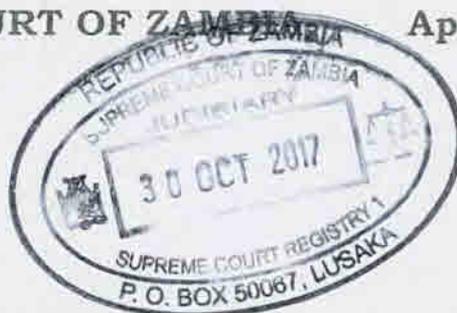


IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

Appeal No.204/2014



**BETWEEN:**

**ZCCM INVESTMENTS HOLDINGS PLC**

**APPELLANT**

AND

**VIDAH BANDA MUMBA**

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

**BETSONE CHAMBESHI**

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

**Coram:** Mambilima CJ, Kaoma and Kajimanga, JJS

On 11<sup>th</sup> July 2017 and 30<sup>th</sup> October 2017

**For the Appellant** : No Appearance  
**For the 1<sup>st</sup> Respondent** : In person  
**For the 2<sup>nd</sup> Respondent** : Mrs L. K. Mbaluku, Messrs L. K.  
Mbaluku & Co.

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## J U D G M E N T

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**KAJIMANGA, JS delivered the Judgment of the Court.**

Cases referred to:

1. **Tito and Others v Waddel and Others No. 2 [1977] Ch.D 106**
2. **Grace Muimui v Sylvia Chunda-Appeal No. 50 of 2000**
3. **Anti-Corruption Commission v Barnnet Development Corporation (2008) Vol. 1 ZR 69**
4. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172 (S.C.)**

5. **Zambia Consolidated Copper Mines Limited v Richard Kangwa - Appeal No. 169 of 1999**
6. **Mukumbuta Mukumbuta and Others v Nkwilimba Choobana, Mongu Meat Corporation and Others - SCZ Judgment No. 8 of 2003**
7. **Jane Mwenya and Jason Randee v Paul Kapinga (1987) ZR 17**
8. **Mbazima, Joint Liquidators of Zimco v Reuben Vera - SCZ Judgment No. 6 of 2001**
9. **Edith Nawakwi v Lusaka City Council and Another - Appeal No. 6 of 2001**
10. **Lusaka City Council and National Airports Corporation v Grace Mwamba and Another - Appeal No. 63 of 1998**

**Legislation referred to:**

1. **Industrial and Labour Relations Act, Cap 269, S.97**
2. **Judgments Act, Cap 81, S.2**

When this appeal was lodged by the appellant on 19<sup>th</sup> September 2014, the 1<sup>st</sup> respondent was **ADRONE BANDA** who has since expired. On 19<sup>th</sup> May, 2017 this court granted an *ex parte* order substituting **ADRONE BANDA** with **VIDAH BANDA MUMBA** as 1<sup>st</sup> respondent. For convenience, we shall hereafter refer to the said **ADRONE BANDA** as the deceased.

This is an appeal against the judgment of the High Court at Kitwe delivered on 21<sup>st</sup> August 2014, which ordered the cancellation of the contract of sale between the appellant and the deceased. It also ordered the cancellation of the deceased's certificate of title relating to House No. 162 Zebra Street, Nkana East, Kitwe ("the house").

The background to this appeal is that the deceased (plaintiff in the court below) was employed by Zambia Consolidated Copper Mines Limited (ZCCM), the precursor to the appellant (2<sup>nd</sup> defendant in the court below), from 1982 to September 1999 when he was discharged on medical grounds. In 1994 the deceased bought house number 10 Nerina Street, Kabwe from ZCCM when the Kabwe Mine where he had been working was closed. He was retained by ZCCM to oversee the closure of the mine from 1997 until 1999.

On 29<sup>th</sup> October 1997, while in occupation of House No. 10 Nerina Street in Kabwe, ZCCM offered the house to the deceased for sale at the price of K11,370,000.00 (now K11,370.00), which offer he duly accepted the same day. A contract of sale relating to the house was entered into by the deceased and ZCCM on 20<sup>th</sup> January 1998 and the full purchase price was later deducted from his terminal benefits.

At the time the deceased accepted the offer, he was unaware that the house was being occupied by the 2<sup>nd</sup> respondent (1<sup>st</sup> defendant in the court below). It was only after the contract was

signed that the deceased viewed the house and he found that the 2<sup>nd</sup> respondent and his family were in occupation.

The 2<sup>nd</sup> respondent was also an employee of ZCCM who had been engaged by its Nkana division sometime in 1984. On 15<sup>th</sup> May 1995, ZCCM seconded him to Nkana Red Devils Limited, a company which was formed by ZCCM, as a coach. He was treated as an employee of Nkana Red Devils Limited for purposes of salary, housing, ZNPF and pension contributions but he continued to accrue service related benefits under ZCCM. The 2<sup>nd</sup> respondent had an option of going back to work with ZCCM upon the termination of his contract with Nkana Red Devils Limited at the grade that he was employed prior to his secondment or choose to terminate his services with ZCCM.

When the 2<sup>nd</sup> respondent was seconded to Nkana Red Devils Limited, he was officially allocated the house in dispute by ZCCM and began paying a composite monthly residential charge in the sum of K12,000.00 (now K12.00) per month for electricity, water and other utilities. Since its allocation to him in May 1995, the 2<sup>nd</sup> respondent has remained in occupation of the house to date.

Consequently, on 10<sup>th</sup> March 2004, the deceased issued a writ of summons against the 2<sup>nd</sup> respondent and the appellant claiming:

- i. Specific performance of the contract of sale relating to the house;
- ii. A declaration that the 2<sup>nd</sup> respondent is a tenant of the deceased;
- iii. An order for mesne profits of K400,000.00 (now K400.00) per month;
- iv. An order for reimbursement of all expenses incurred by the 1<sup>st</sup> respondent [such] as municipal charges;
- v. All necessary and consequential accounts, directions and inquiries;
- vi. Any other relief the court may deem fit and expedient; and
- vii. Costs.

In his statement of claim, the deceased contended that by an agreement in writing dated 20<sup>th</sup> January, 1998 between himself and the appellant, the latter agreed to sell and the former agreed to purchase the house. The purchase price was to be offset against the deceased's terminal benefits and title deeds were to be released to the

deceased upon payment of the purchase price. The deceased paid the purchase price in full and notice of the sale was communicated to the 2<sup>nd</sup> respondent by the appellant. However, the 2<sup>nd</sup> respondent has to date, remained in occupation of the house rent free.

In his defence, the 2<sup>nd</sup> respondent asserted that he deserved to purchase the house as a sitting tenant considering that the deceased owned House No.10 Nerina Street, Kabwe which he purchased from ZCCM. That he had been in occupation of the house long before the alleged contract of sale between the deceased and ZCCM. Further, that the deceased has suffered no loss and he abused court process by instituting the court proceedings against him when the case of **Kennedy Kalunga and Others v ZCCM and Others** under **Complaint No. 116/1999** concerning the same house was pending in the Industrial Relations Court ("IRC").

The appellant also filed a defence refuting the deceased's claims but admitted to having sold the house in issue to the deceased who was its employee and sitting tenant.

The deceased's evidence in the court below was that he was employed by ZCCM from 1982 to September 1999 when he was discharged on medical grounds. In 1997, ZCCM began to sell its houses to its employees and he applied to purchase the house which he believed was vacant. At that time, he was staying at House No. 10 Nerina Street in Kabwe which he purchased from ZCCM in 1994 when ZCCM closed Kabwe Mine. According to the deceased, the sale of ZCCM houses in Kabwe in 1994 was different from the sale of ZCCM houses that started in 1997 in that in 1994, it was due to the closure of the Kabwe Mine whereas in 1997, it was due to the privatisation of ZCCM. He stated that ZCCM had decided to sell the houses in order to offset its unbearably huge terminal benefits bill and that the sale was being made to unhoused employees and sitting tenants. This was in accordance with Rule 2 (ii) of the guidelines on the sale of houses which provides that employees occupying institutional houses or are unhoused will be offered any available house across the industry. In his view, he was eligible to purchase the house under the category of unhoused employees as it had nothing to do with his house in Kabwe. ZCCM considered him as an

unhoused Zambian employee in service because he was staying in his own house and ZCCM had never written to him stating that he was not eligible to purchase the house.

