

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

**APPEAL NO. 004/2020
CAZ/08/363/2019**

BETWEEN:

MALAMA MWANZA

AND

BIANNA STAND PALIYANI



APPELLANT

RESPONDENT

Coram: Kondolo, Chishimba, and Sichinga, JJA

***On 24th March, 2021, 19th May, 2021 and 16th June, 2021
and 9th November, 2021***

For the Appellant: No Appearance

For the Respondent: No Appearance

JUDGMENT

Sichinga, JA delivered the Judgment of the Court.

Cases referred to:

1. *Sablehand Zambia Limited v. Zambia Revenue Authority* (2009) ZR 109
2. *Lenton Holdings v. Moyo* (1984) ZR 55
3. *Anti-Corruption Commission v. Barnnet Development Corporation Limited* (2008) ZR 69 Volume 1.
4. *Nkhata and Others v. The Attorney-General* (1966) ZR 124
5. *Sithole v. State Lotteries Board* (1975) ZR 106

Legislation referred to:

1. *Lands and Deeds Registry Act, Chapter 185, Laws of Zambia*
2. *Lands Act, Chapter 184, Laws of Zambia*
3. *Court of Appeal Rules, Statutory Instrument No. 65 of 2016, Act No. 7 of 2016, Laws of Zambia*
4. *High Court Rules, Chapter 27, Laws of Zambia.*

1.0 Introduction

1.1 The Supreme Court in a plethora of cases including ***Sablehand Zambia Limited v. ZRA¹*** has reaffirmed the principle that the standard of proving fraud is higher than on a balance of probabilities. The application of that principle is called to bare in this case.

1.2 This case concerns the sale of a property in which the sale agreement was between the lawful owner, as the seller and a buyer. The seller died before completing the transaction with the buyer. The transaction was completed by the administrator of the seller's estate and the buyer obtained title in his name. A relative of the buyer later claimed the transaction was fraudulent as the sellor was not the beneficial

owner of the property since he held it in trust for his brother and successor's in title.

1.3 The main question in this appeal is whether the learned trial Judge evaluated the evidence to the appropriate standard of proof. If indeed the learned Judge's determination was wrong, the question also arises as to whether the claimant is entitled to the disputed property.

2.0 The factual background

2.1 Bianna Stand Paliyani, the plaintiff in the court below (the respondent in this appeal) sued as the administrator of the estate of late Mapemba Stand Paliyani (at times referred to as Peliyani on the record, hereinafter referred to as the deceased). She alleged that her father, the deceased entered an agreement with one Manyoni Mwanza for the purchase of property known as Stand L5549/35/5 or Stand no. 35/4803 Matero, Lusaka which he had been renting from the latter. The said Manyoni Mwanza died before completing the transaction. His nephew, one Duncan Mwanza was appointed as administrator of his estate. Duncan Mwanza proceeded to

conclude the sale with Mapemba Stand Paliyani, and a Certificate of Title was issued in his name. When Duncan Mwanza passed on, his young brother, one Yobe Mwanza forced Paliyani out of the property, which was used as a shop. Yobe Mwanza began to use the property for his own benefit and he leased it to tenants. Upon his demise, his family retained possession including the 2nd defendant Malama Mwanza (the appellant in this appeal) who was his son.

2.2 The plaintiff, as administratrix of her father's estate sued the 1st defendant, James Daka who was in occupation of the property as a caretaker of the 2nd defendant, Malama Mwanza. In the writ of summons and statement of claim, she sought the following reliefs:

1. An order for vacant possession of Plot L5549/35/5;
2. An order that the caveat placed on Plot L5549/35/5 being Stand 35/4803 Matero by the 1st defendant be lifted;

3. That an account of rentals collected from the said property be rendered to the plaintiff from the time the property was put on rent;
4. Mesne profits at K5000 per month from the year 2000 to the date of vacant possession; and
5. Costs.

2.3 The 2nd defendant (Malama Mwanza) refuted the plaintiff's claims in his defence and alleged that the Certificate of Title issued to the plaintiff was fraudulently obtained. In his counterclaim he sought the following reliefs:

1. A declaration that the issuance of Certificate of Title No. L5549 to the deceased, Mapempa Stand Paliyani was fraudulent and wrongful;
2. An order that the said Certificate of Title be cancelled and that the Registrar of Lands and Deeds be rectified so that the Certificate of Title relating to the said piece of land be issued to the 2nd defendant as administrator and beneficiary of the estate;
3. Damages; and
4. Costs.

