

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

APPEAL № 005/2018

BETWEEN:

ELIAS TEMBO

APPELLANT

AND

MAUREEN CHIRWA

1ST RESPONDENT

DUNCAN CHIRWA

2ND RESPONDENT

THE ATTORNEY GENERAL

3RD RESPONDENT

LUSAKA CITY COUNCIL

4TH RESPONDENT

PEGGY KANDESHA

5TH RESPONDENT

CORAM: **Chashi, Lengalenga and Siavwapa, JJA**

On 23rd May, 2018, 27th June, 2018 and 29th March, 2021.

For the Appellant:

Mr. M. J. Katolo – Messrs Milner & Paul
Legal Practitioners

For the 1st & 2nd Respondents:

Mr. K. Kaunda – Messrs Ellis & Co

For the 3rd Respondent:

No appearance

For the 4th Respondent:

Miss B. Bulaya & Mr. M. Sholomo – In-House Counsel

For the 5th Respondent:

No appearance

JUDGMENT

LENGALENGA, JA delivered the Judgment of the Court.

Cases referred to:

- 1. PETIT v PETIT (1970) CA 777 at 813**
- 2. PATRICK DICKSON NGULUBE v ROBSON MALIPENGA – SCZ SELECTED JUDGMENT № 3 OF 2015**
- 3. NORA MWAANGA KAYOBA & ANOR v EUNICE KUMWENDA NGULUBE & ANOR – SCZ JUDGMENT № 19 OF 2003**
- 4. HANIF MOHAMMED BHURAI (suing pursuant to a power of attorney granted in his favour by MENRUNISHA MBURA) v YUSUF IBRAHIM ISSA ISMAIL – SCZ APPEAL № 146 OF 2013 (unreported)**
- 5. ANTI-CORRUPTION COMMISSION v BARNET DEVELOPMENT CORPORTAION LTD (2008) 1 ZR 69**
- 6. NKHATA & ORS v ATTORNEY GENERAL (1966) ZR 124**
- 7. JUSTIN CHANSA v LUSAKA CITY COUNCIL (2007) ZR 265**
- 8. YENGWE FARMS LTD v MASSTOCK ZAMBIA LTD & 2 ORS (1999) ZR 65**
- 9. LUSAKA CITY COUNCIL & ANOR v GRACE MWAMBA & ORS – SCZ JUDGMENT № 21 OF 1991**
- 10. ROBERT CHIMAMBO & ORS v COMMISSIONER OF LANDS & ORS (2008) ZR 1**
- 11. WESLEY MULUNGUSHI v CATHERINE BWALE M. CHOMBA (2004) ZR 96**
- 12. BANDA v TEMBO – SCZ JUDGMENT № 18 OF 2008**
- 13. ZAMBIA TELECOMMUNICATIONS COMPANY LTD v VALSON PHARMA (Z) LTD (2010) ZR 142**
- 14. HILDAH NGOSI (suing as Administrator of the estate of Washington Ngosi) v THE ATTORNEY GENERAL & ANOR – SCZ JUDGMENT № 18 OF 2015**

- 15. CAVMONT BANK v LEWIS NATHAN – SCZ JUDGMENT № 6 OF 2016 (unreported)**
- 16. MAYVIJAY GIRL GOSWAMI v DR MOHAMED ANWAR ESSA & ANOR (2001) ZR 31**
- 17. WILMOT v BARBER (1880) 15 CH. D 105 at 106**
- 18. CHARLES KAJIMANGA v MARMETUS CHILEMYA (2016) ZR 189 – SCZ APPEAL № 50 OF 2014**
- 19. SAVENDA MANAGEMENT LTD v STANBIC BANK ZAMBIA LTD – SCZ SJ № 10 OF 2018**
- 20. ANDERSON KAMBELA MAZOKA & ORS v LEVY PATRICK MWANAWASA & ORS (2005) ZR 138 (SC)**
- 21. MOHAMED v THE ATTORNEY GENERAL (1982) ZR 49**
- 22. ATTORNEY GENERAL v MARCUS ACHIUME (1983) ZR 1**
- 23. PHILIP MHANGO v DOROTHY NGULUBE & ORS (1983) ZR 61**
- 24. WILSON MASAUSO ZULU v AVONDALE HOUSING PROJECT (1982) ZR 172**
- 25. JUSTIN CHANSA v LUSAKA CITY COUNCIL (2007) ZR 265**
- 26. NKONGOLO FARM LTD v ZAMBIA NATIONAL COMMERCIAL BANK LTD & ORS (2005) ZR 78**
- 27. BORNIFACE KAFULA & ORS v BILLINGS CHOONGA MUDENDA – SCZ APPEAL № 202 OF 2003**

Legislation referred to:

- 1. THE LANDS AND DEEDS REGISTRY ACT**
- 2. GOVERNMENT CIRCULAR № 1 OF 1985**
- 3. GOVERNMENT CIRCULAR № 2 OF 1996**
- 4. THE URBAN AND REGIONAL PLANNING ACT, № 3 OF 2015**
- 5. ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT, 2009**

Other works:

- 1. CLERK AND LINDSELL ON TORT, 20th Edition**

1.0 INTRODUCTION

1.1 This is an appeal against the High Court judgment dated 16th November, 2017 delivered by Judge Maria Mapani Kawimbe.

2.0 BRIEF BACKGROUND TO THE APPEAL

2.1 The brief background to the appeal is that the 1st and 2nd Respondents commenced an action by way of Writ of Summons against the Appellant in the Court below; the 3rd Party was later joined to the proceedings. The Writ of Summons was later amended to join the 3rd and 4th Respondents.

2.2 According to the endorsement on the Writ of Summons and accompanying Statement of Claim the 1st and 2nd Respondents were claiming the following reliefs:

- (i) Damages for encroachment, *mesne* profits and for trespass on Stand № 24594, Lusaka.**
- (ii) An injunction to restrain the Defendant by himself, his agents, servants or whomsoever from encroaching on the said Stand № 24594, Lusaka.**
- (iii) Interest on *mesne* profits and damages.**
- (iv) Any other relief the Court may deem it.**
- (v) Costs.**

2.3 The Appellant filed an Amended Defence and Counter-claim for the following:

- (i) A declaration that the 1st defendant (Appellant) is the legal owner of Stand № 24594, Libala South, Lusaka and that his offer letter subsists.**
- (ii) A declaration that the offer letter and Certificate of Title issued to the 3rd Party by the Commissioner of Lands and Registrar of Lands and Deeds respectively, are null and void *ab initio* on account of fraud/errors and mistakes committed by the Commissioner of Lands and Registrar of Lands and Deeds and the 3rd Party.**
- (iii) An order compelling the Commissioner of Lands and Registrar of Lands and Deeds to issue the 1st Defendant (Appellant) with a lease and certificate of title in respect of Stand № 24594, Libala South, Lusaka.**
- (iv) A declaration that the 1st Defendant (Appellant) pursuant to Clause 4(1) of offer letter to legally constructed structure at the subject stand thereby spending in excess of K150 000.00.**
- (v) A declaration that the dwelling structure constructed on Stand № 24595, Libala South is legal and not amenable to demolition.**
- (vi) A declaration that the plaintiff (1st and 2nd Respondents) are not innocent purchasers for value without adverse notice.**
- (vii) A declaration that a contract of sale between Oggie Kandesha and the Plaintiffs (1st and 2nd**

Respondents) be cancelled owing to fraud committed by the parties.

