

**IN THE COURT APPEAL FOR ZAMBIA**

**APPEAL NO. 150/2017**

**HOLDEN AT KABWE**

*(Appellate Jurisdiction)*

**BETWEEN:**

**ABENAS UNITED LTD**

**APPELLANT**

**AND**

**J. C. MULUNGA & COMPANY**

**RESPONDENT**



**CORAM:** CHISANGA JP, KONDOLO, SC, MAKUNGU, JJA

On 23<sup>rd</sup> MAY 2018 and 4<sup>th</sup> December 2019

*For the Appellant:*

*No Appearance*

*For the Respondent:*

*No Appearance*

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## **JUDGMENT**

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**CHISANGA**, JP delivered the Judgment of the Court

Cases referred to:

1. ***Douglas vs Stevenson (1932) A.C. 562***
2. ***Hedly Byrne & Company Ltd vs Heller & Partners Limited (1964) A.C. 465***
3. ***Ngulube vs Malipenga (2015) ZR 46 Vol 1***
4. ***Nkongolo Farm's vs Zambia National Commercial Bank & Others (2005) ZR 78***
5. ***Ellis vs Goulton and Another (1893) 1 QBD 350***
6. ***P&P Property Limited vs Own White & Caitlin LLP & Dreamvar (UK) Limited vs Mishcon de Reya [2018] EWCA Civ. 1082***

Other Works referred to:

1. ***Clerk and Lindsell on Tort, 17<sup>th</sup> Edition para 7-112***
2. ***Section 3(1) of the Misrepresentation Act CAP 69***
3. ***The Law of Real Property R.E. Megarry QC***

**4. H. W. R. Wade Third Edition, London, Steven & Sons Limited 1966, P.596.**

The appellant was plaintiff in the court below. It took out an action for damages against the 1<sup>st</sup> defendant for fraud and misrepresentation. It also sought damages for negligence and misrepresentation against the 2<sup>nd</sup> defendant. In addition, it claimed refund of monies paid by way of deposit for the purchase of subdivision 1394 of Stand 7417 Lusaka.

The statement of claim averred that the 1<sup>st</sup> defendant was purported vendor of subdivision 1394 of Stand Number 7417, Lusaka, while the 2<sup>nd</sup> defendant was a law firm representing the 1<sup>st</sup> defendant in a conveyance of the said subdivision. By contract of sale dated 5<sup>th</sup> July 2013, the 1<sup>st</sup> defendant sold and the plaintiff agreed to purchase the subdivision at a consideration of K250,000. It was a special condition of the contract that the plaintiff was to pay an initial deposit of K150,000.00, being 60% of the purchase price on exchange of contracts.

Prior to execution of the contract, the plaintiff's director, one Mrs. Ruth Ironside, met the 2<sup>nd</sup> defendant's managing partner, a Ms. J. C. Mulunga at her chambers for purposes of ascertaining the authenticity of the title to the property being sold, as the latter was the advocate acting for the vendor. The 2<sup>nd</sup> defendant reassured the plaintiff that the property in question was genuine and free of encumbrances as she was satisfied that the 1<sup>st</sup> defendant was the true owner of the property, and that the Title Deed in her possession was

authentic. Mrs. Ironside was advised by the 2<sup>nd</sup> defendant that she could proceed with the transaction without fear and engage counsel to represent her. The plaintiff engaged Messrs Solly Patel, Hamir and Lawrence to represent it. Upon being notified of this appointment, the 2<sup>nd</sup> defendant forwarded a contract to them for approval. In the meantime, the 1<sup>st</sup> defendant had insisted on payment of the initial deposit of K150,000.00 as stipulated in the contract as she was about to leave town. This was confirmed by the 2<sup>nd</sup> defendant. A contract of sale was thus executed at the 2<sup>nd</sup> defendant's chambers on 5<sup>th</sup> July 2013 pursuant to which the deposit was paid by cash in the sum of K27,150.00 and by bank transfer in the sum of K122,850.00.

The plaintiff asserted that notwithstanding having instructed counsel to act for it, it placed reliance on the assurances and representations made by the 2<sup>nd</sup> defendant as a lawyer in paying over the said deposit even before its advocate had had time to peruse and approve the contract of sale.

The plaintiff further averred that on 15<sup>th</sup> July 2013, the 2<sup>nd</sup> defendant forwarded the contract to the plaintiff's advocates for execution when, in fact the same had been executed by the parties at her chambers on the 5<sup>th</sup> July 2013, and the deposit paid.

