

**SELECTED JUDGMENT NO. 49 OF 2017**

P. 1635

**IN THE SUPREME COURT OF ZAMBIA Appeal No. 41/2015**

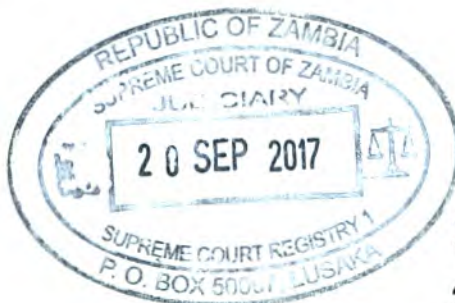
**HOLDEN AT NDOLA**

(Civil Jurisdiction)

**BETWEEN:**

**SAIDI CHIBWANA**

**LYNN BAINES**



**1<sup>ST</sup> APPELLANT**

**2<sup>ND</sup> APPELLANT**

**AND**

**MARRIAN MUTINTA CHITAUKA**

**RESPONDENT**

(suing as Administratrix of the estate  
of the late **HACHAABWA CHITAUKA**)

**CORAM:** Mwanamwambwa DCJ, Kajimanga and Kabuka, JJS,  
on the 5<sup>th</sup> day of September, 2017 and 12<sup>th</sup> September,  
2017.

**FOR THE APPELLANTS:** Mr. M.C.Hamachila, Messrs. Iven  
Mulenga & Company.

**FOR THE RESPONDENT:** No Appearance.

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**JUDGMENT**

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**KABUKA, JS** delivered the Judgment of the Court.

**Cases referred to:**

1. L'Estrange v Graucoub [1934] 2KB 394.

2. Carlill v Carbolic Smoke Call [1892] 2 QB 484.
3. Brodgen v. Metropolitan Railway [1877] A.C. 666.
4. Storer v Manchester City Council [1974] 3 All ER 824.
5. Zambia Consolidated Copper Mines v Eddie Katalayi and Max Chilongo [2001] ZR 28.
6. Leeman v Stock [1951] ALL ER 1043.
7. Vincent Mijoni Vs: Zambia Publishing Company Ltd, Appeal No. 10 of 1986.
8. Wesley Mulungushi v Catherine Bwale Mizi Chomba [2004] ZR 96.
9. Justin Chansa v The Lusaka City Council [2007] ZR 256.

**Legislation and Other Works referred to:**

The Intestate Succession Act, Cap. 59 SS. 3, 20 [2].

Barnsley, D.G, Barnsley's Conveyancing Law and Practice, 3<sup>rd</sup> Edition, [1988], London Butterworths.

Hornby, A.S, Oxford Advanced Learner's Dictionary of Current English, 6<sup>th</sup> Edition, [2000], Oxford University Press.

By a judgment dated 3<sup>rd</sup> September, 2014, the learned High Court judge found that the 1<sup>st</sup> appellant had not signed an agreement relating to the sale of Plot no. 10280, Kabwe. For the said reason, she held that, the requirements of the Statute of Frauds Act, 1677 were not satisfied and that, the agreement was therefore not valid. It is against that finding that the appellants now appeal.

The background to the matter to the extent that it is relevant for the determination of this appeal is straight forward.

Mr Hichaambwa Chitauka and the 1<sup>st</sup> appellant were at the material time both Councillors at the Kabwe Municipal Council ("the Council"). They were also friends. Apart from being a Councillor, the 1<sup>st</sup> appellant was also a businessman involved in the buying and selling of land, to members of the public.

In the year 2009, there were a number of pieces of land in Kabwe District over which there were disputes. It was for the said reason that the Land Management Committee of the Council decided to undertake an audit to identify the various plots over which there were disputes. They limited themselves to the period between 1<sup>st</sup> June to 16<sup>th</sup> October, 2009. After undertaking this task, a list of the properties with disputes was tabled before the Kabwe Municipal Council meeting. By Resolution No. SPWD/29/11/2009, the Council resolved that, the disputed plots be considered for re-allocation.



