SELECTED JUDGMENT NO.36/2019

P.1297

IN THE SUPREME COURT FOR ZAMBIA APPEAL No. 53/2009

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

JULIKA ENTERPRISES AND OTHERS **APPELLANT**

AND

ZAMBIA STATE INSURANCE CORPORATION **1ST RESPONDENT**
ZAMBIA STATE INSURANCE PENSION FUND **2ND RESPONDENT**
GBM MILLING COMPANY LIMITED **3RD RESPONDENT**

CORAM: Musonda DCJ, Kabuka and Mutuna, JJS.

On 1st October, 3rd December, 2019 and 9th December 2019.

FOR THE APPELLANT: N/A

FOR THE 1ST RESPONDENT: N/A

FOR THE 2ND RESPONDENT: Mr K. Kamfwa, Messrs. Wilson Cornhill Advocates.

FOR THE 3RD RESPONDENT: Ms. M. Mushipe, Medames, Mushipe & Co.

JUDGMENT

KABUKA, JS, delivered the Judgment of the Court.

Cases referred to:

1. Midland Basic Limited v Farm Pride Hatcheries limited (1980) EG 493-498.
2. Michael Cipriano v Glen Cove Lodge, No. 1458 B.P.O.E.,et al, Appellate Division of the Supreme Court of New York.
3. Timothy Hamaundu Muuka Mudenda v Tobacco Board of Zambia, Appeal No. 40 of 1998 (unreported).
4. Jean Mwamba Mpashi Vs. Avondale Housing Project Limited (1998-99) ZR 140.
5. Kondaris v Dandiker Appeal No. 177 of 1999.
6. Musonda (Receiver of First Merchant Bank Zambia Limited) v Hyper Foods Products Limited and Others (1999) Z.R. 124.
7. Pritchard v Briggs (1980) 1 All ER 294.
8. Frank Malichupa & Others v Tanzania-Zambia Railway Authority (2008) ZR 112.
9. Workers Compensation Fund Control Board v Kangombe, SCZ Appeal No. 133 of 2001.
10. Frallen Investments Limited v Zambia Railways Limited & National College for Management Development, SCZ No. 9 of 2008, Appeal No 29/2007.
11. Khalid Mohammed v The Attorney General (1982) ZR 49.
12. Edgar Hamuwele (Joint Liquidator of Lima Bank Limited (In Liquidation)) Christopher Mulenga (Joint Liquidator of Lima Bank Limited (In Liquidation)) v Ngenda Sipalo and Brenda Sipalo, SCZ Judgment No. 4 of 2010.
13. Amanda Muzyamba Chaala (Administrator of the estate of the late Florence Mwiya Siyunyi Chaala v Attorney General and Another, (2012) Vol.1 ZR 316.
14. The Attorney-General v Steven Luguru, (SCZ Judgment No. 20 of 2001)
15. Beatrice Muimui v Sylvia Chunda, SCZ Appeal No. 50 of 2000 (Unreported).
16. Antonio Ventriglia Manuela Ventriglia v Eastern and Southern African Trade and Development Bank, SCZ Judgment No. 13 of 2010.
17. Kabwe v Kapasa (Appeal No. 35/2012) [2014] ZMSC 6.

18. Cowan & Others v Scargill and Others (1984) 2 All ER 750.
19. O.K. Simwiinga v Francis Khama, Appeal No. 71 of 2001.

Legislation and other works referred to:

1. Barnsley's Conveyancing Law and Practice, Butterworths (1988), 3rd Edition.
2. Evans: The Law of Landlord and Tenant.
3. Halsbury's Laws of England, Volume 27, 4th Edition, at paragraphs 109-112, 1590 and 1591.
4. Chitty on Contracts, General Principles, Volume 1, 30th Edition.
5. British Acts Extension Act, Chapter 10 of the Laws of Zambia.
6. The Rent Act, Chapter 26 of the Laws of Zambia.
7. Black's Law Dictionary, 8th Edition, Thomson West.
8. Woodfall's Law of Landlord & Tenant, Vol.1, at page 8, paragraph 1-0016.
9. Underhill and Hayton, Law of Trusts and Trustees, (2006), 17th Edition.

