

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

**CAZ Appeal No. 009/2020**

BETWEEN:

**MOSES MILAMBO**

(Administrator of the estate of Alfred Siandavu)

**1<sup>st</sup> APPELLANT**

**COL. JOSEPH KEITH KAMANGA**

**2<sup>nd</sup> APPELLANT**

AND

**FLORENCE H. MWEEMBA**

**RESPONDENT**



**CORAM : Kondolo, Chishimba and Ngulube JJAs**

**On the 16<sup>th</sup> June, 2021 and 10<sup>th</sup> December, 2021**

For the Appellant : Mr. Mutale (SC), Ms M. Mukuka and  
Mr. M. Sitali of Messrs Ellis & Co.

For the Respondent : Mr. S. Mbewe of Messrs Keith Mweemba  
Advocates

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## **J U D G M E N T**

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**Chishimba JA, delivered the Judgement of the Court.**

**CASE REFERRED TO:**

1. Mr. Mubaraz Hussain v. Ireen M. Lemba (ZR 2008) SCZ
2. Re-Sigworth (Bedford v Bedford) (1934) All ER 113
3. Beresford v Royal Insurance Company Limited (1938) 2 All ER 602
4. Phillips v Copping (1935) 1 KB 15.
5. Mirriam Mbolela v Adam Bota Selected Judgment No. 26 of 2017
6. Nkhata & Others v Attorney General (1966) ZR 124

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7. Attorney General v Marcus Achiume (1983) ZR 1
8. Mususu Kalenga Building Limited & Another v Richman Money Lenders Enterprises (1999) ZR 27
9. Barclays Bank Plc v Zambia Union of Financial Institutions and Allied Workers (2007) ZR 106
10. Attorney General v Kakoma (1975) ZR 212
11. Sonny Mulenga & Vismer Mulenga v The Valuation Surveyors' Registration Board (2009) ZR 59
12. Mundala v Mulwani & Others 1987 ZR 23
13. Mwenya and Randee v Paul Kaping'a (1998) ZR 2
14. Tito v Waddel (No. 2) (1977) Ch. D.P. 106
15. YB and F Transport Limited v Supersonic Motors Limited (2000) ZR 22
16. Shoprite Holdings & Shoprite Checkers v Mosho SCZ No. 40/2014
17. Arthur Nelson Ndlovu, DR. Jacob Mumbi Mwanza V AL Shams Building Materials Company Limited & Jayesh Shah SCZ No. 12/2002
18. Eliza Tembo, Thomas Tembo and Kabongo Mbaya v Bousso Indrisso SCZ No. 40/2000
19. Mijoni v Zambia Publishing Company Limited SCZ Appeal No. 10/1986
20. Madison v Alderson 1883 8 AP. 467
21. Delaney v TP Smith (1946) KB 393
22. Wilhelm Roman Buchman v Attorney General (1993-1994) Z.R. 131
23. Gideon Mundanda V Timothy Mulwani and Agricultural Finance Co Ltd and S.S Mwiinga (1987) ZR 29

### **LEGISLATION CITED:**

1. The Intestate Succession Act, Chapter 59 of the Laws of Zambia.
2. The Statue of Frauds, 1677

### **OTHER WORKS REFERRED**

1. Hanbury and Martin. 2005. Modern Equity. London: Sweet and Maxwell.
2. Introduction to Land (4<sup>th</sup> Edition) London Butterworths.

## **1.0 INTRODUCTION**

- 1.1 This is an appeal against the judgment of the High Court delivered by Justice Charles Zulu dated 15<sup>th</sup> November, 2019 in

which the respondent was held to be the lawful purchaser of the land in dispute. The court ordered specific performance of the oral contract of sale of land evidenced in writing between the respondent and the 1<sup>st</sup> appellant Moses Malambo, the administrator of the estate of the late Alfred Siandavu.

