IN THE SUPREME COURT OF ZAMBIA **Appeal No.212/2015**
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:

CHARLES MUTEMWA **APPELLANT**

AND

NKOSI HLAZO (Suing as Administrator of the Estate of the late Stanford Hlazo) **RESPONDENT**

CORAM: Hamaundu, Kajimanga and Kabuka JJS
On 5th September 2017 and 13th September 2017

FOR THE APPELLANT : No Appearance

FOR THE RESPONDENT : Mr. L. Mwanabo, Messrs L. M. Chambers

J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Cases referred to:

1. **Jonas Amon Banda v Dickson Machiya Tembo (2008) Vol.1 ZR 204**
2. **Attorney General v Marcus Kampumba Achiume (1983) ZR 1 (SC)**
3. **Edna Nyasulu v Attorney General (1983) ZR 105 (HC)**
4. **Khalid Mohamed v Attorney General (1982) ZR 49 SC**
5. **Gilcon Zambia Limited v Kafue District Council and Bradford**

Machila Appeal No. 10/2010 and No. 43/2009

6. **Wesley Mulungushi v Catherine Bwale Muzi Chomba (2004) ZR 96 (S. C.)**
7. **David Zulu v The People (1977) ZR 151 (S. C.)**
8. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172**
9. **Nkhata and Others v Attorney General (1966) ZR 124**
10. **Machobane v The People (1972) ZR 101**
11. **Mwape and Others v ZCCM Investment Holdings Limited Plc Appeal No. 57/2012**

Legislation and authorities referred to:

1. **Statute of Frauds 1677, section 4**
2. **Halsbury's Laws of England (4th Edition) Vol 42, paragraph 44**

This appeal emanates from a judgment of the High Court dated 17th November 2014 which upheld the respondent's claim against the appellant and dismissed the appellant's counterclaim against the respondent.

The facts of this case are that the appellant was the registered owner of the Remaining Extent of Lot 2624/M Lusaka ("the property"). Sometime in 1995, one Stanford Hlazo (the deceased) entered into an oral agreement with the appellant for the purchase of the said property. Pursuant to the agreement, the appellant applied

to the Commissioner of Lands for consent to transfer the property to the deceased at nil consideration and was granted the same. The appellant later handed over his original certificate of title in respect of the property to the deceased. The certificate of title was accompanied by a note from the appellant addressed to the deceased and his wife containing among other things, a request for a refund of ground rent bills which he had paid on the deceased's behalf for four years up to 1998. The deceased remained in possession of the property until his demise on 31st July 2006 without any interruption from the respondent. The deceased's son (the respondent), was subsequently appointed as administrator of the estate. The respondent and his mother subsequently approached the appellant for his Tax Payer Identification Number (TPIN) and National Registration Card (NRC) number to facilitate completion of the transfer of the property but he refused, stating that the deceased did not pay the purchase price.

On 8th April 2008, the respondent (plaintiff in the court below) issued a writ against the appellant (defendant in the court below) endorsed with a claim for a declaration that the property belongs to

and forms part of the estate of the deceased; an order for specific performance against the defendant and for the defendant to provide the details required for completion of the transfer of the certificate of title; an injunction restraining the defendant, his agents or servants from interfering with the plaintiff's rights and possession of the property; damages for inconvenience and costs. For his part, the appellant disputed the respondent's claim and counter claimed damages for loss of access to his property; damages for mental anguish, agony and expenses suffered; return of title deed; an order for removal of the caveat wrongfully entered on the property; and costs.

The respondent's evidence in the court below was that following the death of his father and his appointment as administrator, he learnt that the property was still in the name of the appellant. In December 2006, he met with the appellant with a view to complete the transfer of the property from the appellant to the estate. The appellant, however, refused to provide his TPIN and NRC number, stating that the deceased did not pay the purchase price and that if he was interested in the property, he had to pay for it at the current

market price. That this surprised the respondent as he believed that the property belonged to his father because as a young man, he used to go to the property with the deceased to check on the worker who was staying there. They also conducted agricultural activities on the property, drilled a borehole and constructed a thatched hut for the worker.

The respondent testified that he was not prepared to pay for the property as demanded by the appellant because the appellant signed a consent to assign the property to the deceased on 31st March 1995 and his understanding was that the obtaining of consent meant the property was paid for. Secondly, his mother still had the original title deed in her custody and that when the appellant gave the certificate of title to his parents, he wrote a note dated 18th June 1998 to the effect that he should be refunded the ground rent he had paid for four years on behalf of the deceased. That following this, ground rent was being paid by his parents. He testified that to date they were in possession of the land and have continued conducting agricultural activities thereon such as planting jatropha. He insisted that one cannot give an original certificate of title and grant possession to

another without payment. He, however, admitted that when he checked through the deceased's personal documents which were kept at his office, he did not find any document showing the price paid for the property.

It was his further evidence that after the deceased's death he did not receive any communication or claims from the respondent regarding the title deed and the property and that between 1995 and 2006 when they approached the appellant, he never made any effort to tell them that the property was not sold.

The respondent's second witness was Peggy Munkombwe Hlazo, the respondent's mother and deceased's widow. Her testimony was that the deceased and the appellant were very close friends and that sometime between 1991 to 1994, the deceased informed her and the family that he had purchased a piece of subdivided land from the appellant in New Kasama. As a family, they frequented the plot and the deceased engaged some of his staff to ferry building materials to the plot. At this time, the deceased was heavily into politics and this was taking him away from certain responsibilities including his business and was affecting him financially.

She then got concerned at the slow pace of the construction and she insisted on having the title deeds to the plot but since the deceased was not available, he referred her to the appellant who agreed to meet her and hand over the title deed. They met sometime in 1998 and the appellant handed over the title deed with a covering note in which he requested to be refunded K150,000.00 (K150.00) which he said he had been paying as ground rent on their behalf for the last four years as at that date. She stated that she made a verbal undertaking to the appellant that he would be refunded but admitted that she never paid him and was unsure as to whether the deceased had done so.

The witness also testified that the deceased engaged a company called Shaka Drilling to drill a borehole on the property. Later, the deceased wanted to partner with some South African investors and the project required him to transfer title into the project name. She stated that she had a disagreement with the deceased over this issue and decided to place a caveat on the property. The deceased later suffered a stroke and died on 31st July 2006. In the process of sorting out the estate, it was discovered that the property was still in the

appellant's name and she, together with the respondent, met with the appellant in December 2006 and explained to him that they needed his TPIN and NRC number in order to transfer the property. To her shock and surprise, the appellant said he could not avail these details to them because the deceased had not paid him for the land.