Following the said resolution, the 1<sup>st</sup> appellant and his friend Mr Hachaambwa Chitauka, applied to be allocated a plot each, with the latter applying for Plot no. 10280 Luangwa township, Kabwe ("the Property"). The Council approved the applications on 12<sup>th</sup> January, 2010. By a letter dated 5<sup>th</sup> February, 2010, the Council wrote to the Commissioner of Lands recommending that Mr Hachaambwa Chitauka should be offered the property. On 13<sup>th</sup> April, 2010, Mr Hachaambwa Chitauka signed an agreement evidenced by a hand written one paged document, appearing at pages 45 and 67 of the record of appeal. This agreement states that, Hachaambwa Chitauka had decided to sell 'his' property to Saidi Chibwana, the 1<sup>st</sup> appellant in the appeal, at the purchase price of Thirteen Thousand Kwacha (K13,000.00) rebased. That of this amount, the buyer had paid him Five Thousand Kwacha (K5,000.00) rebased, the same day, and that the remaining balance of Eight Thousand Kwacha (K8,000.00) was to be paid after the letter of offer for the property was received from the Ministry of Lands.

Two weeks after that transaction, the 1<sup>st</sup> appellant received the sum of Twenty-Five Thousand Kwacha (K25,000.00) rebased from the 2<sup>nd</sup> appellant, to whom he had apparently, equally sold the property after he had purchased the same from Mr. Hachaambwa Chitauka. The receipt reflecting this payment appears at page 52 of the record of appeal.

Mr Hachaambwa Chitauka who had been ill during this whole period finally succumbed to the illness and died on 30<sup>th</sup> May, 2010. Following his death, his relatives discovered that the 2<sup>nd</sup> appellant had moved on to the property in issue and had started developing it. When efforts to engage the 2<sup>nd</sup> appellant to dissuade her from continuing with the developments failed, on the 6<sup>th</sup> of June, 2011 the family of the deceased took the issue up with the Kabwe Municipal Council ("the Council").

Acting on that complaint, the Director of Engineering Services issued a 'STOP ORDER NOTICE' which was directed at the developer of the property. The notice ordered that any developments being undertaken on the property be halted. The

developer was also requested to report at the Council with evidence of:

- (i) a letter of offer for the property;
- (ii) scrutiny fee; and
- (iii) approved drawing plans.

The record shows that, lawyers were engaged by the parties thereafter. From the correspondence exchanged by the lawyers, it appears there was no dispute that Mr Hachaambwa Chitauka ("the deceased") and the 1<sup>st</sup> appellant had entered into some arrangements involving the sale of the property in issue. That whereas a part payment of K4,900.00 was acknowledged as having been received, there was no evidence of payment of the balance.

As the parties failed to agree on the way forward, on 20<sup>th</sup> August, 2012 the deceased's sister obtained an order of appointment as Administratrix of the deceased's estate. On 6<sup>th</sup> September, 2013, she took out a writ from the High Court at Kabwe against the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively, as defendants. The claim was for damages for trespass by the defendants on the



property which she claimed was allocated to the deceased by the Council. She further sought an order of interim injunction to restrain the appellants from trespassing on the said property, which was granted, ex-parte.

In his defence filed in the matter, the 1<sup>st</sup> appellant denied the claims and averred that, the deceased had received the sum of K5,000.00 from him, upon which the 1<sup>st</sup> appellant became the *bonafide* owner of the property. According to him, after the sale, he followed the appropriate Council formalities required to change ownership from the deceased to the 2<sup>nd</sup> appellant, Lynn Baines.

In her defence, the 2<sup>nd</sup> appellant also asserted that, she had followed all the required formalities before purchasing the property from the 1<sup>st</sup> appellant on 19<sup>th</sup> March, 2011. That as the property at the time had already been sold to the 1<sup>st</sup> appellant, it did not belong to the deceased's estate.