(viii) Damages for unnecessary inconvenience occasioned to the 1st Defendant (Appellant) by the Plaintiffs (1st and 2nd Respondents).

(ix) Costs.

(x) Interest found due on any of the above.

(xi) Any other reliefs the Court may deem fit.

3.0

FINDINGS BY THE COURT BELOW

3.1 The learned trial judge found that it was not disputed that the 1st and 2nd Respondents bought Stand № 24594 Lusaka from the 5th Respondent, herein who at that time held title to the land and that the transaction is alleged to have been facilitated by one Oggie Kandesha. She accepted the Appellant's evidence that he was offered the same property before the 5th Respondent by the Ministry of Lands following a recommendation by the Lusaka City Council, the 4th Respondent herein and that he was not issued with a certificate of title.

3.2 The learned trial judge further found that the 1st and 2nd Respondents acquired the subject property from the registered

proprietor, namely, the 5th Respondent and that they are innocent purchasers who acquired valid title to the property. She also found that the Appellant has no legitimate claim to the subject property and that he illegally encroached thereon. She, therefore, found that he is liable to be condemned in damages.

4.0

DECISION OF THE COURT BELOW

- 4.1 The learned trial judge held that the 1st and 2nd Respondents had succeeded in their first claim. With regard to their claim for *mesne* profits and interest thereon, she found that as they had not led evidence, it was unsuccessful.
- 4.2 She found no merit in the Appellant's counter-claim for a declaration that he is the legal owner of Stand № 24594, Libala South, Lusaka, and that the offer letter issued to the 5th Respondent be declared null and void, on that account. She reasoned that the Appellant's imputation of fraud in the actions of the Commissioner of Lands and the 5th Respondent were not supported by evidence to strengthen his allegations. Consequently, she dismissed it with costs for being devoid of merit.

5.0

APPELLANT'S GROUNDS OF APPEAL

5.1

Dissatisfied with Judge Maria Mapani Kawimbe's judgment, the Appellant has appealed to this Court on the following grounds:

- 1. The learned trial judge in the Court below fell in error in law and fact when she held *inter alia* at J11 and 12 as follows:**

"It is common cause that the Plaintiff bought Stand № 24594, Libala South from Ngandu Kandesha. The transaction was facilitated by Oggie Kandesha."

is against the weight of documentary and oral evidence on court record as the only contract of sale is between the 1st and 2nd Respondent and Oggie Kandesha.

- 2. The learned trial judge in the Court below misdirected herself in law and fact despite finding as a fact at J12 that:**

"It was shown to the Court that the 1st Defendant was offered the property before Peggy Ngandu Kandesha."

when she dismissed the Appellant's counter-claim and further held at J20 and found as a fact that the 1st Defendant has no legitimate claim to the property and illegally encroached thereon against uncontroverted evidence on the record that the Appellant was offered on 15th August, 2001 and accepted his offer on 12th September, 2001, more so that hitherto his offer letter remains unrevoked and/or withdrawn by the Commissioner of Lands.

3. The trial judge in the Court below misapprehended and misinterpreted sections 33 and 34 when she held *inter alia* at J13 as follows:

"According to section 33 of the Lands and Deeds Registry Act a certificate of title is conclusive proof of ownership of property. A certificate of title can only be challenged when an allegation of fraud has been proved according to sections 34 of the Lands and Deeds Registry Act."

as section 33 encompasses or reasons of impropriety in its acquisition as other grounds in which a certificate of title can be successfully challenged and annulled and the certificate of title is mute to pre-existence interest in any property.

4. The trial judge in the Court below fell in error in law and fact when she found as a fact at J14 that the Plaintiffs (1st and 2nd Respondents) produced a Land Register which showed the transaction on the property is against the settled law that state mere land print out is not conclusive evidence as to the status of any property, in the absence of certificate of search duly executed by the Registry of Lands and Deeds pursuant to section 23, Cap 185.
5. The trial judge in the Court below misdirected herself in law and fact when she held *inter alia* at J14 and J15 that the 1st and 2nd Respondents were not required to ascertain that Plot № 24594 was not encumbered prior to purchase of the aforesaid Stand is against the plethora of Supreme Court judgments that state that prior to purchase of any real estate, the intended purchaser ought to be diligent in ensuring that such property is free from any encumbrance.
6. The trial judge fell in error in law and fact when she

held that the Appellant needed to call evidence from Ministry of Lands and that the Appellant is an interested party, is against the weight of documentary evidence on the record to the effect that the Appellant joined the Attorney General on behalf of the Commissioner of Lands who elected not to file any pleadings or attend court proceedings to challenge the Appellant's case.

- 7. The trial judge in the Court below misdirected herself in law and fact when she failed to interpret documentary evidence relied on by the parties in contesting the ownership of the subject property.**
- 8. The trial judge in the Court below fell in grave error in law and fact when she held that the 1st and 2nd Respondents are innocent purchasers despite the fact that no evidence was adduced that the 1st and 2nd Respondents conducted searches and inquiries regarding encumbrances to the subject property before they made up their minds to purchase the subject property from Oggie Kandesha who the judge found to be a facilitator without knowing the capacity in which he acted on behalf of the 5th Respondent.**
- 9. The trial judge in the Court below misdirected herself in law and fact when she held that the Appellant failed to adduce evidence that the transaction between Oggie Kandesha and the 1st and 2nd Respondents was fraudulent is against the weight of documentary and oral evidence on record whose fraud was facilitated by the Commissioner of Lands who allowed the said Oggie Kandesha to execute documents in favour of the 1st and 2nd Respondents without any thread of interest in the subject property of whatsoever sort.**
- 10. The trial judge in the Court below seriously misdirected herself in law and fact when she held that:**

"I also find that the 1st Defendant has no legitimate claim to the property and illegally encroached thereon."

which is against the weight of evidence that the Commissioner of Lands conveyed the subject property to the Appellant on 15th August, 2001 and accepted the offer letter on 12th September, 2001.

11. **The trial judge in the Court below mis-apprehended the law and fact when she held that the dispute over ownership of the subject property can only be resolved if evidence is adduced from the Commissioner of Lands and Register of Lands and Deeds inspite of uncontroverted documentary evidence which the trial judge ought to have interpreted in resolving the dispute *in casu*.**

6.0 APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL

- 6.1 The Appellant filed his heads of argument in support of appeal and list of authorities, heads of argument in reply to the Respondents' arguments on which Mr. M. J. Katolo his Counsel entirely relied.
- 6.2 He argued grounds one, five, eight and nine together. He introduced his arguments in support of the said grounds by referring to the case of **PETIT v PETIT¹** where Lord Upjohn stated that:

"If the property in question is land, there must be

some lease or conveyance which shows how it was acquired."

