaka City Council and Another** ⁽⁵⁾, and **Gibson Tembo v Ali Zwani** ⁽³⁾ on the need to make full inquiries when purchasing land. It was submitted that the 1st Defendant conducted its due diligence and obtained computer printouts as per **Sections 22 and 58 of the Lands and Deeds Registry Act.**

3.21 Reference was made to section 59 of the Lands and Deeds Registry Act in that no liability can accrue to a bona fide purchaser or mortgagee on account that his vendor or mortgagor may have become a registered proprietor through fraud, error or under any void or voidable instrument.

3.22 Regarding the underlying transaction between the 1st and 2nd Defendants not being a sale of a property, it was submitted that the parties consciously and freely entered into a contract of sale of the property in question for the sum of US\$33,500.00. The Court was referred to the case of RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & KG (UK Production)⁽⁹⁾, in submitting that where parties reach an agreement on all the terms of a contract, a contract can be deemed to have been formed as the essential requirements are that there must be an intention to create legal obligations and consideration.

3.23 It was submitted that it was not the responsibility of the Court to rewrite contracts for the parties but to ensure that their terms were enforced. The Court was referred to the case of Kalusha Bwalya v Chadore Properties and Ian Chamunora Nyangwe Haruperi⁽¹⁰⁾ regarding this submission.

3.24 It was further submitted that where parties have embodied the terms of the contract in a written document, extrinsic evidence is not generally admissible to add to, vary, subtract from, or contrast

the terms of the written document as per the case of **Holmes Limited v Buildwell Construction Company Limited** ⁽¹¹⁾.

- 3.25 It was further submitted that it was not in dispute that the 1st Defendant and the 2nd Defendant executed a contract of sale and accompanying deed of assignment, thereafter consent to assign was accordingly granted by the Ministry of Lands. It was submitted that the intention was a clear sale and not a loan between the parties.
- 3.26 It was also submitted that the 1st Defendant acquired good title to the property in question and reliance was placed on the case of **Magic Carpet Travel and Tours v Zambia National Commercial Bank Limited** ⁽¹²⁾.
- 3.27 It was submitted that the Plaintiff, the 2nd Defendant and the 3rd Defendant had the chance to cancel the certificate of title from the time it was vested in the 2nd defendant to right before the 1st Defendant purchased the property in question but failed to do so. Reference was made to **Section 11(1) of the Lands and Deeds Act** for the cancellation of a certificate of title.
- 3.28 It was further submitted that the *nemo dat* rule was applicable as the true owner at the material time being the 2nd Defendant gave authority to the 3rd Defendant to transfer property to the 1st Defendant. It was also submitted that the **Financial Intelligence Centre Act** was inapplicable to this case as the contract was based on a "normal" contract of sale of property and therefore the 1st

Defendant was not duty bound to carry on its business in accordance with the requirements under the said Act.

1.3 3rd DEFENDANT'S SUBMISSIONS

1.3.1 The gist of the 3rd Defendant's submissions was that the Plaintiff was never registered as the Personal Representative of the late Goodson Chilambe's estate. Further that it only became aware of the death of Goodson Chilambe on 26th January 1994 when the beneficiaries to the estate placed a caveat on the property in question which said caveat was withdrawn on 29th January 2014 in line with all legal procedures and later registered in the name of the 2nd Defendant on 15th November 2016.

1.3.2 It was submitted that the 3rd Defendant's duty was to ensure that the right documents were submitted as prescribed by the Lands Act and not what happens behind closed doors between the families. It was submitted that the 3rd Defendant was not negligent in issuing the certificate of title to the 2nd Defendant as a duly executed deed of assignment by the 1st and 2nd Defendant was lodged on 15th June 2018 by the said parties and registered on the 21st June 2018 with all the necessary documents required for the legal conveyance.

1.3.3 It was further submitted that 9 months after the 3rd Defendant requested for legal documents in order proceed

with the Plaintiff's request to issue a certificate of title in the name of the 2nd Defendant, did the Plaintiff decided to write to the Commissioner of Lands requesting for the cancellation of the certificate of title. It was pointed out that the issue was still in what capacity was the Plaintiff requesting for the cancellation of the certificate of title as they had not registered themselves with the 3rd Defendant as required by law.