It was claimed that when the plaintiff attempted to take possession of the property, a Mr. Moono, a third party came, claiming to have purchased the property from the 1<sup>st</sup> defendant and paid K250,000.00 by way of deposit. Shortly after that, a Mr. Nkunika from Lusaka City Council arrived at the

house and informed Mrs. Ironside that he had been informed by the 2<sup>nd</sup> defendant that the house was being sold.

This shocked Mrs. Ironside, who had been advised by the 2<sup>nd</sup> defendant that the house was free of encumbrances and owned by the 1<sup>st</sup> defendant. The plaintiff informed the 2<sup>nd</sup> defendant that it would not proceed with the transaction and demanded a refund of the money paid. The 2<sup>nd</sup> defendant could not refund the deposit as she had paid the same to the 1<sup>st</sup> defendant, whose whereabouts were unknown to her. Additionally when requested to hand over the Property Transfer Tax receipt, Consent to Assign and the Title Deed for completion of the conveyance, the 2<sup>nd</sup> defendant's response was that the documents were not available as she had not attended to them before handing the money over to the 1<sup>st</sup> defendant.

The plaintiff averred that the 2<sup>nd</sup> defendant was in breach of its fiduciary duty when it remitted the funds to the 1<sup>st</sup> defendant without ensuring that the process of conveyance required of a vendor's advocate had been finalised, before doing so.

All efforts to locate the 1<sup>st</sup> defendant had proved futile, and the deposit had not been retrieved. The particulars of the 1<sup>st</sup> defendant's fraud were: Purporting to be true owner of the subdivision; executing a contract of sale knowing full well that the property belonged to third parties; receiving deposit knowing that she was not beneficial owner of the property in question.



The particulars of the 2<sup>nd</sup> defendant's misrepresentations were: Representing to the plaintiff that the 1<sup>st</sup> defendant was beneficial owner of the property and inducing the plaintiff to pay the deposit, knowing fully well that the property belonged to one Mr. Bizwell Nkunika.

Particulars of the 2<sup>nd</sup> defendant's negligence were: failing to disclose to the plaintiff that the 1<sup>st</sup> defendant was not the beneficial owner of the property, knowing fully well that the property belonged to Mr. Bizwell Nkunika, failing to obtain state consent to Assign, pay Property Transfer Tax and execution of the Assignment before transmitting the deposit to the 1<sup>st</sup> defendant.

In her defence, the 2<sup>nd</sup> defendant averred that the duty of ascertaining the authenticity or investigating of title lay with the plaintiff's advocates after the vendor had deduced title. The 2<sup>nd</sup> defendant denied assuring the plaintiff that the property was genuine and free of encumbrances nor that the title deed in her possession was authentic. That the 1<sup>st</sup> defendant requested for payment of K150,000.00 in terms of Special Condition No 6(i) of the draft contract of sale, which the plaintiff on its own volition paid to the 1<sup>st</sup> defendant through the 2<sup>nd</sup> defendant as agent for the vendor.

The 2<sup>nd</sup> defendant denied making any assurance and or representation with regard to the payment of the deposit as it did not possess any duty to the plaintiff, which had independent counsel.

The 2<sup>nd</sup> defendant denied misrepresenting to the plaintiff that the 1<sup>st</sup> defendant was the beneficial owner of the property in question or inducing the plaintiff to pay the deposit. She also denied possessing knowledge of the owner of the property. It was also averred that she did not fail to obtain State Consent to Assign, pay Property transfer Tax and procure execution of the Assignment since the sale had fallen through immediately the vendor had demanded and received a deposit.

At the trial, Ruth Chende Ironside testified. She stated that she and her husband had a business called Abenas United Limited for properties they acquire and own. She was a Director in the said company. She saw an advert in the Newspaper for a house in Chilenje. She called the number on the advert, which was answered by a man she came to know as Daniel. He directed her to the property, which she viewed. It was vacant. The man said the house belonged to his sister Towela Nkunika. He gave the witness her number and she called the said Towela Nkunika who informed her that she lived in Chingola. She expressed interest in purchasing the house.

She later met Daniel at the main bus stop in Kamwala, and he gave her copies of the title deed, four days after the viewing. She passed these copies to Messrs Solly Patel, Hamir and Lawrence, her lawyers. The vendor, Towela, informed her that she also had a lawyer, whose particulars she gave her. The witness went and saw Ms. Mulunga, to ask if the house was legitimate. After they spoke, she went to Ms. Mulunga, and remarked that the documents could be

made in Matero. In response, Ms. Mulunga lifted a file, and said she does not deal with fraudsters. Soon thereafter, Towela Nkunika asked for a down payment in the sum of K150,000.00. Ms. Mulunga said it was okay, she knew who her client was. The money was paid to Ms. Mulunga's account.

