MASTER

IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 46/2018**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

GARRY DAVIES CHIBANGULA **APPELLANT**

AND

MUSESHA CHITUNDU JOSEPH KUNKUTA **1ST RESPONDENT**
CHISAMBA MABLE MWANSA **2ND RESPONDENT**

CORAM: CHASHI, LENGALENGA AND SIAVWAPA, JJA

On 16th October and 14th December 2018

FOR THE APPELLANT: MR. M. CHITUNDU WITH MR. M. KHUNGA BOTH OF MESSRS BARNABY AND CHITUNDU LEGAL PRACTITIONERS AND MR. M. CHONGO OF G. D. C CHAMBERS

FOR THE 1ST RESPONDENT: MR. H. CHONGO OF MESSRS ITUNA PARTNERS

FOR THE 2ND RESPONDENT: NO APPEARANCE

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases referred to

1. *Honorius Maurice Chilufya and Chrispin Haluwa Kangunda SCZ Judgment No. 29 of 1999*
2. *Walsh v Lonsdale (1882) 21 ch-D.19*
3. *Dyer v Dyer; 2 Cox, 93, Lynch v Clarkin [1900]1 1.R.178 (C.A)*

4. *Air Jamaica Ltd v Charlton [1999] 1WLR 1399 at 1412*
5. *Hodgson v Marks [1971] ch 892*
6. *Lavelle v Lavelle [2004] EWCA Civ 223 [2004] 2FCR 418 AT [14]*
7. *Hutton v Walting (1947) 2 ALL ER 641, Jenkins, J*
8. *Tito v Waddel (No. 2) (1977) Ch. D.P 106 at 322*
9. *Mundanda v Mulwani & Others (1987) ZR 30*

Legal Works

1. *Lewin on Trusts 13th Edition, Walter Banks 1928 Sweet & Maxwell London at page 157*
2. *Messrs Underhill and Hayton in their book; Law of Trusts and Trustees Seventeenth Edition Butterworths 2007 (UK) at page 71 3.1 1 (C)*

This is an appeal against the Judgment of the High Court that declared the Appellant not a bonafide purchaser for value without notice of property No. 22974, PHI, Lusaka.

The Judgment further held that the 2nd Respondent was and had never been the beneficial owner of the said property and therefore, had no legal authority to sell it to the Appellant.

The Court also held that the said property belonged to the 1st Respondent by virtue of a resulting trust that had been created in his favour when he paid the full purchase price for the said property and that the 2nd Respondent only held the same in trust for the 1st Respondent.

Having so held the learned trial Judge dismissed the counter claims by the 2nd Respondent and the Appellant for the 1st Respondent to render an account for rentals and mense profits and for a

declaration that the Appellant was the new beneficial owner of the property and for specific performance respectively.

Aggrieved by the Judgment of the Court below, the Appellant launched the appeal before us now raising twelve grounds of appeal.

The first three grounds will be collapsed into one as they all seek to assail the trial Court's finding that the Appellant was not the beneficial owner of the property in question as the contract of sale executed between him and the 2nd Respondent was null and void.

Ground 4 challenges the order to discharge the caveat placed by the Appellant.

Ground 5 attacks the learned trial Judge's alleged unbalanced evaluation of the evidence.

Ground 6 faults the learned trial Judge's dismissal of the Appellant's plea of latches.

Ground 7 attacks the learned trial Judge's dismissal of the Appellant's counterclaim for specific performance.

Grounds 8 and 9 are related as they both question the learned trial Judge's finding that the 1st Respondent had acquired an equitable interest in the said property.

Grounds 10 and 11 are also related in that they attack the learned trial Judge's finding that the Appellant was in breach of the Legal Practitioners' Rules.

Ground 12 attacks the learned trial Judge's failure to order a refund of the amount of K291,000.00 to the Appellant, with interest being the part of the total purchase price he paid for the property.

