

**SCZ Judgment No. 24 of 2012**  
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**IN THE SUPREME COURT OF ZAMBIA**  
**HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**APPEAL NO. 42/2008**  
**SCZ/08/02/2008**

**B E T W E E N :**

**POLYTHENE PRODUCTS ZAMBIA LIMITED**

**APPELLANT**

**AND**

**CYCLONE HARDWARE AND  
CONSTRUCTION LIMITED  
ATTORNEY GENERAL**

**1<sup>ST</sup> RESPONDENT**  
**2<sup>ND</sup> RESPONDENT**

**CORAM: Chibesakunda, Chitengi and Mwanamwambwa, J.J.S.**  
***On 12<sup>th</sup> May 2009 and 17<sup>th</sup> September 2012***

*For The Appellant:*                      *Mr. W.M. Kabimba of Messrs*  
*W.M.*

*Kabimba & Company*

*For the 1<sup>st</sup> Respondent:*                      *Mr.R. Simeza of Messrs*  
*Simeza,*

*Sangwa & Associates*

*For the 2<sup>nd</sup> Respondent:*                      *Mr. S. Simwanza, Assistant*  
*Senior*

*State Advocate*

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## **JUDGMENT**

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**Mwanamwambwa, J.S., delivered the Judgment of the Court.**

***Cases Referred to:***

- 1. Bray v Palmer [1953] 1 WLR 1445.**
- 2. New Plast Industries v Commissioner of Lands and Attorney General [2001] Z.R. 51**
- 3. Zambia National Holdings & UNIP v Attorney General [1993-1994] Z.R. 115.**
- 4. Sithole v State Lotteries Board [1975] Z.R. 106.**
- 5. Kapembwa v Maimbolwa & Attorney General [1981] Z.R. 127.**

***Legislation Referred to:***

**1. The Lands Act, CAP 184; Section 13 (1) & (3).**

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**2. The Lands & Deeds Registry Act, CAP 185, Sections 87 and 11.**

**3. The Constitution of Zambia ,CAP 1 Article 94 (1).**

The delay in delivering this Judgment is deeply regretted. It is due to a heavy workload coupled with other unexpected events. The late Hon Mr. Justice P. Chitengi was part of the Court that heard this appeal. He retired and then passed away. Therefore, this Judgment is by the majority.

In this Judgment, we shall refer to the Appellant as the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Respondent as the Plaintiff and the Attorney General, as the 2<sup>nd</sup> Defendant, which is what they were in the Court below.

The 1<sup>st</sup> Defendant is appealing against the Judgment of the High Court, of 21<sup>st</sup> December 2007. By that Judgment, the High Court:

- 1. Declared that the Plaintiff was the registered owner of Stand No. 12094, Lusaka and thus entitled to its quiet possession and enjoyment.**
- 2. Granted an order in favour of the Plaintiff that the 1<sup>st</sup> Defendant immediately pulls down, demolishes and removes so much of the structure, so far as already erected or constructed on Stand No. 12094, Lusaka.**

The brief facts of this matter are that the 1<sup>st</sup> Defendant was initially the registered owner of Stand No. 12094, Lusaka. On 18<sup>th</sup> August 2003, the Commissioner of Lands re-entered upon the Stand in question, for failure by the 1<sup>st</sup> Developer of the

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property and for failure to pay ground rent, in breach of the State Lease. Thereafter, the Commissioner of Lands granted the Stand in question to Elyas Munshi (D.W.1), and issued him with a Certificate of Title thereto. By an assignment dated 26<sup>th</sup> December 2006, Elyas Munshi sold and assigned the Stand in question to the Plaintiff, for K15 million. The payment was witnessed by P.W.2. At trial, Elyas Munshi reneged on the sale. He claimed that although he signed the contract of sale of the property, he was not paid K15 million, purchase price and that the sale was induced by fraud on the part of the Plaintiff.