- 6.3 In relation to the present case, Counsel for the Appellant challenged the sale of the subject property to the 1st and 2nd Respondents by the 5th Respondent, and facilitated by one Oggie Kandesha as held by the Court below. He argued that the finding by the Court below was not supported by evidence on record as the names appearing on the contract of sale, assignment, deed of transfer and lodgement are Oggie Kandesha's and not Peggy Kandesha's.
- 6.4 It was submitted that according to the certificate of search obtained by the Appellant from the Registrar of Lands and Deeds, Oggie Kandesha was not registered in the data base of the Registrar of Lands and Deeds as having had a power of attorney, order of administration and/or court order to enable him to transact on behalf of the 5th Respondent, the purported beneficial owner of Stand № 24594, Lusaka in the said transactions. Consequently, the Appellant's alleged fraud on the

part of the said Oggie Kandesha as there is no evidence of what capacity he transacted on behalf of the 5th Respondent.

6.5 It was contended that it was clear from the record that Oggie Kandesha masqueraded as the beneficial owner of the subject property in order to swindle the 1st and 2nd Respondents of their hard earned money.

6.6 Counsel for the Respondent submitted that since the 1st and 2nd Respondents and their advocates did not exercise due diligence to conduct a search at the Lands and Deeds Registry, it put them at risk of being swindled by Oggie Kandesha. He argued that they were, therefore, not innocent purchasers for value without adverse notice. He relied on the case of **PATRICK DICKSON NGULUBE v ROBSON MALIPENGA**² where the Supreme Court quoted from **CLERK AND LINDSELL ON TORT, 20th Edition,** **paragraph 10 to 109** where the learned authors state that:

"Where a solicitor is engaged for reward, there is no doubt as to the exercise of a contractual duty to exercise care and skill of his client."

6.7 He further relied on the case of **NORA MWANGA KAYOBA & ANOR v EUNICE KUMWENDA NGULUBE & ANOR³** where the Supreme Court held *inter alia* that:

"In purchasing of real property, parties are expected to approach such transaction with much more serious inquiries to establish whether or not the property in question has no encumbrances. Buying real property is not as casual as buying house-hold goods or other personal property."

6.8 Based on the authorities cited, Mr. Katolo reiterated that the 1st and 2nd Respondents were not innocent purchasers for value without adverse notice as they attempted to buy the subject property that had already been conveyed by the Commissioner of Lands to the Appellant.

6.9 He submitted that in the circumstance of this case, the Court below ought to have decreed specific performance in the Appellant's favour in the interest of justice. To support this argument, he relied on the **NORA MWANGA KAYOBA** and **TREVOR LIMPIC** cases where the Supreme Court cancelled the certificates of title issued to the Appellants due to the impropriety in their acquisition.

- 6.10 He submitted that similarly in *casu*, Oggie Kandesha fraudulently sold property that he had no right and interest and/or authority to sell. Counsel for the Appellant further submitted that the sale and transfer of interest relating to Stand № 24594, Lusaka between Oggie Kandesha and the 1st and 2nd Respondents herein was a sham, odious and scandalous which must be annulled.
- 6.11 To fortify his argument, he relied on the Supreme Court's decision in the case of **HANIF MOHAMMED BHURAI (suing pursuant to a power of attorney granted in his favour by MENRUNISHA MBURA v YUSUF IBRAHIM ISSA ISMAIL**⁴ where the Supreme Court observed and held that:
- "In the case *in casu*, the justice of the case demanded that the certificate of title be cancelled in terms of section 33 of the Lands and Deeds Registry Act because not cancelling the title would have meant laundering the appellant's title."**
- 6.12 Mr. Katolo urged this Court to cancel the 1st and 2nd Respondents' certificate of title on account of the fraudulent manner in which they acquired the said title.
- 6.13 He further contended that the Supreme Court has in a plethora of authorities pronounced itself on the circumstances under

which a certificate of title can be successfully challenged and cancelled and which authorities include the case of **ANTI-CORRUPTION COMMISSION v BARNET DEVELOPMENT CORPORATION LTD⁵.**

6.14 He submitted that on the facts on record, the 1st and 2nd Respondents did not obtain good title from Oggie Kandesha and he relied on the well settled principle of law:

"Nemo dat quod non habet."

6.15 He, therefore, urged this Court to declare the 1st and 2nd Respondent's title *void ab initio* for want of good title.

6.16 In concluding his arguments in support of ground one, Counsel for the Appellant further submitted that finding of fact by the trial court that the Appellant did not prove fraud on the part of Oggie Kandesha and the 1st and 2nd Respondents is perverse.

On the authority of **NKHATA & ORS v ATTORNEY GENERAL⁶** where it was held that findings of fact by a trial court can only be reversed if they are perverse, not supported by evidence or the evidence was wrongly assessed or evaluated, he urged this Court

to reverse the finding of fact and to allow grounds one, five, eight and nine.

6.17 Counsel for the Appellant argued grounds two, three and six together.

6.18 With regard to ground two, Counsel for the Appellant submitted that the procedure for acquiring land in Zambia was highlighted through Government Circular № 1 of 1985, which was pronounced on by the Supreme Court in the case of **JUSTIN CHANSA v LUSAKA CITY COUNCIL**⁷ where it was held that:

- "(1) The authority to consider applications for land allocation from members of the public is vested in the President of Zambia who has delegated this authority to the Commissioner of Lands.**
- (2) An applicant for land has in terms of Circular Number 1 of 1985 an option either to apply to the Commissioner of Lands or to apply through a Local Authority which has been delegated powers to receive applications for land from members of the public.**
- (3) Where a member of the public opts the second route, a Local Authority is mandated to advertise any land available, receive applications from members of the public and make recommendations to the Commissioner of Lands.**

(4) The power to allocate land and make offers to successful applicants is reposed in the Commissioner of Lands."

- 9.19 It was contended by Counsel for the Appellant that based on the Supreme Court's decision, the 5th Appellant did not comply with the guidelines in the aforementioned Circular when she attempted to acquire the subject property while the Appellant did and he received an acknowledgment and recommendation to the Commissioner of Lands.
- 9.20 The Commissioner of Lands was faulted for issuing an offer letter to the 5th Respondent on 15th August, 2001 at 16:35 hours after having earlier issued one to the Appellant on 15th August, 2001 at 09:40 hours in respect of the same piece of land.
- 9.21 It was submitted on behalf of the Appellant that the Supreme Court emphasized that the provisions of Circular № 1 of 1985 are couched in mandatory terms in the case of **YENGWE FARMS LTD v MASSTOCK ZAMBIA LTD & 2 ORS**⁸ when it stated that:

"4. Accordingly, the following procedures have been laid down and it will be appreciated if you

shall ensure that provisions of the Circular are strictly adhered to."