The brief and undisputed facts of the case are that the 2nd Respondent, was offered stand No. 22974, PHI, Lusaka for purchase by the National Housing Authority (hereinafter referred to as NHA) sometime in 2000. She paid the purchase price in full after which Certificate of Title No. 19014 was issued in the name of the 2nd Respondent, Mable Mwansa Chisamba on 18th June 2003.

In 2010, NHA wrote to the owner of stand No. 22974 offering on first refusal basis the plot adjacent to her plot. The 1st Respondent got hold of the said letter and responded accepting the offer on the same date. NHA responded to the acceptance but noted the variance between the registered owner of the plot in question and the person accepting the offer. This prompted NHA to inquire from

the 1st Respondent whether ownership had changed to which he replied in the negative re-affirming the 2nd Respondent's ownership.

By contract of sale dated 27th May 2011, between the 2nd Respondent and the Appellant the former agreed to sell and the latter agreed to purchase stand No. 22974, PHI, Lusaka at the purchase price of K380,000. The Appellant then proceeded to register a caveat against the property on 3rd June 2011.

On 28th September 2011, the 1st Respondent launched court proceedings against the 2nd Respondent and the Appellant in the High Court seeking among other reliefs, a declaration that the 2nd Respondent was not the beneficial owner of stand No. 22974, PHI by reason of which she had no right or authority to sell it.

Both the 2nd Respondent and the Appellant settled their defences and counterclaims on 11th October 2011 having entered appearance.

Trial commenced in earnest on 15th July 2015 and the 1st Respondent was the key witness for the Plaintiff whose testimony was that in 2000 he bought property No. 22974/PHI in the name of the 2nd Respondent. In 2007, while on a visit to the said property to collect rentals, the tenant showed him a vacation notice issued by the 2nd Respondent.

It was his testimony that he bought the property after asking the 2nd Respondent who was the secretary to the Chairman of the Presidential Housing Initiative, PHI to help him secure the property. He said that he was given the offer letter and paid the purchase price of K80,000 in four instalments.

In 2003, the Certificate of Title was issued in the 2nd Respondent's name but that he collected it from the lawyers representing PHI and kept it until 2011 when the 2nd Respondent asked for it. When he attempted to get the Certificate of Title back, the 2nd Respondent gave an excuse prompting him to conduct a search at the Ministry of Lands. His search revealed that the property had been offered for sale.

Discussions followed with the 2nd Respondent's family which resulted in the execution of a Deed of Settlement dated 8th December 2011.

He said that the property was bought in trust for him but that his interest had not been reduced into writing by the parties.

He admitted that the property was offered to the 2nd Respondent but that he accepted the offer and paid the purchase price even though it was not offered to him.

He admitted dealing with NHA in relation to the property as advocate for the 2nd Respondent, the purchaser.

The second witness for the Plaintiff was a man who said he was a brother/cousin to the 1st Respondent. The witness also said he was married to the 2nd Respondent's elder sister and that he had kept both the 1st and 2nd Respondent in his home when they were young.

He testified that he had been aware of the 1st Respondent's purchase of the property in issue through the 2nd Respondent. He also said that when he was informed of the 2nd Respondent's decision to sell the property he called a family meeting where it was resolved that the property be retrieved to avoid family problems.

The Plaintiff's third witness was a friend of the 1st Respondent who said that he was in the company of the 1st Respondent when the tenant of the property in issue showed the 1st Respondent the vacation notice from the 2nd Respondent. He further said that he accompanied the 1st Respondent to the 2nd Respondent's house where the 1st Respondent confronted her on the vacation notice.

When the 1st Respondent asked for the Certificate of Title, the 2nd Respondent told him that her brother had gone with it to South Africa. He said that he also accompanied the 1st Respondent to the Ministry of Lands where he conducted a search.

He also said that he did not attend the family meeting convened in December 2011 but that he was shown a document which was the result of the meeting. He said further that it was decided that in order to promote family unity the property belonged to the 1st Respondent.

The Defendants testified through the Registrar of Lands and Deeds and the Appellant. The 2nd Respondent did not testify as her whereabouts were said to be unknown by her relatives.