3.0 Decision of the court below

- 3.1 Bowa, J, upon analyzing the evidence, found that Duncan Mwanza, as administrator of late Manyoni Mwanza's estate sold the property to the deceased, Mapemba Stand Paliyani. He held that the sale of the property by Duncan Mwanza to Paliyani was valid as no evidence of fraud was led to the required standard.
- 3.2 On the 2nd defendant's allegations that the original owner of the disputed property was his grandfather (also named Malama Mwanza), and that upon his demise, his brother, the said Manyoni Mwanza held the property in trust for Malama Mwanza senior's children, the learned trial Judge found there was no evidence to show that Duncan Mwanza and Yobe Mwanza were direct beneficiaries of the estate of Manyoni Mwanza. The lower court found there was no evidence of fraud committed as alleged by the 2nd defendant. He dismissed the counterclaim.
- 3.3 On the plaintiff's claim for mesne profits, the learned Judge ordered that the same were payable from the year 2000 as this

was the traceable year when the property was rented out by the 2nd defendant's family.

3.4 Turning to the claim against the 1st defendant on the lifting of a caveat he placed on the property in 1997, the learned Judge found it was common cause that the 1st defendant neither entered an appearance nor filed a defence to challenge the claim. In fact, the 1st defendant did not participate in the trial of the matter. The learned Judge found that the 1st defendant had failed to show his interest in the property as required by **Section 76 of the Lands and Deeds Act**¹. Further, he had failed to show cause why the caveat should not be removed. Relying on the case of *Lenton Holdings v. Moyo*² on this point, the learned Judge found that the plaintiff had proved her case on a balance of probabilities. He entered judgment in her favour and made the following declaration and orders –

1. He declared that Stand L5549/35/5 being Stand No. 35/4803 Matero, Lusaka was duly sold to the late Mapemba Stand Paliyani and therefore forms part of his estate;

2. He granted an order for vacant possession of the said stand to the plaintiff as administrator of the concerned estate;
3. He ordered mesne profits to be assessed by the Deputy Registrar against the 2nd defendant from the year 2000 to the date of vacant possession;
4. He ordered the caveat placed on the property by the 1st defendant to be lifted forthwith;
5. He awarded costs to the plaintiff to be taxed in default of agreement.

4.0 The appeal

4.1 Dissatisfied with the lower court's judgment, the 2nd defendant appealed advancing seven grounds as follows:

1. The learned trial Judge misdirected himself by failing to find that although the Lands Register goes on to show that there was an assignment registered in favour of the plaintiff's father dated 22nd October, 1984, the said assignment for K6,000 purported to be signed by

Manyoni Mwanza was cancelled on 8th August, 1990 by the Registrar of Lands and Deeds under Section 11 (1) of the Lands and Deeds Registry Act Cap 185.

2. The learned trial Judge was wrong at law by failing to find that although subsequently Title was issued in the plaintiff's father's name on 8th October, 1996, the said Title was issued on an assignment purported to be executed by Manyoni Mwanza two years after his death and was therefore null and void.
3. The learned trial Judge misdirected himself by finding that Duncan Mwanza could not possibly sell the property in dispute as beneficial owner.
4. The learned trial Judge was wrong at law to find that there was no evidence whether the actual Assignment and Deed of Transfer was done by Duncan Mwanza in his representative capacity or by Manyoni Mwanza who was already dead.
5. The learned trial Judge was wrong at law to find that fraud was not proved to a required high stand.

6. The learned trial Judge was wrong at law by dismissing the counter-claim by the 2nd defendant Malama Mwanza.
7. The learned trial Judge was wrong at law by failing to consider Yobe Mwanza's counter-claim in cause 1998/HP/2031 and by failing to deliver Judgment on it pursuant to the Order for consolidation on the two suits made on 23rd March, 2015 by Hon. Lady Justice M.S. Mulenga.

5.0 Appellant's submissions

- 5.1 On 13th January, 2020, the appellant filed his heads of argument. In the first ground of appeal it was submitted that the assignment which purportedly transferred ownership of the property to Mapemba Stand Paliyani was challenged by Manyoni Mwanza. That it was cancelled by the Registrar of Lands for either an error or fraud. It was submitted that Manyoni Mwanza did not execute any deed of assignment on 29th December, 1995 because he died on 4th June, 1993. It was contended that the learned trial Judge misdirected

himself when he found that Manyoni Mwanza executed the deed of assignment.

5.2 On the second ground of appeal, the appellant made similar submissions as in the first ground. In addition it was submitted that the Certificate of Title issued to Mapemba Paliyani on 8th October, 1996 was issued pursuant to **Section 6 (1) of the Lands Act²** and pursuant to the purported deed of transfer by Manyoni Mwanza. It was submitted that the sub-lessee of the council was Manyoni Mwanza and not Mapemba Stand Paliyani. That the direct lease by the President should have been to Manyoni Mwanza or the administrator of his estate, Duncan Mwanza. It was submitted that the purported assignment by Manyoni Mwanza to Mapemba Stand Paliyani dated 22nd October, 1984 was in fact cancelled under **Section 11 (1) of the Lands and Deeds Registry Act**. That it was therefore a serious misdirection by the learned trial Judge to find that title which was issued to Mapemba Stand Paliyani on 8th October, 1996 was based on the assignment.