The witness asked Ms. Mulunga for the keys to the house. The keys were however not brought, and they ended up breaking the lock to the house. Later, some people came, saying the house belonged to Colonel Nkunika's wife. Another person showed up, a Mr. Moono, claiming that he had also paid for the house. When the witness called Ms. Mulunga, she said she did not know what was going on. Efforts to get hold of Towela proved futile. Ms. Mulunga later informed her that she had sent the documents to Messrs Solly Patel. The witness signed the contract of sale at Ms. Mulunga's office, and in fact informed her that she had advocates. She signed after being assured that the sale was legitimate. At the time she made the transfer, Solly Patel was aware of what she was doing. She explained that she signed the document (Contract of Sale) on 5<sup>th</sup> July.

It was later discovered that the property did not belong to the purported Towela Nkunika, but the late Towela Nkunika. When she spoke to Ms. Mulunga about the matter, her response was that she did not know the vendor who just walked into her office. She had also handed the money over to the seller. She blamed the witness for what had occurred, when the witness had showed her implicit trust.



After several adjournments for the cross examination of the witness and calling of other witnesses, the plaintiff's case was closed due to the defendant's absence, and the matter adjourned for judgment.

In her judgment, the learned trial judge held that apart from the prosecution witness's assertion, there was no other evidence that the 2<sup>nd</sup> defendant assured her that the vendor was known to the 2<sup>nd</sup> defendant and that the documents were authentic. She also referred to the denial by the 2<sup>nd</sup> defendant in the defence, and went on to state that she could not hold, even on a balance of probabilities, that the plaintiff had proved the misrepresentation. She further found that the 2<sup>nd</sup> defendant did not owe a duty of care to the plaintiff, as she did not act for the plaintiff. Dissatisfied with the decision of the trial court, the appellant has launched this appeal, on three grounds. The first ground is that it was an error in law and fact to hold that the appellant was represented by counsel, when the evidence revealed that the appellant had already signed a contract and paid the deposit at the time its advocates were sent the second contract.

The second ground is that it was an error in fact and law to hold that the appellant had failed to prove that the respondent gave assurances on the authenticity of the title held by the purported seller when the appellant (witness) was not cross examined on the issue, the court relying on the denial in the defence.



The third ground is that it was an error in law and fact for the court to hold that the appellant's claim for negligence must fail, as the respondent was not acting for the appellant, but for the fictitious Towela Nkunika.

The appellant's advocates, who had filed a notice of non-appearance, relied on their submissions filed on 1<sup>st</sup> December 2017. Grounds one and three were argued together. It was contended that the respondent owed the appellant a duty of care. This is because, according to learned counsel, a duty of care is owed to anyone it is reasonably foreseeable as likely to be affected by one's acts or omissions. It was, so the argument proceeded, reasonably foreseeable that if the respondent did not carry on a proper due diligence as to the identity of the seller and their right to ownership of the property, then the buyer thereof would suffer damage as they would obtain no title. Learned counsel relied on ***Donogue vs Stevenson*<sup>1</sup> (1932)**, and ***Hedly Byrne & company Ltd vs Heller & Partners Limited*<sup>2</sup>**. The latter case, according to learned counsel, established the principle that a person who made a negligent misstatement could owe a duty of care to a person who suffered economic loss through reliance upon the statement.

It was further contended that the respondent would be in breach of the duty of care if his conduct fell below the standard required by the law, that is, of a reasonable and prudent man. Learned counsel pointed out that the learned authors of ***Clerk and Lindsell on Tort, 17<sup>th</sup> Edition para 7-112*** state that an

advocate will be negligent if he makes a mistake that no reasonable well informed and competent lawyer could have made.

Reference was made to ***Ngulube vs Malipenga***<sup>3</sup>, and it was submitted that the facts of the present case were on all fours with that decision. It was argued that the respondent admitted that she did not do any of those things the court held a lawyer should do, claiming instead to have merely handed over the money to the purported vendor without more.