The Registrar, DW1, produced and identified the documents relating to proprietary interest in stand No. 22974. He produced the Lands and Deeds Register showing the 2nd Respondent as the lessee of the property, the Certificate of Title, issued in her name in 2003, the caveat registered by the Appellant, the contract of sale, the Assignment application for consent to assign and the lodgment schedule.

He confirmed that from the records at the Lands and Deeds Registry, the 2nd Respondent was the owner of the said property by reason of which she had the power to sell it.

The Appellant's testimony was that in May 2011, he saw an advertisement of a property for sale in one of the daily tabloids. He called the number provided and later met with the 2nd Respondent. After discussions with her and after she had given him a copy of the

Certificate of Title to stand No. 22974, PHI which was in her name, he further conducted a search on it at the Ministry of Lands and found no encumbrance on it.

He verified with NHA that the same property was offered to the 2nd Respondent and he also saw a letter by which the 1st Respondent confirmed that the 2nd Respondent was the owner of the property. Finally he and the 2nd Respondent settled on the purchase price of K380,000.00.

He and the 2nd Respondent, who was accompanied by Fanuel Nyirenda, her husband, went to view the property. The house had been leased out to ZAF through the 1st Respondent, the 2nd Respondent's lawyer at the time and whose company, Kays Investments, was managing the said property.

They then executed a contract of sale upon which he paid a deposit of K200,000 and the 2nd Respondent handed over the original Certificate of Title.

Then, in September 2011, before the transaction could be completed, he was served with a writ of summons and an order of interim injunction halting the completion of the transaction.

From this evidence and the submissions before her, the learned trial Judge found that the 1st Respondent paid the purchase price

for the property and that created a resulting trust in favour of the 1st Respondent, whose effect was to render the contract of sale between the Appellant and the 2nd Respondent null and void according to the learned trial Judge.

Both parties filed heads of argument and authorities they seek to rely upon.

The first argument by the Appellant is the one premised on Section 33 of the Lands and Deeds Registry Act which holds a Certificate of Title as conclusive evidence of ownership of Land and we accept that argument as it is not debatable and it was upheld in a number of Supreme Court decisions among them the decision in the case of *Honorius Maurice Chilufya and Chrispin Haluwa Kangunda*[1].

With the said authorities, there is no dispute that the Certificate of Title for stand No. 22974 was issued in the name of the 2nd Respondent and so she is to all intents and purposes the owner of the said property. Subsequently, the Title holder, is empowered to sell pursuant to a contract of sale entered into with an intending purchaser.

The key argument upon which the 1st Respondent is hanging is that he holds an equitable interest in the property as he provided the funds for the purchase of the property.

The 1st Respondent has sought the aid of an ancient case of *Walsh v Lonsdale*[2] which held that;

"Equity looks on that as done which ought to be done."

In her Judgment, it is very clear that the learned trial Judge was persuaded to accept that the 1st Respondent, asked the 2nd Respondent to apply for the property on his behalf as she was well placed to be given the offer and that once the offer was given to the 2nd Respondent, the 1st Respondent then went ahead to pay the full purchase price.

This led the learned trial Judge to the conclusion that a Resulting Trust had been created or was imputable from the conduct of the parties which vested an equitable interest in the property in the 2nd Respondent.

What we need to interrogate is whether, on the evidence on record, it is correct to hold that a resulting trust was created in favour of the 1st Respondent in respect of stand No. 22974, PHI, Lusaka.

Our review of the law governing the creation of trusts shows that a trust may be created in one of two ways namely by express terms in a conveyance instrument such as a device or bequest or by way of a resulting or constructive trust.

We however, do not intend to go into detail on express trusts as our main concern in this judgment is the creation of a resulting trust as the brief facts of the case have shown. A resulting trust may also be inferred from a conveyance, device or bequest where it appears to have been the intention of the parties so to do.

It is the established principle of the law governing resulting trusts that it must be the express or implied intention of the settlor not to part away with his legal interest in the property permanently at the time of giving it to a trustee while he retains the equitable interest in it.