## 2.0 **FACTUAL BACKGROUND**

- 2.1 The facts not in dispute are that on 9<sup>th</sup> January, 2002 the respondent and the 1<sup>st</sup> appellant, Mr. Moses Malambo entered into a contract for the sale of land known as Stand No. F/459a/A/176 situated in Shimabala area of Lusaka Province at the purchase price of ZMW15,000.00. Though the contract of sale was not in writing, the payments made by the respondent in the total of K12,500.00 towards the purchase price was evidenced in writing. After an initial payment of K8,000.00, the respondent requested from the vendor, for the letter of offer and his order of appointment as administrator. None of the above documents was availed to her in spite of numerous requests.
- 2.2 The respondent was allowed to start farming activities on the land. In 2004, her lawyer advised her not to make any further payments until the 1<sup>st</sup> appellant had availed the necessary documents.



- 2.3 In 2006, the 1<sup>st</sup> appellant placed an advertisement in the Times of Zambia for the sale of the subject land, stand No. F/459a/A/176. The 2<sup>nd</sup> appellant, (Col Kamanga) responded to the advertisement and was offered for sale the piece of land. A contract of sale was subsequently executed on 21<sup>st</sup> July, 2006 between the 1<sup>st</sup> appellant and 2<sup>nd</sup> appellant for the land in dispute at the purchase price of ZMK 37, 000.00.
- 2.4 Prior to the transaction above, the 2<sup>nd</sup> appellant averred that he conducted a search at the Ministry of Lands which showed that the land was free of encumbrances. He then proceeded to pay the purchase price in full and the certificate of title was released to him. The 2<sup>nd</sup> appellant further averred in the pleadings that he immediately took possession of the land, obtained State Consent to assign and paid property transfer tax. Upon attempting to lodge the deed of assignment of transfer of property, Col. Kamanga discovered that a caveat had been placed by the respondent.
- 2.5 In the meantime, after receiving payment from the 2<sup>nd</sup> appellant, the 1<sup>st</sup> appellant attempted to refund the respondent the earlier purchase price of K12, 500.00 on the basis that she had failed to complete the sale transaction by not paying the balance sum.

He further disclosed to the respondent that he had since sold the farm to the 2<sup>nd</sup> appellant.

### 3.0 **CLAIMS IN THE COURT BELOW**

3.1 Arising from the above set of facts the 1<sup>st</sup> and 2<sup>nd</sup> appellants commenced an action by way of writ of summons seeking the following reliefs against the respondent:

- 1) A declaration that the 2<sup>nd</sup> Plaintiff (2<sup>nd</sup> appellant herein) is the lawful purchaser of F/459a/A/176;*
- 2) An order to the Chief Registrar of Lands and Deeds to issue a certificate of title to the 2<sup>nd</sup> Plaintiff (Appellant);*
- 3) Damages for the failure to obtain a certificate of title and inconvenience;*
- 4) Interest thereon pursuant to the Judgement Act, Chapter 81 of the Laws of Zambia and costs of the action.*

3.2 In her defence and counterclaim, the respondent counter claimed as follows:

- 1) That the court orders the 1<sup>st</sup> Plaintiff (1<sup>st</sup> appellant) to complete the sale of S/D A of Farm 459a Shimabala, Kafue; and*
- 2) An order for specific performance, damages and costs.*

### 4.0 **DECISION OF THE COURT BELOW**

4.1 The learned Judge in the court below considered the evidence adduced and found that the land in dispute belonged to the late



Alfred Siandavu as per certificate of title. Though the order of appointment of administrator was dated 8<sup>th</sup> October, 2002 the date of death of Alfred Siandavu was recorded as 22<sup>nd</sup> May, 2002. This implied that the property was sold to the respondent while Mr. Alfred Siandavu was still alive in January 2002.

4.2 Though there was no written contract of sale between the respondent and the 1<sup>st</sup> appellant, the court below found that the oral agreement was valid in view of section 4 of the Statute of Frauds, 1677 as there was a sufficient memorandum through the receipts of payments made. Further, that the grant of an order of appointment of administrator to the 1<sup>st</sup> appellant vindicated the sale of the land to the respondent.

4.3 The learned Judge found that the contract between the respondent and the 1<sup>st</sup> appellant was open-ended as there was no date of completion for the payment of the balance sum. This meant that time was not of the essence. The 1<sup>st</sup> appellant did not issue a notice to complete to the respondent for the balance to entitle him to treat the contract as at an end, upon default. He also failed to produce the requisite documents when called upon to do so by the respondent. Therefore, the refusal by the

respondent to accept the refund of the purchase price, meant that the contract remained valid and effective.