It was her evidence that the appellant could not state for how much he had offered the property to the deceased. That he would go and check through his documents in Mongu and then get back to them. That the appellant later said that he had not located the documents and she also informed him that she did not find anything apart from the ground rent receipts which the deceased had been paying and the consent to assign which indicated that there was nil consideration.

She further testified that she believed that the deceased had paid for the property because when she collected the title deeds from the appellant, he did not tell her that he had not been paid. That the manner in which the appellant conducted himself made her believe that he was not owed any money as he never came forward to claim for any outstanding money prior to 2007[2006]. She, however,

admitted that the consent to assign was granted on 6th July 1995 and was valid for 12 months and that the validity of this consent had expired when the title was handed over in 1998.

Joseph Matambo, a former employee of Shaka Drilling, also testified on behalf of the respondent. His evidence merely confirmed that the deceased contracted Shaka Drilling to drill a borehole at a plot off Leopards Hill road sometime in 2005. He stated that he assumed the deceased was the owner of the property but admitted that documents of ownership were not shown to him.

The appellant's evidence in the court below was that he and the deceased were very close friends from 1990 to 2006. They socialized and participated in politics together and exchanged favours. When he lost his job in 1991, he decided to sell his properties in Lusaka, among them was Lot No. 2624/M Lusaka whose extent was 25 acres. He subdivided it into five portions numbered as A, B, C, D and 2624 remainder. The first four portions were sold between 1994 and 1995 and for every sale made, consent to assign was obtained at nil consideration followed by the execution of contracts and an acknowledgement of receipt of payment to the respective purchasers.

That in relation to the property, the deceased pleaded with the appellant to allow him to purchase it in 1995. The appellant then told him that he would reserve it for him until he was in a position to pay for it. He verbally indicated how much he sold the other subdivisions for and requested him to pay the same amount. He admitted that in the consent to transfer, consideration was indicated as nil but stated that the other subdivisions were sold at the market value at that time, being K7,500,000.00 (K7,500.00). According to the appellant, the agreement was not reduced into writing and the deceased did not get back to him or pay anything towards the purchase price. The appellant subsequently relocated to Mongu and the duo would meet every so often when the appellant was in Lusaka.

Sometime in 1998, the deceased asked the appellant for the certificate of title for the property to enable him secure funding to pay the purchase price. The appellant testified that, out of good faith, he handed over the certificate of title to PW2 with a note to the deceased requesting for the refund of ground rent in the sum of K150.00 which was not given up to the time of his demise. He acknowledged that he met with the respondent and PW2 in December 2006, to discuss

about the plot. At the meeting, he informed them that in view of the long friendship between him and the deceased, he was willing to let them buy the plot at market value with a discount taking into account the family ties they had.

It was his testimony that the offer had not been withdrawn and that the only change he had made was to offer the property at the new market price because from 1995 to the deceased's death, he never reviewed the price. The appellant, however, admitted that from 1998 - 2008, he never paid ground rent but made a payment in response to the statement he got from Ministry of Lands in 2012 when the matter was in court. He stated that he paid the ground rent to avoid re-entry by the state since the property was still his and that this showed he was holding onto it for them. Regarding the developments undertaken by the deceased on the property, the appellant stated that he had no knowledge of the borehole having been sunk thereon as it was done without his consent and that when he went to the plot he saw the jatropha plants but he did not know who planted them.

After considering the evidence and the submissions of both

parties, the learned trial judge found that there was part performance on the part of the deceased with regard to the property which could only be attributable to the contract of sale entered into by him and the appellant. In her view, the appellant's own evidence and conduct supported this position. Relying on the holding in the case of **Jonas Amon Banda v. Dickson Machiya Tembo**[1], the learned trial judge granted the respondent a declaration that the property belongs to and forms part of the deceased's estate and an injunction restraining the appellant, his agents or servants from interfering with the respondent's interest and possession of the property with costs. She, however, did not award the respondent's claim for damages for inconvenience due to the lapses in the conduct of both parties in concluding the transaction. The learned trial judge further found that there was an absence of proof that the K150.00 for ground rent was refunded to the appellant. She, accordingly, ordered that the respondent refunds the K150.00 to the appellant with simple interest of 10% per annum from the date of writ to judgment and thereafter at the current average Bank of Zambia lending rate. The appellant's counter claim was dismissed for lacking merit.

Dissatisfied with this decision, the appellant has launched this appeal, advancing three grounds which read as follows:

"1. The Honourable High Court Judge misdirected herself both in fact and law when she held that Lot 2624/M Remaining Extent belongs to and forms part of the estate of the late Stanford Hlazo based on circumstantial evidence of part performance and without proof of consideration.

2. The Honourable High Court Judge misdirected herself both in fact and law when she granted an injunction restraining the Appellant, his agents or servants from interfering with the respondent's interest and possession of Lot 2624/M Remaining Extent.

3. The Honourable High Court Judge misdirected herself both in fact and law when she refused the Appellant's counter claim for the removal of the caveat and damages."

Both parties filed written heads of argument. In support of ground one, the learned counsel for the appellant referred us to the judgment of the trial court at pages 43, lines 12 - 24 and page 44, lines 1 – 12 of the record of appeal, where the trial court held as follows:

"I find that the deceased indeed entered into a verbal contract for the purchase of Lot 2624/M/Rem Leopards Hill Lusaka, that the defendant applied for consent to transfer to the deceased and was granted the same and as all the other transactions the consideration

for the same was indicated as nil as seen on the exhibits appearing at pages 1 – 3 of the plaintiff's bundle of documents and pages 4 and 19 of the defendant's bundle of documents.

Furthermore, I find that the defendant handed over the original certificate of title to the deceased with no attached conditions apart from the refund of ground rent bills which he had paid on the deceased's behalf for four years as at 1998. The deceased remained in possession of the property and started farming jatropha, sunk a borehole, constructed some thatched huts and placed a caretaker on the property until his demise in the year 2006 with no interruption from the defendant.

I find that all these acts clearly amount to part performance only attributable to the contract of sale that the parties entered into. The plaintiff having proved part performance, the defendant cannot deny the same. Even his own evidence and conduct supports the same. In Jonas Amon Banda v Dickinson Machiya Tembo (2008) ZR 204 Vol 1 the Supreme Court held that:

> **'Where a party demonstrates part performance in reliance on the oral agreement consistent with the contract alleged, the court will enforce the contract'."**

It was the learned counsel's contention that the learned trial judge succinctly relied on three facts to arrive at her decision. The first fact was that the appellant applied and obtained consent to transfer the property. The second fact was that the appellant handed over the certificate of title with no conditions but payment of ground

rent. Lastly, that the deceased remained in possession of the property and grew jatropha, sunk a borehole, constructed a hut and placed a caretaker.