It was contended that premised on the Ngulube case, the respondent was not a mere stakeholder. It was thus a grave error to hold that an Advocate only owes a duty of care to the person he or she is acting for. The fact that the seller was a drop in client placed an extra burden on the respondent to satisfy herself of the identity of the purported seller and their right to dispose of their property. In furtherance of this argument, learned counsel drew our attention to sections 15 and 16 of the **Financial Intelligence Centre Act**, No 46 of 2010, which read as follows:

15. A reporting entity shall not establish or maintain an anonymous account or any account in a fictitious name.

16(1) A reporting entity shall identify its customers and verify its customers' identities by means of reliable and independent source documents or information, where –

- (a) Opening an account for, or otherwise establishing a business relationship with a customer.....
- (2) For the purposes of this part, “independent source document or information means a passport, a driver’s licence, a national identification document or a certified certificate of incorporation or such other information as the Minister may prescribe.....
- (5) A reporting entity shall with respect to each customer, obtain and verify as part of its obligations under subsection (1) –
  - (a) For a natural person the full name and address and date and place of birth.

In light of these provisions, it is maintained, had the respondent complied with the law, the identity of the seller would have been discovered to be fake.

It was submitted that the *Ngulube* case did not lay down rules for Advocates to follow when acting for both vendor and purchaser. It laid down rules for an Advocate handling a conveyance, the paramount rule being establishment of the identity of the person purporting to be a vendor.

It was argued that property transfer tax was not paid, nor applied for, before the respondent had handed over all the money paid by the appellant to the bogus vendor. The respondent was patently negligent, on the foregoing.

Turning to ground two, it was submitted that the appellant's witness paid the deposit because of assurances given by the respondent, when she had no reason to believe that the seller was the genuine owner of the property. This statement was thus deceitful, amounting to a misrepresentation. Additionally, accepting the payment, and sending contracts for approval to the appellant's advocates and creating an impression that the process was just beginning when she was aware that the contract had already been signed and money paid over to her amounted to a misrepresentation.

Further to this, the statement was made with the intent that the appellant would act on it. Therefore, the appellant was entitled to damages, the deposit paid being the measure of damages. Reliance was placed on ***Nkongolo Farm's vs Zambia National Commercial Bank & Others*<sup>4</sup>**, and **section 3(1) of the Misrepresentation Act CAP 69**. We were urged to allow the appeal.

The respondent's arguments were not on record.

We have considered the grounds of appeal, submissions and the record of appeal. Perhaps it is helpful to outline the obligations of a lawyer acting for a party on a sale of land transaction. A lawyer acting for a client is his client's agent. The law of agency is therefore applicable.

When a lawyer receives a deposit on the purchase of a piece of land, he does not receive it as stakeholder, unless the conditions of sale expressly state so.



Where he is not so designated by the conditions of sale, he receives the deposit as agent for the vendor. If the vendor demands the deposit so paid from him, the lawyer has no choice but to turn the deposit over to his client, the vendor. The purchaser has no claim against the lawyer for paying the deposit over to the vendor.

***Ellis vs Goulton and Another***<sup>5</sup> illustrates this proposition. The facts were that on the sale of premises by auction, the purchaser paid a deposit to the vendor's solicitor as agent for the vendor. The sale went off through the default of the vendor, and the purchaser brought an action to recover the deposit from the solicitor. It was held that the payment of the deposit to the solicitor was equivalent to payment to the vendor, and that the action could not be maintained.

Bowen L J articulated the position as follows:

***“When a deposit is paid by a purchaser under a contract for sale of land, the person who makes the payment may enter into an agreement with the vendor that the money shall be held by the recipient as agent for both vendor and purchaser. If this is done, the person who receives it becomes a stakeholder, liable in certain circumstances in certain events, to return the money to the person who paid it. In the absence of such agreement, the money is paid to a person who has not the character of stakeholder, and it follows that, when the money reaches his hands, it is the same thing so far as the person who pays it is concerned as if it had reached the hands of the principal. If so, it is impossible to treat money paid under these circumstances and remaining in the hands of the agent as there under any condition or subject to any..... in relation to the payer”.***

A stakeholder is a person who holds the deposit as agent of both parties, with authority to pay it to the person who becomes entitled to it under the contract.

If the sale goes off by the vendor's fault, the purchaser may recover the deposit from the stakeholder directly. On the other hand, if the deposit is paid to a person who is merely the vendor's agent, any action to recover it must be brought against the vendor. The vendor can at any time require his agent to pay over the deposit to him. See **THE LAW OF REAL PROPERTY R.E. MEGARRY QC**, and **H. W. R. WADE THIRD EDITION, LONDON, STEVEN & SONS LIMITED 1966, P.596.**

A purchaser, ordinarily through his advocate, is as a matter of prudence required to conduct searches on a property before he signs a contract. He should conduct a detailed search of the Lands Register, and verify the authenticity of the title. This is the modern practice. The importance of this approach cannot be over emphasised, more so that frauds concerning ownership of land are on the upswing.