According to the learned authors of *Lewin on Trusts 13th Edition, Walter Banks 1928 Sweet & Maxwell London* at page 157, it is stated;

> ***"The general rule is that whenever upon a conveyance, devise or bequest, it appears to have been the intention of a donor that the grantee, devisee, or legatee was not to take beneficially the equitable interest, or so much of it as is left undisposed of, will result to the donor or his representatives."***

The learned authors in the above quotation make it clear that the Court will have to read the intention of the donor at the time where the instrument has no express provision. Once the Court forms the view that the donor never intended to give the beneficial interest in equity to the recipient of the property, then the law will deem the interest to have remained with the donor thereby creating a resulting trust with the donor as the settlor and the recipient as trustee.

Further exposing how trusts may be created, *Messrs Underhill and Hayton in their book; Law of Trusts and Trustees Seventeenth Edition Butterworths 2007 (UK) at page 71 3.1 1 (C) make the following statement;*

> ***"Trusts are imposed by a court applying principles of equity so that while legal title to property is in one person, the equitable right to the beneficial enjoyment thereof is in another, the legal title then being subject to a resulting trust or a constructive trust".***

Again, from the above quotation, it is understood that the Court in imposing a resulting or constructive trust will look at the original intentions of the settlor and apply to those intentions the principles of equity to hold that there was a split of the legal and the equitable interests between the parties.

One illustrative instance in which the Court will impose a resulting trust in favour of a transferor of property is where such transfer is made without corresponding consideration and there is no evidence that the transferor intended to make a gift or to abandon all interest in the property.

The exception is where the transfer is to the transferor's spouse or child as it is normal to make transfers of property to such persons gratuitously as opposed to a stranger.

For that reason such a trust is said to carry the beneficial interest back to the transferor. It is however, important to note that for a

resulting trust to be imposed in equity, the transferor must have a beneficiary or proprietary interest in the property in the first place.

However, in other instances a resulting trust will arise where the claimant paid the purchase price for the transferred property or where the property is purchased in the name of a stranger.

At page 178 of Lewin on Trust (supra) the learned authors make the following statement;

> ***"When real or personal property is purchased in the name of a stranger, a resulting trust will be presumed in favour of the person who is proved to have paid the purchase money in the character of purchaser."***

In the case of *Dyer v Dyer; 2 Cox, 93, Lynch v Clarkin*[3] *Lord Chief Justice Baron Eyre* put it thus;

> ***"The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold or leasehold; whether taken in the names of the purchaser and others jointly, or in the name of others without that of the purchaser; whether jointly or successive, results to the man who advances the purchase money and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor."***

(For the sake of clarity, a feoffment is a term that was used in feudal times under feudal law to refer to a grant of ownership of freehold property to someone).

So according to Lord Chief Justice Baron Eyre, ownership of land granted without consideration in a gratuitous manner will result to the grantor.

In such circumstances however, the presumption of a resulting trust can be rebutted by very clear and strong evidence of intention to the contrary. In other words, there should be evidence that the grantor intended to give the property as a gift or that he intended to abandon his beneficial interest in the property.

If it was a provision of the purchase money for the said property in the name of a stranger, there should be evidence that the purchaser had intended the purchase money to be a loan or an advance to the transferee of the purchased property or the person in whose name the property is purchased.

In the case of *Air Jamaica Ltd v Charlton*[4] *per Lord Millet;*

> ***"In many cases where property is gratuitously transferred there is evidence that the transferor intended to make a gift or loan, or, in a very rare case, to abandon his interest in the property, in which case, the law will give effect to that intention, and no question will arise of a resulting trust being imposed."***

The other point of consideration relates to oral transfers of realty and in that regard, the learned authors of the Law of Trusts and Trustees (Supra) at p 72, Paragraph 3.3., have stated as follows;

> ***"Likewise, if the evidence reveals that the transferor made an enforceable express or inferred declaration of trust of property***

gratuitously transferred into the name of, or bought by the transferor in the name of the transferee, then the law will give effect to that express trust, assuming compliance with the requisite formalities."