The learned counsel submitted that these findings by the learned trial judge were perverse in that they were made on a very unbalanced evaluation of evidence. We were referred to the case of **Attorney General v. Marcus Kampumba Achiume**[2] where this court held that:

> **"An unbalanced evaluation of the evidence, where only the flaws of one side but not the other are considered is a misdirection which no trial court should reasonably make and entitles the appeal court to interfere."**

On the grant of consent to transfer, the learned counsel brought to our attention the following evidence of the appellant at page 217, line 16 of the record of appeal:

> **"The sale was through normal sale seeking consent to sale, contracts of sale and I acknowledged payments to respective buyers by way of receipts".**

He submitted that it was clear from this testimony that the initial step the appellant took was to apply for consent even before

the contract or payment and that this was backed by evidence on record. We were referred to page 114 of the record of appeal which shows that consent to transfer to Mr. Lawrence Muyunda Mwalye was obtained in respect of L/2426/M/C on 20th April 1995 and the same was followed by a property transfer certificate at page 118 of the record of appeal. However, L/2624/M/C was not sold to Mr. Lawrence Muyunda Mwalye because he could not pay for it and it was subsequently sold to Vic Farms Limited in 2003 as shown on pages 107 and 108 of the record of appeal.

We were also referred to page 115 of the record of appeal showing the consent to transfer L/2624/M/D to Mr. Jophael Mbizule. It was argued that this consent was also obtained before payment or the contract but the transaction equally fell through and L/2624/M/D was subsequently sold to Vic Farms Limited in 1999. The learned counsel submitted that in each of these examples, it took several years before the appellant sold to a third party and that therefore, it was a misdirection on the part of the learned trial judge to rely on the acquisition of consent to transfer.

On the question of the jatropha, borehole and hut, the learned counsel referred us to page 217, lines 6 – 10 of the record of appeal where the appellant testified as follows:

> **"In 1991, I lost my job as Managing Director of National Housing Authority and it became a matter of urgency to organise myself and relocate to Mongu."**

We were also referred to his testimony at page 219, lines 2 - 4 of the record of appeal where he stated that:

> **"I subsequently relocated to Mongu and would meet when I would come to Lusaka."**

Our attention was also drawn to page 222, lines 22 - 23 of the record of appeal where the appellant said:

> **"I did not attend Stanford Hlazo's funeral. I was in Mongu."**

We were further referred to page 216, lines 11 - 13 of the record of appeal where the appellant stated that his address was as follows:

> **"Shangombo District – Maziba Bay Chief Lukama Village, Maziba."**

The learned counsel contended that the foregoing evidence showed that the appellant was not living in Lusaka and could not possibly monitor what was happening on his plot. Further, the friendship between the two parties herein should not be ignored. He also referred us to page 221, lines 1 – 3 of the record of appeal where the appellant testified that:

> **"I had no knowledge of the arrangements of the borehole being sank as stated by PW3. Mr. Hlazo did it without my consent."**

We were further referred to **Halsbury's Laws of England, 4th Edition Vol. 42** at paragraph 44 where it is stated as follows:

> **"Equity will not allow a statute to be used as an instrument of fraud. Thus, a party who by his own act prevents the making of a written memorandum cannot plead the statutory requirement for such a memorandum. However, the principal elaboration of this idea has been in the doctrine of part performance, which has received statutory recognition. The basic principle is that, where the plaintiff has, to the defendant's knowledge, performed an act referable to some such agreement as alleged, equity will not allow the defendant to rely on the absence of written evidence."**

The learned counsel submitted that if the respondent chose to sink a borehole, plant crops and build a hut on the property without notice or knowledge of the appellant, he did so at his own peril as a

party cannot build on another's land without his permission or knowledge and later point at it as a sign of part performance and thus demand ownership. He contended that to allow this, the court would open the door to squatters who can point to their ram shackles as evidence of part performance built in belief of ownership of land.

The learned counsel, therefore, submitted that the learned trial judge misdirected herself by relying on the said developments as evidence of a contract without any proof that they were made with the knowledge and, or consent of the appellant who was the registered owner. That it was of paramount importance to establish consent on the part of the appellant or at least that the appellant had knowledge of such developments before or at the time they were made.

On the aspect of the handover of title, the learned counsel submitted that the same was well explained in the appellant's testimony at page 219, lines 4 -13 of the record of appeal where he testified that:

> **"At some point he indicated that it would be easier to secure money if he had the title deeds and trusting him as I did I gave him the**

title deeds. It was to enable him to source funding. It did not happen up to the time he passed on. I got to know that he had passed on subsequently when I met the widow and we discussed the plot and I told them that in view of the long friendship I was willing to let them buy the same..."

We were also referred to page 220, lines 9 -13 of the record of appeal where the appellant stated that:

"Sometime in 1998 when the late turned up asking for title deeds to secure funding. I gave him title deeds with a note that, for his further action, and the second one was that they refund me the ground rent I had paid."

The learned counsel submitted that it was surprising that the learned trial judge interpreted this fact against the appellant in that the handover and the note actually confirmed the appellant's evidence. He further referred us to page 218, lines 15 – 25 of the record of appeal where the appellant testified that:

"On the remainder of 2624, one weekend I went with Stanford Hlazo to see the land, he pleaded that he was interested in purchasing. I told him I would reserve the piece for him to purchase when he would be in a position to do so. I verbally indicated how much I sold the other pieces and that when he had the money he would come to conclude. I wanted him to pay the price as for the other four. He agreed to look for money and then pay. That was in 1995. We did not reduce it in writing."

The learned counsel submitted that after reserving the plot for the respondent and not selling it to anyone, it was only logical for the appellant to pay ground rent on behalf of the respondent as the appellant agrees that there was an agreement to sell in 1995 but was not reduced in writing. That in any event, the respondent took possession albeit without the consent of the appellant and they were growing jatropha and other crops on the land. It was argued that the appellant had every right to demand a refund of ground rent, therefore, to turn around and point to such an event as proof of payment was a misdirection.