- 9.22 Further reliance was placed on the case of **LUSAKA CITY COUNCIL & ANOR v GRACE MWAMBA & ORS⁹** where the Supreme Court directed that certificates of title issued to the Respondents in breach of Government Circular № 2 of 1996, if any be cancelled.
- 9.23 Based on the said Supreme Court decision, Counsel for the Appellant urged this Court to order cancellation of the certificate of title issued to the 1st and 2nd Respondents on account of the 5th Respondent's failure to produce her application and recommendation letters to prove that her offer letter was not fraudulently obtained.
- 9.24 The gist of the arguments with respect to ground three are that section 34 of the Lands and Deeds Registry Act encompasses reasons of impropriety in the acquisition of land as other grounds in which a certificate of title can be successfully challenged and annulled was held in the case of **ANTI-CORRUPTION**

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- 9.25 It was contended on behalf of the Appellant that in the instant case, the evidence on record clearly indicates that the 5th Respondent acted fraudulently when she obtained an offer letter from the Commissioner of Lands and a certificate of title from the Registrar of Lands and Deeds without submitting an application letter to the Lusaka City Council and obtaining a recommendation letter to the Commissioner of Lands as required by Circular № 1 of 1985 and in accordance with the Supreme Court's guidance in the **JUSTIN CHANSA** case.
- 9.26 Counsel for the Appellant, submitted that, therefore, the Commissioner of Lands and Registrar of Lands and Deeds breached the law or committed an operative mistake and/or error when he issued an offer letter to the 5th Respondent and a certificate of title without satisfying themselves that she had complied with Circular № 1 of 1985.
- 9.27 He further argued that the Commissioner of Lands' attempt to

allocate the subject property to the 5th Respondent on the same day he had allocated the same to the Appellant was a futile exercise as the property was neither free nor unencumbered. To support this argument, Counsel for the Appellant relied on the case of **ROBERT CHIMAMBO & ORS v COMMISSIONER OF LANDS & ORS**¹⁰ in which the Court held that:

“..... the Commissioner of Lands, on behalf of the President, makes a grant or disposition of land that is free or unencumbered to any person who qualifies under the law.”

- 9.28 It was further contended on behalf of the Appellant that the contract entered into between the Commissioner of Lands and the Appellant, the same being the offer letter and acceptance exhibited on record, cannot be annulled on account of the Appellant not having a certificate of title as there is evidence of part performance on the Appellant's part.
- 9.29 To fortify this position, Counsel for the Appellant relied on the case of **WESLEY MULUNGUSHI v CATHERINE BWALE M. CHOMBA**¹¹ where the Supreme Court held *inter alia* that:
- “Lack of a certificate of title to land cannot be a bar to the conclusion of allegedly binding contract.”**

- 9.30 He further relied on the case of **BANDA v TEMBO**¹² where the Supreme Court in a later case held *inter alia* that:
- "We accept the principle of Halsbury's Laws of England that a Court will enforce a contract which, had all formalities been observed, would be binding at law, in which case it would be specifically enforced."**
- 9.31 To further support the Appellant's part performance on his part, it was submitted that the Commissioner of Lands made a disposition of the subject property to the Appellant on 15th August, 2001 and he accepted/perfected the said offer on 12th September, 2001 when he paid the annual rental charge and fees. It was contended that by so doing, the Appellant acquired a good title from the Commissioner of Lands and that unless otherwise, the Commissioner of Lands has no basis to repudiate the Appellant's legal rights to the subject property without assigning good reasons for doing so.
- 9.32 In relation to the Appellant's claim that he acquired a good title to the property, it was argued that the certificate of title issued to the 5th Respondent on 29th October, 2002 and assigned to the

1st and 2nd Respondents on 4th February, 2003 has no retrospective effect and cannot supersede the Appellant's offer letter issued on 15th August, 2001 and perfected on 12th September, 2001 by payment of consideration fees.

- 9.33 The Appellant's argument was buttressed by reliance on the case of **ZAMBIA TELECOMMUNICATIONS COMPANY LTD v VALSON PHARMA (Z) LTD**¹³ where the Supreme Court had occasion to determine whether a certificate of title has retrospective effect when the Court observed that:

"..... the telephone exchange on sub 'A' of Stand № 11020, Lusaka, was established well before the plaintiff obtained a certificate of title on 14th October, 2002. The facts, which are not disputed, show that the building, housing the telephone exchange, was built and commissioned in 1990. This being the case, a certificate of title obtained in 2002, has no respective effect in terms of section 35 of the Act. The issuance of a certificate of title has, as per section 35, therefore, the effect of overriding only any interest established or contemplated to be established thereafter as these will clearly be adverse to the subsisting title deed...."

- 9.34 In support of ground four which was argued alone, Counsel for the Appellant submitted and contended that the purported land register print out produced by the 1st and 2nd Respondents and

exhibited in the record of appeal, is of no consequence in light of the Supreme Court's decision in the case of **HILDAH NGOSI (suing as Administrator of the estate of Washington Ngosi) v THE ATTORNEY GENERAL & ANOR**¹⁴. In that case the Supreme Court had occasion to pronounce itself on the issue of the lands register computer print-out when it stated that:

"The 1st Respondent produced a computer print out to show that title had properly passed on to the 2nd Respondent. Unlike a certificate issued by the Registrar under section 23 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia, a computer print out is not conclusive proof of any matter concerning a property."

- 9.35 It was submitted by Counsel for the Appellant that the only document which is acceptable by the Courts as conclusive evidence of any matter concerning a property is a certificate of title.
- 9.36 It was submitted that the 1st and 2nd Respondents did not prove the status of the property and that therefore, this Court was urged to uphold this ground of appeal.
- 9.37 Counsel for the Appellant argued grounds seven and eleven together.

- 9.38 Grounds seven and eleven were argued together.
- 9.39 Counsel for the Appellant submitted that the 1st and 2nd Respondents' and Appellant's respective bundle of documents are exhibited on record and that the said documents were settled after discovery and inspection. It was further submitted that in the absence of oral evidence from the Ministry of Lands and Lusaka City Council, the trial judge would have addressed her mind to the documents that originated from the two institutions and were filed by the respective parties hereto. It was argued that by so doing, the trial judge would have done justice to the case as priority of interest and fraud is clear in the said documents.
- 9.40 To fortify this argument, Mr. Katolo relied on the case of **CAVMONT BANK v LEWIS NATHAN**¹⁵ where the Supreme Court held that:
- "The duty of the Court below was to interpret the documents within its four corners and not to interpret it in the light of or in conjunction with the evidence of the plaintiff witness."**
- 9.41 Counsel for the Appellant submitted that based on the cited

authority, this Court had a duty to interpret the documents filed and exhibited in the record of appeal within their four corners as held by the Supreme Court.

- 9.42 He further submitted that the 1st, 2nd and 5th Respondents lamentably failed to show that they adhered to the provisions of the law in dealing with Stand № LUS/24594 Lusaka. He contended that acquiring a certificate of title is not an event as the Respondents would want this Court to believe but a process which is enshrined in Circular № 1 of 1985 and other applicable statutes which was subject of *dictum* in the **JUSTIN CHANSA** case that was earlier cited.
- 9.43 He further argued that the Appellant's offer letter is still subsisting as the same has not to-date been withdrawn or revoked by the Commissioner of Lands as required by law and the planning permission to erect a building which was subsequently approved was legitimately obtained.
- 9.44 Ground ten was argued alone. The Appellant therein challenges the trial judge's finding that the 1st Defendant (Appellant) has no legitimate claim to the property and illegally encroached thereon

which is against the weight of the evidence on record. He submitted that the Commissioner of Lands made an offer by letter dated 15th August, 2001 which was perfected on 12th September, 2001 by payment of consideration fees and other related charges by the Appellant. It was further submitted that the Appellant subsequently applied to the Lusaka City Council to erect a building as is evidenced by scrutiny fee official receipt number 248525 dated 24th July, 2005 for payment for submission of a building plan no. 965/05. Also exhibited on record is an approval of the plan dated 20th December, 2005.