In this jurisdiction, the Law Association of Zambia General Conditions of Sale stipulate that the deposit in the sum of ten per centum of the purchase price is to be paid on the exchange of contracts. Such deposit is to be paid to the vendor's advocate as stakeholder for the parties. See **Clause 2 of the Law Association of Zambia - General Conditions of Sale 1997.** The same clause has been retained in the 2018 Law Association of Zambia General Conditions of Sale.

The procedure employed on sale of land is straightforward and needs no elaboration. The vendor is required to deliver the abstract of title to the purchaser. This is done through the advocates. The purchaser's advocates will then peruse the abstract of title, consider the validity of the title shown, and check the abstract against the vendor's title. They may make requisitions on the title if necessary. These will have to be replied to. Thereafter follows the drawing up of the draft assignment which is done by the purchaser's advocates, who send it to the vendor's advocates for approval. Amendments may be made by the parties' advocates until the assignment is agreed. The purchaser's advocates will then prepare an engrossment and send it to the vendor's advocates for signature and sealing. Before the date fixed for completion, the purchaser's advocate will make searches.

In the present case, it appears the purchaser did not conduct any searches before making the payment. The record reveals the following. On 22<sup>nd</sup> June 2013, 'Doug' sent an email to 'Solly' informing him that his wife and he had identified a house in Chilenje for purchase. That the house was vacant and the seller appeared genuine. That they were negotiating a price in the region of K250,000.00, and would probably purchase it in the name of Abenas United Limited, a company they owned jointly. 'Doug' requested 'Solly' to *'please advise how to proceed'* as well as his fees for the conveyancing. He went on to state that the property was in the name of Towela Nkunika who was the lady they were negotiating with, and that he also had a copy of her National Registration Card as well as her phone number. He stated that he had left



copies of the title deed with 'Jonathan' and asked him to forward them to 'Solly' on Monday. He indicated that he would be away till Wednesday.

Solly Patel responded on 22<sup>nd</sup> June 2013, advising Douglas Ironside that he would be out of the office until Thursday, and would attend to the matter upon his return.

On 27<sup>th</sup> June 2013, Douglas Ironside wrote to Solly Patel, to inform him that the other party's lawyer was Joyce Mulunga.

On 22<sup>nd</sup> July 2013, Douglas Ironside wrote to Solly Patel, requesting him to issue a side letter to the signed contract to facilitate occupancy. He stated that he understood that the seller was agreeable to sign and that the key points were as follows:

1. Buyer takes immediate vacant possession;
2. Buyer takes responsibility for security and maintenance costs;
3. Seller received 60% of purchase consideration less their lawyer's deduction (PTT and outstanding fees); and
4. Final 40% balance to be paid on transfer of title, free of any interest charge.

Douglas Ironside went on to state that if Solly Patel had any comments or suggested amendments, inclusions, he should let him know. If not, it (the contract) could be sent to the seller's lawyer for signature at the earliest opportunity.



The evidence reveals that the parties in fact executed a Law Association of Zambia Contract and Conditions of sale on 5<sup>th</sup> July 2013. The purchaser's advocates were stated as Messrs Solly Patel Hamir and Lawrence. A request for transfer of the sum of K122,850.00 from a US dollar account was made by BDO Zambia, in favor of J C Mulunga and Company on 5<sup>th</sup> July 2013. A receipt for K127,150.00 dated 5<sup>th</sup> July 2013 was issued to Abenas United Limited by J C. Mulunga and Company.

On the same date, 5<sup>th</sup> July 2013, Messrs Solly Patel Hamir and Lawrence wrote to J C Mulunga and Company, responding to a letter dated 3<sup>rd</sup> July 2013. They under cover of that letter returned the draft contract of sale, approved as amended, requesting that an engrossed contract be forwarded to them for execution on behalf of the purchaser.

In response to this letter, Messrs J C Mulunga, by letter dated 15<sup>th</sup> July 2013, returned the contracts of sale for execution by the purchaser. They requested that the contracts be returned to them for their client's execution. It was also pointed out that clause 6 had been amended as K150,000.00 had already been paid by the purchasers to Messrs J C Mulunga and Company.

The evidence reveals that between 17<sup>th</sup> and 22<sup>nd</sup> July 2013, Towela Nkunika had received K150,000.00 of the purchase price of the subject property. It was later discovered that she was a fraud, and not the registered owner of the property.