In that regard, in the case of *Hodgson v Marks*[5] where A transferred her house to B on oral trust for A the Court of Appeal held that B held the house on trust for A nonetheless. It is said that this was an express trust imposed to prevent statute being used as an instrument of fraud.

The reason for the imposition of a resulting trust as opposed to the express trust is that the trust was unenforceable for offending against the Law of Property Act 1925, Section 53 (1) (6).

In essence, A would have failed to enforce his equitable interest in the house and hence the court's holding that there was a resulting trust in favour of A.

In the case of Lavelle v Lavelle[6] Lord Phillips MR put it thus;

"Thus resulting trusts are imposed only in cases where property is gratuitously transferred and there is insufficient evidence to ascertain the transferor's intention. In these circumstances the law will raise a presumption in the transferor's favour that the transferor does not intend to part with the beneficial interest in the property."

In Re Vandervell's Trusts No. 2 1974, Mergarry J made the following statement;

"There is no mention of any expression of intention in any instrument or of any presumption of a resulting trust; the resulting trust takes effect by operation of the Law (by law implied that; that property will revert to you) and so appears to be automatic."

So, in applying the principles of the law on resulting trusts as laid down in the various authorities cited, we bring into focus the facts in the case at hand to see whether any of the elements that could lead to an imposition of a resulting trust in favour of the 1st Respondent did exist.

In the first place, it is clear that there was no instrument executed between the 1st Respondent and the 2nd Respondent by which the intention of the parties could be ascertained. There is also no evidence that the 1st Respondent was the beneficial owner of property stand No. 22974 PHI, Lusaka and that he transferred the same property to the 2nd Respondent with the intention to retain an equitable interest in it for the beneficial interest to revert to him at some point.

What is however, the basis upon which the Court below imposed a resulting trust in favour of the 1st Respondent is its finding of fact that the 1st Respondent provided the full purchase price money for the said property. We are alive to the fact that as an appellate Court, we ought not to reverse a trial courts findings of fact unless such findings are perverse, or not supported by the evidence on the record.

The question then is, did the Court below have sufficient evidence to support its finding of fact that the 1st Respondent did indeed purchase the property in question but in the name of the 2nd Respondent? First and foremost, there is no evidence to prove that the 1st Respondent requested the 2nd Respondent to apply for the purchase of the said property on his behalf from NHA. The fact that the 2nd Respondent categorically refuted that assertion in her defence and counterclaim left only the assertions of the 1st Respondent in his statement of claim as well as his oral testimony at trial and that of his cousin PW2.

However, even assuming that that were the case, we take the view that the 1st Respondent's evidence of such an arrangement lacked cogency to be relied upon by the Court below. This is in view of the letter dated 4th February 2010 written by the 1st Respondent in which he categorically confirmed that house No. 22974 still belonged to the 2nd Respondent. The letter is exhibited at page 87 of the Record of Appeal.

We however, note that the date on this letter must have been an error because in that letter, the 1st Respondent states in the 1st paragraph that he was responding to a letter addressed to him by NHA dated 15th December 2010. That letter is exhibited at page 50 of the Record of Appeal, clearly the reply could not have come earlier than the letter referred to. We therefore take it that the date on the letter at page 87 should have read 4th February 2011.

We further take note that at page 85 of the Record of Appeal is an offer letter of the land adjacent to stand No. 22974. The offer is addressed to the purchaser of Plot No. 22974, PHI and it is dated 3rd November 2010. At page 86 the 1st Respondent responds accepting the said offer on the same date.

In her affidavit in opposition to the ex-parte summons for an interim injunction, filed into Court on 11th October 2011 and exhibited at page 298, volume 2 of the Record of Appeal, the 2nd Respondent states in paragraph 11 thereof at page 299 line 21, that the letter offering the adjacent land to Plot 22974 which was delivered at the said property was intercepted by the 1st Respondent who purported to accept the offer.