The learned counsel submitted that the judgment of the court below went out of the way to discredit the appellant's evidence and its perceived flaws and used that as a basis of the conclusion whereas it left the respondent's evidence untouched. According to the learned counsel, the learned trial judge at pages 40 – 43 of the record of appeal, dedicated her judgment on the perceived flaws of the appellant's evidence as follows:

> **"On the other hand, the defendant has produced and relies on the evidence of contracts of sale which were executed between him and**

the other purchasers and has argued that this followed after consent to assign was granted. Further, that one of the purported purchasers failed to complete the sale and thus he sold the property to Vic Farms.

The defendant acknowledged that he only produced contracts of sale for three of the subdivisions and the sale price was K7,500.00 in two instances in 1994 and 1995 and K5,000.00 in one which was dated 12th July 1999 to Vic Farms. The defendant also only exhibited two consents to transfer for subdivisions C and D which indicate nil value as consideration and did not produce the applications for consent for all the four subdivisions. I note from the receipt at page 5 of the defendant's supplementary bundle of documents that he applied for consent to transfer all the four subdivisions at the same time in April 1995.

In terms of receipts for payments, the defendant only exhibited two, one for Vic Farms and one for part payment for Mr. Nkhoma in 2002. These inconsistencies are contrary to the defendant's assertions that all the buyers for the four subdivisions signed contracts of sale and that he acknowledged receipt of payment in writing for all of them. The defendant's testimony was that the four subdivisions were sold at almost the same time in 1994 to 1995 but the Lands Registers for the individual subdivisions show that only subdivision A and B were transferred in 1995 while subdivisions C and D were transferred to Vic Farms in 2001 and 2005, respectively. The further evidence of the defendant was that all the other people he sold the four subdivisions to were not his close friends as the deceased was.

As regards the price at which the defendant offered the deceased the plot, the defendant consistently could neither mention the same nor the price at which he alleged the deceased was to sell it on his

behalf. This lack of definite answers from the defendant as vendor supports the undisputed assertions by PW2 that the deceased was financially assisting the defendant at the time when he had lost his job and was having financial challenges. That it was following this that the defendant sold the subject remaining extent to the deceased for undisclosed sum of money. The close friendship between the defendant and deceased could explain the loose or casual manner in which they conducted their transaction.

Regarding the purported sale to Chileshe Sokota in 2007 by the defendant as shown on the Land Register for 2624/M particularly entries 10 and 11, the defendant when cross-examined said after he was questioned by PW2, he went and met with Sokota who acknowledged that it was a mistake and that the entry was reversed. This conduct by the defendant to apparently attempt to sell the plot in 2007 after he was approached by the plaintiff and PW2 to conclude the transfer of the property in 2006 shows lack of good faith to say the least. The defendant did not call the said Sokota to testify on how the purported sale from the defendant and registration of the assignment in her names as indicated on the Land Register was done at the time when there was a caveat and when PW2 was in possession of the original certificate of title. This shows opportunistic conduct on the part of the defendant and PW2 for over nine (9) years prior to being informed that the formal transfer was not effected."

The learned counsel drew our attention to the fact that the events herein occurred in 1995 and that almost 20 years lapsed

before trial. That therefore, it was unreasonable and unfair to expect the appellant to produce every document and recall every detail.

Regarding the above passage, it was submitted that the contracts of sale were produced to show that consent to transfer was followed by contracts of sale and not as evidence of price. Secondly, the consent to transfer was produced as evidence that not all those in whose favour consent was obtained did actually complete the transaction by payment. Therefore, the non-production of all the consents to transfer is irrelevant. Further, it was trite law that in the 1990s bare land was deemed to have no value and if on applying for consent to assign the applicant puts value, the Ministry of Lands would refuse to grant consent. According to the learned counsel, consent to assign bare land was deliberately called "consent to transfer" because assignment of bare land was not allowed due to its nil value. Therefore, at the time it was common to indicate nil value even where there was consideration for the bare land. The learned counsel urged us to take judicial notice of this fact.

The learned counsel also submitted that at page 42 of the record of appeal, the learned trial judge came to a conclusion that the

appellant failed to indicate the price at which he sold the plot and that this confirms PW2's assertion that the deceased was financially assisting the appellant and that that is how he sold the remaining extent. He argued that this finding was purely based on assumption and is without evidence. That nowhere in the statement of claim or the viva voce evidence was it mentioned that the appellant sold the property in issue to the respondent in exchange for financial assistance.

It was submitted that the judgment failed to take into account certain factors in its conclusion. Firstly, that the appellant gave evidence which shows that it was the respondent who was going through financial problems by his failure to purchase the plot outright in 1995. Secondly, that the appellant gave evidence that the respondent was once evicted and it was the appellant who found accommodation for him. It was argued that eviction is not a sign of liquidity. Further, that the appellant testified that he sold his Kabulonga house at the time, therefore, the conclusion by the lower court was unfounded.

The learned counsel further submitted that the learned trial judge also wrongly concluded that the appellant showed "bad faith" and opportunist conduct because of the alleged sale of the plot to Miss Chileshe Sokota. He referred us to the letter to the Chief Registrar from Messrs Chibesakunda and Company, the lawyers for Miss Chileshe Sokota, on page 161 of the record of appeal. He submitted that no bad faith and opportunistic conduct could be alleged in the face of this letter and unchallenged viva voce evidence denying the transaction. Further, that no value would have been added by calling Miss Chileshe Sokota.

The learned counsel also contended that from pages 40 - 43 of the record of appeal, the judgment of the trial court was so engrossed with discrediting the evidence of the appellant that it did not recognise that he was a defendant and that it was the duty of the plaintiff to prove his case no matter what may be said about the defendant's defence. He submitted that the law on the burden of proof is so well settled and the rule is that the burden of proving the case always remains with the plaintiff and not the defendant. We were referred to the case of **Edna Nyasulu v. Attorney General**[3]

where Sakala J, as he then was, citing the case of **Khalid Mohamed v. Attorney General**[4], held that:

> **"A plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. I would not accept a proposition that even if the plaintiff's case has collapsed of its own inanition or for some reason or other, judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not need a defence."**

The learned counsel submitted that the judgment of the trial court was entered not because the respondent proved his case but because the judge did not believe the appellant. He argued that payment was supposed to be proved specifically and not assumed from the consent to transfer.

The learned counsel also submitted that the court below misunderstood the case and applied the wrong law. He argued that the judgment was based on the Statute of Frauds, however, the present case was purely one of breach of contract. That the respondent was in breach due to his failure to perform a fundamental obligation under the contract in that he failed to pay the purchase price. Further, that the appellant does not deny that he and the

deceased entered into an oral contract. That his only dispute was on the payment of the purchase price.