It was also his testimony that on 29<sup>th</sup> October 1997, ZCCM offered to sell him the house, which offer he duly accepted. Subsequently, the Human Resource Manager of ZCCM took him to view the property. They found the 2<sup>nd</sup> respondent's wife who allowed them to view the property but expressed displeasure at the fact that ZCCM had offered it to him. However, she did not explain how her family came into occupation of the house. Prior to accepting the offer, the deceased was not allowed to visit or inspect the house and, therefore, he was not aware that the house was occupied by the 2<sup>nd</sup> respondent. On 20<sup>th</sup> January 1998, a contract of sale relating to the house was executed between him and ZCCM. On 20<sup>th</sup> May 1998, the Human Resource Manager of ZCCM wrote to Nkana Business Ventures to inform them that the house which they had been renting from ZCCM, was sold to him. An agreement was then entered into between the deceased and Nkana Business Ventures whereby, they would pay him K275,000.00 (now K275.00) per month as rent but no

tenancy agreement was actually executed by them. Accordingly, Nkana Business Ventures paid rentals to him from January 1998 until December 2000, during which time the 2<sup>nd</sup> respondent and his family were in occupation of the property.

The deceased further testified that in 2001, officials of Nkana Business Ventures verbally informed him that they had stopped paying rent because the 2<sup>nd</sup> respondent was claiming that he was entitled to purchase the house as a sitting tenant. That sometime in 2002, the 2<sup>nd</sup> respondent applied to ZCCM to purchase the same house but he was informed that it had already been sold to one of its employees. Further, that although the IRC ordered that the 2<sup>nd</sup> respondent was not eligible to purchase the house, he has not vacated it. The deceased also stated that he obtained a certificate of title relating to the same house in 1999 and since then he has been paying ground rent and municipal charges.

The 2<sup>nd</sup> respondent's evidence was that he joined ZCCM in 1984 and was employed as a community development officer. However, when ZCCM introduced professional football, he was employed as a professional football player for Nkana Red Devils Limited in 1990 and

stayed there until 1995 when he went back to work at ZCCM Mine Power Services Department as a clerk. When the coach for the Nkana Football team passed away, he was seconded to Nkana Red Devils Limited under Nkana Business Ventures as a coach. The said appointment was considered as a promotion, and he was allocated the house and began paying K12.00 per month for his stay in the house with effect from 1<sup>st</sup> May 1995. According to the 2<sup>nd</sup> respondent, Nkana Business Ventures was not a limited company but was an organisation meant to raise funds for sports clubs and other clubs run by ZCCM. Therefore, he and other workers in his category who were working for the business venture were treated as ZCCM employees and it was ZCCM that was determining their conditions of service.

The 2<sup>nd</sup> respondent further testified that under clause 2 of the ZCCM Rules on Sale of Houses, he qualified to purchase a ZCCM house and he was assured by ZCCM that he would benefit from the privatisation of the company, yet when they started selling houses, he was not offered the house which he still occupies. He stated that in or about 2002, he was told that there were some people who had

come home claiming to be owners of the house. As soon as he learnt that the house had been offered to the appellant, he went and quizzed the ZCCM Human Resource Manager.

It was also his testimony that according to the ZCCM rules, he is the one who was supposed to buy the house because he was in service when they started selling the houses and he was a sitting tenant. He and others in similar positions then took the matter to the IRC but the Court did not decide in their favour. That the judgment of the IRC was appealed against and the Supreme Court advised them to sue in the High Court. By a letter dated 18<sup>th</sup> May 2006, ZCCM promised to offer him and others the company houses which they were occupying as sitting tenants but the promise did not materialise.

The 2<sup>nd</sup> respondent's witness was Dennis Kapembwa who testified that he worked for ZCCM from 1986 to 2004 and his last post in the company was Senior Sports and Recreation Officer under Nkana Division-Community Development Services. He stated that there was a time when ZCCM introduced football divisions and formed Nkana Business Ventures for the purpose of raising funds to

supplement the running of football and other activities. According to the witness, Nkana Business Ventures was merely a business entity and not a separate legal entity. The ZCCM employees who were football players were seconded to Nkana Red Devils Limited, a subsidiary of ZCCM, under the business venture with an option to return to ZCCM should their careers as professional footballers end. He also testified that the 2<sup>nd</sup> respondent was initially employed by ZCCM as a housing officer, later as a footballer and then as a football coach. He further stated that the letter on page 9 of the supplementary record of appeal dated 17<sup>th</sup> September 1990 is a transfer and not a secondment.

Alex Bwalya testified on behalf of the appellant. His testimony was that he joined Roan Copper Mines (RCM) in 1973 and worked in various capacities ending up as a Senior Housing Officer in 2000 under ZCCM, as at that time RCM had changed its name to ZCCM. When ZCCM started selling its houses in 1997, he was a senior housing officer. In 1990, ZCCM Kabwe Mine was closed and its houses were sold to its employees. Like the 1<sup>st</sup> respondent, the witness also testified that the sale of company houses in Kabwe was

different from the sale in 1997, in that in 1994, it was due to closure of the mine but in 1997, it was due to privatisation and the need to empower ex-employees of ZCCM.

He further testified that according to the ZCCM Rules on Sale of Company Houses to Zambian Employees, priority was supposed to be given to sitting tenants. Availability of a ZCCM house for sale depended on the circumstances, for example, a house occupied by a person who is not a ZCCM employee would be considered available for sale to a ZCCM employee in service at the time. The one envisaged as a sitting tenant was the one in the house and working for ZCCM. According to this witness, clubs and business ventures were not subsidiaries of ZCCM and their employees were ineligible to purchase ZCCM houses. Further, if an employee was seconded to another company or institution, he was considered as an employee of the company which seconded him.

After considering the evidence and submissions of both parties, the trial judge found that Nkana Business Ventures was wrongly considered as a tenant by ZCCM because it was not a legal entity. She also found that ZCCM played a major role in determining the 2<sup>nd</sup>

respondent's conditions of service and for all workers under the business venture it was not a corporate body. She found that the house was not allocated to the business venture but directly to the 2<sup>nd</sup> respondent. The learned trial judge further found that by July 1997, the 2<sup>nd</sup> respondent was receiving a salary and pay slips from ZCCM Limited entailing that he was still an employee of ZCCM.

The learned trial judge concluded that although the deceased had fully paid for the house and obtained a certificate of title, he has been unable to take possession of the house because of an encumbrance that existed before the offer was made to him which he had constructive notice of. She found that the deceased was under a legal obligation to find out who was in occupation of the house since he was aware that the vendor was not in possession. It was her view that if the deceased had been a prudent buyer, he would have made inquiries as to who was in occupation of the house from the vendor or the 2<sup>nd</sup> respondent's neighbours and later from the sitting tenant himself. Since the deceased had not done so, the learned trial judge found that the title he held in respect of the property was subject to the rights of the 2<sup>nd</sup> respondent. According to the learned trial judge,

ZCCM misled the deceased that the house was available for sale to unhoused employees when in fact it was not.

Guided by the case of **Tito and Others v. Waddel and Others**<sup>1</sup>, the learned trial judge held that under the circumstances, the deceased was not entitled to specific performance of the contract of sale as such an order would not be just. The learned trial judge also relied on the case of **Grace Muimui v. Sylvia Chunda**<sup>2</sup> and found that in view of Rules 1, 2 (i) and (v) of the ZCCM Rules on the sale of houses, the deceased was ineligible to purchase the house because although he was a ZCCM employee, he had never occupied it. That on the other hand, the 2<sup>nd</sup> respondent was and is still eligible to purchase the house because he was an employee of ZCCM, seconded to another institution and allocated the house by ZCCM in 1995 for which he was paying some form of rent and, therefore, was a sitting tenant for about 9 years at the date of the judgment. Further, that in the present case, the vendor was supposed to first offer the house to the 2<sup>nd</sup> respondent and if he rejected the offer or accepted it but failed to abide by the conditions thereof, then it could offer it to anybody else.