In her evidence given at the trial before the High Court, the respondent contended that there was no evidence showing that the 1<sup>st</sup> appellant had fully paid for the property. As such, that the

property belonged to the deceased's estate. It was her further evidence that, after the deceased's death, when she was pursuing the issue of title deeds, she was informed that the property was now being processed in favour of the 2<sup>nd</sup> appellant. This was so, as the 1<sup>st</sup> appellant had informed the Council that he had earlier bought the property, from the deceased after which he sold it to the 2<sup>nd</sup> appellant. It is for that reason, that the 1<sup>st</sup> appellant was requesting for a direct transfer of interest in the property from the deceased to the 2<sup>nd</sup> appellant, as the person who had bought it.

In his testimony, the 1<sup>st</sup> appellant insisted that he had bought the property from the deceased. That he initially paid K5,000.00 and later, after completing the payment, they had gone together with the deceased to the Council where change of ownership was effected. That the 2<sup>nd</sup> appellant had first approached him to inquire over the property in April, 2010 and he sold it to her at K25, 000.00 (rebased). Thereafter, he assisted the 2<sup>nd</sup> appellant with the formalities required by the Council for the title deeds to be issued directly in her name. According to the 1<sup>st</sup> appellant, he believed that the deceased had died sometime in



2011. He admitted that he had no evidence to confirm that he had fully paid the balance of the purchase price for the property. He also confirmed that he did not sign the agreement of 13<sup>th</sup> April, 2010 by which the deceased sold him the property but insisted that it was witnessed by two people.

One of the witnesses who allegedly witnessed the signing of the contract by the deceased, in his evidence said that, there were still outstanding amounts on the sale. That he only witnessed the payment of K5, 000.00. He also said that the sale transaction was only effected after the death of the deceased.

The 2<sup>nd</sup> appellant in her evidence told the trial court that she was offered the property for sale by the 1<sup>st</sup> appellant sometime in March or April, 2010. She inquired whether it was his property and he confirmed, saying he had bought it from the deceased. When she asked him to show her the documents to prove this assertion, the 1<sup>st</sup> appellant took her to his office where he showed her the sale agreement he had entered into with the deceased. As she was satisfied with the document, she took the original and left him with

copies. The 2<sup>nd</sup> appellant also confirmed that, according to the same document that she was relying on, the land was not fully paid for by the 1<sup>st</sup> appellant.

After hearing this evidence, the trial judge considered that that the contract was not signed by the purchaser who is the 1<sup>st</sup> appellant and that this raised the question whether a failure to sign a contract by the purchaser, amounts to a breach of contract or makes the whole transaction null and void.

She also considered arguments raised by Counsel for the respondent that the document the appellants were seeking to rely on did not meet the requirements of S.4 of the Statute of Frauds Act, 1677 for a valid contract of sale. Section 4 states 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 there unto by him lawfully authorised."**

Accordingly, the learned trial judge came to the conclusion that, if a buyer signs a contract he is bound by it, and conversely, if he does not sign, he is not bound by it. The case of **L'Estrange v Graucoub**<sup>1</sup> was relied upon. She further found that, the requirements of section 4 of the Statute of Frauds had not been met and that, the 1<sup>st</sup> appellant did not acquire any rights in the property, nor did the 2<sup>nd</sup> appellant, who purported to buy the same from him. The conclusion of the trial judge was that, the property remained that of the deceased, and upon his death, formed part of his estate.

It is against those findings that the appellants have now appealed to this Court, on three grounds of appeal, stated as follows:

1. The learned trial judge erred both in law and fact when she held that the contract of sale of Plot No. 10280, Luangwa township, Kabwe entered into between the 1<sup>st</sup> appellant and the deceased was non-binding due to the non-availability of the 1<sup>st</sup> appellant's signature.



2. The learned trial judge erred both in law and in fact when she held that Plot No. 10280, Luangwa township, Kabwe, formed part of the estate of the late Hachaambwa Chitauka.
3. The learned trial judge erred both in law and in fact when she failed to address third party rights in relation to the 2<sup>nd</sup> appellant as she was an innocent purchaser for value without notice of any adverse claims in relation to Plot No. 10280 Luangwa township, Kabwe, at the time she purchased the said property from the 1<sup>st</sup> appellant.