4.4 Further that, whilst the contract between the respondent and the 1<sup>st</sup> appellant was subsisting, no good title could pass to the 2<sup>nd</sup> appellant, unless he was a bona fide purchaser for value without notice. The court below held that the 2<sup>nd</sup> appellant was not a bona fide purchaser for value without notice because, he only had an equitable interest as opposed to a legal estate. In any event, the 2<sup>nd</sup> appellant had notice that the earlier purchaser of the land was the respondent when he was informed by the 1<sup>st</sup> appellant. Even upon conducting a search and discovering that a caveat had been placed on the property.

4.5 Having found that the 2<sup>nd</sup> appellant and the respondent both had acquired an equitable interest in the land, the court below considered which of the two competing interest should prevail, and reasoned that where equities are equal, the first in time prevails. Therefore, the first equitable interest created being that of the respondent, it followed that her equitable interest must prevail.

4.6 The court below dismissed the claims by the appellants and held that the lawful purchaser of the subject piece of land in



dispute is the respondent. The respondent's counterclaim for an order for specific performance was upheld and the 1<sup>st</sup> appellant was directed to complete the sale of Stand No. F/459a/A/176, Shimabala within 90 days of the date of judgment by making available all the relevant documentation.

- 4.7 The court below refused to grant an award for damages to the respondent on the basis that the claim lacked certainty, particularity and evidence. Costs were awarded to the respondent to be taxed in default of agreement.

#### 5.0 **GROUND OF APPEAL**

- 5.1 The 2<sup>nd</sup> appellant, being aggrieved with the decision by the lower court, appealed and advanced four amended grounds as follows that:

- 1. The court below erred both in law and in fact by upholding the sale of S/D 176 of Farm 459a from the 1<sup>st</sup> appellant to the respondent.*
- 2. The court below erred both in law and fact by holding that the appellant is not a bona fide purchaser for value without notice.*
- 3. The court below, in any event, erred both in law and fact by ordering specific performance in favour of the respondent.*
- 4. The court below erred both in law and fact by awarding costs to the respondent.*

6.0 **APPELLANT'S ARGUMENTS**

6.1 The appellants filed amended heads of arguments dated 7<sup>th</sup> June, 2021 in which grounds one and two were argued together. The gist of the grievance in ground one is that the 1<sup>st</sup> appellant had no authority to sell the subject property for the reason that at the time of the sale, the deceased was still alive; while in ground two, the issue is that the appellant is a bona fide purchaser for value without notice as the caveat placed was premised on the sale between the 1<sup>st</sup> appellant and the respondent.

6.2 The appellant submits that the 1<sup>st</sup> appellant was appointed administrator on 8<sup>th</sup> October, 2002 and that the registered proprietor/lessee of the property in issue died intestate on 22<sup>nd</sup> May, 2002 as per the Order of Appointment of Administrator. It was submitted that it was a grave misdirection, even after finding as a fact that the 1<sup>st</sup> appellant entered into the agreement to sale the land in issue while the deceased was alive, for the court below to hold that the subsequent order of appointment validated the said sale agreement. No evidence was led to show that the 1<sup>st</sup> appellant and the respondent had entered into a fresh or second agreement of sale following the



grant of the order of appointment of administrator. Consequently, there is only one agreement of January 2002 between the 1<sup>st</sup> appellant and the respondent, which is contended to be illegal, null and void ab initio for want of authority on the part of the 1<sup>st</sup> appellant who is not the registered proprietor.

- 6.3 In reference to section **24(1) of the Intestate Succession Act Chapter 59 of the Laws of Zambia**, it was submitted that the grant of an order of appointment of administrator cannot validate any acts, affecting the intestate estate of the deceased by the person who later on is appointed as administrator. Therefore, the 1<sup>st</sup> appellant, as administrator, only assumed the rights of the deceased on 8<sup>th</sup> October, 2002 and that anything done by him from 22<sup>nd</sup> May, 2002 being the date of death of the deceased, to 7<sup>th</sup> October 2002 cannot be validated. An analogy was made to the case of ***Attorney General & Mr. Mubaraz Hussain v. Ireen M. Lemba*** <sup>(1)</sup> where the deceased in that case was not entitled to acquire land for the reason that he was not a Zambian at the time the application for the land was made.
- 6.4 The fact that the 1<sup>st</sup> appellant had no authority to sell the land in dispute was said to be known to the respondent as evidenced