The learned trial judge concluded that the deceased obtained the certificate of title improperly and relying on the case of **Anti-Corrupting Commission v. Barnnet Development Corporation Limited**<sup>3</sup>, she cancelled the contract of sale between the deceased and ZCCM and ordered that the appellant should offer the house to the 2<sup>nd</sup> respondent for sale. It was also ordered that the appellant should refund the 1<sup>st</sup> respondent the purchase price with interest at 20% per annum from the time that it was paid to date. The case was accordingly dismissed and the learned trial judge further ordered that the appellant should bear the costs of both the 1<sup>st</sup> and 2<sup>nd</sup> respondents as it sold the house to the deceased without following the government policy on the sale of parastatal houses and its own rules.

Dissatisfied with this decision, the appellant has now appealed to us, advancing nine grounds as follows:

1. **The court below erred in law and fact when, though trial of this matter was stayed in the High Court before the same judge pending determination of the case of Kennedy Kalunga and Others v. ZCCM and Others, Complaint No. 161 OF 1999, the court chose to ignore the judgment of the Industrial Relations Court which was rendered against**

the 1<sup>st</sup> [2<sup>nd</sup>] respondent who formed part of the 4<sup>th</sup> Complainants in that matter on grounds that it was neither bound by its decision and that a material issue had not been adjudicated upon namely the purported secondment of the 1<sup>st</sup> [2<sup>nd</sup>] respondent to Nkana Business Ventures.

2. The court below erred in law and fact in failing to consider that the 1<sup>st</sup> [2<sup>nd</sup>] respondent had sued the appellant herein in the Industrial Relations Court as one of the 4<sup>th</sup> respondents [Complainants] (being employees of ZCCM Clubs) and thereby allowed to appear before another court that ranks parri passu with the Industrial Relations Court that had rendered a judgment against him and effectively obtained a more favourable judgment than the one he had obtained earlier in relation to the same property is [in] issue.
3. The court below erred in law and fact when it based its judgment in favour of the 1<sup>st</sup> [2<sup>nd</sup>] respondent on grounds that the 1<sup>st</sup> [2<sup>nd</sup>] respondent had been merely seconded to Nkana Business Ventures, a matter that the 1<sup>st</sup> [2<sup>nd</sup>] respondent had neither pleaded in the court below nor in the IRC and was clearly an after-thought following the loss in the IRC.
4. The court below erred in law and fact when it made a finding that the 1<sup>st</sup> [2<sup>nd</sup>] respondent herein was an employee of ZCCM (as opposed to being an employee of Nkana Red Devils Football Club) and entitled to purchase a house from ZCCM at the time that the sale of houses began.
5. The court below erred in law and fact when it found that the 1<sup>st</sup> [2<sup>nd</sup>] respondent was an employee of ZCCM on the basis of an option that he had to retake employment with ZCCM after employment with Nkana Red Devils Football Club in the absence of documentary evidence that the said 2<sup>nd</sup> respondent ever exercised such option.

6. The learned trial judge erred in law and in fact when she found that the 1<sup>st</sup> [2<sup>nd</sup>] respondent was a tenant of the appellant herein when the available documents show that Nkana Business Ventures was in fact renting the house in issue for the 1<sup>st</sup> [2<sup>nd</sup>] respondent herein.
  
7. The learned trial judge erred in law and fact when she found that the appellant misled the 2<sup>nd</sup> [1<sup>st</sup>] respondent into believing that the house that it had sold to him was available for sale in light of evidence from the 1<sup>st</sup> [2<sup>nd</sup>] respondent himself that he has never been offered the house in issue by ZCCM as well as his claim for the said house as a club employee when the action was commenced in 1999 showing that he was aware that he was ineligible to purchase the said house.
  
8. The learned trial judge erred in law and fact when she ordered the appellant to refund the plaintiff the purchase price of House No. 162 Zebra Street, Kitwe at an interest rate of 20% per annum from the date that it was paid for to date in disregard of the provisions on the Judgment Act CAP 81 of the Laws of Zambia which requires the rate of interest if payable (which it is not in this case) to be calculated from the date of the judgment up to payment.
  
9. That the learned trial judge erred in law and fact when she ordered the appellant to pay costs for both the 1<sup>st</sup> and 2<sup>nd</sup> respondents, stating that it had failed to follow the government policy and its own rules when selling House No.162 Zebra Street to the 2<sup>nd</sup> [1<sup>st</sup>] respondent when in fact it has so complied.

At the hearing of this appeal, the learned counsel for the 2<sup>nd</sup> respondent informed the court that she agreed with the appellant's learned counsel that they were both relying entirely on their written heads of argument. The 1<sup>st</sup> respondent was granted leave to file her heads of argument within twenty-one days from the date of hearing.

In support of grounds one and two of the appeal, the learned counsel for the appellant referred us to the case of **Wilson Masauso Zulu v. Avondale Housing Project Limited**<sup>4</sup> where we held as follows:

**“Before this court can reverse findings of fact made by a trial judge, we would have to be satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make.”**

It was, therefore, submitted that this was a proper case for this court to reverse the findings of fact that were made in the court below as firstly, they proceeded from the wrong premise in that had the court below correctly applied its mind to the facts that were before it, it would have not arrived at the decision that it did. Secondly, the

court below created a situation where the 2<sup>nd</sup> respondent was permitted to forum shop for a favourable judgment and actually succeeded in doing so.

The learned counsel submitted that the court below began its judgment by referring to the case of **Zambia Consolidated Copper Mines Limited v. Richard Kangwa and Others**<sup>5</sup>, which was totally unrelated to the facts that were before the court as it was a judgment arising out of an appeal from the IRC against a refusal to extend the sale of houses to employees of ZCCM's wholly owned subsidiaries. Counsel argued that when the 2<sup>nd</sup> respondent filed a notice of complaint in the IRC, he brought it against ZCCM as one of the employees of ZCCM clubs in the case of **Kennedy Kalunga and Others v. ZCCM Complaint No. 161 of 1999**.

We were then referred to the judgment of the trial court at J9 where the trial court stated as follows:

**“At one point the proceedings in this case were stayed pending the outcome of the case of ZCCM Limited v. Kangwa [Kalunga] and Others which was in the Industrial Relations Court. The judgment of the Industrial Relations Court was delivered some time before 2000 but was appealed against and the Supreme Court made its decision on**

6<sup>th</sup> June 2000 which was only brought to my attention in 2013. The judgment of the Industrial Relations Court was that employees of subsidiaries of ZCCM were to be treated the same as direct employees when it came to purchasing ZCCM houses in which they were sitting tenants.”

According to the learned counsel, the matter before the court below from which this appeal arises had been stayed on account of a judgment that was pending in the **Kennedy Kalunga** case. As the judgment in the **Kennedy Kalunga** case was delivered by this court in 2000, the learned counsel wondered how a matter that was commenced in 2004 could be stayed before the court below pending a judgment that had already been delivered by this court in 2000 prior to the commencement of the said action. It was contended that in any event, the 2<sup>nd</sup> respondent filed a notice to produce documents on 10<sup>th</sup> October 2013 exhibiting the **Kennedy Kalunga** judgment. That therefore, it was unclear as to how the court below could err and proceed from a totally incorrect premise in this case, in making its determination.

The learned counsel argued that it was worthy of note that the matter before the court below had been stayed pending determination

of the **Kennedy Kalunga** case in the IRC at the instance of the 2<sup>nd</sup> respondent and the judgment was rendered against the said respondent. Counsel submitted that the court below, despite having had sight of the **Kennedy Kalunga** judgment, disregarded its own order for stay and instead stated that the IRC had no jurisdiction over matters pertaining to ownership of land and that the issue of secondment had not been considered by the IRC which it now in error took the liberty to hear and reconsider.