We were referred to page 218, lines 15 – 26 of the record of appeal where the appellant gave evidence as follows:

> **"On the remainder of 2624, one weekend I went with Stanford Hlazo to see the land, he pleaded that he was interested in purchasing. I told him I would reserve the piece for him to purchase when he would be in a position to do so. I verbally indicated how much I sold the other pieces and that when he had the money he would come to conclude. I wanted him to pay the price as for the other 4. He agreed to look for money and then pay. That was in 1995. We did not reduce it in writing. He did not come back or pay a single ngwee..."**

It was argued that the Statute of Frauds only comes into play where the existence of the contract or its enforceability is being denied. That in this case, the contract is not denied and the appellant is still willing to sell at the current market value because the respondent failed to pay. The learned counsel submitted that the question for determination of the court was and still is, whether the deceased did actually pay for the piece of land. He contended that throughout the evidence, the respondent failed to bring forth any proof of payment for the property. Our attention was drawn to the

respondent's testimony at page 197 of the record of appeal where he stated in lines 3 – 9 that:

> **"My father had always kept some of his personal documents at the office and when I tried to look I did not find the document on the price paid for it. You would not be correct to say he did not pay for it because of the consent. There is consent and my mother is in possession of the original title and as the family we have possession of the plot."**

And in lines 19 – 21, the respondent stated that:

> **"My understanding is that getting consent is synonymous with paying for the property – or means the property was paid for."**

We were also referred to the testimony of PW2 who stated as follows at page 209 lines 22 – 26 of the record of appeal:

> **"I have no receipt to show the court that my husband paid except that he told me he had paid and he told me to see the Defendant to collect the title deed. That is the only thing I can adduce from the behaviour of the Defendant that he is..."**

We were further referred to the following evidence of PW2 at page 211 of the record of appeal:

> **"Obtaining consent is proof that the purchase price has been paid."**

The learned counsel submitted that from the above testimony, the respondent assumes that the consent and the handing over of the certificate of title means that the purchase price was paid which flies in the teeth of the evidence on record. That the record and the appellant's evidence shows that the appellant in all the transactions started by obtaining consent before actually selling the properties. He argued, however, that the transaction with Mr. Mwalye went a step further by obtaining property transfer tax clearance before payment and when they failed to pay, the plot was sold to Vic Farms Limited. Therefore, counsel contended, obtaining consent in the present case cannot be relied on as proof of payment of the price. That in a contract of sale, payment must actually be proved and not assumed and in this case the respondent failed to do so.

The learned counsel submitted further, that even assuming that the question of Statute of Frauds was relevant, the law was misapplied. He cited section 4 of the Statute of Frauds 1677 which provides that:

> **"No action shall be brought upon any contract for the sale or other disposition of land or an interest in land, unless the agreement upon which such action shall be brought, or some memorandum or note**

thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."

Our attention was also brought to the case of **Gilcon Zambia Limited v. Kafue District Council and Bradford Machila**[5] where this court held as follows:

"In the case of Wesley Mulungushi v. Catherine Bwale Muzi Chomba[6], this court held that:

"For a note or memorandum to satisfy section 4 of the Statute of Frauds 1677, the agreement itself need not be in writing. A note or memorandum of it is sufficient, provided that it contains all the material terms of the contract, such as names, or adequate identification of the subject matter and the nature of the consideration."

It was submitted that in the **Gilcon**[5] case, there was evidence that Gilcon had, in reliance on the agreement with the respondents, built and set up quarry machinery worth thousands of kwacha on the land of the 2nd respondent which was actually part performance but the Supreme Court refused to enforce the agreement.

On the question of part performance, the learned counsel submitted that the learned trial judge misdirected herself by relying

on the case of **Jonas Amon Banda v. Dickinson Machiya Tembo**[1] where it was held that:

> **"Where a party demonstrates part performance in reliance on the oral agreement consistent with the contract alleged, the court will enforce the contract."**

He contended that, that case is distinguishable in that there was evidence of completed payment with acknowledgment of receipt of payment whereas in the present, there was no payment. We were again referred to paragraph 44 of **Halsbury's Laws of England, 4th Edition Vol 42** quoted earlier.

The learned counsel, therefore, submitted that the part performance should be with the knowledge of the seller. That to allow a purchaser to rely on part performance which is unknown to the seller would be unjust as even a squatter may rely on his development on the land as part performance. That in the present case, the appellant moved to Mongu in 1991 and never took much time to inspect the property. The learned counsel contended that, the abandonment of the transaction herein was not strange and was not exclusive to the respondent alone. He argued that the appellant

obtained consent in respect of Lot L/2624/M/C in favour of Mr. Lawrence Muyunda Mwalye and it took him ten years before he sold the property to Vic Farms Limited in 2005, whereas for Lot L/2624/M/D, it took six years before resale.

Mr. Mwanabo, the learned counsel for the respondent stated that he was relying entirely on the respondent's written heads of argument filed into court on 30th June, 2017. In response to ground one, the learned counsel submitted that aside from the three facts which the appellant listed as having been relied on by the court in arriving at its conclusion, there were other factors which show that the appellant had nothing further to claim from the deceased, such as his failure to demand for purchase price prior to and after the death of the deceased. In addition, the appellant had not shown the Court that he ever demanded the purchase price from the deceased, there was no notice to complete and no repudiation or rescission of contract.

The learned counsel agreed that the facts in issue were circumstantial as the dispute relating to the property only arose after the demise of the deceased. That prior to the death of the deceased, there was no dispute whatsoever, therefore, the issues of payment

could only be inferred from the conduct of the parties involved. To support this argument, the learned counsel cited the case of **David Zulu v. The People**[7] where we stated as follows:

> **"It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn."**

It was argued that although the above cited case is under criminal law, the principles of law established therein were applicable to circumstantial evidence in civil cases. According to the learned counsel, the present case is circumstantial in nature in that the contract for the sale of the property in issue was entered into between the appellant and the deceased. However, the nature of the transaction and the issue of consideration can only be inferred from the surrounding circumstances emanating from the conduct of the appellant before and after the death of the deceased.