- 1.3.4 It was lastly submitted that the Plaintiff knew that the certificate of title was registered in the name of the 2nd Defendant as they had made that request themselves and that the Plaintiff had provided the 3rd Defendant with the requested document in order for the 3rd Defendant to proceed with the issuance of a certificate of title in the name of the 2nd Defendant.

4 LAW

- 4.1 It is a principle of law that he who alleges must prove. In the case of Khalid Mohammed v The Attorney General ⁽¹³⁾, it was stated that:

"a plaintiff cannot automatically win whenever a defence has failed; he must prove his case."

- 4.2 Furthermore, in the case of Wilson Masauso Zulu v Avondale Housing Project ⁽¹⁴⁾, Ngulube, DCJ, as he then was, stated the following:

"I think that it is accepted that where a plaintiff alleges, as indeed any other case where he makes any allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case."

4.3 According to the Learned Author G. Monahan, on Essential Contract Law⁽²⁾, on page 27:

"A valid contract is a contract that the law will enforce and creates legal rights and obligations [...] and contains all the three essential elements of formation: agreement (offer and acceptance); intention (to be bound by the agreement); and consideration ... "

4.4 In Galunia Farms Limited v National Milling Company Limited⁽¹⁵⁾ it was held that:

"If the acceptance varies the terms of the offer it is a counteroffer and not acceptance of the original offer"

4.5 The Supreme Court in the case of Rating Valuation Consortium & DW Zyambo & Associates (suing as a firm) v Lusaka City Council & Zambia National Tender Board⁽¹⁶⁾, held inter alia that:

"the approach analysing the process of reaching business relations in simplistic terms of offer and acceptance gives rise to complications. What is required is for the Court to discern the

clear intention of the parties to create a legally binding agreement”

4.6 In the case of Holmes Limited v Buildwell Construction Company Limited⁽¹¹⁾, it was stated that:

“Where the parties have embodied the terms of their contract in a written document, extrinsic evidence is not generally admissible to add to, vary, subtract from or contradict the terms of the written contract.”

4.7 Further, in the case of Printing and Numerical Registering Company v Simpson⁽¹⁷⁾, quoted at page 8 in the case of Colgate Palmolive (Z) Inc. v Chuka and Others⁽¹⁸⁾ it was also stated as follows:

“If there is one thing more than another which public policy requires it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract, when entered into freely and voluntarily, shall be enforced by Courts of justice.”

4.8 It is apt to note that legal ownership of land is evidenced by the production of a certificate of title to a property. In this respect, section 33, of the Lands and Deeds Registry Act⁽²⁾ states inter alia as follows:

“A certificate of title shall be conclusive as from the date of its issue and after the issue thereof, notwithstanding the existence in any other person of any estate or interest.....” the Registered proprietor of the land comprised in such certificate shall except in case of fraud, hold the same subject only to such encumbrances, liens, estates on interest as may be shown by such certificate of title.....”

4.9 In the case of Anti-Corruption Commission v Barnet Development Corporation Limited ⁽¹⁹⁾ the Supreme Court held that:

"Under section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of land by the holder of the certificate ...we also know that under the same section or section 34 a certificate of title can be challenged and cancelled for fraud or for reasons of impropriety in its acquisition."

4.10 Furthermore, Sections 11 and 24 of the Lands and Deeds Registry Act ⁽²⁾ respectively state as follows:

11. Where any person alleges that any error or omission has been made in a Register or that any entry or omission therein has been made or procured by fraud or mistake, the Registrar shall, if he shall consider such allegation satisfactorily proved, correct such error, omission or entry as aforesaid.”

“24. The Registrar shall not, nor shall an Assistant Registrar nor any person acting under the authority of the Registrar or an Assistant Registrar, or under any order or regulation made in pursuance of this Act, be liable to any action or proceeding for or in respect of any act or matter done or omitted to be done in good faith in the exercise or supposed exercise of the powers of this Act or any order or regulation made thereunder.”