It was the contention of the learned counsel that the High Court and IRC rank *pari passu* and he relied on **section 97 of the Industrial Relations and Labour Act, Chapter 269 of the Laws of Zambia** which provides that any person that is aggrieved by an award or judgment of the IRC may appeal to the Supreme Court on any point of law or any point of mixed law and fact. The learned counsel submitted that the 2<sup>nd</sup> respondent never appealed from the decision of the **Kennedy Kalunga** case that was rendered against him. That therefore, the court below had no jurisdiction to sit as an appellate court from the decision of the **Kennedy Kalunga** case which is exactly what it did when it stated in its judgment on page 9 of the

record of appeal that the issue of secondment had not been considered by the IRC. Counsel wondered why the 2<sup>nd</sup> respondent failed to raise the issue of secondment in his notice of complaint before the IRC or in the appeal to this court had that truly been his position on the matter, and not a mere afterthought following his loss in the IRC.

The learned counsel argued that since the **Kennedy Kalunga** case had been determined by the IRC then it was res judicata in relation to the High Court as the judgment in that matter had the same status of a decision of the High Court itself. Counsel further argued that litigants are not permitted to commence different actions before courts in the hope of obtaining a more favourable judgment as was held in the case of **Mukumbuta Mukumbuta and Others v. Nkwilimba Choobana, Mongu Meat Corporation Limited**<sup>6</sup>.

The learned counsel argued grounds three to nine together and submitted that it was undisputed that the deceased was eligible to purchase the property in issue having been a confirmed ZCCM employee at the time that the sale of houses began in 1997 in line

with the rules of sale of ZCCM houses and the Supreme Court judgment in the **Grace Muimui**<sup>2</sup> case where the court held as follows:

**“We do not subscribe to the argument that being a sitting tenant is the sole criterion in purchasing of a government or quasi government house in the current policy of empowering employees by government. We take judicial notice that the other important criterion is that the potential purchaser has to be an employee of the government organization.”**

The learned counsel submitted that though the 2<sup>nd</sup> respondent alleged that he had been a ZCCM employee merely seconded to Nkana Red Devils Football Club at the time that the sale of ZCCM houses began, the evidence on record is that he was an employee of the football club as shown by the notice of claim in the **Kennedy Kalunga** case where the property in issue falls under the claim of houses made by the 4<sup>th</sup> Complainants described as Emmanuel Chileshe and other employees of ZCCM clubs on pages 58 and 97 - 101 of the record of appeal. That in the **Kennedy Kalunga** case, the IRC held that the 4<sup>th</sup> Complainants' case failed and the same was dismissed and that judgment was never appealed against.

The learned counsel also submitted that the deceased was not entitled to a refund but possession of the house. That had he been entitled to a refund, interest at 20% per annum from the date of his payment to ZCCM until it is repaid contravenes the provisions of the Judgment Act, Chapter 81 of the Laws of Zambia. We were referred to section 2 of the Act which reads as follows:

**“Every judgment, order or decree of the High Court or of a subordinate court whereby any sum of money, or any costs charges or expenses, is or are to be payable to any person shall carry interest as may be determined by the court which rate shall not exceed the current lending rate as determined by the Bank of Zambia from the time of entering such judgment, order or decree until the same shall be satisfied...”**

The learned counsel contended that the court below had no jurisdiction to award interest to the deceased contrary to the provisions of the Judgments Act and that the order for payment of interest should be wholly set aside or varied to conform to the statutory requirement.

The learned counsel argued that the appellant followed the government policy and its own rules in selling the house to the

deceased and the argument that the deceased should have been put on notice that the property was not vacant does not arise. According to the learned counsel, the rules clearly anticipated that some houses had been rented out to non ZCCM employees and that they would be sold to its employees. That there was nothing novel about this state of affairs and therefore, the case of **Jane Mwenya and Jason Randee v Paul Kapinga**<sup>7</sup>, was of no relevance to the present case.

It was also submitted that the house has never been offered to the 2<sup>nd</sup> respondent and the said respondent lost a claim in relation to it in the **Kennedy Kalunga** case. Further, that counsel for the 2<sup>nd</sup> respondent having acted for the 2<sup>nd</sup> respondent both before the IRC in the **Kennedy Kalunga** case and in this case, should be condemned in costs for having encouraged forum shopping when they were aware that the matter had been tried and was res judicata albeit not in favour of the 2<sup>nd</sup> respondent in the IRC. To support this argument, counsel cited the **Mukumbuta**<sup>6</sup> case aforesaid, where we condemned the advocates for the respondents in costs for having deliberately gone forum shopping.

In her heads of argument, the 1<sup>st</sup> respondent agreed with the appellant's submission in ground one, that this matter was stayed in the court below pending determination of the case of **Kennedy Kalunga and Others v. ZCCM** in which the 2<sup>nd</sup> respondent was among the 4<sup>th</sup> complainants against whom judgment was entered. The 1<sup>st</sup> respondent argued that the sole purpose of staying the matter was to wait for the outcome of that case and follow its direction. That however, the trial judge in the court below misdirected herself on this aspect.

In response to ground two, the 1<sup>st</sup> respondent concurred with the appellant's contention that there was forum shopping on the part of the 2<sup>nd</sup> respondent in the court below. She referred us to the application to dismiss matter on a point of law appearing on pages 91 - 93 of the record of appeal, where the 2<sup>nd</sup> respondent asked the court to dismiss the matter in the court below on the ground that there was a pending matter before the IRC involving the same house subject of these proceedings. She argued that after judgment in the IRC matter was entered against him, he neither adhered to nor appealed against it. The 1<sup>st</sup> respondent also submitted that the

learned trial judge erred when she found, at page J20 of her judgment, that the 2<sup>nd</sup> respondent was seconded to Nkana Red Devils as a coach and not as an employee of ZCCM. It was her contention that the 2<sup>nd</sup> respondent was merely a football player who eventually became a coach and as such he ought to be treated as one who is not eligible to purchase or be offered the house in dispute.

As regards ground three, the 1<sup>st</sup> respondent submitted that the learned trial judge misdirected herself at page J20 of her judgment, when she rightly noted that the 2<sup>nd</sup> respondent was treated as an employee of Nkana Red Devils Football Club who had an option of going back to work with ZCCM upon termination of his contract with the said Club at the grade that he was employed prior to his secondment, or choose to terminate his services with ZCCM. She contended that the house in issue was for officers in higher grades and not the lower ranking officers such as the 2<sup>nd</sup> respondent who claimed that he was a clerk, if at all he was.

In response to ground four, the 1<sup>st</sup> respondent submitted that the learned trial judge erred by not considering the fact that the Nkana Business Ventures was the actual tenant of ZCCM and not

the 2<sup>nd</sup> respondent, hence, the house had to be sold to the 1<sup>st</sup> respondent and the Business Ventures was advised to deal with him if the 2<sup>nd</sup> respondent wished to continue occupying it.

In response to ground five, the 1<sup>st</sup> respondent submitted that the learned trial judge misdirected herself when she held and found at page J21 of her judgment, that the house was not allocated to Nkana Business Ventures but directly to the 2<sup>nd</sup> respondent because the former was not a corporate body. She contended that the fact that Nkana Business Ventures was not a corporate body is the more reason why ZCCM did not consider offering the house to the 2<sup>nd</sup> respondent, coupled with the fact that the 2<sup>nd</sup> respondent did not revert back to his initial job as a clerk.

In response to ground six, it was submitted by the 1<sup>st</sup> respondent that the learned trial judge misdirected herself when she found and held at page J22 of her judgment, that the sale of the house to the deceased was done contrary to the government policy of selling houses of government or quasi government institutions to sitting tenants and the ZCCM rules on the sale of houses to its Zambian employees in service who were sitting tenants. She

submitted that ZCCM itself through its channels of offering houses to its employees found that the 2<sup>nd</sup> respondent did not qualify hence he was written a letter to start paying rent to the deceased and he did so.