The learned counsel submitted that the appellant's first ground of appeal is against the findings of fact by the trial court. That however, this is not a proper case to reverse the findings of the trial

court as the same were not perverse or made in the absence of relevant evidence. That the court cannot be faulted for the decision it made because there were a number of basic facts surrounding the circumstances in the present case which include the following: the appellant applied for and obtained consent to transfer the property to the deceased; the appellant handed over the Certificate of Title voluntarily to the deceased's wife with no conditions, except the demand for payment of ground rent paid on behalf of the couple; the deceased remained in possession of the property, developed it and grew jatropha, sunk a borehole, constructed a hut and placed caretakers to mind the property; all this time, the appellant did not make any demands for payment of the purchase price for the property from the deceased since 1994 [1998] when he handed over the title deed, up to 2006 when the deceased died; and that even after the death of the deceased, the appellant did not make any demand or claim concerning the property up to the time when the widow and the respondent requested for his particulars to facilitate the creation of a TPIN for purposes of change of title.

The learned counsel submitted that when all these facts are

taken together, they establish a further fact that the appellant had sold the property to the deceased and that he was paid the money for the said property. He contended that the appellant divorced himself from the subject property and had completely nothing to do with it as he had sold it and that when handing over the certificate of title he only asked for a refund of the ground rent which he said he paid on behalf of the deceased. That the only reasonable conclusion which the court could and did arrive at is that the appellant was paid and that he merely wished to take advantage of the absence of the deceased to the disadvantage of the respondent.

As regards the documents referred to by the appellant to support the claim of consent being obtained before payment or contract, it was submitted that the same was incomplete as there was no contract between the appellant and Mr. Mbizule or Lawrence Muyunda and the contracts for Mr. Nkhoma and Trentbridge do not state the subdivision allegedly bought. The learned counsel argued that the consent for sale on page 130 of the record of appeal does not show the details of the purchase and that the one on page 119 of the record of appeal was for authority to subdivide. That the payment by

Trentbridge on page 131 of the record of appeal was made on the same day of the contract appearing on page 126, whereas the consent on page 132 of the record of appeal was obtained after that payment. He also argued that the payment on page 149 of the record of appeal by Ms. Agness Ngoma is not supported by any contract nor does it show the subdivision bought and this document did not form part of the bundle of documents in the court below. That the contract for Mr. Nkhoma was made in 1994 before consent to subdivide was obtained and therefore, the appellant would not have obtained the consent for him before the contract. Further, that this demonstrated the haphazard manner in which the appellant handles his affairs relating to sale of land.

The learned counsel submitted that the issue of consent came into existence for purposes of proving that there was indeed a contract that existed between the appellant and the respondent which the appellant was denying to have been in existence. In the circumstances, there was no basis for the appellant to insist that the consent to transfer the property in issue was done prior to the contract with the deceased. The learned counsel wondered how a

vendor would obtain consent to transfer his or her property to a particular buyer with whom he/she had no contract and where no purchase price had been agreed upon. According to him, there was evidence on record which showed that the appellant applied for consent to transfer the property to the respondent's father in April 1995 and consent to transfer the same was obtained in July 1995. That the appellant's submission that in each of the transactions state consent was obtained before the contract or payment is defeated by his own documents on pages 126 - 127 of the record of appeal.

The learned counsel also submitted that the argument that the judgment of the trial court discredited the appellant's evidence and its perceived flaws whilst leaving the respondent's evidence untouched was purely fanciful as the appellant had not even highlighted any flaws in the respondent's evidence which were overlooked by the court below. That in any case, the appellant filed a defence and counter claim and the court below took into account all the evidence adduced and found glaring flaws and contradictions in the appellant's evidence. It was submitted that this court has in several cases stated that there are only few instances when this court

can interfere with the factual findings of the lower court. We were referred to the case of **Wilson Masauso Zulu v. Avondale Housing Project Limited**[8] where this court held 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."**

We were also referred to the case of **Nkhata and Others v. Attorney General**[9] where this court held as follows:

> **"The findings of a trial judge sitting alone without a jury can only be reversed on fact, when it has been positively demonstrated to the appellate court that:**
>
> **(a) by reason of some non-direction or mis-direction or otherwise, the judge erred in accepting the evidence which he did accept;**
>
> **(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 has failed to take into account some matter which he ought to have taken into account;**
>
> **(c) it unmistakenly appears from the evidence itself or from the unsatisfactory reasons given by the judge for accepting it, that he could have not taken proper advantage of his having seen, and heard the witnesses; or**
>
> **(d) in so far as the judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence**

of the witnesses which he accepted is not credible as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer."

The learned counsel submitted that the court below cannot be faulted for relying on the circumstantial evidence presented before it because no other reasonable conclusion would have been made as to why the appellant gave the certificate of title to the deceased and later remained quiet without making any demand for payment nor its return when in his own words, he had just lost employment and was in dire need of money. Further, that the appellant himself failed to tell the court the consideration he was to be paid as he was at pains to tell the court the amount of money which was due to him from the deceased.

According to the learned counsel, there was one distinguishable fact in the appellant's transaction with the deceased namely, the voluntary handover of the certificate of title which took place in 1998. He submitted that the appellant attempted to explain why he handed over the certificate of title when he said that he did so to enable the deceased who was his good friend to use it. That this was incredible

in light of the demand for refund of the ground rent and the obtaining of consent to assign. Moreover, the appellant did not produce any letter authorising the deceased to use the certificate of title to borrow money. It was therefore conclusive that the appellant was attacking the decision of the lower court's findings of fact, yet this court can only reverse such findings if the conditions in the **Nkhata**[9] case are fulfilled. It was argued that this case does not fall within such conditions.

The learned counsel also submitted that the court below had occasion to observe the demeanour of the appellant and having done so, it did not believe his story. That therefore, the court cannot be faulted for not believing the appellant's story because this court in the case of **Machobane v. The People**[10] stated that **"demeanour is an item of evidence observed by the court from which inferences or conclusions are drawn."**

The learned counsel further contended that the use of the words **"paid on your behalf"** showed that the appellant was aware of the fact that the deceased was the owner of the land which he had sold to him otherwise he would not have paid on his behalf. He argued

that it was worth noting that the period that the appellant was referring to was for the years starting from 1994 to 1998 when he handed over the certificate of title, thereby showing that as early as 1994 he had no further claim against the deceased except the ground rent which he makes clear in the handover note. Further, that the conduct of the appellant from the time he entered into a contract with the deceased to the time when the latter died showed that the land was under the control of the deceased. It was also argued that the appellant never made any demand at any time from the deceased for the payment of the purchase price except the demand for refund of ground rent. Therefore, the learned counsel contended, the learned judge cannot be faulted for holding that the developments carried out by the deceased were part performance on his part.