- 5.3 On the substantive arguments in the third ground of appeal, it was submitted that Duncan Mwanza did not execute the contract of sale as administrator of the estate of Manyoni Mwanza in his personal capacity but as a beneficial owner. The appellant submitted that the learned trial Judge misdirected himself when he found that Duncan Mwanza could not possibly sell as beneficial owner. That the court was not competent to amend the contract of sale but to interpret it.
- 5.4 On the fourth ground of appeal, similar arguments were presented as in the previous ground. In addition, it was submitted that it was a misdirection by the trial Judge to find that Duncan Mwanza completed the conveyance because there was no valid contract of sale between Manyoni Mwanza and Mapemba Stand Paliyani on 17th July, 1993, two years after his demise. That Duncan Mwanza did not execute any deed of transfer to Mapemba Stand Paliyani and the latter obtained Certificate of Title using the purported deed of transfer by Manyoni Mwanza by applying under **Section 6 (1) of the Lands Act** *supra* while a direct lease had already been granted

to Manyoni Mwanza. It was submitted that the learned trial Judge was therefore wrong to find that there was no evidence as to who had purported to execute the deed of transfer or that there was no evidence of fraud.

5.5 With regards to the fifth ground of appeal, it was submitted that the appellant proved fraud to the required high standard.

That he proved that –

- (i) Manyoni Mwanza died on 4th June, 1993;
- (ii) Manyoni Mwanza died before he purportedly executed the deed of transfer;
- (iii) The application for Certificate of Title to Stand Paliyani was made pursuant to Section 6 (1) of the Lands Act, and it applied to Manyoni Mwanza who was a sub-lessee to the Lusaka City Council and not to Stand Paliyani who had no sublease with the Lusaka City Council;
- (iv) The Contract of sale dated 17th July, 1993 was between Duncan Mwanza and Mapemba Paliyani. Therefore, the deed of transfer was supposed to be executed by

Duncan Mwanza as administrator and not by Manyoni Mwanza who was already dead;

(v) there was no evidence on record that Mapemba Stand Paliyani paid K11,300 (rebased) to Duncan Mwanza who did not execute any deed of transfer;

(vi) the special conditions of the contract of sale did not show how the K11,300 purchase price was to be paid;

(vii) the amended statement of claim does not show when K11,300 was paid; and

(viii) the purported deed of transfer by Manyoni Mwanza does not show any consideration paid.

5.6 On the sixth ground of appeal, the appellant relied on his arguments under ground five. He submitted that the Certificate of Title issued to Mapemba Stand Paliyani should be cancelled on the ground that it was fraudulently obtained.

5.7 The appellant introduced a new ground seven in the heads of argument in which he contended that there was no finding by the court below that Paliyani paid the purchase price of K11,300 for the disputed property. This ground of appeal as it

was not filed in compliance of **Order 10, rule 3 of the Court of Appeal Rules**³ which requires that a memorandum of appeal is filed with the Registrar within thirty days after the judgment. **Order 10, rule 9 (2) and (3) of the Court of Appeal Rules** clearly spells out the format and content of a memorandum of appeal. In any event, we have exercised our discretion to consider it.

5.8 The argument in ground 7 as contained in the memorandum of appeal is that in cause no. 1998/HP/2031 Mapemba Stand Paliyani did not bring a suit against Duncan Mwanza with whom he had signed the contract of sale on 17th July, 1993. However, he sued Yobe Mwanza as the administrator of the estate of Duncan Mwanza because by 26th October, 1998, when the writ was issued, Duncan Mwanza was already deceased. It is submitted that the learned trial Judge at the time, M.S. Mulenga, J (as she then was) ordered the consolidation of this suit under cause no. 2014/HP/900 to cause no. 1998/HP/2031. That the counterclaim by Yobe

Mwanza in the earlier cause was exactly the same as the counterclaim by the appellant in the latter cause.

6.0 Respondent's submissions

6.1 The respondent filed her heads of argument on 31st January, 2020. In her arguments all the grounds of appeal are argued together. The filed arguments begin with a preface containing the declaration and orders of the court and a summary of the facts which we have earlier highlighted in this Judgment.