1.0 Introduction

1.1 The appellants are appealing against a judgment of the High Court declining to grant their claim that, as sitting tenants in flats belonging to the 2nd respondents, they were, pursuant to the common law right of first refusal, entitled to purchase the same.

1.2 This appeal questions when a tenant can enforce through the courts of law, their pre-emptive right to purchase property

occupied on rent, pursuant to a tenancy agreement, when the landlord decides to dispose of the property by way of sale.

2.0 Background

2.1 The background to this appeal is that the appellants were all tenants in occupation of a block of flats located at Plot 1539, Mungwi Road, Kasama ("the property") leased to them by the 1st and 2nd respondents. On 25th August, 2005 the appellants received notices from the 1st respondent informing them that their tenancy agreements were being terminated, with effect from 31st August, 2005. The appellants were further informed that in the interim, their tenancy agreements had been transferred to the 3rd respondent who was the new owner of the property.

2.2 Upon enquiry, the appellants discovered that the property had been advertised for sale as a single unit, in the Post Newspaper of 26th June, 2005 by the 2nd respondent. An offer to purchase them as a unit was made by the 3rd respondent, which offer was accepted by the 2nd respondent.

2.3 The rationale given for selling the property off as a single unit was that the board of trustees of the 2nd respondent had found it unprofitable to rent out the flats and that, it was considered more economical to dispose them of as a single unit than selling them off individually, as the latter option was going to expose the 2nd respondent to unnecessary costs and cause losses to it (the 2nd respondent).

3.0 Proceedings before the High Court

3.1 Aggrieved with the 2nd respondent's decision not to offer them the property for sale, the appellants issued a writ of summons from the principal registry at Lusaka, seeking a declaratory judgment to allow them exercise what they referred to as their 'right of first refusal', as tenants occupying the property. The appellants also claimed an order of interim injunction to restrain the transfer of ownership. The appellants contended that, the 2nd respondents ought to have offered the flats in question for sale to them, as sitting tenants who were willing and desirous of purchasing the property. An interim order for

injunction was granted pending final determination of the main matter.

3.2 The respondents in their respective defences denied terminating the appellants' tenancy agreements and averred that the same were legally transferred to the 3rd respondent, as the new owner. The respondents further averred that, there is no law that compelled a landlord to sell his property to a sitting tenant. Hence, no obligation fell on them to grant the appellants the right of first refusal as no such agreement was entered into with them. For its part, the 3rd respondent in denying the claim, averred that its purchase of the property was done within the law, and had already been concluded.

4.0 Application to dispose of matter on a point of law

4.1 Having duly filed their respective defences, the 1st and 2nd respondents made an application before the High Court to have the matter disposed of on a point of law on determination

of the following questions:

1. **whether the plaintiffs (appellants) as tenants, could in the absence of an option to purchase clause, in their respective lease agreements with the 1st defendant (1st respondent) as landlord, claim a preferential right to purchase the flats; and**

2. **whether the court could compel the 1st defendant (1st respondent) to offer for sale the said flats at Plot 1539 Mungwi road, Kasama, to the appellants, when they had already been sold to the 3rd respondent.**

4.2 In support of their application for disposal of the action on points of law, the 1st and 2nd respondent contended that the lease agreements signed by the appellants did not contain clauses giving them an option to purchase the property. And, that the 1st and 2nd respondents were under no obligation to sell the property to the appellants. It was their further contention that, following the decision to sell the property, public tenders were made inviting bids, but the appellants failed to bid for the purchase of the property either individually or collectively, and that the property had since been transferred to the 3rd respondent who was the successful bidder.

4.3 In their skeleton arguments and submissions filed in response, the appellants relied on their pleadings for the position that, the respondents had failed to distinguish between an 'option to purchase' and 'the right of pre-emption' or 'right of first refusal'. Relying on **Barnsley's Conveyancing Law and Practice, Butterworths (1988), 3rd Edition,** where, in distinguishing between an option to purchase and a right of pre-emption, the learned authors state that, the latter obligates the grantor to offer the property to the grantee should he desire to sell, but does not entitle the grantee to set in motion any process for acquisition of the land. The appellants argued that, they were not as grantees, accorded the right of first refusal by the 1st and 2nd respondents. It was further argued that, in **Evans: The Law of Landlord and Tenant**, an option to purchase the reversion is treated not as part of the lease but as a separate agreement between the parties, collateral to the lease agreement.