On the argument of unfairness by the lower court to expect the appellant to produce every document and recall every detail of the sale transaction considering the 20 year time lapse before trial, the learned counsel submitted that while the appellant recognises the long time lapse, he nonetheless expected the respondent to produce documentation showing that he was paid money, yet knowing very

well that the respondent was not there when the contract was entered into. It was his contention that if it was a miracle that the appellant managed to find some documents relating to the transaction, the respondent too cannot fairly be expected to adduce all the documents relating to the transaction when he is just a personal representative and was not originally party to the contract.

In response to the appellant's argument that the lower court misunderstood the case and applied a wrong law, the learned counsel referred us to the following submission by the appellant in the court below on page 179 lines 8 – 11 of the record of appeal, as to what the issues for determination in the High Court were:

> **"My Lady, the issues for determination by this Court is firstly whether or not there was an agreement between the parties and secondly whether or not from the facts of this case, it can be deduced with certainty that the deceased paid the purchase price to warrant this Court to grant the reliefs prayed for."**

The learned counsel contended that it was clear that the appellant is now not disputing the validity of the transaction in issue. However, from his own submissions in the court below, the appellant was disputing the fact that there was a contract with the deceased

and he argued that he just offered the land to the deceased and that there was no contract which was entered into between the two. It was, therefore, untenable for the appellant to submit that the court below misunderstood the case by not considering the issue of part performance, as this issue and the Statute of Frauds arose in the present case because the appellant had denied the fact that there was a contract between him and the deceased.

On the respondent's failure to prove payment of the purchase price, the learned counsel submitted that the present case was distinguishable from cases where both parties to the dispute were the parties to the contract in dispute as the claim herein was on behalf of the estate of the deceased. He argued that there was overwhelming evidence which if combined and linked together, creates a strong conclusion that the appellant was paid the purchase price as agreed between him and the deceased. That the court below made findings of fact based on the evidence adduced and there was no basis to disturb them.

It was also submitted that the appellant's attempt to include another letter of acknowledgement on page 149 of the record of

appeal cannot be entertained by this court as the same was not produced in the court below. He urged this court not to consider the said letter and argued that even if it were accepted, it does not relate to any of the parties that the appellant alleges to have sold his property to as seen from his statement on page 217 lines 19 – 23 of the record of appeal.

We were referred to page 181 lines 13 – 14 of the record of appeal where the appellant stated that he had made it clear to the deceased that consideration was crucial in the transaction as he required the money to look after his family and help him relocate to Mongu. The learned counsel submitted that he agreed with the appellant on this point but argued that if consideration was very important to him at that time, he would not have waited for 11 years without making any demand for consideration. It was his contention that the appellant's statement that consideration was important only leads to an inference and conclusion that he was paid money by the deceased because if he had not been paid, he would have demanded for the payment within a reasonable period of time as he did with the refund of ground rent rather than keeping quiet for 11 years. That it

does not make sense that one would remember to demand for payment on a lesser sum and not on the bigger amount.

The learned counsel further submitted that when all the above factors are read together, they lead to the conclusion that the appellant was paid his purchase price and that he is now attempting to take advantage of the demise of the deceased to deprive the respondent of the property which legally belonged to him and the estate of the deceased. We were referred to the case of **Mwape and Others v. ZCCM Investment Holdings Limited Plc**[11] where we held that:

> **"As we have said in a plethora of cases, he who asserts a claim in a civil trial must prove on a balance of probabilities that the other party is liable."**

The learned counsel concluded that the court below cannot be faulted for entering judgment in favour of the respondent because it was proved by the respondent on a balance of probabilities that the appellant sold the land to the respondent's father and had no further claim to the land as he had sold it and forgotten about it until after the death of his friend whose estate he seeks to take advantage of.

We were therefore urged to dismiss the appeal and uphold the lower court's judgment.

In the appellant's brief reply to the appellant's arguments under ground one, reliance was again placed on the **Gilcon**[1] case. It was also reiterated that consideration cannot be assumed or circumstantial but must be actual and proved.

In grounds two and three, the learned counsel for the appellant submitted that both grounds depended on the outcome of ground one. He, however, submitted in respect of ground three that PW2 made it clear in her testimony that the caveat was placed on the property because of the dispute between her husband and herself and that it was surprising that even after the death of her husband she had not removed the caveat. Further, that it was surprising that even in the face of such evidence the lower court refused to order the removal of the caveat.

The learned counsel, accordingly, prayed that the judgment of the lower court be reversed. The respondent did not respond to grounds two and three in his heads of argument.

We have considered the record of appeal, the judgment appealed against and the arguments of and authorities cited by the parties. Both parties submitted at length on ground one. As we have indicated below, the lengthy submissions were unwarranted in light of the simple issue which is the subject of determination in this appeal.

In sum, the appellant's grievance under ground one is that it was a misdirection by the court below to hold that the property belongs to and forms part of the estate of the deceased, based on circumstantial evidence of part performance and without proof of consideration. It was argued that the learned trial judge relied on three facts to arrive at her decision namely, that the appellant applied and obtained state consent to transfer the property; that the appellant handed over the certificate of title with no conditions but payment of ground rent; and that the deceased remained in possession of the property and grew jatropha, sunk a borehole, constructed a hut and placed a caretaker there. According to counsel, these findings were perverse as they were made on a very unbalanced evaluation of evidence.

The gist of the respondent's argument under this ground is that while the respondent does not dispute that the court below relied on the three facts identified by the appellant in arriving at its decision, there were other factors which show that the appellant had nothing further to claim from the deceased. That they included the appellant's failure to demand for the purchase price prior to and after the deceased's death; the failure by the appellant to show to the court that he ever demanded the purchase price from the deceased; and there having been no notice to complete and no repudiation or rescission of contract.

It was submitted that this case is circumstantial in nature as the contract for the sale of the property was entered into between the appellant and the deceased. That, therefore, the nature of the transaction and payment of the purchase price can only be inferred from the surrounding circumstances emanating from the conduct of the appellant before and after the death of the deceased. And that this is not a proper case where the findings of the trial court could be reversed.

As we have observed above, it was unnecessary for the parties

to go to great length arguing about peripheral issues when the issue for our determination in this appeal is quite simple. It is not whether there was an agreement for the sale of the property between the parties. It is obvious from the record of appeal that even in the court below, there was no dispute, and the appellant did not deny, that the deceased entered into an oral agreement with him for the sale of the property. The issue, as we see it, is simply whether the deceased had paid the purchase price for the property. It is on this sole issue that the entire appeal hinges.