6.2 Turning to the substantive arguments, our attention was drawn to the provisions of **Section 30 of the Lands and Deeds Act** which provides that a Certificate of Title shall be conclusive of ownership save where fraud is proved. To the same effect we were referred to the case of ***Anti-Corruption Commission v. Barnnet Development Corporation Limited***³ which held that:

“Under Section 33 of the Lands and Deeds Registry Act, a Certificate of Title is conclusive evidence of ownership of land by a holder of a Certificate of Title. However, under Section 34 of the same Act, a Certificate of Title can be

challenged and cancelled for fraud or reasons for impropriety in its acquisition.”

6.3 Our focus was then turned to the cases of ***Nkhata and others v. The Attorney General***⁴ on when a trial judge’s findings of fact may be reversed, and ***Sithole v. State Lotteries Board***⁵ on the standard of proof to be applied in a civil case.

6.4 It was submitted that on the facts of this case, the evidence availed to the court was that Certificate of Title No. L5549 Matero was issued to the purchaser, Mapemba Stand Paliyani on 8th October, 1996 pursuant to a contract between the said Mapemba Stand Paliyani and Duncan Malama Mwanza both of Matero. The respondent contended that these facts did not prove the presence of fraud. That as a result, the Certificate of Title could not be nullified for fraud.

6.5 It was submitted that there was evidence before the trial court showing a trail of events including execution of a contract dated 17th July 1993, issuance of Certificate of Title dated 8th October, 1996 in favour of Mapemba Stand Paliyani, and a

record in the Land Register dated 16th June, 2012 showing recordings relating to the property.

6.6 It was submitted that the trial Judge was alive to all the circumstances of the case as was required in the ***Nkhata case***. That his decision could not be faulted as on a preponderance of probabilities, the respondent had established that the Certificate of Title was not obtained fraudulently. It was submitted that the trial court did not err in assessing and evaluating the evidence by taking into account some matter which he should have ignored or failed to take into account something which he should have considered. The respondent finally contended that the decision of the trial court could not be faulted as it was on firm ground and it complied with the tenets set out in the ***Nkhata case***. Counsel urged the court to uphold the decisions of the trial court and subsequently dismiss the appeal.

7.0 The decision of the court

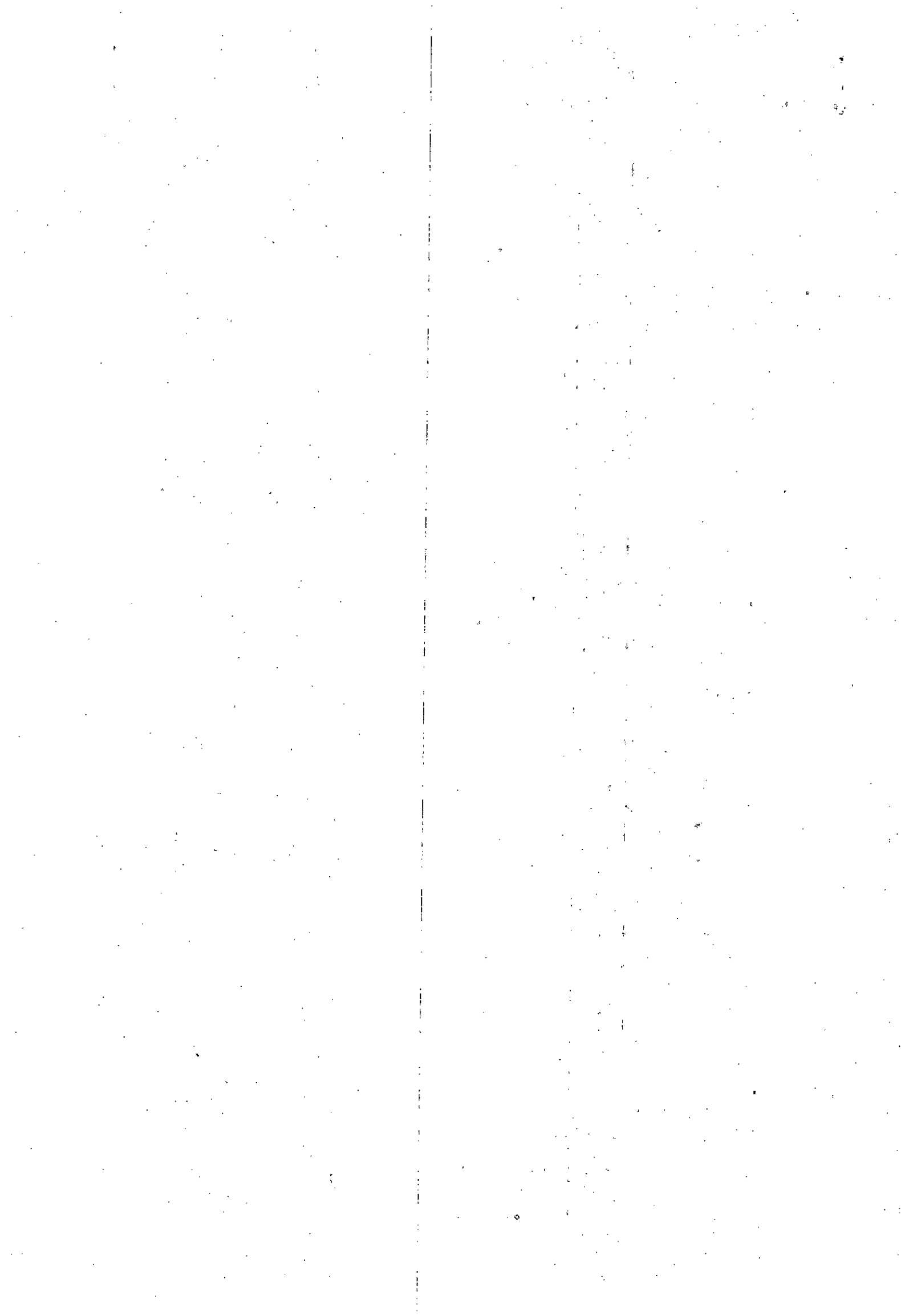
7.1 We have carefully considered the evidence on record, the judgment of the court below and the written submissions by counsel for the parties. The appellant raises 7 grounds of appeal, but they amount in reality to saying that the learned trial Judge misdirected himself in holding that there was a valid assignment between Duncan Mwanza, as vendor and Mapemba Stand Paliyani as purchaser of the disputed property because the transaction was fraught with fraud. That the said Duncan Mwanza had no capacity to assign the property to the said Paliyani.