On this evidence, ground one must fail. This is because as revealed by the emails exchanged by Douglas Ironside with Solly Patel, the appellant approached its advocate before the contract of sale was drawn up and executed. Douglas Ironside requested Solly Patel to advise how to proceed, stating that he wanted to be sure that there were no outstanding liabilities. He left copies of the title deeds with his advocates. This was obviously meant to enable the advocates satisfy themselves that it was safe to proceed with the sale.

However, despite engaging counsel, the purchaser proceeded to sign a contract of sale on 5<sup>th</sup> July 2013 and paid the sum of K150,000.00. As indicated by Solly Patel, this was done behind the advocate's back. It is incorrect to assert that counsel for the appellant was only engaged after the deposit had already been paid and the contract executed. The truth of the matter is that the appellant, through at least one of the directors, acted behind its advocate's back and executed the contract, paying the sum of K150,000.00 on the same date. It appears the fraudster was anxious to receive payment. Had the appellant's directors waited for their advocates to conduct necessary searches before paying, the fraud would not have been perpetrated. We concur with the trial judge that the appellant was represented at the time. This fact however does not assist the respondent as will presently become apparent.

We turn to ground 2. When a party asserts a fact in a pleading, a court will not accept that fact as proved, unless it elects to believe the oral evidence of the

pleader, or the fact is admitted by the opponent, or documentary evidence bears out the pleaded fact. Here, the appellant's witness testified and was not cross examined. In our considered view, the fact that Ms. Mulunga had the appellant's witness execute the contract, despite knowing that the appellant was represented by Messrs Solly Patel, Hamir and Lawrence raises questions. It is highly probable that there was a conversation between them, leading the witness to execute the contract at Ms. Mulunga's office. Our considered view is that in dismissing the appellant's witness' assertion that she was assured, the trial judge did not take all the factors into account, and erroneously relied on the 2<sup>nd</sup> defendant's denial as a result.

Ms. Mulunga should have sent the contract to the appellant's advocates for approval, and not intruded on the client-advocate relationship between the appellant and Messrs Solly Patel, Hamir and Lawrence. Ms. Mulunga procured the signature of the appellant's director to a contract not approved by the appellant's advocate. It was highly probable that she assured the witness of the authenticity of the title. On the foregoing, ground 2 must succeed.

Learned counsel has raised arguments touching on '*warranty of authority*'. He argues that the respondent said she did not deal with crooks and that the documentation was genuine. We think it helpful to discuss when such a warranty of authority would be deemed to have been given by a party. We will refer to two English cases, decided as conjoined appeals in the Court of Appeal.



These are ***P & P Property Limited vs Owen White & Caitlin LLP and Dreamvar (UK) Limited vs Mishcon de Reya***<sup>6</sup>. In ***P&P Property Limited vs Owen White & Caitlin LLP***<sup>6</sup> a developer, P&P Property Limited (“P&P”) made an offer to purchase 52 Brackenbury Road (“52BR”), which was registered at HM Land Registry in the name of Mr. Harper. A fraudster pretending to be Mr. Harper, telephoned Owen White & Caitlin LLP (“OWC”) first indicating that he intended to raise a mortgage against 52BR, and later instructing OWC that he intended to sell it. The fraudster instructed Winkworth that he required a rapid sale, as a result of which 52BR was marketed for 75% of its market value. Winkworth relied upon OWC to check the identity of the vendor.

OWC failed to carry out comprehensive identity checks, and there were a number of inconsistencies and discrepancies in the information provided to OWC (e.g. various signatures were inconsistent, the fraudster gave different addresses and bank statements provided by him to OWC should, in the trial judge’s judgment, have led OWC to make further enquiries). Nevertheless, on 4 December P&P made an offer to purchase 52BR which the fraudster accepted.

On 12 December the deposit of £103,000 and a further sum of £327,000 provided by the mortgagees was transferred to OWC. On the basis of a request from OWC that this money could be used to complete the purchase of a property in Dubai, P&P’s solicitors agreed that the £430,000 should be held by OWC as agent for the vendor. The balance (£600,000) was transferred to OWC on 12 December and the net proceeds of sale were paid to the fraudster on the



same day. The contract and transfer documentation were signed for the fraudster by OWC. The fraud was discovered on 17 January 2014 following an application to register P&P's title at HM Land Registry.