In support of the grounds of appeal, written heads of argument were filed by Counsel for the appellants. The respondent filed heads of argument in response. When the appeal came up for hearing however, only Counsel for the appellant was in attendance and he indicated to the Court that he would be relying on his heads of argument. When we asked him whether he wished to say anything in reply to the respondent's heads of argument, he informed us that he had not been served with the same. We accordingly directed the Clerk of Sessions to avail him a copy and

gave him a maximum of four (4) days within which to file written submissions, in reply, should he deem it necessary.

At the time of writing this judgment, there were no submissions in reply filed on record. Our inquiry through the Clerk of Sessions disclosed that, Counsel for the appellants had communicated that he would not be filing any submissions in reply. We will accordingly proceed to deal with the appeal on the basis of the written arguments on record.

The gist of the appellants' written heads of argument, in ground one, is that, an agreement can be inferred from the conduct of the parties. The cases of **Carlill v Carbolic Smoke Ball**<sup>2</sup> and **Brodgen v. Metropolitan Railway**,<sup>3</sup> were cited in advancing the principle that, the conduct of another party within the scope of the offer, does amount to an agreement enforceable at law and that, acceptance of a contract can be inferred from the conduct of the parties involved. Counsel also cited the case of **Storer v Manchester City Council**<sup>4</sup>, as held that, the contract of sale of

Municipal Council houses was concluded irrespective of the non-availability of the defendant's signature to the contract.

On ground two, Counsel relied on **Section 3 of the Intestate Succession Act**, in advancing the argument that, what belongs to a deceased's estate is limited to only that which the deceased had control of and was entitled to during his life or that which he would be entitled to, had death not occurred. It was in this regard submitted that, the deceased's estate did not have possession of the property, as interest in the land had passed to the 1<sup>st</sup> appellant before his death, who then, became the owner of the land and was entitled to the benefit thereof. It was further argued that, **section 20 (2) of the Intestate Succession Act** provided only for property which the deceased was entitled to prior to his death or that which accrued to him, by virtue of his death.

Finally, the arguments on ground three were to the effect that, the court should have considered that the 2<sup>nd</sup> appellant was an innocent purchaser for value without notice. The submission here, was that, the 2<sup>nd</sup> appellant's undertaking to satisfy herself of



the 1<sup>st</sup> appellant's right to assign the said property to her, was sufficient evidence of her being a *bonafide* purchaser for value. The case of **Zambia Consolidated Copper Mines v Eddie Katalayi and Max Chilongo**<sup>5</sup> was cited in support of this submission.

In their response to ground one of the appeal, learned Counsel for the respondent argued that, the issue on the particular facts of the present appeal, is not on the effect of **section 4 of the Statute of Frauds** as it relates to construing whether or not there was an agreement by considering the general intention of the parties. It was rather, the construction of the document in question. He observed that some documents dictate to the parties that they must sign, and where they so dictate, the effect of failure to sign cannot be the same as where the document does not have provision for a signature.

Counsel pointed us to the document in issue in the present appeal and noted that, this 'purported' agreement as it appears at page 41 of the record of appeal shows a provision which was marked for the buyer to sign, yet the buyer did not sign the

document. The submission on the point was that, according to the law, someone can be found wanting if he does not sign a document when the signature is required. The case of **Leeman v Stock**<sup>6</sup> was relied upon to support the submission.

Counsel further pointed to the fact that, there is no proof of full payment of the purchase price, save for the K5,000.00 paid out of the agreed sum of K13, 000.00 and the balance of K8, 000. 00 which was to be paid after the deceased received his letter of offer from the Ministry of Lands.

It was Counsel's argument in this regard that, there is no evidence to show that the letter of offer to the deceased, which was the condition precedent for the payment of the balance, was actually issued. His submission was that, in the absence of evidence that an offer letter was received from the Ministry of Lands, it cannot be argued, as the appellants seek to do, that the requirements of section 4 of the Statute of Frauds were satisfied.