by her letter to the Chief Registrar of Lands and Deeds dated 8<sup>th</sup> August, 2006 at page 100 of the record of appeal. It was submitted that she willingly participated in the illegality by entering into the ill-fated agreement of sale and cannot thus benefit from the same as it is contrary to public policy. The cases of **Re-Sigsworth (Bedford v Bedford)** <sup>(2)</sup> and **Beresford v Royal Insurance Company Limited** <sup>(3)</sup> were called in aid for the principle grounded on public policy precluding a murderer from claiming a benefit conferred on him by the State in the case of his victim dying intestate.

6.5 To this end, it was contended that the respondent is as guilty as the 1<sup>st</sup> appellant and that the counterclaim for the equitable relief of specific performance, ought not to have been granted as he who comes to equity must come with clean hands. Further that the caveat ought not to have been entered by the respondent, as it was premised on an agreement which is null and *void ab initio*, and borders on illegality which overrides pleadings. For this, we were referred to the case of **Phillips v Copping** <sup>(4)</sup>.

6.6 With respect to ground three, the appellants submit that the sale of the land in dispute was illegal as it breached the terms



of **section 19(2) of the Intestate Succession Act**, which require an administrator to first obtain authority from the court before proceeding to sell the property. Therefore, the holding of the lower court that the order of appointment of administrator validated the agreement of 9<sup>th</sup> January, 2002, cannot stand as the sale was illegal.

6.7 The appellants anchored their submission on the case of **Mirriam Mbolela v Adam Bota** <sup>(5)</sup> which proscribed the sale of property, inclusive of real property, forming part of the estate of a deceased person without prior authority of the court so as to prevent administrators from abusing their fiduciary responsibilities by selling property forming part of such estates. The appellants submits that the order for specific performance in favour of the respondent should not be sustained.

6.8 In ground four, the appellants contend that in view of the foregoing arguments, it was a misdirection to award costs to the respondent. We were urged to award costs here and in the court below to the appellants.

7.0 **RESPONDENT'S ARGUMENTS**

7.1 The respondent filed amended heads of argument in response dated 9<sup>th</sup> June, 2021 in which the grounds of appeal were dealt with separately.

7.2 In ground one, the respondent submitted that the criticism directed at the court below is without any legitimate basis and ought to be dismissed as the lower court did not err in upholding the sale of the land in issue. The lower court relied on the evidence placed before it, in particular the memoranda or notes at pages 97, 98, 99, 101, 109 and 110 of the record of appeal, which it was argued, satisfied **section 4 of the Statute of Frauds, 1677**.

7.3 It was further contended that the court below correctly found as a fact that the contract of sale between the 1<sup>st</sup> appellant and the respondent was earlier in time to the one between of the 1<sup>st</sup> appellant and the 2<sup>nd</sup> appellant as per paragraph 3 of the amended statement of claim at page 67 of the record of appeal. Therefore, the court below properly concluded that on the facts before it, the 2<sup>nd</sup> appellant could not raise the defence of bona fide purchaser for value without notice because:



- (i) It is a fact that the 2<sup>nd</sup> appellant has no legal title to the disputed land; and
- (ii) The 2<sup>nd</sup> appellant had both actual and constructive notice of the respondent's earlier interest in the land in question as shown by a caveat restricting further entries on the property pending the determination of whether the 1<sup>st</sup> appellant is the administrator; and the 2<sup>nd</sup> appellant being informed by the respondent that there was an outstanding balance on the property before the transaction between herself and the 1<sup>st</sup> appellant could be completed.

7.4 It was further submitted that the 2<sup>nd</sup> appellant, notwithstanding having notice of the respondent's earlier interest in the property, took possession of the land in March 2007, seven months after becoming aware of the respondent's interest.

7.5 In the alternative, it was submitted that the appellants are merely attacking findings of fact, which can only be reversed on appeal if they are found to have been perverse or made in the absence of any relevant evidence or on a misapprehension of the facts or could not have been reasonably made by the trial court as per the cases of **Nkhata & Others v Attorney General**<sup>(6)</sup> and **Attorney General v Marcus Achiume**<sup>(7)</sup>. In this

case, it was submitted that the court below upheld the sale of the land between the 1<sup>st</sup> appellant and the respondent because it was supported by the evidence on record.