After discovery of the fraud, P & P brought claims against OWC relying on breach of warranty of authority, breach of undertaking, negligence and breach of trust. It also sued Winkworth for breach of warranty of authority and in negligence. In summary, P & P alleged that both OWC and Winkworth held themselves out as having the authority of the true owner, the real Mr. Harper, and were negligent in not carrying out adequate identity checks on the fraudster and (in the case of OWC) did not have authority to disburse the purchase monies to their client other than on completion of a genuine sale. At first instance Mr Robin Dicker QC dismissed each and every one of P&P's claims ([2016] EWHC 2276 (Ch)) and P&P appealed the decision to the Court of Appeal.

In ***Dreamvar (UK) Limited vs Mishcon de Reya*** small developer ("Dreamvar") was informed by estate agents Douglas & Gordon ("D&G") that a client was looking for a quick sale of a property at 8 Old Manor Yard, Earl's Court, London SW5 ("8OMY"). Dreamvar inspected 8OMY, which was vacant, and had an offer of £1.1m accepted.

Dreamvar instructed Mishcon de Reya ("Mishcon") to act on the purchase, acknowledging that there would not be time to carry out all of the necessary searches. Mishcon's letter of retainer did not expressly deal with the terms and

circumstances under which the purchase monies would be held and/or released to the vendor or his solicitors.

D&G sent a memorandum to Mishcon naming Mr. David Haeems as the vendor and stating that his solicitors were Mary Monson Solicitors Limited ("MMS"). On 3 September MMS indicated that it had not received proof of Mr Haeems' ID and was therefore unable to send out the contract pack. In fact, MMS never met Mr. Haeems and took no proper steps to verify his identity. MMS acted for a fraudster, not the true Mr. Haeems, the owner of 8OMY. Notwithstanding this, on 11 September Mishcon received from MMS the draft contract, office copy entries and TAO6 and TA10 forms, each apparently signed by Mr. Haeems.

It was agreed that completion would take place in accordance with the Code and that MMS would send the purchase monies to another firm of solicitors, Dennings. On 17 September Mishcon sent the purchase monies to MMS on terms that MMS hold it to Mishcon's order pending obtaining indemnity insurance to cover the risk that there were adverse rights of way over 8OMY. That took place later the same day, and exchange and completion took place simultaneously that afternoon.

Dreamvar started work on 8OMY, but after an application was made to register Dreamvar as proprietor the Land Registry contacted the real Mr. Haeems and the fraud was discovered.

Following discovery of the fraud, Dreamvar brought proceedings against Mishcon for negligence and breach of trust and MMS for breach of warranty of authority (not pursued in the Court of Appeal), breach of undertaking and breach of trust. A late application, heard by the Court of Appeal, was made by Dreamvar to amend to include an allegation of negligence against MMS. At first instance Mr David Railton QC dismissed the claim against Mishcon for negligence but found that it had acted in breach of trust by releasing the money to a fraudulent vendor and denied it relief under s.61 of the Trustee Act 1925 ("TA 1925"). The claims against MMS were dismissed.

Lord Justice Patten, with whom Gloster LJ and Floyd LJ agreed (save in respect of s.61 TA 1925, where Gloster LJ dissented), handed down judgment on 15 May 2018. The Court of Appeal held that OWC and Winkworth were not in breach of warranty of authority or negligent, but that OWC and MMS were in breach of undertaking under the Code and had acted in breach of trust. The Court of Appeal upheld the first instance decisions that a vendor's solicitor (or estate agent) does not owe the purchaser a duty of care when verifying the identity of his client. None of the solicitors, including Mishcon (who accepted that it acted in breach of trust but contended that it should be relieved from liability) was granted s.61 TA 1925 relief.

One of the arguments by P&P was that by signing the contract of sale on behalf of the 'seller' and against the backdrop of the requirements of the Money Laundering Regulations (2007) OWC represented that it had authority to act on



behalf of the real Mr. Harper and not the fraudster using Mr. Harper's identity to pose as the seller.

Patten LJ held that by executing the contract of sale itself, and by adopting the terminology of the contract in so doing, OWC had warranted that it had authority to act for the real vendor as opposed to the fraudster. However, that P&P had not been induced into the purchase of the property by the warranty.

*(Underlined for emphasis)*

The applicable code on both sales had the following undertakings:

***“The seller’s solicitor undertakes:***

- (i) to have the seller’s authority to receive the purchase price on completion; and***
- (ii) on completion, to have the authority of the proprietor of each mortgage, charge or other financial encumbrance which was specified under paragraph 6 but has not then been redeemed or discharged, to receive the sum intended to repay it;***

***BUT if the seller’s solicitor does not have all the necessary authorities then:***

- (iii) to advise the buyer’s solicitors no later than 4 pm on the working day before the completion date of the absence of those authorities immediately if any is withdrawn later; and***
- (iv) not to complete without the buyer’s solicitor’s instructions.***

Patten LJ concluded that on a true construction, the vendor’s solicitor gave an undertaking that they had the authority of the real vendor, the true owner, to receive the purchase money on completion because only the real seller could give that authority for the purposes of a genuine completion.