7.2 The issues for determination as deciphered from the grounds of appeal, in our view, are the following -

- i. Whether or not there was a valid assignment between Duncan Mwanza and Mapemba Stand Paliyani;
- ii. Whether or not Duncan Mwanza had capacity to assign the property;

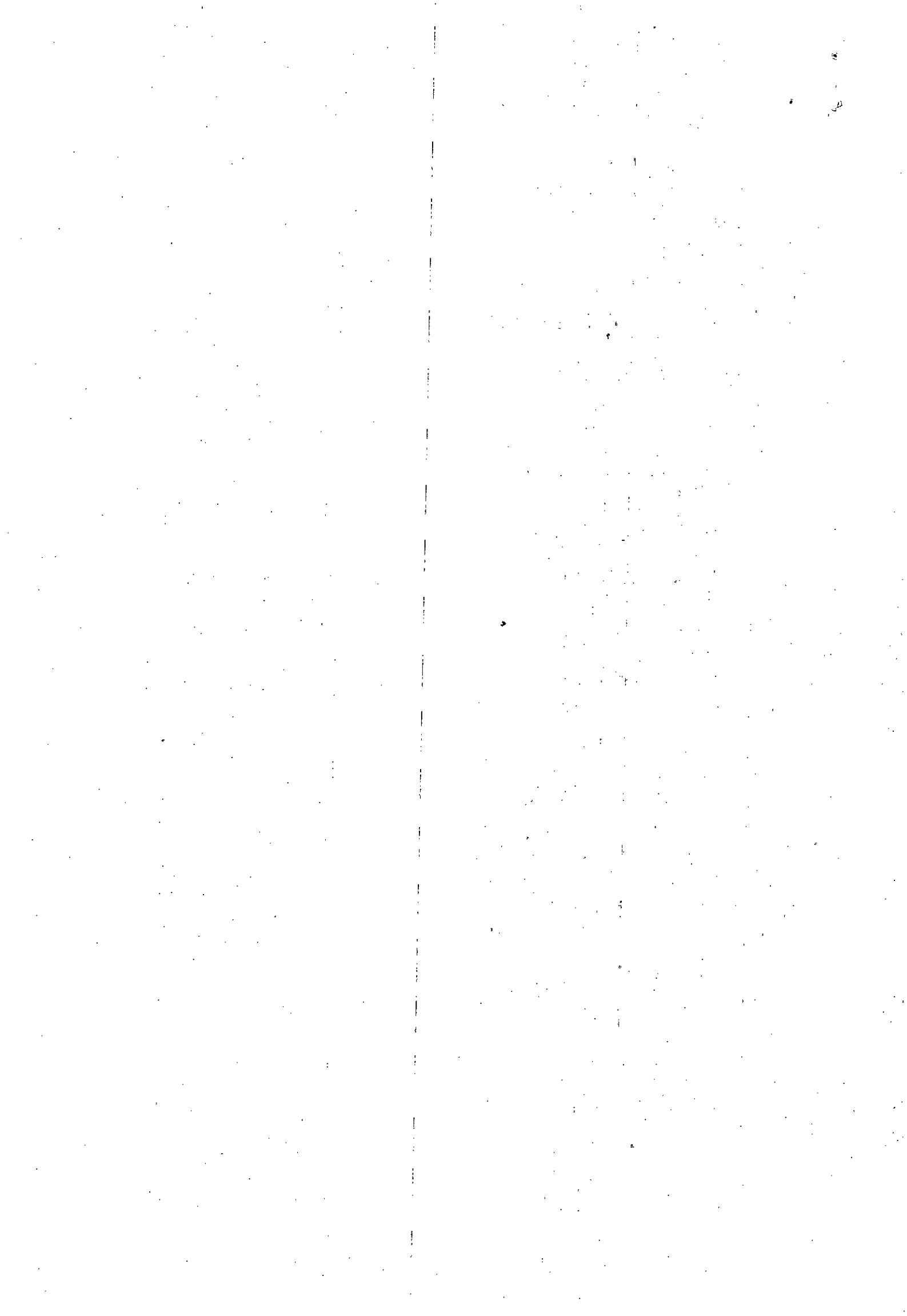
- iii. Whether or not the learned Judge erred in holding that fraud had not been proved to a higher standard; and
- iv. Whether the learned Judge ought to have considered the counter-claim of Yobe Mwanza in cause no. 1998/HP/2031.