7.6 The respondent submitted that the contention by the appellants that the 1<sup>st</sup> appellant had no authority to sell the land to the respondent is not only baseless and wrong, but is a new issue that never arose in the lower court. Therefore, the argument could not be raised on appeal. The cases of **Mususu Kalenga Building Limited & Another v Richman Money Lenders Enterprises** <sup>(8)</sup> and **Barclays Bank Plc v Zambia union of Financial Institutions and Allied Workers** <sup>(9)</sup> were relied upon for the principle that it is not competent for any party to raise an issue on appeal which was not raised in the court below.

7.7 With respect to **section 19 of the Intestate Succession Act**, the respondent submits that the provision is inapplicable on the basis that Alfred Siandavu was alive on 9<sup>th</sup> January, 2002 when the contract of sale was concluded. It was further contended that there is no justification in arguing that the respondent is as guilty as the 1<sup>st</sup> appellant in the subject transaction because the 1<sup>st</sup> appellant, who also had the certificate of title for the land,



appeal and ground three in particular, does not reveal any ground or arguments relating to **section 19(2) of the Intestate Succession Act**. As this never arose in the court below, this court has no jurisdiction to entertain it. Therefore ground three must be treated as having been abandoned. For authority, we were referred to the case of **Sonny Mulenga & Vismer Mulenga v The Valuation Surveyors' Registration Board** <sup>(11)</sup> where the Supreme Court stated as follows:

*“We have considered these arguments from both sides and the record before the High Court which is now before us. It is not clear whether or not the appellants abandoned all other grounds of appeal, other than grounds four and five. Since even in the written arguments only grounds four and five have been canvassed, we will regard their conduct as amounting to abandonment of the other grounds of appeal other than grounds four and five.”*

7.13 The respondent submitted that the court below in awarding specific performance turned to the application of equity as both the 2<sup>nd</sup> appellant and respondent held equities to the property in issue. Further that the respondent had counterclaimed for an order of specific performance of the contract between herself and the 1<sup>st</sup> appellant. Therefore, the court below cannot be faulted for ordering specific performance, as in the

circumstances of the case, this was the only remedy that would do perfect and complete justice for the respondent than an award of damages.

7.14 To buttress this position, the respondent referred us to page 27 paragraph 1-025 of the learned authors of **Hanbury and Martin. 2005. Modern Equity. London: Sweet and Maxwell** where it is stated that:

*“Equity will not suffer a wrong to be without a remedy. The principle behind this maxim is that equity will intervene to protect a right which, perhaps because of some technical defect, is not enforceable at law.”*

7.15 Further the case of **Mwenya and Randee v Paul Kaping’a** <sup>(12)</sup> was cited where the Supreme Court held that:

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

In the above cited case, the apex court further referred to the case of **Tito v Waddell No. 2** <sup>(13)</sup> at p. 322 where it was stated:

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



7.16 In addition, the case of **Mundada v Mulwani & Others** <sup>(14)</sup> was drawn to our attention on the discretion of the court to make an order for specific performance of contracts where damages would not adequately compensate a party for breach of contract.

7.17 With respect to the absence of an order of court in terms of **section 19(2) of the Intestate Succession Act**, the respondent repeated its earlier contentions in ground one, that this argument is misplaced because the provision is inapplicable to the present facts, the deceased having been alive at the time the contract between the 1<sup>st</sup> appellant and the respondent was made. Consequently, the case of **Mirriam Mbolela v Adam Bota** <sup>(5)</sup> cited by the appellant, is not applicable to the facts of this case.

7.18 In any event, the respondent submitted that **section 19(2) of the Intestate Succession Act** is only applicable to the contract of sale between the 1<sup>st</sup> appellant and the 2<sup>nd</sup> appellant for the reason that as at 21<sup>st</sup> July, 2006, Alfred Siandavu had already passed away, on 22<sup>nd</sup> May, 2002. Therefore, it was the 1<sup>st</sup> appellant who needed to obtain an order of court authorizing him to sell the subject land to the 2<sup>nd</sup> appellant. Further, that

the 2<sup>nd</sup> appellant has failed to demonstrate to the court that his purchase of the land was sanctioned by the court. Therefore, it is the contract of sale between the 1<sup>st</sup> and 2<sup>nd</sup> appellants which must be found to be null and void because the 1<sup>st</sup> appellant did not comply with the provisions of section 19(2).