4.4 The court was also referred to the case of **Midland Basic**

Limited v Farm Pride Hatcheries Limited[1] in which it was held that, a purchaser who is put on notice that someone other than the vendor is in occupation of the property sold, either because he actually knows of such occupation or because he does not bother to inspect the property, is said to have constructive notice of the occupier's interest. The argument was that, the 3rd respondent ought to have known that the appellants were in occupation of the premises and therefore had constructive notice of their interest in the same.

4.5 The appellants maintained that the 1st and 2nd respondents had an obligation to extend the 'right of first refusal' to them, which, according to them, was a common law right conferred on a tenant. That the advertisement to sell the property was also defective, as the closing day for the bids was the very next day, following the advertisement made on 26th July, 2005.

4.6 On the 2nd point of law, questioning whether the court could compel a sale to them of property that had already been sold to the 3rd respondent, the appellants contended that, since the

property in question was public property, its disposal should have been done in a manner expected of public institutions.

5.0 Consideration of the points of law and decision by the High Court

5.1 In considering the arguments, the learned trial judge relied on the American case of **Michael Cipriano v Glen Cove Lodge,**[2] in which the right of first refusal was also referred to as 'first option to buy', 'pre-emptive right', 'right of pre-emption', 'first right of purchase' etc. The learned judge substantively found that, tenants could enjoy such a right by virtue of the general law and this could also be enforced by the contents of their rental agreements. That such right, can be protected by ensuring that there is a condition in a contract or lease signed by the parties.

5.2 Upon perusal of the standard lease agreements entered into by the appellants with the 2nd respondent, the learned trial judge found that it was clear that the 'right of pre-emption' or 'right of first refusal', was not part of the terms of the agreement signed between the parties, nor was there any law

on which the appellants could rely to assert their purported rights.

5.3 Although the court agreed that the manner in which the property was advertised and sold raised concern, it still found that this was not sufficient to prevent the 2nd respondent from selling property to whomever they pleased. That the decision to sell the property as a single unit was a policy decision of the 2nd respondent's trustees which was taken in order to avoid incurring expenses that could have arisen with sub-dividing and the issuance of individual certificates of title. The learned judge found that, it would not be right for the court to impose new terms of contract which were not intended by the parties at the time of entering into the lease agreement; and, that she was in no position to direct or in any way influence the corporate policy of the 2nd respondent on how it should dispose of its property.

5.4 The case of **Timothy Hamaundu Muuka Mudenda v Tobacco Board of Zambia**[3] was cited as authority, in which this Court held that, a licencee is not a sitting tenant at law and has no

legal right to purchase a house he is living in, except where there has been a firm offer and acceptance.

6.0 Grounds of appeal to this Court

6.1 The appellants being dissatisfied with the findings of Chawatama, J, now appeal to this Court on two grounds:

1. **that the learned trial judge erred in law when she decided that in the absence of a term to purchase in the lease agreement, there is no other law upon which the plaintiffs can rely;**

2. **that the learned judge erred in law when she failed to distinguish the plaintiff's legal status as sitting tenants and not licencees of the property.**

6.2 At the hearing of the appeal, we informed the parties that this was a re-hearing on account of a depletion of the number of Judges in the earlier Coram. The appeal having thus proceeded as a re-hearing, the parties were granted liberty to re-file fresh heads of argument to assist their cases, if they so wished.

6.3 In their heads of argument filed at the hearing, the appellants on ground one, argued that, according to **Halsbury's Laws of England, Volume 27, 4th Edition, at paragraphs 1590**

and 1591, the common law position is that, there is a requirement to avail the 'right of first refusal' to a tenant of any premises that is placed on sale by a landlord. That a landlord must serve a notice of sale on a qualifying tenant, and the disposal must be made in accordance with statutory requirements. The submission was that, the property in issue ought to have been sold according to the requirements of common law. And, that the court erred in fact and law by holding that there was no provision in the tenancy agreement granting the 'right of first refusal'.