On the application of the 1<sup>st</sup> Defendant, the Attorney General was joined as the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant challenged the re-entry of the property by the Commissioner of Lands. It counterclaimed for:-

- 1) A declaration that it was still the registered and bona fide owner of the Stand.**
- 2) Loss and damage against the Plaintiff, for fraud.**
- 3) Loss and damage against the 2<sup>nd</sup> Defendant, for negligence; and**

**4) For an order that the 2<sup>nd</sup> Defendant should cancel the Certificate of Title issued, extraneously, to the Plaintiff.**

After evaluating the evidence, the learned trial Judge found that the State validly re-entered the property, the 1<sup>st</sup> Defendant having failed to pay ground rent for three years. He also found that there was a valid contract of sale between Elyas Munshi

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and the Plaintiff and that the Plaintiff did not acquire the Certificate of Title to the property by fraud. And that the Plaintiff was a bonafide purchaser for value. Accordingly, granted the Plaintiff the reliefs claimed and dismissed the 1<sup>st</sup> Defendant's counter claim.

There are four (4) grounds of appeal. These read as follows:-

- “1. The learned trial Judge erred in law and fact by not making any findings of negligence as pleaded by the 1<sup>st</sup> Appellant against the 2<sup>nd</sup> Appellant.**
- 2. The learned trial Judge misdirected himself in law in deciding that Section 13 (3) of the Lands Act No. 21 of 1995 had ousted the powers of the High Court in respect of the Certificate of re-entry as pleaded by the 2<sup>nd</sup> Appellant.**
- 3. The learned trial Judge erred in law and fact in deciding that there was no procedural**

**impropriety on the part of the 2<sup>nd</sup> Appellant regarding the alleged certificate of re-entry on Stand No. 12094, Lusaka contrary to the evidence on record.**

- 4. The learned trial Judge erred in law and fact when he did not make any findings of fraud as pleaded by the Appellant in the counter-claim contrary to the evidence on record and hence deciding that the Respondent was a bona fide purchaser for value who had acquired good title to Stand No. 12094, Lusaka.”**

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On ground one, on behalf of the 1<sup>st</sup> Defendant, Mr. Kabimba submits that as per page 156 of the record of appeal, the 1<sup>st</sup> Defendant pleaded three particulars of negligence, led evidence on them and was cross examined thereon. That despite that, the learned trial Judge did not make any findings of negligence in accordance with the evidence before him. In support of his submission, he cites **Bray v Palmer (1)**. In that case, the trial Judge failed to decide between the Plaintiff and the Defendant, as to who has been negligent, and did not, therefore, make a conclusion to that effect. It was held by the Court of Appeal that the trial Judge’s decision, as it stood, was a denial of justice and that he should have formed some conclusion on the matter.

In reply on behalf of the Plaintiff, Mr. Simeza submits that the learned trial Judge addressed the claim for alleged negligence and found nothing in the evidence to support the particulars pleaded. He adds that in any event, the claim for negligence ought to be understood within the context in which it was argued at trial. That the Plaintiff alleged negligence against the Commissioner of Lands in the issuance of the Certificate of Title for Stand 12094, Lusaka. That it was alleged that the Commissioner of Lands issued the Certificate of Title to Elyas Munshi by mistake or negligently. That, however, no evidence was led to show how the Commissioner of Lands was supposed to have acted negligently or mistakenly. He submits that the

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trial Court specifically made a finding that there was no mistake in the issuance of the Certificate of Title to Elyas Munshi; by the Commissioner of Lands. He points out that Elyas Munshi's Title to Stand !2094 Lusaka had never been challenged by the 1<sup>st</sup> Defendant. That instead Elyas Munshi was merely called as a witness for the 1<sup>st</sup> Defendant. And in his testimony, Munshi did not concede that he obtained his Certificate of Title to Stand 12094, Lusaka, either by mistake or negligently.

On behalf of the 2<sup>nd</sup> Defendant, Mr. Simwanza submits, on ground one, that the trial Court was on firm ground in not making a finding of negligence, as pleaded by the 1<sup>st</sup> Defendant. That there is no evidence on record which was

adduced during trial to show that the Commissioner of Lands acted negligently in the whole transaction.