9.45 It was submitted that, therefore, the unexhausted improvements on the subject property were lawfully done and that the said property cannot be taken away without recourse, and reference was made to Act № 3 of 2015 which replaced Chapter 283 of the Laws of Zambia.

9.46 To support that argument, Mr. Katolo relied on the case of

MAYVIJAY GIRI GOSWAMI v DR MOHAMED ANWAR ESSA

& ANOR¹⁶ where the Supreme Court held *inter alia* that:

“Our Constitution does not countenance the deprivation of property belonging to anyone....”

- 9.47 He further relied on the case of **WILMOT v BARBER**¹⁷ where Fry J. in deliberating on the law of deprivation observed that:
- "It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he had acted in such a way as would make it fraudulent for him to set up those rights."**
- 9.48 Counsel for the Appellant submitted that where there is proof of planning permission, compensation is mandatory and to fortify this position he relied on section 50(4) of the Urban and Regional Planning Act, № 3 of 2015 which states that:
- "Where a planning permission is cancelled under subsection (3) the person to whom the planning permission was granted shall be entitled to claim compensation from the Planning Authority in respect of any expenditure incurred by that person in carrying out the work terminated by the cancellation of the planning permission and respect of any other loss or damage which is directly attributable to the cancellation of the planning permission, and the Planning Authority shall pay compensation to that person in respect of expenditure, loss or damage."**
- 9.49 He further submitted that a careful perusal of the bundle of

documents settled by the parties reveals that nowhere is it suggested that the 4th Respondent rejected and/or revoked the planning permission granted to the Appellant to-date within the meaning of the Act. He submitted that the said planning permission has never been revoked by the 4th Respondent and that by implication of the law, the said planning permission was approved ninety (90) days after lodgment as provided for in section 55 of the Act.

- 9.50 He concluded by submitting that section 51(4) of the Act guarantees compensation in the event of cancellation of the planning permission.
- 9.51 Grounds twelve and thirteen were not pleaded in the Memorandum of Appeal and therefore, there is no need for this Court to deal with them as they are not properly before this Court.
- 9.52 In conclusion, this Court was urged to allow the appeal with costs.

10.0 1ST AND 2ND RESPONDENTS' ARGUMENTS IN OPPOSITION TO THE APPEAL

- 10.1 Heads of argument were filed into court on behalf of the 1st and

2nd Respondents.

10.2 In response to grounds 1, 5, 8, 9 and 11 it was submitted that PW1, the 1st Respondent's testimony was that he and the 2nd Respondent purchased the subject property from the late Peggy Kandesha and not Oggie Kandesha and that they never dealt with the said Oggie Kandesha.

10.3 It was further submitted that a perusal of the public documents disclose that they refer to a contract of sale and assignment between Peggy Kandesha and the 1st and 2nd Respondents.

10.4 This Court was referred to the following documents in the record of appeal:

- (i) The State Consent to Assign addressed to Peggy Ng'andu Kandesha and not Oggie Kandesha.**
- (ii) The Property Transfer Tax Clearance Certificate that shows that it was Peggy N. Kandesha who assigned the property to Duncan Chirwa and Maureen L. Chirwa and not Oggie Kandesha.**
- (iii) The electronic Lands Register Print Out under Entry № 3 and the Appellant's own certificate of official search which indicates the following:**

Assignor	Kandesha Peggy Ng'andu
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Assignee	Chirwa Maureen Lungu and Chirwa Duncan
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Nature of Doc**K4 000 000.00 Assignment of
property 16554**

- 10.5 Counsel for the 1st and 2nd Respondents beseeched this Court to take judicial notice that the names of parties appearing on the State Consent to Assign, the Property Transfer Tax Clearance Certificate and the registration of assignment details were taken from the Contract of Sale and Assignment.
- 10.6 He further submitted that the issue of Oggie Kandesha should be put to rest by the fact that the purported Contract of Sale and Assignment were not registered at the Lands and Deeds Registry whilst the registration of the purported Deed of Transfer between Oggie Kandesha and the 2nd Respondent was cancelled. He submitted that further to that the 2nd Respondent denied that the signature on the purported documents was his wife's. He submitted that an unregistered assignment cannot lead to issuance of title and that as indicated in the Lands Register print out and the certificate of official search, the Assignment that was registered is between Peggy N. Kandesha and Duncan Chirwa and Maureen Lungu Chirwa.

- 10.7 He further submitted that the documents relied on by the Appellant are not helpful to him in any way because a sale is different from a mere transfer of property. He submitted that some of the Appellant's documents show a purported sale and others show a mere transfer, vide Deed of Transfer when the two are different.
- 10.8 Counsel for the 1st and 2nd Respondents' response to ground five is that the Appellant has misconstrued the holding of the Court below as it did not hold that the 1st and 2nd Respondents were not required to ascertain that the plot herein was encumbered. He submitted that the holding of the Court below was that a purchaser from a registered proprietor is not required to investigate how a proprietor acquired title. He further submitted that investigating how a seller acquired title is different from ascertaining whether or not there are encumbrances registered at the Lands and Deeds Registry. He relied on the mandatory provisions of section 33 of the Lands and Deeds Registry Act which state that:

"A certificate of title shall be conclusive as from the

date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise, which but for Parts III to VII might be held to be paramount or to have priority; the Registered Proprietor of the land comprised in such certificate shall, except in the case of fraud, hold the same subject only to such encumbrances, liens, estates or interests as may be shown by such certificate of title and any encumbrances, liens, estates or interests created after the issue of such certificate as may be notified on the folium of the register relating to such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever."

- 10.9 Counsel for the 1st and 2nd Respondents submitted that there being no encumbrances on the Lands Register, the Court below was on firm ground when she held that the 1st and 2nd Respondents are innocent purchasers. He further submitted that that is supported by the fact that the 1st and 2nd Respondents did not purchase from Oggie Kandesha. He submitted that ground five is bound to fail.
- 10.10 He further submitted that in relation to the holding by the Court below that the 1st and 2nd Respondents were not required to investigate how the proprietor acquired title, the Court below was properly guided by sections 58 and 59 of Lands

and Deeds Registry Act. He submitted that section 58 clearly states that even where the purchaser from a registered proprietor has notice (actual or constructive) of any existing interest, such shall not be imputed as fraud.