7.3 In considering the first and second issues we have looked at the evidence presented to the trial court by both parties. PW1, Biana Stand Paliyani narrated to the trial court that her father, late Paliyani had been a tenant of Manyoni Mwanza who leased the property to him from the 1970s. She recalled that around 1993 when she was in her 30s her father expressed an interest to purchase the subject property. That he paid a sum of K6,000 in consideration of the purchase price for the subject property. She said the purchase price was revised to K11,300 and it took some time before her father raised the full purchase price. As a result, the completion of the transaction was held up. However, a contract of sale was executed in 1993. PW1 told the trial court the transaction was

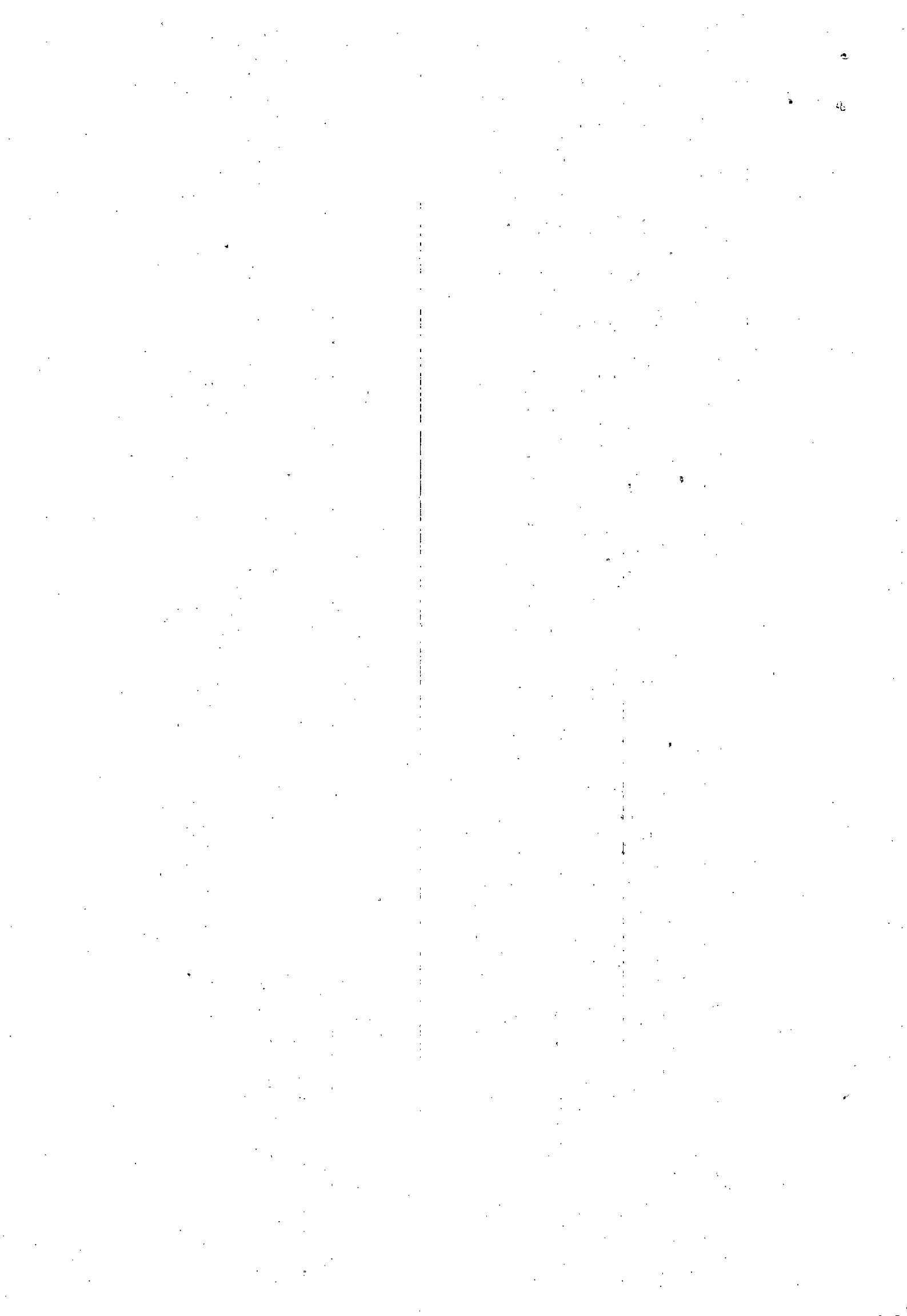


completed by Duncan Malama Mwanza after Manyoni Mwanza passed on in June, 1993. This testimony we find corroborates the contract of sale at page 118 of the record of appeal. PW1 said her father obtained title after the transaction was completed and she referred the court to a print out from the Ministry of Lands showing transactions in relation to the subject property. Page 120 of the record of appeal refers. Under cross-examination, PW1 testified that she believed Duncan Mwanza had the authority to sell the property in his capacity as administrator of Manyoni Mwanza's estate. We refer to page 117 of the record of appeal.

7.4 DW1 Malama Mwanza's testimony gave a historical account of the ownership of the subject property which he alleged was built by his grandfather, also known as Malama Mwanza. That upon the latter's demise, his grandfather's young brother, one Manyoni Mwanza held the property in trust for Malama Mwanza's children. These were Duncan Mwanza and Yobe Mwanza. DW1 said Yobe Mwanza was his father. He testified that the property was registered in Manyoni Mwanza's name



after his grandfather died in 1957. In his testimony DW1 contended that Duncan Mwanza had no right to sale the property because Yobe Mwanza was equally a beneficiary to the estate of Malama Mwanza. DW1 denied that there was a sale of the property by Duncan Mwanza to Mapemba Stand Paliyani. He told the court that he was 9 years old in 1996 when the alleged transfer took place. He alleged the Certificate of Title in Paliyani's name was obtained fraudulently because at the time of the transaction Manyoni Mwanza, who appears on the land register was already dead. It was DW1's evidence in cross-examination that he did not have any proof that the property