7.19 In response to ground four, the respondent submits that the awarding of costs is in the discretion of the court awarded to a successful litigant as held in the case of **YB and F Transport Limited v Supersonic Motors Limited** <sup>(15)</sup>. The respondent's counterclaim having succeeded, she was accordingly awarded costs. The appellants have failed to show that in awarding costs, the court below did not exercise its discretion judiciously or that the respondent was guilty of some misconduct during the action.

7.20 The respondent further argued that the conduct of the 1<sup>st</sup> appellant in failing to complete the transaction and then resorting to re-selling the same land to the 2<sup>nd</sup> appellant who proceeded with the transaction and took possession seven months after becoming aware of the earlier sale to the respondent; cannot result in the lower court being faulted for awarding costs to the respondent.



8.0 **APPELLANTS ARGUMENTS IN REPLY**

- 8.1 The appellants filed re-amended heads of argument in reply with leave of court dated 21<sup>st</sup> June 2021. In response to the contention by the respondent that new issues are being raised on appeal, it was submitted that no new issues have been raised aside from merely developing the argument on validating of the sale to the respondent raised in the pleading. The case of **Shoprite Holdings & Shoprite Checkers v Mosho** <sup>(16)</sup> was called in aid to show that an argument was being developed on the same facts and issues. Similarly, **Order 10 Rule 9 of the Court of Appeal Rules (CAR)** was also cited on what a memorandum of appeal should set out.
- 8.2 The appellants submitted that they have not raised anything new but developed the argument on the validity of the sale in view of the findings of the lower court, which findings of fact, the respondent has not appealed from.
- 8.3 What was being challenged is the finding by the court below that the subsequent grant of letters of administration validated a sale that took place before the grant was made, which is not a new issue. The case of **Arthur Nelson Ndlovu, DR. Jacob Mumbi Mwanza v AL Shams Building Materials Company &**

**Jayesh Shah** <sup>(17)</sup> was cited on the position of law that there can be no *estoppel* against a statute.

- 8.4 It was argued that the evidence on record and the findings of fact made by the learned trial judge reveal that the sale of the property to the respondent was illegal. Therefore, we must determine the question of illegality and subsequent validation.
- 8.5 The appellant contends that it is not assailing any findings of facts by the court below but the points of law made on those facts. Further that the order of administrator did not have a retrospective effects, therefore the sale to the respondent remains *void ab initio*.
- 8.6 The 1<sup>st</sup> appellant had no legal right to sell the land to the respondent because he did not have title of ownership at the time which resided with Alfred Siandavu who was alive at the time of the sale. The case of **Eliza Tembo, Thomas Tembo and Kabongo Mbaya v Bousso Indrisso** <sup>(18)</sup> was cited as authority. That one needs the express authority of the registered lessee to sell his land on his behalf and that the grant of letters of administrator does not validate transactions entered into prior to the grant. The appellants went on to refer to the cases earlier



cited by the respondent on reversal of perverse findings of fact which we shall not reiterate.

8.7 As regards the contention by the respondent that the sale of land had satisfied that statute of Frauds Act 1677, it is submitted that it did not satisfy the said requirements. The case of **Mijoni v Zambia Publishing Company Limited** <sup>(19)</sup> on the position of law that for a note or memorandum to satisfy **Section 4 of the Statute of Frauds**, the note must contain all the material terms of the contract such as names or adequate identification of the parties and description of the subject matter and consideration.

8.8 The documents relied upon by the respondent were neither signed by the 1<sup>st</sup> appellant, nor the particulars of the transaction set out to identify the property or describe it. We were referred to the documents at page 51, 97, 98 and 99 of the record. That in the absence of proof of part performance, an oral contract for the sale of land cannot be enforced. The case of **Madison v Alderson** <sup>(20)</sup>, and the learned author of **Introduction to Land (4<sup>th</sup> Edition) London Butterworths** was cited on part performance as well as the case of **Delaney v TP Smith** <sup>(21)</sup> where the mere payment of a deposit did not

constitute part performance so as to make a clear inference of an intention to be bound. In a nutshell, the 2<sup>nd</sup> appellant contends that the sale of land to the respondent is unenforceable as it had run afoul of the Statute of Frauds Act.