6.4 On ground two, the appellants relied on the cases of **Jean Mwamba Mpashi v Avondale Housing Project Limited**[4], **Kondaris v Dandiker**[5] and **S. Brian Musonda (Receiver First National Bank Zambia Limited in receivership) v Hyper Food Products Limited & Others**[6] to argue that, sharp practice on the part of a vendor vitiates a contract. That, it makes the hands of the vendor unclean which entitles the purchaser to compensation and damages, as well as nullification of the certificate of title. The appellants

further alluded to fraudulent conduct on the part of the respondents, of allegedly concealing the sale from them.

6.5 In answer to those submissions, the 1st respondent, on ground one, argued to the effect that, a party can protect itself by ensuring such a condition is embodied in the contract, but that, where the 'pre-emption right' has been left out of a contract, there is no law compelling the landlord to avail the tenant the exercise of that right. Following the rationale in the case of **Pritchard v Briggs**[7], it was further submitted that, 'pre-emption' depends on two things: The first, is the volition of the vendor while the second, is that it is contained in an agreement.

6.6 On ground two, the 1st respondent relied on the case of **Timothy Hamaundu**[3], for the argument that a preferential right can only be considered where there has been a firm offer to sell the rented property and acceptance of that offer which was not the case in the present appeal. The submission was that, in line with the freedom to contract the appellants could

not in any way, influence the corporate policy of the 2nd respondent on how it wished to dispose of its property.

6.7 The 2nd respondent also filed heads of argument in which, in response to ground one, the case of **Frank Malichupa & Others v Tanzania-Zambia Railway Authority**[8], was relied upon, where this Court reaffirmed its earlier position in the unreported case of **Workers Compensation Fund Control Board v Kangombe**[9], that there is no law, constitutional or general, which compels an unwilling person to sell his property to a sitting tenant. The submission was that, the 2nd respondent was under no obligation to sell the flats in question, as correctly found by the trial court. On ground two, the submission was simply that, whether the appellants were treated as sitting tenants or not, was immaterial as what was material, is that no law could compel the 2nd respondent to dispose of its property.

6.8 The 3rd respondents equally filed their heads of argument on 21st October, 2019 which in substance, mirrored those of the

1st and 2nd respondents. The case of **Frallen Investments Limited v Zambia Railways Limited & National College for Management Development**[10] and the learned authors of **Halsbury's Laws of England, 4th Edition, Volume 27, paragraphs 109-112** were cited in arguing that, a lease may confer an option to purchase the landlord's interest in the demised property and no such option was contained in the leases in question in this appeal.

6.9 In response to the appellants' allegations of fraud, the 3rd respondent submitted that, it was procedurally improper to allege fraud at this stage when the same was not specifically pleaded in the court below. The case of **Khalid Mohammed v The Attorney General,**[11] amongst others, was cited in support of the submission.

7.0 Consideration of the appeal and decision of this Court

7.1 We have read the record of appeal, heads of argument filed by the respective parties and submissions, which we have considered. As the issues in the two grounds of appeal are interrelated, we propose to deal with them together. The real

question calling for determination in this appeal, as we see it, is whether the appellants can be said to be 'sitting tenants' with an option to purchase the flats they occupied by virtue of their tenancy agreements on the basis that they were entitled to the first right of refusal.

7.2 In considering who qualifies to be referred to as a 'sitting tenant,' in this jurisdiction, the case of **Edgar Hamuwele (Joint Liquidator of Lima Bank Limited (In Liquidation)), Christopher Mulenga (Joint Liquidator Of Lima Bank Limited (In Liquidation)) v Ngenda Sipalo and Brenda Sipalo[12],** is instructive. We there stated that, it was government policy for sitting tenants to be allowed to purchase the houses they occupied as an incidence of their employment. And, that the purchase price be deducted from their terminal benefits to offset payment of the same. We went on to observe that:

> **"Since the 2nd respondent was not an employee of Lima Bank, her right to purchase the house did not exist. The benevolence of the trial judge that the respondents could decide to purchase the house jointly was clearly misplaced. The 1st respondent was at liberty, after exercising his right**

to purchase, to invite the 2nd respondent to jointly own the property with him."