In ground seven, the 1<sup>st</sup> respondent submitted that the learned trial judge erred by not considering the memorandum dated 13<sup>th</sup> October 1997 at page 13 of the record of appeal, which stated that ZCCM had prohibited all unhoused company officials from inspecting the properties which were said to be available for sale. She argued that the same cannot be classified as an encumbrance which the deceased had constructive notice of. That therefore, ZCCM did not mislead the deceased by saying that the house was available for sale because ZCCM had all the names and categories or grades of those who qualified to purchase a specific house according to the ranks and grades respectively, unlike the findings of the learned trial judge.

In response to ground eight, the 1<sup>st</sup> respondent submitted that the judgment of the court below contradicted other decided cases which granted individuals who never stayed at the houses they were offered to purchase. She argued that the trial court ought to have

considered the matter from ZCCM's stand point as they were the owners of the houses and they knew those who qualified to purchase them. It was her submission that the 2<sup>nd</sup> respondent was seconded as a footballer and treated as an employee of ZCCM but was not in fact an employee hence, the appeal must succeed. Further, that the 1<sup>st</sup> respondent cannot be refunded as the sole purpose of selling the housing units was to offset the huge terminal benefits for the bonafide employees of ZCCM.

Lastly, the 1<sup>st</sup> respondent submitted in response to ground nine, that the certificate of title was obtained in good faith but the trial judge portrayed that the same was obtained in a fraudulent manner and, or as if there were errors in the manner it was prepared. She argued that ZCCM was on firm ground in offering the house to the deceased. That the deceased accepted the offer and subsequently a contract of sale was executed and the purchase price was deducted from his terminal benefits, which was the main or sole purpose of selling the houses to its eligible qualified employees to offset its debts.

In the 2<sup>nd</sup> respondent's heads of argument, Mrs Mbaluku submitted in response to ground one, that the deceased is the one

who instituted the matter and the 2<sup>nd</sup> respondent merely defended himself. Counsel therefore, wondered how the 2<sup>nd</sup> respondent as a defendant in the court below could be guilty of forum shopping in that when a defendant is taken to court, he is expected to find a way of defending himself. She contended that it was strange that the appellant could raise this ground because they are on record together and in alliance with the deceased insisting that the matter proceeds when the 2<sup>nd</sup> respondent tried to resist it.

According to the learned counsel, there was an application made before court on 7<sup>th</sup> November 2013 and a ruling was delivered on the same day as shown on page 129 line 20, page 130 lines 25-30 and page 131 lines 1-3 of the record of appeal. That by then the deceased had filed the notice of intention to proceed appearing on page 54 of the record of appeal. We were referred to pages 91 - 102 of the record of appeal, where it is submitted that the 2<sup>nd</sup> respondent attempted to block the hearing through summons to dismiss the matter but the appellant and the deceased opposed the application and the court later ordered that the matter proceeds. The learned counsel submitted that both the appellant and the deceased

proceeded to file bundles of pleadings and documents and requested the court to set down the matter for trial. The court then set a hearing date and the appellant participated in the trial without objection when the trial started. In the circumstances, the court below was justified in proceeding with the matter as they had requested her to do. The appellant, therefore, cannot turn around to state that the court erred in proceeding with the matter as once a case is on the active cause list, it will be heard and determined. That if the appellant did not want the case to proceed, it should have appealed against the ruling within 14 days after it was made in chambers on 7<sup>th</sup> November 2013. Bringing this ground of appeal in September 2014, almost a year after the ruling was made is irregular as it is out of time and no leave was obtained to extend the time within which to appeal against the ruling. Counsel contended that the appellant was merely disappointed that the decision did not go in its favour.

The learned counsel further submitted that the court below considered that this was a conveyancing matter and the IRC had no jurisdiction to handle such a matter where a title was issued. The case of **Mbazima, Joint Liquidators of ZIMCO v. Reuben Vera**<sup>8</sup> was

cited to support the argument. It was contended that the court below rightly allowed the case to proceed as it was the proper court with power to cancel a title deed.

Under ground two, the learned counsel reiterated the fact that it was the deceased who brought the action and that he insisted that the matter proceeds to trial. Counsel, therefore, wondered why the appellant is now complaining on its behalf. That the deceased put himself and his case before the court to be heard and determined and upon losing, one cannot then say the court erred.

In response to ground three, the learned counsel submitted that the learned trial judge was on firm ground when she found that the 2<sup>nd</sup> respondent was a ZCCM employee seconded to Nkana Red Devils Limited, a subsidiary of ZCCM. Counsel argued that the documents in the 2<sup>nd</sup> respondent's bundle of documents appearing in the supplementary record of appeal show ZCCM letters indicating secondment of the 2<sup>nd</sup> respondent to Nkana Red Devils and that the ZCCM rules on sale of houses clearly indicated what would happen to those seconded in relation to purchase of ZCCM houses as sitting tenants. That the appellant was in court participating in the trial and

it did not object to the production of documents including its own documents. Secondly, that the issue of secondment was raised in the oral evidence adduced during trial and the appellant did not raise any objection when the evidence was tendered in court but instead it cross-examined the 2<sup>nd</sup> respondent on it.

It was submitted that it is trite law that if an unpleaded issue is raised in court and it is not objected to, the court will not be precluded from considering it. According to the learned counsel, the issue of secondment touched on the eligibility of the 2<sup>nd</sup> respondent to purchase the house he occupied by virtue of his employment with ZCCM, coupled with the fact that he was the sitting tenant in the house in issue entitled to the first priority to purchase it. The learned counsel argued that the 2<sup>nd</sup> respondent made this assertion in his pleadings in the court below. That the 2<sup>nd</sup> respondent had to prove this by showing how he was employed and what happened during his employment and he had to show that he was a sitting tenant which was not disputed. It was also argued that the 2<sup>nd</sup> respondent provided evidence that he had a working relationship with ZCCM and the secondment came in as part of the proof of his connection to ZCCM,

which was not objected to during trial. Further, that ZCCM was duly served with the 2<sup>nd</sup> respondent's list and bundle of documents and no objection to their production was raised at all. That the issue cannot be raised at this late hour when the court has acted on the evidence deployed before her without any objection.

The learned counsel submitted that the ZCCM documents on record clearly showed that it used to second people to other institutions. In respect of professional footballers, it used to send them on leave of absence but still in ZCCM employment with an option to leave if they so wished. With regard to the sale of ZCCM houses, ZCCM's own rules provided that those seconded to ZCCM subsidiaries or to other institutions would qualify. That therefore, the court below was on firm ground when it considered the issue of secondment of the 2<sup>nd</sup> respondent which was an essential part of evidence in assessing whether he was employed by ZCCM or not.

It was also contended that the lower court was on firm ground in finding that the 2<sup>nd</sup> respondent was not only a sitting tenant but also an employee of ZCCM entitled to the first priority to purchase the house he occupied as a sitting tenant. This was a finding of fact

and the appellate court does not usually interfere with findings of fact of the court below as the trial judge has an opportunity to directly hear the evidence and make certain observations as he or she makes those findings. Counsel contended that on the facts as they stood and the documentary evidence on record, it cannot be said that the findings of fact by the court below was perverse in any way. That as such, this court is not obliged to interfere with the finding that the 2<sup>nd</sup> respondent having been seconded from ZCCM to Nkana Red Devils Limited still remained a ZCCM employee entitled to purchase the house and that ZCCM allocated the house in question to him after he was promoted to the position of coach.