8.9 As regards the holding by the court that the 2<sup>nd</sup> appellant was not a bonafide purchaser for value, it was contended that the trial judge glossed over the testimony of the witnesses and documentary evidence such as the fact that he had not been told that there had been a sale to the respondent, no caveat as at July 2006 was registered against the property and was only lodged after the 2<sup>nd</sup> appellant was granted consent to assign and had paid Property Transfer Tax (PTT) and obtained the tax clearance certificate. Therefore, it cannot be argued that the 2<sup>nd</sup> appellant is not a bonafide purchaser for value.

8.10 In respect of the position of an administrator who sells any property forming part of the estate of a deceased without leave of court, the case of **Miriam Mbolela v Adam Bota** was cited.

8.11 As regards the arguments advanced by the respondent on specific performance, it was contended that the respondent has ignored the equitable maxim of '**he who comes to equity must come with clean hands**'. There is no order of court



authorising the sale of the land to the respondent and the remedy of specific performance ought not to have been granted. Therefore the appeal should be dismissed.

## 9.0 **THE DECISION OF THIS COURT**

9.1 We have considered the record of appeal, the evidence adduced in the court below, the arguments advanced by the Learned State Counsel and Advocates on record, as well as the authorities cited. The following facts are not in dispute, that Farm 459/a/176 belonged to the late Alfred Siandavu, who died on 25<sup>th</sup> of May 2002. The 2<sup>nd</sup> appellant and the respondent both claim that they purchased the land in issue.

9.2 The property was first offered to the in January 2002 at the purchase price of K15,000.00. She paid a substantial part in the sum of K12,000.00 leaving a balance of about K3, 000.00. The 1<sup>st</sup> appellant was appointed administrator of the deceased estate around October 2002. The 1<sup>st</sup> appellant proceeded to sell the same piece of land to the 2<sup>nd</sup> appellant for the sum of K37,000.00 in July 2006.

9.3 The 1<sup>st</sup> appellant does not refute the fact that the property was first sold to the respondent. He averred that upon the respondent failing to complete the transaction, he sold the

property to the 2<sup>nd</sup> appellant. It is not in dispute that the sale of property to the respondent and payments made was acknowledged in writing by virtue of the receipts issued to her.

9.4 There was evidence adduced to the effect that the 1<sup>st</sup> appellant attempted to refund the respondent the paid sum on account of alleged failure to complete the transaction. There was no Notice to complete issued by the vendor to the respondent. The respondent testified that she was advised not to pay the balance of the purchase price by her advocates until the requested documentation to complete the sale was furnished by the administrator of the estate.

9.5 In our view, the following are the issues for determination on appeal;

- (i) ***Whether the court erred in upholding the sale of Farm 459/a/176 to the respondent;***
- (ii) ***Whether the 2<sup>nd</sup> appellant can be said to be a bonafide purchaser for value without notice;***
- (iii) ***Whether the remedy of specific performance ought to have been granted to the respondent; and***
- (iv) ***Whether costs ought not to have been awarded to the respondent.***



9.6 In dealing with the appeal, we propose to address each ground on its own. In ground one, the appellants contend that the 1<sup>st</sup> appellant had no authority to sell the property to the respondent because the deceased was alive as at 9<sup>th</sup> January, 2002 being the date of the contract. This position is said to be informed by the dates appearing on the order of appointment of administrator obtained on 8<sup>th</sup> October, 2002 to the effect that Alfred Siandavu died on 25<sup>th</sup> May, 2002. In a nutshell, that the agreement between the 1<sup>st</sup> appellant and the respondent is illegal, *null and void ab initio*.