In the cases of **Mijoni v Zambia Publishing Company**<sup>7</sup> and **Wesley Mulungushi v Catherine Bwale Mizi Chomba**<sup>8</sup>, which the



appellants sought to rely on, held to the effect that, an agreement for the sale of land need not be in writing and a memorandum of it is sufficient. Counsel for the respondent noted that, in both those cases, there were clear offers and clear evidence. In the *Wesley Mulungushi* case in particular, the seller who had offered to sell the property at K120, 000.00, attempted to avoid to comply with the first offer by raising the purchase price to K300,000.00. In contrast, there is no such clear evidence of an offer letter in the present appeal, so Counsel argued.

Coming to ground two, Counsel proceeded by arguing that, having dodged the process of signing the contract, the document was not binding; and the conclusion was thus inescapable, that the property remained the deceased's and after his death, it formed part of his estate. His submission was that, **section 20 (2) of the Intestate Succession Act**, did not apply to the facts of the case subject of the present appeal.

On ground three, Counsel referred to the letter written by the Council advising that, allocation of the property in question



should be changed from the deceased to the 2<sup>nd</sup> appellant. His argument was that, this letter was only written on 15<sup>th</sup> June, 2012 which was two years after the death of the deceased. His submission was that, at that point in time, no lawful change of the property could be effected from the deceased to any other person without involving the Administrator of the deceased's estate. In the circumstances, that these joint efforts of the 1<sup>st</sup> and 2<sup>nd</sup> appellants do not make the 2<sup>nd</sup> appellant a *bonafide* purchase for value.

Counsel also referred to the evidence of the 1<sup>st</sup> appellant, in cross-examination, where he admitted that there was no evidence showing that the entire purchase price of K13,000.00 was paid, save for the K5,000.00 stated in the contract. Further, that the 2<sup>nd</sup> appellant equally admitted that the only evidence she saw was of a part payment towards the purchase price as stated in the said agreement.

The arguments on the point were that, the 2<sup>nd</sup> appellant proceeded to buy land not in the name of the offeror, but of the deceased, when she should have made inquiries as to whether there

were any outstanding issues regarding the property. She however, chose to use the name of the deceased to effect change of ownership to herself. Counsel submitted in conclusion that, the case of *Zambia Consolidated Copper Mines Limited v Eddie Katalayi and Max Chilongo* which talks of the rights of the third party, does not apply to the situation in the present appeal, where the purchaser had reason to suspect there could be an adverse claim to the property she was buying.

We have considered the arguments, submissions, the authorities relied on by Counsel, against the evidence on record.

Although Counsel on both sides belaboured to argue the appeal based on the Statute of Frauds, according to O.18/8/4 of the Supreme Court Practice (1999) White Book, for a party to rely on the Statute of Frauds, the same must be specifically pleaded. A glance at the pleadings in the present appeal, reveals that the Statute of Frauds was not specifically pleaded by the appellants, but was sneaked in through submissions made by Counsel for the respondent, on conclusion of the trial before the High Court. On



the view of the matter that we take, the Statute of Frauds was not properly referred to, to resolve the dispute in the circumstances of this case and should not have been considered by the trial court.

The real issue disclosed by the evidence as we see it, is rather, whether at the time of the purported contract of sale, the deceased had beneficial interest in the property in issue, capable of being transferred to the 1<sup>st</sup> appellant or indeed, to any other person.

This issue did fall for consideration by this Court in the case of **Justin Chansa v The Lusaka City Council**,<sup>9</sup> where we acknowledged that, applications for land by members of the public can take two forms. It can be made directly to the Commissioner of Lands or through the Council, as agent of the Commissioner of Lands. We went on to say that:

**"...it is also clear from the evidence that, where a member of public opts for the second route, the respondent (the Council) is only mandated, firstly, to advertise any land available; secondly, to receive applications from members of the public; and thirdly, to make recommendations to the Commissioner of Lands. The powers to allocate land and make an offer to successful applicants still remain in the Commissioner of Lands. The respondent only makes recommendation to the Commissioner of Lands. The Commissioner of lands after receiving these recommendations from the respondents has the discretion to either accept or reject the recommendations made by the respondent."** (underlining for emphasis supplied)