10.11 He further submitted that section 59 also confirms that a purchaser from a registered proprietor is not to be concerned with the fact that the certificate of title might have been issued by mistake or error. He submitted that the Appellant's contention that Peggy Kandesha's offer letter was issued by mistake flies in the teeth of section 59, as there is no evidence to support such an assertion. Counsel for the 1st and 2nd Respondents further submitted that fraud had not been proved against any of the Respondents herein and that, therefore, ground nine is also bound to fail.

10.12 Grounds two, three, six, seven, ten and eleven were also argued together.

10.13 With regard to ground two, Counsel for the 1st and 2nd Respondents responded that even if it was assumed that the Appellant was issued with the offer letter, it would not change

the statutory position that a certificate of title is conclusive proof of ownership and can only be impugned upon evidence of fraud. He relied on section 33 of the Lands and Registry Act, and the recent case of **CHARLES KAJIMANGA v MARMETUS CHILEMYA**¹⁸ where the Supreme Court reaffirmed that:

"A certificate of title is conclusive evidence of ownership of the property to which it relates. It can only be nullified if fraud in acquisition is proved."

10.14 In the present case, it was submitted that the so called rule of thumb cannot override mandatory statutory provisions. It was further submitted that the Appellant did not lead any evidence of fraud against the 5th Respondent to the required standard. His testimony on record was that:

"On fraud, the 3rd Party acquired an offer letter without submitting an application as required by law."

10.15 It was further submitted that whilst the Appellant alleged that the 5th Respondent acted fraudulently, which is denied, he defeated his argument when he testified that Oggie Kandesha

was neither appointed on behalf of Peggy Kandesha nor did he possess a power of attorney to transact on her behalf.

- 10.16 Counsel for the 1st and 2nd Respondents submitted that Peggy Kandesha's acquisition of land herein complied with Circular № 1 of 1985, as she had applied for the land. With regard to the Appellant's argument that the 5th Respondent failed to provide the recommendation letter, he submitted that the issue of the recommendation letter by the Council did not arise in the Court below, and that it is also misleading because the Appellant assumed that she applied through the Lusaka City Council, the 4th Respondent herein. He further submitted that even assuming that the 5th Respondent did not apply for the land herein, which was denied, that would not amount to fraud.
- 10.17 It was further submitted that contrary to the Appellant's contention that he paid ground rent on the subject property, according to the law, it is not possible to do so as ground rent is not a condition found in an offer letter but the lease with the President of the Republic of Zambia.

10.18 He responded to the allegation of mistake and error by submitting that the lease between the 5th Respondent and the President was signed by the former Commissioner of Lands, one Nathaniel Nawa Inambao. He submitted that, however, there was no evidence in court by the said former Commissioner of Lands confirming that the offer letter and certificate of title in Peggy Kandesha's name were issued in error or by mistake. He further submitted that if the Appellant believed that that was the position, he could have had the said Nathaniel Inambao subpoenaed as a witness.

10.19 In responding to ground three, Counsel for the 1st and 2nd Respondents submitted that the Appellant was attempting to sneak in "**impropriety**" as a ground for cancelling the certificate of title. He drew this Court's attention to the fact that the Appellant's amended Defence and Counter-claim does not contain any allegation of impropriety against Peggy Kandesha or the 1st and 2nd Respondents. He, therefore, relied on the case of

SAVENDA MANAGEMENT LTD v STANBIC BANK ZAMBIA LTD¹⁹ in which the Supreme Court held that the Court ought not

to consider matters or issues that are not pleaded in their judgments. He submitted that, therefore, the argument on impropriety should be ignored.

10.20 With regard to ground 6 and contrary to the Appellant's contention, it was submitted that the Appellant is not a lessee herein as there is no lease between him and the President of the Republic of Zambia.

10.21 It was further submitted that the fact that the Commissioner of Lands, through the 3rd Respondent did not file the pleadings herein, does not automatically entitle the Appellant to a judgment in his favour. It was also submitted that the 3rd Respondent had no burden to dispel the Appellant's contentions. Counsel for the 1st and 2nd Respondents supported his submission by relying on the case of **ANDERSON KAMBELA MAZOKA & ORS v LEVY PATRICK MWANAWASA & ORS**²⁰

in which the Supreme Court held *inter alia* that:

"A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case."

10.22 He further relied on the earlier case of **MOHAMED v THE ATTORNEY GENERAL**²¹ where the Supreme Court observed that:

"An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A plaintiff must prove his case and if he fails to do so, the mere failure of the opponent's defence does little to entitle him to judgment."

10.23 In relation to the present case, it was submitted that the non-filing of pleadings by the 3rd Respondent should have motivated the Appellant to call witnesses from the Ministry of Lands to assist him to prove his allegations of either fraud or mistake. It was therefore submitted that the Court below was on firm ground and cannot be faulted. It was accordingly submitted that on the totality of the foregoing, grounds seven and eleven are bound to fail.

10.24 The 1st and 2nd Respondents' response to ground four was that the said ground is frivolous and vexatious as the Appellant's own official search confirmed the contents of the electronic printout which he contended the Court below should not have relied on.

- 10.25 It was further submitted that the Electronic Communications and Transactions Act, 2009 permits the production into evidence and admission thereof of computer generated evidence such as the Lands Register printout.
- 10.26 It was submitted that the said Act was enacted in 2009, long after the Lands and Deeds Registry Act relied on by the Appellant.
- 10.27 In conclusion, it was submitted that the Appellant had failed to prove his counter-claim of fraud and mistake/error. This Court was, accordingly, urged to dismiss the appeal with costs.
- 11.0 **THE 4TH RESPONDENT'S ARGUMENTS IN RESPONSE TO THE APPELLANT'S GROUNDS OF APPEAL**
- 11.1 Heads of argument and list of authorities were filed into Court on behalf of the 4th Respondent on which they relied.
- 11.2 In response to grounds one, two, four, five, six, seven, eight, nine and ten, it was submitted on behalf of the 4th Respondent that a quick perusal of the said grounds and heads of argument indicate that the mentioned grounds essentially attack findings of fact by the Court below. Reliance was placed on the case of

NKHATA & ORS v THE ATTORNEY GENERAL OF ZAMBIA in which the Court of Appeal then pronounced itself on the judicature's reluctance to reverse findings of fact made by a judge sitting alone without a jury unless it was positively demonstrated to the appellate court that:

- (a) **there was a misdirection or otherwise in accepting the evidence;**
- (b) **in assessing and evaluating the evidence, the judge has taken into account some matter which he ought not to have taken into account or failed to take into account some matter which he ought to have taken into account etc.**

11.3 Further reliance was placed on the cases of **ATTORNEY GENERAL v MARCUS ACHIUME²²**, **PHILIP MHANGO v DOROTHY NGULUBE & ORS²³** and in **WILSON MASAUSO ZULU v AVONDALE HOUSING PROJECT LTD²⁴** in which the pronouncement in the **NKHATA** case received judicial endorsement when the Supreme Court held *inter alia* that:

"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."