In response to ground four, the learned counsel submitted that the court below was on firm ground when she found that the 2<sup>nd</sup> respondent was an employee of ZCCM as indicated in documents from ZCCM. It was argued that ZCCM did not dispute the letter indicating the 2<sup>nd</sup> respondent's secondment served on it in the 2<sup>nd</sup> respondent's bundle of documents and did not object to its production during trial. From the contents of the documents in the 2<sup>nd</sup> respondent's bundle of documents, it was clear that ZCCM had

employed the 2<sup>nd</sup> respondent, put him on leave of absence, promoted him to the position of coach and seconded him to its subsidiary company, Nkana Red Devils Limited and allocated him the house and further, that he remained its employee under its conditions of service. That the documents also indicate that when footballers turned professional, they remained ZCCM employees until they exercised their option to leave and that there was no break in service with ZCCM at the time the 2<sup>nd</sup> respondent was playing professional football or when he was seconded to another institution. That the 2<sup>nd</sup> respondent never left after playing professional football but, he came back and worked as a clerk in ZCCM.

Further, that ZCCM's own witness indicated in his evidence that a seconded employee remains an employee of the seconding company which in this case was ZCCM. That there was overwhelming evidence that the 2<sup>nd</sup> respondent was employed by the appellant and the appellant determined his conditions of service. That therefore, the court below was on firm ground when she made that finding of fact.

The learned counsel also submitted that the 2<sup>nd</sup> respondent was in the house when ZCCM started selling the houses. He applied to

buy the house but it was sold to the deceased, a non-sitting tenant without according him the right to first refusal which was contrary to the rules for the sale of ZCCM houses. We were referred to page 38 lines 1-3 of the record of appeal, where the objectives of the rules were indicated. Counsel contended that it would be unequitable to deprive a deserving employee of the right to buy the house clearly enshrined in ZCCM's own rules. He submitted that the 2<sup>nd</sup> respondent was, therefore, entitled to the right of first refusal before any offer to a third party could be made.

In response to ground five, the learned counsel submitted that the 2<sup>nd</sup> respondent had been seconded to Nkana Red Devils, a subsidiary of ZCCM and he never exercised his option to leave. That therefore, it is strange for ZCCM to turn around and blame the court for making such a finding of fact in the face of overwhelming evidence in support. According to the learned counsel, the issue was not whether he exercised his option to come back to ZCCM from Nkana Red Devils but rather what his status was with regard to ZCCM, considering that he had been seconded to Nkana Red Devils and the answer as confirmed by the appellant's witness is that he remained

a ZCCM employee.

It was also contended that ZCCM's own rules provided that a seconded employee was eligible to buy the house he occupied as a sitting tenant and was entitled to have the first priority of purchasing the house. That ZCCM made the seconded employees eligible to buy houses because they remained ZCCM employees. That therefore, the 2<sup>nd</sup> respondent occupied the house by virtue of his employment with ZCCM and ZCCM rules applied to him. The learned counsel contended that this was a finding of fact and we were referred to the case of **Wilson Masauso Zulu**<sup>4</sup>.

In response to ground six, the learned counsel referred us to the allocation letter on page 10 of the supplementary record of appeal and submitted that ZCCM allocated the house in issue to the 2<sup>nd</sup> respondent and that an amount was being paid to ZCCM at the rate of K12.00 as rent for his stay in a ZCCM house. It was submitted that what was in issue was whether the 2<sup>nd</sup> respondent was an employee of ZCCM and whether he was a sitting tenant. We were referred to

the **Grace Muimui**<sup>2</sup> case, where it was held that being a sitting tenant alone is not the only criteria; there must be an employment relationship with ZCCM. The learned counsel submitted that the two were established in this matter in that the 2<sup>nd</sup> respondent was not only a sitting tenant but also an employee entitled to the first priority to purchase the house he occupied.

We were also referred to the **Richard Kangwa**<sup>5</sup> case where, in the learned counsel's submission, the court defined a sitting tenant as a person who occupied the house by virtue of his employment. The learned counsel contended that the 2<sup>nd</sup> respondent fitted this description and, therefore, he was the sitting tenant entitled to the first priority to purchase the house but this priority was not accorded to him.

In response to ground seven, the learned counsel submitted that the court below made a proper finding that ZCCM misled the deceased at the time he was offered the house that it was available when in fact it was occupied by the 2<sup>nd</sup> respondent who was also its employee and entitled to the first option to purchase the same. Further, that ZCCM advised the deceased not to go to the house

which clearly showed that ZCCM was hiding something and that it did not want him to find out that the house had an encumbrance.

The learned counsel submitted that the deceased had a duty to make inquiries in order to ascertain that the house he was buying was indeed available and had no encumbrances. We were referred to the case of **Edith Nawakwi v. Lusaka City Council and another**<sup>9</sup>, where it was held as follows:

**“A prudent buyer ought to investigate whether there was another person with a superior right to purchase the same house. Failure to do so, the purchaser will be taken to have had constructive notice of the other person’s superior right.”**

The learned counsel argued that in the above case, the offer to the appellant who was a Minister was revoked as the sitting tenant was not accorded the first priority to purchase the house before the offer was made to the appellant and that the same principle ought to apply in this matter.

Under ground eight, the learned counsel submitted that the court below was on firm ground when it ordered ZCCM to refund the money it received from the deceased because the house it sold to him

was encumbered with the 2<sup>nd</sup> respondent's superior right to purchase it. Further, that ZCCM knowingly and wilfully disobeyed its own rules and the direction from the government, being the majority shareholder, to sell the houses to sitting tenants. Counsel relied on the case of **Lusaka City Council and National Airports Corp v. Grace Mwamba and Others**<sup>10</sup> where this court took judicial notice of the rights of sitting tenants to purchase the houses they occupied. That since the sale failed, the court was justified in ordering ZCCM to refund the deceased the money he used to purchase the house.

In response to ground nine, the learned counsel submitted that costs are in the discretion of the court and the discretion should be exercised judiciously. That in this matter, the government formulated a home empowerment policy meant to empower sitting tenants with housing. In addition, ZCCM formulated rules for the sale of its houses whose objective was to ensure a smooth, transparent and equitable sale of company houses to Zambian employees. That however, ZCCM ignored the government directive to sell the houses to sitting tenants and its own rules which provided that first priority be given to sitting tenants and that those seconded to subsidiary and other institutions

were eligible to buy. According to the learned counsel, the appellant appeared to be at the centre of wrong doing in this matter and, thus, the court was justified in ordering it to bear the costs of the deceased and 2<sup>nd</sup> respondent. To support this argument, we were again referred to the **Richard Kangwa**<sup>5</sup> case where this court condemned ZCCM in costs for ignoring directives from the government, the majority shareholder.

It was submitted further, that the appellant's argument that counsel for the 2<sup>nd</sup> respondent encouraged forum shopping and should be condemned in costs is misconceived as it was the deceased who instituted these proceedings against the 2<sup>nd</sup> respondent and the lawyer merely defended the latter in this action. The learned counsel contended that if lawyers were ordered to pay costs simply by defending clients, they would be scared to defend them and this would be against public policy.

We have considered the record of appeal, the heads of argument and the judgment appealed against. Grounds one and two are interrelated and we will consider them together. Similarly, grounds

three to seven will also be considered together as they are intertwined.

We note that most of the grounds of appeal assail the findings of fact made by the trial judge. As we have underscored in a plethora of cases, such findings of fact can only be reversed if they were perverse or made in the absence of relevant evidence, or if they were based on a misunderstanding of facts. See, for example, the **Masauso Zulu**<sup>4</sup> case cited by the learned counsel for the appellant.

The main thrust of the appellant's argument under grounds one and two is that, because the learned trial judge incorrectly applied her mind to the facts, she created a situation where the 2<sup>nd</sup> respondent was permitted to engage in forum shopping for a favourable judgment and succeeded in doing so. That the matter in the court below that has given rise to this appeal was stayed pending judgment in the **Kennedy Kalunga** case in the IRC where the 2<sup>nd</sup> respondent was one of the complainants and judgment was subsequently rendered against him but he did not appeal against that decision. That the court below had no jurisdiction to sit as an appellate court when it stated in its judgment that the issue of

secondment had not been considered by the IRC. That since the case had been determined by the IRC which had equal status with the lower court, it was to that extent *res judicata*. It was further argued by the appellant that litigants should not be permitted to commence actions before different courts in the hope of obtaining a more favourable judgment.