We have considered the submissions on ground one and have examined the case record and the judgment appeal against, in relation to this ground. At page 156 of the record of appeal are the three particulars of negligence pleaded by the 1<sup>st</sup> Defendant, in its counterclaim. They read as follows:-

**“(i) Issuing by mistake and/or negligently a certificate of title**

**to Elyas Munshi for Stand No. 12094 Lusaka in lieu of Stand No. 12095, Lusaka.**

**(ii) Failing to identify and show Elyas Munshi the correct**

**Stand No. 12095 Lusaka in lieu of Stand No. 12094, Lusaka.**

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**(iii) Failure to serve upon the 1<sup>st</sup> Defendant a notice of re-entry**

**And certificate of re-entry to enable the 1<sup>st</sup> Defendant to remedy the alleged breach if any or make representation.”**

If I understand Mr. Kabimba correctly, the gist of his submission in the pleaded mistake and negligence, is that the State made a mistake or acted negligently when they issued the Certificate of Title for Stand No. 12094, to Elyas Munshi. That was after it was re-entered and repossessed from the 1<sup>st</sup>

Defendant in 2003. That instead of showing Elyas Munshi the correct Stand No. 12095, Lusaka, the officer from Lands Department, made a mistake by showing Elyas Munshi Plot 12094, which the 1<sup>st</sup> Defendant claims it belongs to it. But according to the evidence of P.W.2, Gulum Mohamed Saddiqi, the Plaintiff was already the registered owner of Stand 12095, Lusaka and indeed Stand 12096, Lusaka, before the Plaintiff bought Stand 12094, Lusaka from Elyas Munshi in 2006. P.W.2 sold Stands 12095 and 12096 Lusaka, to the Plaintiff. Thereafter, P.W.1, on behalf of the Plaintiff, showed interest in Stand 12094, Lusaka. It was at that stage that P.W.2 told P.W.1 that the Stand in question was owned by Elyas Munshi. Then P.W.1 approached Elyas Munshi, over Stand 12094 and bought it (*See pages 10 and 11 of the record of appeal*). Additionally, on the evidence, Stand 12095 Lusaka, was not a subject of re-entry by the Commissioner of Lands, in August 2003. A named person had its quiet and valid ownership and possession.

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Therefore, it could not have been mixed up with Stand 12094, after the latter was re-entered by the Commissioner of Lands.

Given the foregoing, we agree with Mr. Simeza and Mr. Simwanza that particulars of mistake and negligence, as pleaded, were not supported by evidence at trial.

With regard to specific findings of fact on the counterclaim, the learned trial Judge said this:-

**“In conclusion, the President, through the Commissioner of Lands, having re-entered the property due to non-development and non-payment of ground rent by 1<sup>st</sup> Defendant and having allocated that property to D.W.1 who sold it to the Plaintiff, P.W.1, therefore acquired good title and for what I have stated, he was a bonafide purchaser for value. The Plaintiff, therefore acquired good title. For what I have stated there is no need to consider 1<sup>st</sup> Defendant’s counterclaim and it, accordingly, falls away and the injunction granted to the Plaintiff is confirmed (as permanent). The Plaintiff is therefore successful in all his prayers and the costs will follow the event to be taxed in default of agreement. Leave to appeal to the Supreme Court if desired is hereby granted.”**

On the evidence on record, we are of the view that the learned trial Judge was correct in his conclusion. Therefore, he cannot be faulted. Accordingly, **ground one** fails.

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On **ground two**, Mr. Kabimba opens his submission by quoting Section 13 (1) of the Lands Act 1995, which provides as follows:

**“Where a lessee breaches a term or condition of covenant under the Act, the President shall give the lessee three months notice of his intention to cause a Certificate of re-entry to be entered in the**

**register in respect of the land held by the lessee and request him to make representations as to why a Certificate of re-entry should not be entered in the register.”**

He again quotes Section 13(3) of the Act, which provides as follows:-

**“A lessee aggrieved by the decision of the President to cause a Certificate of re-entry to be entered in the register may within thirty days appeal to the Lands Tribunal for an Order that the register be rectified.”**

He submits that on a proper construction of Section 13 (1) and (3) of the Act, the Act does not oust or attempt to oust the jurisdiction of the High Court in respect of the Certificate of re-entry. That the High Court having unlimited jurisdiction, has power to hear a matter in a land dispute which is brought before it by an aggrieved party, after 30 days of the decision to re-enter the property. That therefore, the learned trial Judge misdirected himself when he decided that Section 13 (3) of the Act ousted his powers in respect of the Certificate of re-entry.