- 11.4 In the present case, it was submitted that the learned trial judge was on firm ground when she made the findings of fact and that the outlined grounds of appeal have failed to meet the required conditions set out in the cited cases to warrant this Court to reverse the said findings. It was further submitted that in the premises, this Court cannot be moved to reverse the findings of fact by the learned trial judge.
- 11.5 Counsel for the 4th Respondent responded to grounds three and 11 together. With regard to ground three, he submitted that the learned trial judge was on firm ground in the manner she interpreted and applied the provisions of sections 33 and 34 of the Lands and Deeds Registry Act. He further submitted that the Appellant herein has failed to clearly show how the learned trial judge misapprehended and/or misinterpreted said provisions when she made the following finding that:

"According to section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive proof of ownership of property and can only be challenged when an allegation of fraud has been

proved in accordance to section 34 of the same Act."

- 11.6 He submitted that the learned trial judge's interpretation was correct and represents the true implication of section 33 and 34 and that as such, there was no misinterpretation or misapprehension of the said provisions of the law.
- 11.7 It was noted that the Appellant argued that sections 33 and 34 envisages that a certificate of title can also be challenged and cancelled for reasons of impropriety in its acquisition and that the learned trial judge ought to have addressed the question of impropriety in the acquisition of the certificate of title by the 1st and 2nd Respondents.
- 11.8 The 4th Respondent responded by submitting that the learned trial judge was on firm ground when she did not consider the question of impropriety as the same is not envisaged by sections 33 and 34 of the Act.
- 11.9 It was submitted that consequently, the question for determination in the Court below was whether the 1st and 2nd Respondents' certificate of title derived from Peggy Kandesha

(5th Respondent) was tainted with fraud so as to warrant its cancellation. It was further submitted that the learned trial judge found that the Appellant had failed to prove his allegation of fraud and that such allegations of fraud could not be directed at the 1st and 2nd Respondents because they were *bona fide* purchasers for value.

11.10 It was, therefore, submitted that ground three should fail and that this Court should uphold the learned trial judge's interpretation of sections 33 and 34 of the Act.

11.11 With respect to ground eleven, it was submitted that the learned trial judge was on firm ground when she held that the dispute in question could only be resolved if evidence was adduced by the Commissioner of Lands and the Registrar of Lands. Counsel for the 4th Respondent submitted that the Appellant rightly admitted in his arguments that as set out in the case of **JUSTIN CHANSA v LUSAKA CITY COUNCIL**²⁵, any person intending to acquire land in Zambia ought to submit a written application to the Lusaka City Council which has delegated powers to receive applications on behalf of the Commissioner of Lands or apply

directly to the Commissioner of Lands and that the Commissioner of Lands holds the authority to issue certificates of title.

11.12 It was further submitted that the learned trial judge rightly observed in her judgment that the existence of two certificates on the record could only be explained by the Commissioner of Lands as the issuing authority.

11.13 In conclusion, it was submitted that the Appellant had failed to prove that the learned trial judge erred both in law and in fact and this Court was urged to dismiss the appeal with costs.

12.0 APPELLANT'S REPLY TO THE 4TH RESPONDENT'S ARGUMENTS

12.1 In reply to the 4th Respondent's response to grounds one, two, three, four, five, six, seven, eight, nine and ten that the said grounds attack findings of fact by the Court below which cannot be reversed, Counsel for the Appellant submitted that this Court is perfectly entitled to reverse findings of fact made by the Court below where there is a miscarriage of justice or violation of some principle of law or procedure in arriving at the said findings of fact.

- 12.2 It was further submitted that the question whether there is evidence on which the Court below relied on to arrive at the findings of fact attacked by the aforesaid grounds of appeal is a question of law that this Court cannot be precluded from considering.
- 12.3 Reference was made to the finding of the Court below that:
- "It is common cause that the Plaintiffs bought Stand № 24594, Libala South from Peggy Ngandu Kandesha. The transaction was facilitated by Oggie Kandesha."**
- 12.4 Counsel for the Appellant submitted that the quoted finding of fact is so perverse as it was made in the absence of any relevant evidence supporting such a fact and was premised on a misapprehension of facts by the Court below. He further submitted that since it is clear that the trial court's conclusion of primary facts were not supported by any evidence or at all, this Court is entitled to set aside the said finding for being perverse in accordance with the decision in the case of **WILSON ZULU v AVONDALE HOUSING PROJECT LTD.**

12.5 In relation to the present case, it was submitted that no reasonable Court properly directing its mind could have arrived at the finding of facts that the Court below did.

13.0 THIS COURT'S DECISION

13.1 We have considered the evidence on record, the grounds of appeal, respective arguments by the parties, authorities cited and judgment appealed against.

13.2 Having considered the grounds of appeal and arguments advanced for and against the appeal, we opine that the issues raised for determination relate to allegations of fraud. That is, whether there was fraud in the manner in which the 5th Respondent initially acquired the subject property, and whether the 1st and 2nd Respondents can be considered to be innocent purchasers for value without notice of encumbrances.

13.4 From the evidence on record, we observed that the learned trial Judge in her judgment was reluctant to find that the 1st and 2nd Respondents who purchased the land from the registered proprietor made false statements or suppressed information on

how they acquired the property from the registered proprietor, the 5th Respondent.

13.5 Upon perusal of the record of appeal and particularly, the trial proceedings, we observed that the 2nd Respondent testified on how he and his wife acquired the subject property in his testimony at page 202, lines 8 to 16 of the record of appeal when he stated that:

"The 1st Plaintiff is my wife. My wife and I bought the property in dispute from Peggy Ng'andu Kandesha at K4 000 000.00 in 2002. The documents I have are the letter of offer from the Ministry of Lands. The service charge letter from Lusaka City Council and the title deed issued in my name."

13.6 From the evidence, the role that Oggie Kandesha played in facilitating the sale between the 1st and 2nd Respondents and Peggy Ng'andu Kandesha is unknown as the Certificate of Official Search at page 147 of the record of appeal shows that Peggy Ng'andu Kandesha, the 5th Respondent assigned the property to Maureen Lungu Chirwa and Duncan Chirwa, the 1st and 2nd Respondents on 4th February, 2003, the same day Certificate of Title No. 16554 was issued.

13.7 In view of the allegations of fraud levelled at the 1st and 2nd Respondents in the acquisition of the property, we had occasion to peruse section 23 of the Lands and Deeds Registry Act on the nature and effect of an official certificate search. The said provision states that:

- "(1) Where any person requires a search to be made at the Registry for entries of any matters or documents, whereof entries are required or allowed to be made in the Registry, he may, on payment of the prescribed fee, lodge at the Registry a requisition in that behalf.**
- (2) The Registrar shall thereupon make the search required, and shall issue a certificate setting forth the result thereof.**
- (3) In favour of a purchaser or an intending purchaser, as against persons interested under or in respect of matters or documents whereof entries are required or allowed as aforesaid, the certificate, according to the tenor thereof, shall be conclusive, affirmatively or negatively, as the case may be."**

13.8 The Certificate of Official Search being conclusive of the matters and documents entered therein, we opine that the 5th Respondent lawfully acquired Plot № LUS/24594 and

subsequently sold it to the 1st and 2nd Respondents as is evidenced by the entry of the assignment in the said Certificate.