7.3 In the case of **Amanda Muzyamba Chaala (Administrator of the estate of the late Florence Mwiya Siyunyi Chaala v Attorney General and Another**[13] we clarified further, that the eligibility of a sitting tenant to purchase the property they occupied depended on a particular criteria, which in that case, was set out in clause 2.0 as follows:

"2.1. Eligibility

In the process of identifying civil servants who are bona fide sitting tenants, the following criteria shall be used:-

(a) A confirmed civil servant who is in service and is a legal tenant;
(b) .....;
(c) .....;
(d) A spouse or children of a civil servant who died but was not paid terminal benefits and was a legal tenant; and
(e) (e) A civil servant who qualifies to own land under the provisions of section 3(2) and (3) of the Lands Act, No. 29 of1995;

7.4 Another example of a case in which we considered the eligibility criteria of sitting tenants is the case of **The Attorney-General v Steven Luguru**[14] where under the

eligibility clause to purchase, it was provided that:

> **"in the process of identifying University of Zambia workers who are bona fide sitting tenants, the following criteria shall be used: (a) a confirmed Zambian national who is in the service and is a legal tenant; (b) staff on a permanent and pensionable terms of service; (c) a worker who retired or was retrenched but was not paid terminal benefits and is a legal sitting tenant; (d) a spouse or children of a worker who died but was not paid terminal benefits and was a legal tenant; (e) a worker means any University of Zambia employee regardless of marital status....."**

7.5 It is clear from the above cited cases that each public institution had its own unique requirements for eligibility of sitting tenants. In **Beatrice Muimui v Sylvia Chuunda**[15] we underscored the point that, being a 'sitting tenant' in and of itself, was not the sole criteria that would qualify one to be offered the particular house in issue for purchase, when we said that:

> **"We do not subscribe to the argument that <u>being a sitting tenant is the sole criteria in purchasing of a Government or quasi- government house</u> in the current policy of empowering employees of Government." (underlining for emphasis supplied)**

7.6 Reverting to the present appeal, we note that the appellants were not in occupation of the flats in question by virtue of them being sitting tenants who are civil servants. They were

individual tenants who merely entered into standard tenancy agreements with the 2nd respondent, not as an incidence of their employment but on payment of rent.

7.7 From that premise and in answer to the question identified as arising for determination in this appeal specifically, whether the appellants are entitled to claim that they were sitting tenants with an option to purchase, the distinction between an option to sell and a right of pre-emption, is key.

7.8 The learned authors of **Chitty on Contracts, General Principles, Volume 1, 30th Edition,** have stated with regard to what constitutes a binding pre-emption right, at **paragraph 2-125,** as follows:

> **"A right of pre-emption.....is not itself an offer but an undertaking to make an offer in certain specified future circumstances. An agreement conferring such a right is, therefore, not void for uncertainty merely because it fails to specify the price. It obliges the landowner to offer the land to the purchaser at a price at which he is in fact prepared to sell; and if the purchaser accepts that offer there is no uncertainty as to price."**

7.9 In **Barnsley's Conveyancing Law and Practice, 4th Edition,** which was relied upon by the appellants, but which, we note,

was selectively quoted, the learned authors there write at page 229 that:

> "**A valid <u>option to purchase</u>** land **constitutes an offer** by the grantor to sell to the grantee during the period specified for its exercise...**an option to purchase must be distinguished from a right of pre-emption (or first refusal) which merely obliges the grantor to offer the property to the grantee, should he desire to sell. It does not entitle the grantee to set in motion any machinery for the acquisition of the land."** (boldfacing and underlining ours for emphasis).

7.10 It is clear from a reading of the above excerpts that a right of pre-emption is not an automatic right but requires that there is a prior agreement or contract between the offeror and offeree, that should the landlord decide to dispose of the property by way of sale, the tenant will have the right of pre-emption before the property is offered to someone else to purchase. The appellants have in their arguments failed to demonstrate that there was any such agreement between themselves and the 1st and 2nd respondents or that they were grantees to whom the 1st and 2nd respondents owed a duty to offer the property for sale. The argument in ground one by the appellants that there is a common law remedy that a

tenant of any premises has a right of first refusal is not supported by the law referred to.