was owned by his grandfather, Malama Mwanza. He admitted that the information he had of the subject property was told to him by his family as he was born 30 years after his grandfather, Malama Mwanza had died. He admitted that his uncle Duncan Mwanza, and his father, Yobe Mwanza were of majority age when their father passed on. DW1 said he was about 6 years old when the transaction between Manyoni Mwanza and Mapemba Paliyani took place in 1993.



7.5 From the above evidence before him, and the documentary evidence presented before him the learned trial Judge formulated two questions to determine the dispute –

1. Who was the initial owner of the property?
2. Is there proof of fraud on the facts?

7.6 The learned Judge found that the appellant only presented oral evidence of ownership. He found that the appellant admitted in cross-examination that he did not have any actual proof of the claimed ownership. He found that the appellant's claim was exclusively based on hearsay. That there was no evidence on record that went to show that the property belonged to the appellant's grandfather as he alleged. The documentary evidence as captured on the Lands Register showed that the property was assigned to Paliyani on 22nd October, 1984 who subsequently obtained title in his name on 8th October, 1996. Based on this evidence the learned trial Judge concluded that the property was initially owned by Manyoni Mwanza and later transferred to Mapempa Stand Paliyani. The learned trial Judge considered the order of

appointment of administrator for the late Malama Mwanza's estate and found that it was evidence of the appointment it purported to make.

7.7 We cannot fault the learned trial Judge in holding that Duncan Mwanza had the capacity to assign the property and that there was a valid assignment between Duncan Mwanza and Mapemba Stand Paliyani. The evidence is that the appellant had no proof that the property belonged to his grandfather. Further there is nothing on record to show that Manyoni Mwanza was the administrator of the appellant's grandfather of the same name. The entry on the Lands Register showing that a document was cancelled on 8th August, 1990 is countered by subsequent entries on the same Register. Entry No. 7 reveals that Paliyani was issued with Certificate of Title on 8th October, 1996. There is nothing on the Register revealing that the appellant or his late grandfather had any interest in the subject property. We accordingly dismiss grounds one to four of the appeal, and

effectively the new ground seven as presented by the appellant.