We must state from the outset that ground one attacks the findings of fact made by the learned trial judge. As we have stated in a plethora of cases, this court can only reverse findings of fact in rare circumstances where it is clearly shown that such findings were either perverse or made in the absence of relevant evidence. See, for example, the **Wilson Masauso Zulu**[8] and **Nkhata**[9] cases cited by the learned counsel for the respondent.

The appellant vehemently denies that the deceased paid him the purchase price. On his part, the respondent is categorical that the deceased informed him that he paid the purchase price and he has

given some facts in support of his assertion. Unfortunately, the deceased is not here to give his version on the payment or otherwise, of the purchase price. Consequently, inference on whether the purchase price was paid by the deceased has to be drawn from circumstances that gave rise to the dispute, and particularly the conduct of the parties.

In our view, the note given to the deceased and his wife when the appellant was handing over the original certificate of title to them must be the starting point as it seems to unravel the 'jigsaw puzzle'. This note is at page 103 of the record of appeal and it reads as follows:

> **"To Mr. & Mrs Hlazo**
>
> **Herewith is the Title Deed for 2624/M for your further action.**
>
> **I will be most grateful if you could refund ground rate/rent paid on your behalf over the past four years amounting to K150,000.00. Please note that without payment of ground rent/rates the land would have been taken back by the Govt.**
>
> **Kind regards**
>
> **Charles L. Mutemwa"** (emphasis added)

Our interpretation of this note is that apart from the request that he should be refunded the sum of K150.00 which he paid for

ground rent on behalf of the deceased and his wife, the original certificate of title was handed over by the appellant for the couple's **"further action"**, without any other conditions. According to the appellant's evidence deployed in the court below, the appellant paid ground rent on behalf of the deceased for four years from 1995 – 1998 but never did so between 1998 and 2008. Further, that he only paid ground rent in 2012 when the matter was already in the court below. As aptly submitted by the learned counsel for the respondent, the words **"paid on your behalf"** could only mean one thing: that the appellant had ceased to be the owner of the property, otherwise he would not have paid for the ground rent on behalf of the deceased if it was still his. For the same reason, he did not pay for ground rent from 1998 – 2008. The evidence on record shows that payment during this period was being made by the deceased. In our view, the only reasonable inference to be drawn from these facts is that it is more probable than not, that the deceased had paid the appellant the purchase price for the property. We posit that it was also for this reason that the appellant surrendered the original certificate of title to the deceased without further conditions.

The appellant testified in the court below that he gave the title deed to the deceased to enable him source for funding. We do not find credibility in this evidence. If this were the case, the appellant would have expressly stated so in the note, as he did with the refund for payment of ground rent. Furthermore, common sense counsels that no one in his right senses can risk surrendering his original title deed to the intending purchaser prior to full payment of the purchase price. Moreover, the appellant did not show in his evidence, how the deceased was going to use his original title deed to secure funding.

The appellant also stated in his evidence that by the words **"for your further action"** in the note, it was meant that the deceased would buy the property and if he failed, he would sell it on his behalf for a commission. We find this to be a red herring as the note does not suggest such an interpretation or understanding.

The evidence on record also indicates that the appellant and the deceased entered into the oral agreement for the sale of the property sometime in 1995. In 1998, the appellant surrendered the original certificate of title for the property to the deceased's wife, together with the accompanying note referred to above. The evidence also shows

that from 1995 to 2006 when the deceased expired, the deceased had been in possession of the property for about eleven years without any interruption from the appellant. In addition to being in possession, the evidence also shows that the deceased grew jatropha, sank a borehole, built a thatched hut and placed a caretaker on the property. These facts also seem to suggest that having been in control of and used the property in such a manner for that long, the inference could only be that the deceased had purchased the property from the appellant and it belonged to him. These facts tend to support the evidence of PW2 in the court below that according to her belief, the deceased had paid for the property because when she was collecting the original certificate of title, the appellant did not tell her that he had not been paid; and further, that the appellant's conduct made her believe that he was not owed money as he never made any claim before the demise of the deceased in 2006. In the circumstances, we do not accept the appellant's assertion that the deceased conducted activities on his property without his consent or knowledge and that he was unable to check what was happening on the land because he was far away in Mongu.

Although we agree with the appellant that his having obtained consent to transfer the property to the deceased may not in itself be sufficient proof that the deceased purchased the property, there is adequate circumstantial evidence that the deceased purchased the property and it belonged to him at the time of his demise in 2006. On the facts and circumstances of this case, we are inclined to accept the respondent's assertion that by denying receipt of the purchase price, the appellant was merely taking advantage of the demise of the deceased who was his friend, in order to deprive the estate.

It is our view that the argument by the appellant that payment was supposed to be proved specifically and not assumed can only hold in circumstances where both parties to a contract are available to give evidence, not in this case where one of the parties is deceased. As aptly submitted by the learned counsel for the respondent, the claim in this case was made by the respondent only in his capacity as administrator of the estate of the deceased.

In her judgment at pages J37 – J38 (pages 43 – 44 of the record of appeal), the learned trial judge found that the deceased entered into a verbal contract for the purchase of the property; that the

appellant applied for consent to transfer the property to the deceased and was granted the same; that the appellant handed over the original certificate of title to the deceased with no attached conditions apart from a refund of ground rent bills which he had paid on the deceased's behalf for four years as at 1998; and that the deceased remained in possession of the property and started growing jatropha, sunk a borehole, constructed some thatched huts and placed a caretaker on the property until his death in 2006, without any interruption from the appellant. The appellant argued that these findings were perverse and made on a very unbalanced evaluation of evidence. We do not agree. In our view, these are findings of fact made by the learned trial judge based on the evidence deployed before her and properly evaluated. They are, therefore, neither perverse nor were they made in the absence of relevant evidence. For this reason, we do not find merit in the appellant's argument that the learned trial judge discredited the appellant's evidence and its perceived flaws but left the respondent's evidence untouched. Consequently, we do not find any justifiable grounds to interfere with the findings of the learned trial judge.

For the reasons stated above, we conclude that ground one has no merit and it accordingly fails.

We agree with the appellant that grounds two and three are dependent on the outcome of ground one. In view of the conclusion we have reached on ground one, grounds two and three inevitably suffer the same fate. We equally dismiss them for lack of merit.

The net result is that the judgment of the court below is upheld and this appeal is dismissed as it is bereft of merit. We award costs in the court below and here, to the respondent, to be taxed in default of agreement.

E. M. HAMAUNDU
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE

J. K. KABUKA
SUPREME COURT JUDGE