4.11 In the case of **Sithole v State Lotteries Board** ⁽²⁰⁾, the court stated that:

“If a party alleges fraud, the extent of the onus on the party alleging is greater than a simple balance of probabilities.”

4.12 In **Sablehand Zambia Limited v Zambia Revenue Authority** ⁽²¹⁾ it was held that:

“A party alleging fraud must lead evidence so that the allegation is clearly and distinctly proved on a higher standard of proof that on a mere balance of probabilities because the allegations are criminal in nature”

4.13 According to **Halsbury’s Law of England** ⁽⁴⁾, Paragraph 1219, fraud

“usually takes the form of a statement that is false or suppression of what is true”.

4.14 In the case of Abewe Company Limited v Hadow Mupele Moonga ⁽²²⁾ wherein the Supreme Court cited Gibson Tembo v Alizwani ⁽³⁾ it was stated that:

“if a wholly innocent purchaser acquires a Certificate of Title, his right to the property is not affected by any fraudulent conduct of the vendor unless such conduct had resulted in a third party’s acquiring rights which the purchaser had notice”

4.15 In Gibson Tembo v Alizwani ⁽³⁾ it was also stated that:

“only the fraud of the purchaser, and not that of the vendor, can vitiate a Certificate of Title”

4.16 The definition of bona fide purchaser as defined in Black's Law Dictionary ⁽¹⁾ at Page 1355 is as follows:

“One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or iniquities against the Seller's Title; one who has in good faith paid valuable consideration for property without notice of prior claims.”

4.17 In the case of Clementina Banda and Emmanuel Nyanje v Boniface Mudimba ⁽⁷⁾, (unreported) as well as the learned author of Snells Principles of Equity ⁽⁵⁾ set out the test for the doctrine of the bona fide purchaser as follows:

“a) A Purchaser must act in good faith

b) A Purchaser is a person who acquires an interest in property by grant rather than the operation of law. The Purchaser must also have given value for the property

c) The Purchaser must generally have obtained the legal interest in the property; and

d) The Purchaser must have had no notice of the equitable interest at the time he gave his consideration for the conveyance."

A purchaser is affected by notice of an equity in three cases:

(i) actual notice; where the equity is within his own knowledge;

(ii) constructive notice; where the equity would have come to his own knowledge if proper inquiries had been made; and

(iii) imputed notice; where his agent as such in the course of the transaction has actual, or constructive notice of the equity."

4.18 Whilst it is commonly accepted that the sale of land in Zambia is usually governed by the Law Association of Zambia General Conditions of Sale, one must ensure compliance with other laws such as Lands Act ⁽⁴⁾.

4.19 Section 5 (1) of the Lands Act ⁽⁴⁾ provides that:

"a person shall not sell, transfer or assign any land without the consent of the President and shall accordingly apply for that consent before doing so."

4.20 In addition to the above the common law principle of *nemo dat quod non habet* ("no one can give that which he has not.") applies to this

matter see also Rajan Patel v Attorney General ⁽²³⁾ and according to the learned author of Commercial Law 2nd Edition ⁽⁶⁾, wherein it is stated that:

“The rule of common law is that only the legal owner of goods or one who has been authorized or otherwise held out as entitled to dispose of them can make a disposition which will be effective to deprive the legal owner of his title or encumber his interest in principle.”

4.21 This principle was reiterated in the case of Audrey Wafwa Gondwe v Supa Baking Limited (in liquidation) and Vu Akubat⁽²⁴⁾.

4.22 In the case of Nora Mwaanga Kayoba and Alizani Banda v Eunice Kumwenda Ngulube and Andrew Ngulube ⁽⁴⁾, the Supreme Court articulately stated that:

“in purchasing of real properties, parties are expected to approach such transactions with much more serious inquiries to establish whether or not the property in question has no encumbrances. Buying real property is not as casual as buying household goods or other personal property.”