We further note that at no point throughout the pleadings did the 2nd Respondent concede ever having any agreement, oral or written by which the 1st Respondent asked her to apply for the said property on his behalf and that she accepted that request.

The only concession is the Deed of Settlement dated 8th December 2011 which was executed while the matter was already before Court. The Deed is exhibited at page 141 of the Record of Appeal. Curiously though the said agreement does not talk about the said purported request and neither does it state that the 1st Respondent provided the purchase money. The reason for the purported

rescission of the contract of sale is stated as *"in order to maintain family unity"*.

The Agreement also states that the agreement was not her own but that of the family. It therefore raises the question whether or not the Agreement was of her own volition or by coercion by family members.

It is also strange that the 2nd Respondent was conveniently not available during trial as a witness for the 1st Respondent if indeed she had freely and voluntarily recanted her earlier denial that the property belonged to the 1st Respondent.

We also note that in a bid to give the Deed of Settlement legal force, the 2nd Respondent deposed to an affidavit to verify the said Deed but this was close to four years after the Deed was executed and after the matter was commenced in the High Court.

The trial Court however, expunged the document from the record thereby also pouring cold water on the Deed of Settlement. With that failed bid by the 1st Respondent to rely on the Deed of Settlement, he needed to provide evidence that he paid the purchase price for the property in issue.

We however, note that the only payment that the 1st Respondent made was for the purchase of the land adjacent to stand No 22974.

This was evidenced by two receipts exhibited in the 1st Respondent's affidavit in support of ex-parte summons for an interim injunction dated 28th September 2011.

The two receipts are on pages 153 and 154 of the Record of Appeal. The total amount paid was K45,000 in two instalments being the full purchase price for the adjacent property as set out in the offer letter dated 15th December 2010 which appears at page 152 of the Record of Appeal.

We have no doubt that the 1st Respondent paid for the adjacent property because not only does the record show that he accepted the offer, though not addressed to him but the receipts are also in his name.

On the contrary stand No 22974, PHI, which is the main property in contention was offered to the 2nd Respondent in 2000 and the Certificate of Title was issued in her name in 2003.

In paragraph 2 of the 2nd Respondent's affidavit in opposition to ex-parte summons for an interim injunction at page 172 of the Record of Appeal, the 2nd Respondent deposes as follows;

> ***"That paragraph 4 is denied and the Plaintiff (1st Respondent) will be put to strict proof that he paid me the sum of K80 million to purchase the property for him. As intimated above, the PHI scheme was open to the public and I can think of no earthly reason why I should purchase the property for the Plaintiff when I need one myself."***

We believe this was a robust defence by the 2nd Respondent against the 1st Respondent's claim that he firstly requested the 2nd Respondent to apply for the property on his behalf and secondly that he provided the money used to purchase the property.

The onus was squarely upon the 1st Respondent to provide documentary evidence that he did make the request to the 2nd Respondent and that he financed the purchase.

We have looked at the receipts exhibited in respect of payments toward the purchase price of stand No 22974 which occur from page 161 to page 164 of the Record of Appeal. The total sum of the receipts is K80 million which was the full purchase price as deposed to by the 2nd Respondent.

The said purchase price was paid in varying instalment amounts between the months of February and September 2001- all in the names of the 2nd Respondent.

In light of the said evidence we do not see the evidence that the learned trial Judge used to make a finding of fact that the K80 million purchase prices for stand No 22974 was provided by the 1st Respondent.

This finding is therefore, not supported by the evidence on the record and on that basis, we take the liberty to interfere with that finding of fact and set it aside.

In the result, the imposition or presumption of a resulting trust in favour of the 1st Respondent to stand No. 22974 collapses as it has no limb to stand on in the absence of proof that the 1st Respondent provided the funds which the 2nd Respondent used to purchase the property.

The inevitable effect of the setting aside of the Judgment of the Court below that there was a resulting trust in favour of the 1st Respondent is that the 2nd Respondent being the beneficial owner of stand No 22974, possessed the authority to sell the property and consequently the contract of sale between the 2nd Respondent and the Appellant was valid and enforceable.