The court also considered the position whether solicitors and agents acting for the vendor owe a common law duty to the purchaser, to ensure that the transaction is a genuine one. His lordship considered these factors in arriving at his decision:

- (a) there was no actual assumption of responsibility to the purchaser;
- (b) the Money Laundering Regulations do not create private law right of action.
- (c) P&P and Dreamvar were distinguishable from *White vs Jones* on the ground that in the latter case the instructions given by the client were intended to benefit a third party, whereas a conveyancing transaction is an arm's length arrangement between the parties. Patten LJ concluded that it would not be fair, just and reasonable to treat the vendor's solicitors as having assumed responsibility to the purchasers for the adequacy of the due diligence performed in relation to their client's identity.

We are persuaded by the reasoning of the court as it is premised on sound principles of the law.

Turning to the case with which we are engaged, we similarly note that the Financial Intelligence Centre Act No 46 of 2010 does not create a private law cause of action for failure by an advocate to verify its client's identity. This however does not assist the respondent.

When the sale collapsed, Messrs Solly Patel Hamir & Lawrence requested the respondent to return the deposit paid to her client in view of the fact that the transaction was not proceeding further. The respondent's response was that they had earlier requested their client to return the deposit paid in view of the complications that had arisen, and she had promised to revert by the month end. The respondent regretted the inconvenience caused, lamenting that there was nothing on the face of the transaction to suggest that it was not genuine.

As confirmed in the defence, the deposit was remitted to the purposed vendor, the fraudster. The LAW ASSOCIATION OF ZAMBIA CONDITION of Sale adverted to above leaves no doubt that the respondent, on receiving the deposit as stakeholder owed a duty to the appellant, as a fiduciary, to see to it that the money so held was applied only to the purpose for which it had been paid. If the purpose for which it has been paid did not materialize, then the respondent, as stakeholder, was obligated to return the deposit to the purchaser. Thus, the respondent was trustee of the deposit, by agreement, as per the stated condition. Impliedly, the deposit could only be paid over on a genuine sale of the land by the owner to the appellant; not on a purported sale by a fraudster. By receiving the deposit as stakeholder, the 2<sup>nd</sup> defendant was in a position of trust and confidence to the purchaser. We thus agree with the argument that the respondent was negligent as stakeholder.

As discussed above, we agree that there was misrepresentation on the 2<sup>nd</sup> respondent's part, without ensuring that the assurances given to the appellant's witness were accurate.

The appellant argues that the *Ngulube* case *op.cit.*, is not only applicable to advocates acting for both vendor and purchaser, but to all lawyers. We hasten to put this statement in proper context. In the *Ngulube* case, the concerned advocate was acting for both parties. It will be recalled that the relationship between a lawyer and his client is one of agency.


The authorities we have cited reveal that the advocate will be liable to the opposing party if he receives payment of the purchase price as a stakeholder, for then he has a duty to the purchaser to ensure that he only pays over the money to the genuine vendor. The applicable provision in the LAW ASSOCIATION OF ZAMBIA GENERAL Conditions of Sale imposes this duty on the vendor's advocate, as he receives the deposit in that character. This duty will remain as long as the applicable LAZ Condition of Sale subsists. At common law however, a vendor's lawyer or solicitor is not a fiduciary of the purchaser in the absence of express stipulation in the contract.

Thus, as argued on behalf of the appellant, the respondent had to satisfy herself of the identity of the purported vendor and their right to dispose of their property.

On the foregoing, the appellant succeeds, the appeal is allowed, and the judgment of the court below set aside. Instead, judgment is entered for the appellant in the sum of K150,000.00, being the measure of damages payable to the appellant for the 1<sup>st</sup> respondent's negligence, and misrepresentation. We award interest at short term deposit rate from date of writ to date of judgment and thereafter at current bank rate till payment in full. Costs are for the appellant both here and in the court below, to be agreed and in default taxed.



.....  
**F. M. CHISANGA**  
**JUDGE PRESIDENT**  
**COURT OF APPEAL**



.....  
**M. M. KONDOLO, SC**  
**COURT OF APPEAL JUDGE**



.....  
**C. K. MAKUNGU**  
**COURT OF APPEAL JUDGE**