7.11 We further wish to clear the misconception created by the appellant, that there is a common law right of 'first refusal'. We took time to consider the paragraphs we were referred to in **Halsbury's Laws of England, Volume 27(2), 4th Edition**. The first point of departure is that the term 'right of first refusal' was actually coined under English statute. It is in the English **Landlord and Tenant Act, 1987,** that certain definitions such as what are '*qualifying premises*' and who is considered to be a '*qualifying tenant*' are considered.

7.12 The **British Acts Extension Act, Chapter 10 of the Laws of Zambia**, restrict the application of the Laws of the United Kingdom, to Zambia as therein specified and the English **Landlord and Tenant Act 1987,** is not applicable in Zambia. In any event, the **Rent Act, Chapter 206 of the Laws of Zambia**, was already in effect as the legislation governing the relationship between landlords and tenants in Zambia. It is

therefore misleading for counsel for the appellants to try and pass the statutory legislation of another jurisdiction as common law in our jurisdiction.

7.13 In **Halsbury's Laws of England, Volume 23, 3rd Edition, at paragraph 1090,** the learned authors clarify the import of the option to purchase when they state that:

> **"A lease may confer upon the tenant an option to purchase the interest of the landlord in the demised premises. This usually takes the form of a covenant by the landlord..... Such an option is collateral to, independent of, and not incident to the relation of landlord and tenant. It is not therefore one of the terms which will be incorporated in the terms of a yearly tenancy created by the tenant holding over after the expiration of the original lease.**

7.14 The argument that there is a common law requirement that a tenant of any premises must be granted 'a right of first refusal', is untenable as there is no such right at common law. It is only an 'option to purchase' which is contractual as already established. In stating so, we are alive to the fact that the two expressions have, in many instances, including the arguments of the parties to this appeal, been used interchangeably, *albeit*, wrongly.

7.15 As to the appellants' alternate argument that, since the advertisement in the newspapers relating to the sale of the property lacked sufficient particularity, this amounted to 'sharp practice' on the part of the 2nd respondent. We note that, 'sharp practice' is defined by the authors of **Black's Law Dictionary, 8th Edition, Thomson West**, to mean, "*unethical action and trickery especially by a lawyer.*" As the 2nd respondent is an institution, we are at a loss to appreciate the sense in which the ill practice was imputed to it. For that reason, we find the argument lacks merit.

7.16 On the allegations of fraud or fraudulent conduct, we note that the same were not pleaded in the court below and cannot, therefore, be raised for the first time on appeal in this Court. This was the point we made in among many other cases, **Antonio Ventriglia, Manuela Ventriglia v Eastern and Southern African Trade and Development Bank[16].**

7.17 Coming to the appellants' argument that the learned trial judge failed to distinguish the appellants legal status as

sitting tenants in the property and not licensees, our comment is that, having already established the status of who a sitting tenant is for purposes of our jurisdiction and in light of the history of disposal of government and quasi government property to civil servants and others, the distinction remains of little assistance in aiding the case of the appellants in this appeal.

7.18 In the case of **Frallen Investments Limited**[10] we did hold that:

> **"Save in exceptional circumstances, an agreement creates the relationship of landlord and tenant and not that of licensor and licensee where there is a right of exclusive possession for a fixed period term at a stated rate. Where an agreement is made in writing, the question whether it creates a tenancy or licence is determined by the consideration of the substantive terms of the agreement and not by the labels and terminology used."**

7.19 We see here, that the distinction between licensee and tenant does not assist the appellants as the distinction goes to the *right of exclusive use or possession of a property*. The writers in **Woodfall's Law of Landlord & Tenant, Vol.1, at page 8, paragraph 1-0016**, have stated that a lease or

tenancy confers on the grantee an interest in the land demised but a licence confers no such interest and merely makes lawful that which would otherwise be unlawful, and that all lessees and tenants necessarily have exclusive possession of the demised properties.

7.20 It is clear from the evidence on record that the intention of the parties in this appeal can be drawn from a reading of the standard lease agreements entered into between the appellants and the 1st respondent. These agreements were purely tenancy agreements on a year to year basis subject to renewal and did not contain any term that could create any expectation or agreement of a right of 'pre-emption' or 'a right of first refusal' as claimed by themselves. To hold otherwise, would be to force the parties into an unintended contract.