4.23 Lastly, section 13 of the High Court Act ⁽³⁾, provides as follows:

“In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely

or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto May, appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties maybe completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity, and the rules of the common law with reference to the same matter, the rules of equity shall prevail.”

4.24 It is a well-established maxim that "*he who comes to equity must come with clean hands*" and "*he who seeks equity must do equity*".

5 ANALYSIS

5.1 The pleadings and evidence in this matter reveal that there are two cardinal issues that the Court ought to resolve in arriving at its decision. These are:

- a) What the nature of the transaction was between the 1st and 2nd Defendant; and
- b) Whether the 1st Defendant was a bona fide purchaser for value without notice.

5.1 Nature of Transaction between the 1st and 2nd Defendant

5.1.1 From the evidence of DW1 the transaction between the 1st Defendant and the 2nd Defendant started out as one where the 2nd Defendant had approached the 1st Defendant to borrow money. The record will show that the first Defendant was in the business of lending money. DW1 stated that the 2nd Defendant had pledged her property as security for the loan but was advised that the property's value was less than the amount of money she sought to borrow. In the alternative she was advised that she could sell the property to the 1st Defendant with an option to buy back the property after she had paid back the loan. He testified that the agreed purchase price was US\$33,000, which was paid in July 2017. Then a caveat was placed on the Lands Register by the 1st Defendant as intending purchaser. That at the expiry of the credit period an assignment, which had been executed by the parties was filed at the Ministry of Lands together with the Certificate of Title. Subsequently, a Certificate of Title was issued in favour of the 1st Defendant's mother company. On the other hand, the 2nd Defendant (DW2) has denied ever having sold the house to the 1st Defendant. She stated that she merely committed the property as security for a loan which, in any event, was never paid. With regard the execution of the documentation, her evidence was that in relation to the Contract of Sale she had been advised that it

was standard procedure. Then with regard the other documentation she stated that she she did not know what she was signing. She also confirmed that she handed over the Certificate of Title in relation to the property in question. Now the facts of this case, in relation to the contract of sale of the property, are very similar to that in the case of **Kalusha Bwalya v Chadore Properties and Ian Chamunor Nyangwe Haruperi.** In that case the Appellant, entered into a loan agreement with the Defendant, Chadore Properties Limited for the sum of US\$26, 250. In terms of the agreement, Mr. Bwalya acknowledged receipt of the sum in exchange for the sale of his property, in the event of default of payment. Like in this case, Mr Bwalya tried to allege duress and misrepresentation as grounds upon which he settled his signature on the documentation in question. In that case the Supreme Court stated as follows:

“Likewise, if the record showed any evidence of duress, undue influence or unconscionability of the bargain, we would not hesitate to make the necessary pronouncements and orders. Having ourselves perused the entire record of the evidence that was tendered against the respondents, we are left in no doubt that the evidence not only led the trial Judge to the logical conclusion that the transaction was at arm's length, regardless of what the appellant said or thought, but also excluded the possibility that the appellant was fraudulently cajoled, or unlawfully coerced into signing the two

documents, namely, the contract of sale, and the deed of assignment. We would be shirking in our judicial responsibility if we could, in the absence of clear evidence to that effect, foist bad faith and subterfuge on the part of the respondents in this transaction”.

- 5.1.2 The record in this matter clearly shows that there is no evidence of duress or misrepresentation. The 2nd Defendant sought to give the court the impression that she did not know what the other papers she was signing were for. Now in a journal article discussing the case of **Eva Chiboni v a Chiboni v. New Future Finance Company Limited (2020/HPC/0776)** published in the SAIPAIR Case Review, Volume 5, Issue 3, November 2022, the eminent scholar, Chanda Chungu, had occasion to discuss the plea of *non est factum*. He stated in that article as follows:

The plea was originally used to protect illiterate and blind persons who were tricked into putting their mark on documents. A successful plea makes a document void. It eventually became available to literate persons who had signed a document believing it to be something totally different from what it was. It is a doctrine that operates only in respect of written agreements.