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In response on behalf of the 1<sup>st</sup> Appellant, Mr. Simeza supports the learned trial Judge as having been on firm ground in deciding that Section 13 (3) of the Lands Act 1995 ousts the High Court’s jurisdiction in respect of Challenges to the

Certificate of re-entry. In support of his submission, he cites **Newplast Industries v Commissioner of Lands and Attorney General (2)**. He submits that to the extent that the 1<sup>st</sup> Defendant sought an Order cancelling the Plaintiff's Certificate of Title to Stand 12094, Lusaka, on the basis of the Notice of re-entry by the Commissioner of Lands was issued by mistake or negligently, such challenge can only be made before the Lands Tribunal, under Section 13 (3) of the Lands Act. That the High Court has no jurisdiction to entertain such a claim.

On behalf of the 2<sup>nd</sup> Defendant, Mr. Simwanza too, supports the decision by the learned trial Judge that in holding that Section 13 (3) of the Lands Act, ousts the jurisdiction of the High Court, in dealing with challenges of Certificate of re-entry because the 1<sup>st</sup> Respondent in its counterclaim failed to prove fraud. He submits that **Zambia National Holdings & UNIP vs Attorney General (3)** is instructive as to the jurisdiction of the High Court. He adds that the learned trial Court was on firm ground in holding that there was no procedural impropriety on the party of the State, regarding the Certificate of re-entry. He points out that the 1<sup>st</sup> Defendant admitted not having paid ground rent for over 2 years, in breach of Clause 2 of the State

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Lease agreement. He points out that under the same Clause, failure to pay ground rent, within 28 days, can lead to the Commissioner of Lands causing a re-entry to be entered on the

property against the title holder. He adds that he who comes to equity must come with clean hands. He submits that the 1<sup>st</sup> Defendant in this case did not have clean hands to question the re-entry, as it had not paid ground rent.

We have considered **ground two** and the submissions of Counsel. **New Plast Industries v Commissioner of Lands and Attorney General (2)** was decided under Section 87 of the Lands and Deeds Registry Act, CAP 185 of the Laws of Zambia. That Section provides that a party aggrieved by a decision of the Registrar of Lands and Deeds, may appeal to the High Court, (*following the procedure in appeals from the Subordinate Court*). The aggrieved party in that case commenced proceedings by way of Judicial Review. In dismissing the appeal, this Court held that the mode of commencement of any action is generally provided by the relevant Statute. Thus, where a Statute provides for the procedure of commencing an action, a party has no option but to abide by that procedure. That the matter having been brought to the High Court by way of Judicial Review, when it should have been commenced by way of an appeal, the Court had no jurisdiction to make the reliefs sought. This Court followed its earlier decision in **Chikuta v Chipata Rural Council [1974] Z.R. 241.**

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In the instant case, Section 13 (3) of the Lands Act specifically provides that a party aggrieved by: "*a Certificate of re-entry entered in the Register may within thirty days appeal*

*to the Lands Tribunal for an order that the Register be rectified.”* Following our decisions in the two cases referred to above, we hold that the 1<sup>st</sup> Defendant, being aggrieved by the Certificate of re-entry on Stand 12094 Lusaka, had no option but to appeal to the Lands Tribunal, in its challenge of the Certificate of re-entry. The 1<sup>st</sup> Defendant did not do so. On the facts of this case, we hold that the learned trial Judge had no jurisdiction to entertain the 1<sup>st</sup> Respondent’s counterclaim on fraud and negligence in this action, which was commenced by a writ of summons.

The issue of unlimited jurisdiction of the High Court was considered in **Zambia National Holdings Limited and UNIP v Attorney General (3)**. In that case, this Court held as follows:-

**“As a general rule, no cause is beyond the competence of and authority of the High Court; no restriction applies as to the types of cause and other matters as would apply to lesser Courts. However, the High Court is not exempt from adjudicating in accordance with the law, including complying with procedural requirements, as well as substantive limitations, such as those one finds in mandatory sentences or other specifications of available penalties or, in civil matters, the types of choice of relief or remedy available to litigants, under the various laws or causes of action.”**

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It is clear from the above quotation that the High Court's unlimited jurisdiction under Article 94 (1) of the Zambian Constitution is subject to compliance with prescribed procedure. It does not entitle a party to deviate from procedure prescribed by a statute and commence an action or raise a counterclaim in an action, in the High Court, in disregard of prescribed procedure. In our view, the unlimited jurisdiction does not help the 1<sup>st</sup> Defendant in this matter.