7.21 As we have previously held in numerous cases, there is no law that can compel a vendor to sell his property to a party that he is not willing to sell to, as the right to enter into

contracts willingly is sacrosanct. In **Kabwe v Kapasa**[17], the following observations were made by this Court:

> **"As argued by Counsel for the appellant, the respondent was fighting for an offer and the court had no power to order ZCCM to offer a house to the respondent. This is in line with the case of *Frank Malichupa & Others vs. Tanzania-Zambia Railway Authority (2008) Vol.2 Z.R. 112*, where we said that, there was no law which compels an unwilling person to sell his property to a sitting tenant. The behaviour of ZCCM somewhat indicated that it was not willing to sell the house to the respondent despite him being in occupation of the house in issue... In this case, the respondent refused to vacate the house yet he had no offer and as we have already stated a court is not empowered to order anyone to make an offer."**

7.22 The learned trial judge in the court below found, the 1st and 2nd respondents in the present appeal had their own policy considerations on why they wanted the flats sold as a single unit. These were on account of the uneconomic expenses that would have been incurred in subdividing the units and issuance of individual title deeds.

7.23 The 2nd respondent as Trust Fund was entrusted with the property in question and obliged to make sound business decisions for the benefit of its beneficiaries. The learned authors of **Underhill and Hayton, Law of Trusts and**

P.1324

Trustees, (2006), 17th Edition, at p.2, paragraph 1.1., write that;

> **"a trust is an equitable obligation, binding a person called a trustee, to deal with property called trust property owned by him as a separate fund distinct from his own private property for the benefit of persons called beneficiaries." (underlining for emphasis).**

7.24 In the English case of **Cowan & Others v Scargill and Others**[18], at page 760, the learned judge held as follows:

> "**The duty of the trustees towards their beneficiaries is paramount. They must, of course obey the law; but subject to that, they must put the interests of the beneficiaries first. When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally their best financial interests. In the case of a power of investment, as in the present case, the power must be exercised so as to yield the best return for the beneficiaries, judged in relation to the risks of the investments in question; and the prospects of the yield of income and capital appreciation both have to be considered in judging the return from the investment. (underlining for emphasis).**

And further at page 761:

> **"I can see no reason for holding that different principles apply to pension fund trusts from those which apply to other trusts. Of course, there are many provisions in pension schemes which are not to be found in private trusts, and to these the general law of trusts will be subordinated. But subject to that, I think that the trusts of pension funds are subject to the same rules as other trusts. The large size of pension funds emphasises the need for diversification, rather than lessening**

> **it, and the fact that much of the fund has been contributed by members of the scheme seems to me to make it even more important that the trustees should exercise their powers in the best interests of the beneficiaries."**

7.25 It is clear from the above quotes that trustees exercise their powers in the best interests of the beneficiaries, which interests are paramount. It is not for the courts to question the financial decisions, as in this case, made for the benefit of the fund and those to whom it is accountable, so long as there is no illegality.

7.26 Accordingly, we cannot fault the learned trial Judge when she found the 2nd respondent was obliged to make decisions that promoted the best interests of its beneficiaries, by disposing of the property in issue as a single unit based on economic considerations. In **Timothy Hamaaundu[3] and O.K. Simwiinga v Francis Khama[19],** we held that:

> "**specific performance cannot be granted in a deal that was not in existence. In conclusion, we hold that there is no justification to inflict injustice on the 2nd Respondent, an innocent bonafide purchaser for value.**"

7.27 We are satisfied that the law is settled in this regard. The appellants cannot hold the 1st and 2nd respondents to ransom

by demanding a 'right of first refusal' which, as authorities referred to have established, is an English right premised on statute. We further find that, the 3rd respondent was a *bonafide* purchaser for value whose interest in the property cannot be assailed by the appellants.

7.28 It is for the reasons given that we dismiss this appeal with costs to the respondents.

.....
M. MUSONDA
DEPUTY CHIEF JUSTICE

.....
J.K. KABUKA
SUPREME COURT JUDGE

.....
N. K. MUTUNA
SUPREME COURT JUDGE