On her part, the 1<sup>st</sup> appellants' argument is simply that the sole purpose of staying the matter in the court below was to wait for the outcome of the **Kennedy Kalunga** case and follow its direction. Like the appellant, she also argues that the 2<sup>nd</sup> appellant was engaged in forum shopping in the court below.

The gist of the 2<sup>nd</sup> respondent's argument under these two grounds is that he could not be accused of forum shopping when he was merely defending himself against a suit commenced by the deceased. That even when he tried to apply for the dismissal of the matter in the court below, the deceased opposed the application and the court ordered that the matter should proceed to trial. According to the 2<sup>nd</sup> respondent, the appellant cannot now accuse the lower court for proceeding with the matter just because the decision did

not go in its favour and that of the deceased. Further, that the lower court rightly determined that this was a conveyancing matter in respect of which the IRC had no jurisdiction.

The record of appeal shows that the deceased who was the plaintiff in the court below commenced the action subject of this appeal against the 2<sup>nd</sup> respondent (1<sup>st</sup> defendant) and ZCCM Investments Limited (2<sup>nd</sup> defendant) on 10<sup>th</sup> March 2004. At page J4 of the judgment of the lower court, the learned trial judge stated as follows:

**"At one point the proceedings in this case were stayed pending the outcome of ZCCM Limited v Kangwa & Others [Kennedy Kalunga & Others v ZCCM & Others] which was in the Industrial Relations Court. The judgment of the Industrial Relations Court was delivered sometime before 2000 but was appealed against and the Supreme Court made its decision on 6th June 2000 which was only brought to my attention in 2013. The judgment of the Industrial Relations Court was that employees of subsidiaries of ZCCM were to be treated the same as direct employees of ZCCM when it came to purchasing ZCCM houses in which they were sitting tenants. The Supreme Court endorsed that decision. On 7<sup>th</sup> November, 2013 the plaintiff made an application to proceed with trial, or for me to finalise this matter on the basis of that judgment. Upon hearing that application, I decided to hold a trial because it is trite law that the Industrial Relations Court has no jurisdiction in matters relating to ownership of land. It**

**is also clear from that judgment that the issue of ZCCM employees seconded by their employer to any other institution was not directly tackled."**

The record of appeal shows that neither the appellant nor the deceased appealed against the lower court's decision to proceed with trial of the matter which was commenced by the deceased. In any case, both of them had even filed notices of intention to proceed. The appellant's and the deceased's notices are at pages 54 and 55 of the record of appeal respectively. It is therefore, highly irregular that they can now accuse the lower court of impropriety, at this point in time.

It is also astonishing that the 2<sup>nd</sup> respondent can be accused of forum shopping when he did not institute the action in the court below. As aptly contended by the learned counsel for the 2<sup>nd</sup> respondent, the 2<sup>nd</sup> respondent was a party to the proceedings in the court below merely to defend himself against the suit instituted by the deceased. Having been sued by the deceased, it would be an affront to logic that the 2<sup>nd</sup> respondent should have been expected to fold his arms and not enter appearance and defence to the deceased's claims.

In the main, the deceased's claim in the court below was for an order of specific performance of the contract of sale between himself and the appellant, relating to the house in dispute. Whereas in the IRC, the complaint filed by the 4<sup>th</sup> Complainants who included the 2<sup>nd</sup> respondent is stated in the judgment at page J2 as follows:

**"4. 4th Complainant: Emmanuel Chileshe and other employees of ZCCM clubs:-**

**Unfair treatment and discrimination of the 4th Complainants by the first Respondent [ZCCM] for refusal to offer them houses they occupy as sitting tenants as well as its employees based at its clubs in line with what ZCCM did to other employees to sell them houses they occupy as sitting tenants as well as its employees based at ZCCM clubs."**

In the passage from the judgment of the lower court quoted earlier, the learned trial judge stated, among other things, that:

**"... I decided to hold a trial because it is trite law that the Industrial Relations Court has no jurisdiction in matters relating to ownership of land. It is also clear from that judgment that the issue of ZCCM employees seconded by their employer to any other institution was not directly tackled."**

We cannot fault the learned trial judge for this decision because she was merely stating the correct position of the law as regards the

jurisdiction of the IRC. The action which had been instituted in the court below was one of conveyance, which the IRC has no jurisdiction to adjudicate. Quite clearly, therefore, the issues in dispute relating to the sale of the house could not be said to be *res judicata*. We also find as misconceived, the argument by the appellant that the lower court was sitting as an appellate court when it found that the issue of ZCCM employees on secondment was not directly tackled by the IRC as that was a correct finding.

For the reasons we have stated above, it is inevitable that grounds one and two must fail for being devoid of merit.

We now turn to grounds three, four, five, six and seven. The kernel of the appellant's argument running through these grounds is that the deceased was eligible to purchase the house as an employee of ZCCM. Further, that the 2<sup>nd</sup> respondent was ineligible because he was an employee of Nkana Red Devils, a football club and not ZCCM. Similar arguments have been canvassed by the 1<sup>st</sup> respondent. On his part, the 2<sup>nd</sup> respondent is vehement that he was a ZCCM employee, seconded to Nkana Red Devils Limited, a subsidiary of ZCCM.

The learned trial judge found at pages J23 - J24 of her judgment that:

"Applying the case of *Grace Muimui v Sylvia Chunda*<sup>2</sup> [and] rules 1, 2(i) [and] (v) of the ZCCM Rules on sale of houses, I find and hold that the plaintiff [deceased] was ineligible to purchase the house in issue because although he was a ZCCM employee, he has never stayed in the house in issue. On the other hand, the 1st defendant [2nd respondent] was and still is eligible to purchase the house because he was an employee of ZCCM seconded to another institution and allocated the house by ZCCM in 1995 for which he was paying some form of rent and therefore, he has been a sitting tenant for about 9 years now ... In this case the vendor was supposed to first offer the house to the plaintiff and if he rejected the offer or accepted it but failed to abide by the conditions thereof, then offer it to anybody else.

For the foregoing reason, I find that the plaintiff obtained the certificate of title improperly. Applying the case of *Anti -Corruption Commission v Barnnet Development Corporation Limited*<sup>3</sup>, I hereby cancel the contract of sale between the plaintiff and ZCCM and order the cancellation of the plaintiff's certificate of title. I further order that the 2nd defendant should offer the house to the 1st defendant for sale."

For the reasons given below, we are satisfied that the learned trial judge was on firm ground in her findings as they were based on relevant evidence deployed before the trial court.

The 2<sup>nd</sup> respondent's undisputed evidence is that he was employed by ZCCM Nkana Division in 1984. By 1990 he was working for ZCCM as a professional footballer. This is confirmed by a letter at page 16 of the record of appeal which reads as follows:

**"29<sup>th</sup> May, 1990**

**Mr. B. Chambeshi**

**Dear Sir**

**CONDITIONS OF EMPLOYMENT AND SERVICE FOR PROFESSIONAL PLAYERS**

**I am pleased to inform you that during the period of your tenure as a professional player for Nkana Red Devils Limited, you will be treated as being on unpaid leave of absence from ZCCM Limited.**

**You will be treated as an employee of Nkana Red Devils Limited for purposes of salary, housing, ZNPF and pension contributions if you are a member of the Mukuba Pension Fund but will continue to accrue service related benefits under ZCCM Limited.**

**Upon termination of your contract with Nkana Red devils Limited, you will have the option of taking up an appointment under ZCCM Limited at the grade you were employed at prior to your joining Nkana Red Devils Limited or choose to terminate your services with ZCCM Limited.**

**Yours faithfully**

**For ZAMBIA CONSOLIDATED COPPER MINES LIMITED**

**NKANA DIVISION**

.....