**For the foregoing reasons, we dismiss ground two.**

On ground three, the gist of Mr. Kabimba's submission is that there is no evidence on record to show that the notice of intention to re-enter the Plot was served on the 1<sup>st</sup> Defendant, as required by Section 13 (1) of the Lands Act, CAP 184 of the Laws of Zambia. That there being no proof of service of the notice of intention to re-enter the Stand, the learned trial Judge erred in deciding that there was no procedural impropriety on the part of the 2<sup>nd</sup> Defendant.

On behalf of the Plaintiff, on ground three, Mr. Simeza repeats his submission on ground two that is a challenge to any re-entry by the Commissioner of Lands can only be launched in the Lands Tribunal, as required under Section 13 (3) of the Lands Act. That the 1<sup>st</sup> Defendant ignored this procedure.

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On behalf of the 2<sup>nd</sup> Defendant, Mr. Simwanza submits that the learned trial Judge was on firm ground in holding that there was no procedural impropriety on the part of the Commissioner of Lands, regarding the Certificate of re-entry. He points out that the 1<sup>st</sup> Defendant admitted having failed to pay ground rent for two (2) years.

We have considered the submissions on **ground three**. The short answer, as we said in ground two, is that the learned trial Judge had no jurisdiction to hear the 1<sup>st</sup> Defendant's challenge of the re-entry process by the Commissioner of Lands. Therefore, he should not have even ruled on the impropriety or otherwise of the re-entry process. Accordingly, **we dismiss ground three**.

On **ground four (4)**, Mr. Kabimba submits that the 1<sup>st</sup> Defendant pleaded fraud against the Plaintiff, in the manner it acquired the Stand from Elyas Munshi. That the 1<sup>st</sup> Defendant did not plead fraud against Elyas Munshi, in the manner he got the Plot. He points out that the learned trial Judge ruled that there was no fraud on the part of Elyas Munshi, D.W.1, in obtaining the title from the State. He argues that, that was not the case pleaded by the 1<sup>st</sup> Defendant. That the learned trial Judge, therefore, fell into error when he did not make specific finding of fraud or lack of it, on the evidence before him, in respect of the Plaintiff. He adds that the evidence of D.W.1,

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Elyas Munshi, relating to the circumstances under which the transfer to the Plaintiff company of Stand 12094 Lusaka, took place, is at pages 203 - 206 of the record of appeal. He submits that a Certificate of Title obtained in a fraudulent manner can be cancelled. In support of his submission he referred us to **Sambo & Others v Mwanza [2000] Z.R. 79**.

In response, on ground 4, on behalf of the Plaintiff Mr. Simeza refers us to Section 11 (1) and (2). Sub-Section (1) deals with correction of errors or omissions in the Register, arising from fraud or mistake. Sub-Section (2) deals with applications, by an aggrieved party, to the High Court, for corrections of such errors or omissions in the Register. He submits that since the 1<sup>st</sup> Defendant alleges fraud in the transfer of the disputed Stand, from Elyas Munshi to the Plaintiff, he should have lodged a complaint under Sub-Section (1) to the Registrar of Lands. That way, the Registrar would have investigated the alleged fraud and mistake. And if proved, the Registrar would have proceeded as per Section 11 (2) of the Lands and Deeds Registry. He submits that D.W.1 Elyas Munshi conceded that no complaint of fraud or mistake was ever made to the Registrar of Lands and Deeds. Referring to the claim by Elyas Munshi that he signed the conveyance documents by mistake as he thought that he was signing conveyance documents for Stand 12095, he points out that Elyas Munshi admitted that he did not own Stand 12095. And therefore, could not have been signing conveyance for the

Stand he does not own. That Munshi admitted that the only Stand he owned in Chinika area was Stand 12094, Lusaka. That Munshi admitted that he signed the conveyance documents for Stand 12094, freely and was not forced. He submits that there was no evidence to show any fraud on the part of the Plaintiff. He submits that Munshi and other defence witnesses conceded that there was nothing to show that there was any wrong doing or irregularity in the transfer of the property from Munshi to the Plaintiff. He finally urges the Court to dismiss the appeal.