- 5.1.2 He further went on to discuss the application of this principle to situations such as the one in this case involving

the signing of contracts of sale to stand in the stead of security for a loan. He posited as follows:

The use of the rule in modern times has been restricted. For a successful plea of non est factum, two factors must be established. First, it must be established that the signer was not careless in signing. Secondly, it must be shown that there is a radical difference between the document which was signed and what the signer thought they were signing.

5.1.4 He further states that:

However, where a person knows the nature of the document he signs, but is mistaken as to the contents, the contract is not avoided. In Howatson v. Webb (1907) 1Ch 537, Webb, who was a lawyer, was asked to execute and did so on being told that it was a conveyance of property of which he was a trustee. The deed was in fact a mortgage of the property. Webb was subsequently sued on the mortgage. It was held that Webb was bound by the terms of the mortgage.

5.1.6 Further in the case of Morton Mhango v. Jackson Kapobe (CAZ Appeal No. 119 of 2020), the Court of Appeal was confronted with a similar situation. Their finding in that case was that:

From assessment of the foregoing evidence, we have no reason to fault the lower Court's finding that the appellant had failed to demonstrate that he was under duress when signing

the contract of sale. The Judge also found that there was no evidence suggesting that the appellant was threatened to surrender the certificate of title. The parties had some interactions in their dealings in the period between which the contract of sale was signed in June 2012 and the time the appellant wrote to the respondent affirming his commitment to paying the debt recommitting the certificate of title to the respondent. It is therefore a far-fetched notion to presuppose that the lower Court could have inferred any duress or coercion from the said circumstances.”

5.1.7 In the case at hand it is can be equally stated that the 1st Defendant raised the excuse that she did not know what she was signing as an afterthought. The evidence of DW1, which went unchallenged, was that the reason why the 1st Defendant was signing the contract of sale and depositing the certificate of title was explained to her. Her coming at trial to state that she did not know what she was signing is an afterthought and should not be entertained. In her own evidence, DW2 indicated that as far as she knew the property was bequeathed to her by her father, therefore she had the authority to deal with it as she best saw fit. She stated that it was only later that she learned that she was to merely hold it in trust for the others.

5.1.8 In view of the foregoing, on a balance of probabilities, I find as a fact in this matter that the contract of sale between 1st Defendant and the 2nd Defendant was executed freely and

voluntarily by the parties with a full understanding of the consequences. The principle in the case of Printing and Numerical Registering Company v Simpson as cited in the case of Colgate Palmolive (Z) Inc v Chaka and others is followed.

5.2 Was the 1st Defendant a bona fide purchaser for value without notice

5.2.1 Now in defending the matter the 1st Defendant argued that it was a bona fide purchaser for value without notice of encumbrance or fraud. Now this doctrine presupposes that the purchaser of a property has conducted due diligence to ensure that legally and factually the property they seek to purchase is not encumbered, hence the sentiments of the Supreme Court in the case of Nora Mwaanga Kayoba and Alizani Banda v Eunice Kumwenda Ngulube and Andrew Ngulube (*cited above*). Further, in the case of Gibson Tembo v Alizwani (1996) SJ SC where the Appellant had an opportunity to visit the property in dispute and inquire about the occupants of the house but didn't the Supreme Court found that the purchase of the property was tainted as the Appellant was not entirely innocent. In this case DW1 testified that a search was conducted on the land register. Also that the Chairman viewed the property in the presence of the 2nd Defendant before purchasing it. According to PW2 she stated that sometime between 2016 and 2017 her home was visited by some Chinese nationals who were in the

company of the 2nd Defendant (DW2). She testified that when she confronted them and told them the property was hers, they all did not say anything. The evidence of DW1 and PW2 both shows that a representative of the 1st Defendant visited the property but neglected to make any inquiries from the person or people they found at the property. I find this as a fact in this case. That being the case and applying the reasoning of the Supreme Court in the case of **Gibson Tembo v Alizwani** this should have put the 1st Defendant on high alert with regard any equitable interest of the occupiers of the property they were about to purchase. The failure or neglect by the 1st Defendant to make a full inquiry regarding the interests of the property is detrimental to their assertion that they were bona fide purchasers for value. It is not in dispute here that the 1st Defendant and the 2nd Defendant had entered into an agreement wherein the the house was pledged as security. It is also not a material issue, for purposes of validity of the contract, what amount of money was paid. It is found as a fact therefore that there was an agreement in which the house was pledged over as security and that the 1st Defendant had notice of the fact that there were people occupying the house.