**MANAGER HUMAN RESOURCE**

**Cc: Company Secretary**

**Nkana Red Devils Ltd"**

The 2<sup>nd</sup> respondent's evidence also shows that on 15<sup>th</sup> May 1995, ZCCM seconded him to Nkana Red Devils Limited, a subsidiary of ZCCM, as a coach. On the same date, he was allocated the house in dispute by ZCCM. A memorandum to that effect is at page 10 of the supplementary record of appeal and it is reproduced below:

**"Zambia Consolidated Copper Mines Limited  
Nkana Division  
Kitwe**

**MEMORANDUM**

<b>TO</b>	<b>:</b>	<b>STAFF OFFICER - NKANA</b>
<b>FROM</b>	<b>:</b>	<b>HEAD HUMAN RESOURCES - CHIB/CHAM</b>
<b>DATE</b>	<b>:</b>	<b>15 MAY 1995</b>
<b>REF</b>	<b>:</b>	<b>HHR 542/95</b>

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**HOUSE MOVE - B. CHAMBESHI**

**This is to confirm that Beston Chambeshi who has been seconded to Nkana Red Devils Ltd under Nkana Business Ventures as a coach has moved to house No. 162 Zebra Street Nkana East Kitwe. Amend the records accordingly.**

**R. B. KAFUMUKACHE (MAJOR)**

**CC. Mr. B. Chambeshi**

**/mmm"**

Further, that after being offered the house, the 2<sup>nd</sup> respondent started paying a composite monthly residential charge in the sum of K12.00 for electricity, water and other utility services. The letter to that effect addressed to the 2<sup>nd</sup> respondent which further confirms that the 2<sup>nd</sup> respondent was a sitting tenant is at page 12 of the record of appeal and it is reproduced below:

**“Zambia Consolidated Copper Mines Limited  
Nkana Division  
Kitwe**

**PERSONAL & STRICTLY CONFIDENTIAL**

**Mr. B. Chambeshi  
Mine No. 211460**

**Dear Mr. B. Chambeshi**

**COMPANY ACCOMMODATION (RENTAL CHARGE)**

**Further to our earlier notice given on the amendment of conditions of service, as you are aware, our records show that you occupy house No. 162 Zebra Street Nkana East Kitwe whose category is BAN and the new composite monthly residential charge for electricity, water and other utility service will be K12,000.00 with effect from 1 May 1995.  
Yours faithfully**

**E. M. Pilula  
GENERAL MANAGER**

**CC. Manger Human Resource - CAU  
Superintendent - Group Remuneration**

**P. O BOX 22000 KITWE ZAMBIA  
TELEPHONE (02) 247555 Telex: ZA 53140 Fax: (02) 225082"**

Further evidence that the 2<sup>nd</sup> respondent was an employee of ZCCM is the certificate at page 35 of the supplementary record of appeal. This certificate was issued to the 2<sup>nd</sup> respondent by ZCCM Nkana Division on 23<sup>rd</sup> October 1997, for attending a 'Basic Supervisory Skills Course' and his Mine No. is indicated as NBV001. (Emphasis added)

It is plain from the foregoing that when the deceased was offered the house on 29<sup>th</sup> October 1997, the 2<sup>nd</sup> respondent was not only an employee of ZCCM seconded to its subsidiary company, Nkana Red Devils Limited, but also a sitting tenant. Being an employee of ZCCM, the 2<sup>nd</sup> respondent was, therefore, eligible to purchase the house from the company in accordance with the rules governing the sale of ZCCM houses to Zambian employees. Rule 2 of the said rules provided in relevant part as follows:

**"2. ELIGIBILITY**

**All confirmed Zambian ZCCM employees in service shall be eligible to purchase Company houses subject to the following provisions;**

- (i) **Priority will be given to sitting tenants.**
- (ii) ...
- (iii) ...
- (iv) ...
- (v) **Employees who are seconded to subsidiary companies or any other institution shall qualify.**
- (vi) ...
- (vii) ...”

The 2<sup>nd</sup> respondent having met the criteria contained in the rules quoted above, the learned trial judge was on firm ground in deciding that the 2<sup>nd</sup> respondent, and not the deceased, was eligible to purchase the house. Consequently, the 2<sup>nd</sup> respondent should, therefore, have been given the first priority by ZCCM before offering the house to the deceased. In the circumstances, we cannot fault the finding by the learned trial judge that the deceased improperly obtained the certificate of title and the ordering of its cancellation. We equally find no impropriety in the order made by the learned trial judge that the appellant should offer the house to the 2<sup>nd</sup> respondent.

Consequently, grounds three, four, five, six and seven also lack merit and are equally dismissed.

The appellant's grievance under ground eight is that the learned trial judge was wrong to order that the appellant should refund the purchase price when the sale of the house to the deceased was in accordance with the government policy and its own rules. That therefore, the **Jane Mwenya and Jason Randee v Paul Kapinga**<sup>7</sup> case was not relevant to this case. Further, that the order for the payment of interest should be set aside or varied to conform to the Judgments Act.

The 1<sup>st</sup> respondent's argument is that the 1<sup>st</sup> respondent cannot be refunded as the sole purpose of selling the housing units was to offset the huge terminal benefits for the bonafide employees of ZCCM. On his part, the 2<sup>nd</sup> respondent's argument is that since the sale failed, the trial court was on firm ground to order a refund of the purchase price.

We have since upheld the finding by the court below that the sale of the house to the deceased by the appellant was irregular. There was, therefore, no valid sale. Consequently, the learned trial judge was on firm ground to order the appellant to refund the purchase price to the deceased with interest.

Section 2 of the Judgments Act which the appellant seems to rely on in assailing the learned trial judge's award of interest provides that:

**“Every judgment or order or decree of the High Court or of the Subordinate Court whereby any sum of money, or any costs, charges or expenses, is or are to be payable to any person shall carry interest as may be determined by the court which shall not exceed the current lending rate as determined by the Bank of Zambia from the time of entering up that judgment, order or decree until the same shall be satisfied...”**

Section 2 of the Judgments Act only applies where a judgment sum arising from litigation has been ordered to be paid by the court. In the present case, however, no judgment sum was ordered by the court. The court only ordered the appellant to refund the purchase price it received from the deceased. Since the transaction for the sale of the house failed, we cannot fault the learned trial judge in awarding interest on the purchase price from the date it was paid to the appellant since the appellant had illegitimate use of the deceased's money as from date of payment. This ground lacks merit and must suffer the same fate as other grounds we have dismissed.

Finally, under ground nine, the appellant frowns upon the order of costs made against it by the lower court. According to the appellant, the 2<sup>nd</sup> respondent should have been condemned in costs because he was involved in forum shopping.

The 1<sup>st</sup> respondent elected to advance arguments not relevant to this ground. However, the 2<sup>nd</sup> respondent's argument is that the appellant appeared to be at the centre of the wrong doing in this matter and the lower court was, therefore, justified to order costs against it.

It is trite law that costs are in the discretion of the court. Order 62(3) (3) of the Rules of the Supreme Court Rules, 1999 Edition states that:

**“If the court in the exercise of its discretion sees it fit to make an order as to costs of any proceedings, the court shall order the costs to follow the event...”**

Costs are normally awarded on the general principle that “costs follow the event”, i.e. that the losing party shall bear the recoverable costs of the winning party, unless circumstances show that this

would be inappropriate in relation to the whole or part of the costs. Considering that the appellant had been found wanting in respect of the manner in which it handled the sale of the house to the deceased and that judgment was subsequently entered against it, the lower court was justified in ordering the appellant to bear the costs of the other parties. Therefore, ground nine also fails.

All the grounds of appeal having failed, we uphold the judgment of the lower court. This appeal is accordingly dismissed with costs to the 2<sup>nd</sup> respondent and to be taxed in default of agreement.



**I. C. MAMBILIMA  
CHIEF JUSTICE**



**R. M. C. KAOMA  
SUPREME COURT JUDGE**



**C. KAJIMANGA  
SUPREME COURT JUDGE**