13.9 The Appellant urged this Court to order the cancellation of the certificate of title issued to the 1st and 2nd Respondents on the ground that there was fraud and impropriety in the acquisition of the subject piece of land because he was offered the same piece of land and paid the service charges before it was offered to the 5th Respondent.

13.10 To support his allegation of fraud and impropriety, he further argued that Oggie Kandesha's names appear on the contract of sale and assignment instead of the 5th Respondent's names. From the record we observed that even though the 5th Respondent was joined to the action, she never appeared to defend the action for whatever unknown reasons. However, based on the Certificate of Official Search, we are satisfied that the learned trial Judge was on firm ground in finding that the transaction was between the 5th Respondent and the 1st and 2nd Respondents.

13.11 The issue of fraud and impropriety in the acquisition of the property has been sufficiently addressed in the arguments, authorities cited by Counsel and provisions of the law referred to, particularly sections 33 and 34 of the Lands and Deeds Registry Act, so we shall not belabour the point.

13.12 It is trite law that for an allegation of fraud to succeed, it must be specifically pleaded and proved to the required standard of proof which is slightly higher than the balance of probability. In the case of **NKONGOLO FARM LTD v ZAMBIA NATIONAL COMMERCIAL BANK LTD & ORS²⁶**, it was held that:

"Where a party relies on any misrepresentation, fraud, breach of trust, willful default or undue influence by another party, he must supply the necessary particulars of the allegation in the pleadings. Fraud must be precisely alleged and strictly proved. There is no presumption of fraud."

13.13 A perusal of the amended Defence and Counter-claim at page 64 of the record of appeal filed by the Appellant, shows that three particulars of fraud were alleged, as set out therein:

"(1) That the 3rd party, Oggie Kandesha caused the Commissioner of Lands to generate an offer letter in his name without having first

submitted an application letter to be allocated the property;

- (2) That the 3rd party knew or ought to have known that it is not legally tenable for the Commissioner of Lands to allocate the subject property without submitting an application letter; and**
- (3) That the sale between the 1st and 2nd Respondents on the one hand, and the 3rd party on the other, was fraudulent as the 3rd party was not the beneficial owner at the material time.”**

- 13.14 The certificate of official search, which is conclusive of matters contained therein, shows that the said Oggie Kandesha was not a party to the transactions between the 1st and 2nd Respondents on one hand, and the 5th Respondent, on the other. While we accept that the Appellant produced documents, namely, a contract of sale and an assignment, showing that they were executed by the said Oggie Kandesha, Counsel for the 1st and 2nd Respondents argued that the said documents were never registered at the Lands and Deeds Registry. Similarly, the deed of transfer was also cancelled as indicated by the stamp on it at page 133.

- 13.15 Upon perusal of the record of appeal, we were unable to find any proof of an application letter by either the 5th Respondent to the Ministry of Lands or the Lusaka City Council for the land. However, the fact that an offer letter and a certificate of title were issued to the 5th Respondent, raises a presumption that the 5th Respondent did at one point lodge an application for land, and was subsequently issued the same.
- 13.16 From the evidence, we are satisfied that the offer letters to the Appellant and the 5th Respondent were issued on the same date with that of the Appellant being prior in time. However, in terms of section 33 and 34 of the Lands and Deeds Registry Act, no action for possession, or other action for the recovery of the subject land, can lie or be sustained against the 1st and 2nd Respondents who are holding a certificate of title for the property in respect to which they are registered.
- 13.17 Therefore, we come to the conclusion that the Appellant failed to prove fraud and impropriety on the part of the 5th Respondent in her acquisition of the property.

- 13.18 It was contended on behalf of the Appellant that the 1st and 2nd Respondents are not innocent purchasers without notice of any encumbrances. It was argued that the 1st and 2nd Respondents ought to have conducted searches and inquiries regarding encumbrances to the subject property before purchasing the same.
- 13.19 We agree with Mr. Sholomo that investigating how a seller acquired title is different from ascertaining whether or not there are encumbrances registered at the Lands and Deeds Registry. There is no law that requires a purchaser of land to make enquiries into how the vendor acquired title to the land on offer.
- 13.20 We are fortified in taking this view when consideration is given to the provisions of **section 58 of the Lands and Deeds Registry Act** which states that:
- "58. Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer or mortgage from the Registered Proprietor of any estate or interest in land in respect of which a Certificate of Title has been issued shall be required or in any manner concerned to inquire into or ascertain the circumstances in or the consideration for which such Registered Proprietor or any previous Registered Proprietor of the estate or interest in question is or was"**

registered, or to see to the application of the purchase money or of any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

- 13.21 We, further, noted from the evidence on record that neither the Appellant nor any other person entered or placed a caveat on the property at the Ministry of Lands or the Lusaka City Council regarding their interest in the subject property. In the case of

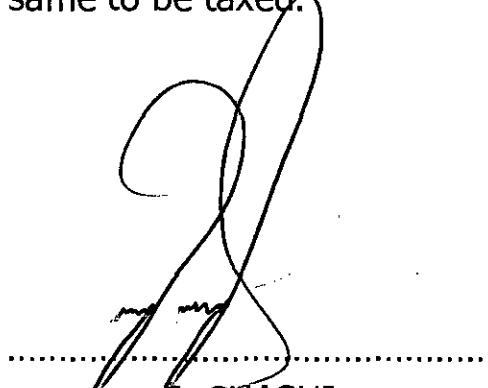
BORNIFACE KAFULA & ORS v BILLINGS CHOONGA MUDENDA²⁷, the Supreme Court gave guidance on the effect of a caveat being placed on property when it stated that:

"In law, a caveat is a caution that there are other competing interests, and as such we expected the plaintiff to act with great caution in the acquisition of the house, which unfortunately he did not do. With this evidence, it cannot be said that the plaintiff was an innocent purchaser."

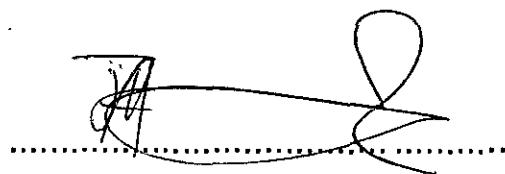
- 13.22 In this case, however, we opine that in the absence of a caveat, the 1st and 2nd Respondents cannot be held to have been negligent in not conducting a search on the property as there

was nothing to compel them to act with caution in the acquisition of the property.

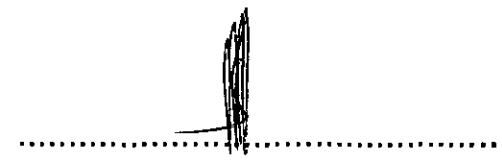
- 13.23 Therefore, we uphold the reasoning of the Court below that the provisions of the Lands and Deeds Registry Act entail that a purchaser for valuable consideration from a registered proprietor who has title is not required to investigate how the proprietor acquired title.
- 13.24 All in all and in conclusion, we find no merit in the appeal and dismiss it with costs to the Respondents. In default of agreement, same to be taxed.



J. CHASHI
COURT OF APPEAL JUDGE



F. M. LENGALENGA
COURT OF APPEAL JUDGE



M. J. SIAWWAPA
COURT OF APPEAL JUDGE