5.2.2 Now what needs to be resolved is the effect of this on the rights of the 1st Defendant in the property in question. As was found in the **Gibson Tembo case**, I find it here that the manner in which the representatives of the 1st Defendenant

behaved in ignoring PW2 when she was identifying herself to them as the owner of the property, tends to show that 1st Defendant must have been aware that this property did not entirely belong to the 2nd Defendant. This should have alerted the 1st Defendant that the 2nd Defendant was acting with fraudulent intent. This case should be distinguished from the Kalusha Bwalya case in that in the Kalusha Bwalya case there was no evidence of another person in occupation of the property. It is therefore clear that there was a failure by the 1st Defendant to conduct due diligence on the property that was being presented to them by DW2.

5.2.3 Now section 34 of the Lands and Deeds Registry Act provides for the circumstances where a certificate of title can be cancelled. Interests of third parties, whose interest was apparent at the time of the transfer, constitute valid grounds to interfere with the rights under Section 33 of the Lands and Deeds Registry Act.

5.2.4 Now the Plaintiff in seeking to impeach the contract between the 1st and 2nd Defendant, alleging that Section 30 of the Financial Intelligence Center Act had been breached. It was submitted that the amount of money that was paid out to the 1st Defendant should not have been paid in cash therefore the Contract between the parties is illegal. Now Section 30 of the FIC Act makes it a requirement for a reporting entity to report transactions exceeding a certain threshold to the Centre. It does not provide that failure to

make the Report amounts to any offence or ought to render any such transaction a nullity. The provision is one that is regulatory in nature. It would be a stretch of application to render a contract void on account of the method of payment. Needless to say that there is even no evidence on the record to show that the said report was not made. The proposition to apply Section 30 of the Financial Intelligence Act to the facts of this case is therefore a misdirection at law.

5.2.5 The Plaintiff has also claimed payments for damages for mental anguish and distress. In paragraph 24 of the Statement of Claim there was a statement made that four of the beneficiaries of the Estate have suffered damage, distress and mental anguish. **PW1** and **PW2** are two of these beneficiaries. A careful consideration of the evidence shows that the two witnesses did not refer to any evidence to substantiate this claim. There being no evidence in relation to this issue it can be stated that it is not proved.

6 CONCLUSION

6.1 While the Contract of Sale cannot be impeached on the basis of fraud, it can be impeached on the failure by the 1st Defendant to conduct due diligence on the property that was up for sell. The Claim to set aside the Contract of Sale on account of the failure to conduct due diligence accordingly succeeds.

6.2 In relation to the claim for cancellation of the Certificates of title Numbers 45328 and 27149 it is stated that the only title that can be cancelled is the one pertaining to the 1st Defendant as that is what

the issue was before this Court as it was as a result of the contract between the 1st and 2nd Defendant. The Certificate of Title Number 45328 is accordingly cancelled.

- 6.3 In relation to the Certificate of Title 27149 in favour of the 2nd Defendant, that part of the claim is dismissed as it has not been proven by any evidence.
- 6.4 In relation to possession of the property in question, this claim appears to be misplaced. The evidence on the record shows that the beneficiaries of the estate have always been in possession of the property. Making any pronouncement in that regard would serve no purpose as it never arose either in the pleadings or in the evidence.
- 6.5 With regard damages for mental anguish and distress, these have not been proved therefore the claim is dismissed.
- 6.6 The Plaintiff, having succeeded on some of its claims, they are awarded costs. Costs to be taxed in default of agreement.
- 6.7 Leave to appeal is granted.

Delivered at Lusaka this 15th day of May, 2024.



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C. LOMBE PHIRI
JUDGE