On ground 4, on behalf of the State, Mr. Simwanza submits that there is no evidence on record to show that there was fraud in the transaction between D.W.1, Munshi and the State. Therefore, the learned trial Judge was on firm ground in not making any finding of fraud, as pleaded by the 1<sup>st</sup> Defendant. He submits that fraud must be proved on a standard higher than the balance of probabilities. In support of his submission, he cites **Sithole v State Lotteries Board (4)**. He submits that the 1<sup>st</sup> Defendant did not satisfy the standard of proof set out in the Sithole case. He finally urges us not to interfere with the trial Court's findings of fact in line with **Kapembwa v Maimbolwa and Attorney General (5)**.

We have examined the 1<sup>st</sup> Defendant's counterclaim and have considered submissions on this ground. As correctly

submitted by Mr. Simwanza, fraud must be proved on a standard higher than the balance of probabilities: **See Sithole v State Lotteries Board (4)**. On the allegation of fraud, the 1<sup>st</sup> Defendant rested its counterclaim on the evidence of D.W.1, Elyas Munshi.

As correctly pointed out by Mr. Simeza, the record shows that the evidence of this witness was totally discredited in cross examination. The learned trial Judge evaluated D.W.1's evidence and did not believe it. This is what he said of the witness:

**“One may characterize D.W.1’s testimony in jurisdictions which liberally use the language as a *“cheque book witness”*, while here it would be appreciated to call the witness incredible. To allow D.W.1’s testimony to stand is to destroy Section 4 of the Statute of Frauds, whose philosophy was to prevent, *“Court-room perjury”*. The Defence testimony was riddled with palpable contradictions.”**

On the specific allegation of fraud, the learned trial Judge said:

**“Fraud must be proved above the balance of probability as it is of a criminal nature. The 1<sup>st</sup> Defendant relies on the *‘discounted’* story of D.W.1, that he signed documents whose nature he did not understand, and he thought he was transferring Plot 12095 and yet he signed documents for Plot 12094, for which he was registered proprietor and not Plot**

12095 which the Plaintiff bought from P.W.2. Now, can it be

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said that there was misrepresentation by the Plaintiff to Elyas Munshi, D.W.1, as the title holder and the property described in these documents is Plot 12094, for which Elyas Munshi (D.W.1) was the holder of the Title... The Contract of sale on the front page reflected consideration in big letters. I find it to be unbelievable that D.W.1 can now say he did not know the nature of the documents he was signing..... I think not. The facts of this case can account for no other hypothesis, apart from the fact that this was a valid contract of sale between the Plaintiff and Elyas Munshi did not obtain title by fraud as was canvassed, the plaintiff was bonafide purchaser for value, from Mr. Elyas Munshi (D.W.1) who also obtained title from the State, as I have stated earlier, legally.”

On the evidence on record, we are of the view that the learned trial Judge correctly disbelieved the evidence of D.W.1, Elyas Munshi, alleging fraud against the Plaintiff, in the manner it bought Stand 12094 from D.W.1. The contradictory evidence Elyas Munshi gave, on the sale transaction, was not capable of proving fraud, on the standard set by the **Sithole case**. Therefore, we do not accept the submission by Mr. Kabimba that the 2<sup>nd</sup> Defendant led evidence to prove the perpetration of fraud by the Plaintiff in its purchase of Stand 12094 from Elyas Munshi. The learned trial Judge correctly

rejected the evidence of Elyas Munshi on alleged fraud. This amounts to a finding of fact that there was no fraud on the part of the Plaintiff, in its purchase of Stand 12094, from Elyas Munshi. Accordingly, we do accept the submission by Mr. Kabimba that the learned trial

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Judge fell into error, when he did not make specific findings of fraud or lack of it, on the evidence before him, in respect of the Plaintiff.

For the foregoing reasons, we dismiss ground 4, for lack of merit. In the total analysis, this appeal fails. We award costs to the Plaintiff and the attorney General. These will be taxed, default of agreement.

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**L. P.CHIBESAKUNDA**  
**ACTING CHIEF JUSTICE**

.....  
**M. S. MWANAMWAMBWA**  
**SUPREME COURT JUDGE**