7.8 Turning to the issue of the standard of proof to prove fraud, we refer to the case of ***Sablehand Zambia Limited v. Zambia Revenue Authority*** *supra* where the Supreme Court held as follows:

- “1. Where fraud is an issue in the proceedings, then a party wishing to rely on it must ensure that it is clearly and distinctly alleged. Further, at the trial of the cause, the party alleging fraud must equally lead evidence, so that the allegation is clearly and distinctly proved.***
- 2. Allegations of fraud must, once pleaded, be proved on a higher standard of proof, than on a mere balance of probabilities, because they are criminal in nature.”***

7.9 *In casu*, the appellant alleged in his counter-claim that the issuance of Certificate of Title No. L5549 to the respondent's father, Mapempa Stand Paliyani, was fraudulent and wrongful. **Section 58 of the Lands and Deeds Registry Act** provides as follows:

“Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer or mortgage

from the Registered Proprietor of any estate or interest in land in respect of which a Certificate of Title has been issued shall be required or in any manner concerned to inquire into or ascertain the circumstances in or the consideration for which such Registered Proprietor or any previous Registered Proprietor of the estate or interest in question is or was registered, or to see to the application of the purchase money or any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.”

7.10 The learned Judge after considering the assignment, we have earlier in this judgment alluded to, found that the conveyance of the property was valid. He had considered the appellant's evidence that the late Duncan Mwanza had no capacity to sell as beneficial owner and the representation he made at the time of the sale suggesting that he was selling as owner when he was allegedly not the owner. The learned Judge found that the evidence presented confirmed the representation on the document that the seller was disposing of the property as the beneficial owner. We uphold the finding by the learned trial Judge because the appellant's assertion that the property

belonged to his grandfather, Malama Mwanza, from whom he traced his interest was not supported by the evidence on record.

7.11 We agree with the learned trial Judge that the appellant had not proved his allegation on a higher standard of proof. In any event the said fraud was not attributed to Paliyani, but to late Duncan Mwanza. The fifth and sixth grounds of appeal cannot succeed.

7.12 Turning to the seventh and final ground of appeal, the appellant's complaint is that the learned Judge ignored the counter-claim of Yobe Mwanza in cause 1998/HP/2031 which was consolidated to cause 2014/HP/0900 by a ruling of the lower court dated 23rd March, 2015. It was submitted that Yobe Mwanza's counterclaim in the earlier cause is exactly the same as the appellant's claim in cause 2014/HP/900 under consideration.

7.13 A thorough examination of the record of appeal at page 101 reveals an order for substitution of defendant, Yobe Mwanza, in favour of the appellant herein as the Administrator of Yobe

Mwanza. The Order made by G.S. Phiri, J (as he then was) under cause 1998/HP/2031. On 23rd March, 2015, Mulenga J (as she then was) ordered the consolidation of cause 2014/HP/900 to cause 1998/HP/2031.

7.14 Two important points emerge from these set of facts. The first is that at the time the consolidation of the matters was made, Yobe Mwanza was deceased. The second point is that the appellant assumed his interest in a representative capacity which is reflected in the parties in the court below. It is therefore inaccurate to contend on appeal that the counter-claim by Yobe Mwanza were not considered by the court below when he was infact the personal representative of the deceased Yobe Mwanza's estate. **Order 16, rule 1 of the High Court Rules**⁴ provides as follows:


"1. Where, after the institution of a suit, any change or transmission of interest or liability occurs in relation to any party to the suit, or any party to the suit dies or becomes incapable of carrying on the suit, or the suit in any other way becomes defective or incapable of being carried on, any person interested may obtain from the Court or a Judge any order requisite for curing the

defect, or enabling or compelling proper parties to carry on the proceedings.”

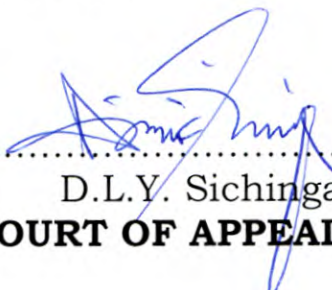
7.15 The learned trial Judge cannot be faulted as she did consider Yobe Mwanza's counter-claim in cause 1998/HP/2031 because when the two matters were consolidated they became one under cause 2014/HP/900. In any event this matter of fact that ought not to have been raised on appeal. The seventh ground of appeal is misconceived and accordingly dismissed for lack of merit.

8.0 Conclusion

8.1 We find this whole appeal lacks merit. It is therefore dismissed with costs to the respondent to be taxed in default of agreement.


.....
M.M. Kondolo, SC
COURT OF APPEAL JUDGE


.....
F.M. Chishimba
COURT OF APPEAL JUDGE


.....
D.L.Y. Sichinga, SC
COURT OF APPEAL JUDGE