The Appellant contracted to purchase the property without any legal encumbrance and he was entitled to place a caveat on it to protect his interest in it.

As regards the purported rescission of the contract of sale by the 2nd Respondent, we note that this was never the basis upon which the Court below found in favour of the 1st Respondent in the Judgment.

We also find no ground of appeal based on that fact.

Finally, in light of the dim view we have taken of the Deed of Settlement in which the purported rescission is contained we will not discuss the rescission any further as it is of no consequence to this appeal.

In its Judgment, the Court below also found the Appellant guilty of violating Rules 5 and 32 of the Legal Practitioners' Rules Statutory Instrument No. 51 of 2002 for not obtaining written consent of the parties to the contract of sale to act for both parties, which conduct is prohibited under Rule 32.

The Appellant submitted in his Heads of Argument that he was surprised by the court's pronouncement on the issue as the same was not pleaded by the 1st Respondent in his statement of claim but that the issue was brought up only in cross-examination. He contends therefore, that he was not given an opportunity to address his mind to the issue in his pleadings as it was not in the 1st Respondent's pleadings.

We have perused the 1st Respondent's pleadings in the Court below and we indeed find no claim based on the Appellant's breach of the Rules in question.

We therefore find it unfair that the Court below made such an adverse finding on an issue that was not pleaded by the 1st Respondent. We accordingly reverse that finding.

Finally, the Appellant seeks to have the remedy of an order for specific performance of the contract of sale.

We note that out of the purchase price of K380 million agreed upon, the Appellant did make payments to the 2nd Respondent towards the purchase price which payments were duly acknowledged by the 2nd Respondent.

In addition, there was an application for consent to assign and an assignment was prepared and executed by both parties. We consider that the necessary steps were being taken towards the completion of the conveyance until an order of interim injunction was granted to the 1st Respondent. We do not think that an order for damages would be an appropriate remedy given the circumstances of this case.

In the case of *Hutton v Walting*[7], *Jenkins J* made the following statement;

> ***"Common law remedy for breach of a contract; namely; damages is not in all cases an adequate remedy."***

In *Tito v Waddel*[8] the following was said;

> ***"The question is not simply whether damage are an "adequate" remedy but whether specific performance as it were, will do more perfect and complete justice than an award of damages. This is particularly so in all cases dealing with a unique subject matter such as land."***

In the case of *Mundanda v Mulwani & Others*[9] the Supreme Court of Zambia placed reliance on paragraph 1764 of Chitty on Contracts 25th Edition which states as follows;

> ***"The law takes the view that damages cannot adequately compensate a party for breach of contract for the sale of an interest in a particular piece of land or of a particular house (however ordinary).***

The court then concluded;

> ***"This authority is supported in countless other instances and in this case it is quite clear that the learned trial judge did not have his attention drawn to the fact that his discretion in relation to specific performance for the sale of land was decidedly limited."***

Quite clearly, the authorities cited point to specific performance as the remedy of choice for breach of contract in matters relating to land.

We however, note in this case that the conveyance was not completed due to an order of interim injunction that was obtained by the 1st Respondent. The 2nd Respondent, who is the vendor has reportedly gone missing and her whereabouts are unknown.

We would nonetheless allow the appeal on all the grounds and grant specific performance to the Appellant by the 2nd Respondent

on condition that the Appellant pays the outstanding balance on the purchase price. For expedience the parties are hereby ordered to complete within sixty (60) days of this Judgment and that if the 2nd Respondent cannot be traced within thirty (30) days of this Judgment, the Appellant shall pay the outstanding balance of the purchase price into Court and proceed to present the requisite documents before the Registrar of the Court of Appeal for execution.

Costs here and below shall be for the Appellant.

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J. CHASHI
COURT OF APPEAL JUDGE

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F. M. LENGALENGA
COURT OF APPEAL JUDGE

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M. J. SIAVWAPA
COURT OF APPEAL JUDGE