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The evidence on record in the present case reveals that, the deceased was only recommended to the Commissioner of Lands to be considered for an offer in respect of the property in issue. The letter of recommendation reads as follows:

5<sup>th</sup> February 2012

The Commissioner of Lands  
P.O. Box 30069  
Lusaka

Dear Sir

**CONSENT FOR OFFER OF RESIDENTIAL PLOT NUMBER 10280**

We refer to the aforementioned subject matter and wish to inform you that Council under Minute SPWD/29/11/ 2009 **resolved to recommend** the allocation of Residential Plot No. 10280, situate in Luangwa, Kabwe to Hichaambwa Chitauka at its meeting held on 12<sup>th</sup> January, 2010.

I have accordingly enclosed here in application forms for plot no. 10280 in duplicate and the extract of the Council minute number SPWD/29/11/ 2009 for your necessary action.

Yours faithfully

**KABWE MUNICIPAL COUNCIL**

Daniel Mapulanga  
**DIRECTOR OF DEVELOPMENT PLANNING  
FOR/ TOWN CLERK**

cc. Director of Engineering Services  
Kabwe Municipal Council  
**KABWE**

cc. Hichaambwa Chitauka  
**KABWE**

(Underlining and boldfacing for emphasis, supplied.).

In defining what recommendation means, the Oxford Advanced Learner's Dictionary of Current English, 6<sup>th</sup> Edition states that:

**"it is an official suggestion about the best thing to do."**

We thus have no difficulty in coming to the conclusion that, at the time the deceased and the 1<sup>st</sup> appellant were purporting to enter into a contract of sale, the deceased had not been offered this property by the Commissioner of Lands, but had merely been recommended to be offered the same.

In the premises, he did not, at the time of the purported agreement dated 13<sup>th</sup> April, 2010, have any vested interest in the property in issue, or any title at all, which he could transfer by way of sale to the 1<sup>st</sup> appellant or any other person for that matter. As aptly stated by the learned authors of Barnsley's Conveyancing Law and Practice, 3<sup>rd</sup> Edition:

**"The word 'title' is an ambiguous word, meaning different things in different contexts. Conveyancers use the word in two main senses- first, to mean ownership, the vendor's right to the property; secondly, the evidence supporting the claim to ownership, i.e. proof of title in the first sense. In the expression 'good title,' the**

word is used as equivalent to ownership; a vendor must show a title as will enable the purchaser to hold the property against any person who may probably challenge his right to it. This obligation to make a good title requires the vendor to show that he alone, or with the concurrence of some person or persons whose concurrence he alone can compel, can convey the whole legal estate and equitable interest in the land sold, free from incumbrances except for those disclosed by the contract."

A microscopic scrutiny of all the documents constituting the record of appeal has also revealed to us, that the Commissioner of Lands never issued a letter of offer to the deceased or any other person, in respect of Plot No. 10280 Luangwa, Kabwe. The letter of recommendation for an offer is the only reference made regarding the anticipated conveyance of interest in the said property. We can only underscore the position that, in law, a recommendation is not synonymous with an offer and confers no legal rights whatsoever on the person so recommended, to the subject of the recommendation. The deceased, who had no beneficial interest in Plot No. 10280 which had not been offered to him at the material time, could not enter into any valid contract for the disposal of the property to the 1<sup>st</sup> appellant, which in turn he could pass on to the 2<sup>nd</sup> appellant or anyone else. On the facts, where the Commissioner of Lands has



not yet exercised his discretion to make the offer in favour of the deceased, pursuant to the recommendation made by the Council; the 2<sup>nd</sup> appellant cannot claim to be a *bonafide* purchaser for value.

It is for the reasons given, that all the three grounds of appeal cannot be sustained and must fail.

This appeal is accordingly, dismissed for being one devoid of any merit. Costs of the appeal will be borne by the respective parties.



**M.S. MWANAMWAMBWA**  
**DEPUTY CHIEF JUSTICE**



**C. KAJIMANGA**  
**SUPREME COURT JUDGE**



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