9.7 A perusal of the writ of summons, amended statement of claim and proceedings in the court below shows that the appellants never raised any issue regarding the validity of the contract of sale between the respondent and the 1<sup>st</sup> appellant. The only issue raised by the 1<sup>st</sup> appellant concerning the contract of sale between himself and the respondent was the question whether the contract had failed in view of the respondent not having paid the balance and that, it ought to be rescinded. Therefore, the question of validity and the issue that the agreement was null and void was not raised in the court below

9.8 Equally there was no question raised as to whether the 1<sup>st</sup> appellant had authority to transact as at 9<sup>th</sup> January, 2002 in view of the fact that the deceased was alive at that date. It is trite that issues not raised in the court below cannot be raised on appeal. We therefore agree with the respondent that the above issues were never raised before the court below, and as guided by the Supreme Court in **Wilhelm Roman Buchman v Attorney General** <sup>(22)</sup> and the other cases cited by the respondent, we are constrained to address the issue for the reason that a matter not raised in the court below cannot be raised before an appellate court as a ground of appeal.

9.9 We will now proceed to address the other issues raised in the arguments. We shall begin with the contention by the respondent that the sale of land agreement had not satisfied the requirements under **Statute of Frauds Act 1677** particularly section 4 of the said Act.

9.10 It is trite that for a note or memorandum to satisfy section 4 of the **Statute of Frauds 1677 Act**, the note must contain all material terms of the contract. As held in the cited case of **Wesley Mulungushi**, the material terms of contract includes names, or adequate identification of the subject matter and the



consideration. The issue is whether the note/memorandum adduced by the respondent in evidence satisfied the requirements alluded to above. We have perused the record. In our view the notes evidencing the part payment towards the purchase price of K15,000 met the requirement under section 4. It contains the material terms of the contract such as the subject matter namely sale of farm 459 Shimabala Farm, the purchase price of K15,000 and the vendor and seller.

9.11 We therefore cannot fault the lower court for holding that the sale of the land between the 1<sup>st</sup> appellant and respondent constituted a valid contract within the ambit of section 4 of the **Statute of Frauds 1677 Act.**

9.12 The only issue we see is the further statement made by the court to the effect that the ***“the subsequent grant of the order appointment validate the sale of the land to the defendant ....”*** This was a misstatement of the law.

9.13 We are of the view that the property having been sold to the respondent prior to the death of the registered lessee Alfred Siandavu, the sale remained valid. There was no basis to state that the subsequent grant of letters of administration validated the sale of land transactions entered into earlier. The earlier

sale having been validly entered into whilst the legal registered owner was alive.

9.14 The 2<sup>nd</sup> contention by the 2<sup>nd</sup> appellant being that the 1<sup>st</sup> appellant had no legal right to sell the land to the respondent because he did not have title of ownership at the time which resided with Alfred Siandavu who was alive at the time. It is interesting that the 2<sup>nd</sup> appellant is the one raising this issue which he did not raise in the court below. Neither did the 1<sup>st</sup> appellant raise this issue. In the court below the 1<sup>st</sup> appellant sought damages for the failed conveyance, inconvenience and trauma and rescission of the purported contract on the basis of failure to complete payment in due course. Contending therefore that the 1<sup>st</sup> appellant was entitled to terminate the contract which he purportedly cancelled. The 2<sup>nd</sup> appellant sought a declaration that he is the lawful purchaser of **F/459a/A/176**.

9.15 The 3<sup>rd</sup> contention by the 2<sup>nd</sup> appellant is that the sale of the land in dispute is illegal on account of breach of **Section 19 (2) of the Intestate Succession Act**, which requires authority to be obtained from the court by an administrator before selling property forming part of a deceased's estate.



9.16 We are of the view that the sale of property having been sold prior to the death of the title holder, **Section 19(2) of Intestate Succession Act** is inapplicable. No order of sale was required from the court because the registered owner was alive at the time of the sale of the farm in dispute. We reiterate that the court below erred only to the extent of stating that the order of the appointment of administrator validated the agreement of 9<sup>th</sup> January 2002. The sale having been entered into prior to the death of the title holder did not require validation by subsequent order of appointment of administrator. In fact, the property having been sold prior did not even form part of the deceased estate to require an order of sale. The 1<sup>st</sup> appellant's duty as administrator was to complete the sale transaction commenced earlier whilst the vendor was alive. In fact, evidence on record shows the 1<sup>st</sup> appellant accepting the purchase price in the instalments payments up to K12,000, leaving a balance of K3,000=00.

9.17 It is further not in dispute that time was not of the essence of contract in this transaction. No notice to complete was issued by the 1<sup>st</sup> appellant to warrant the alleged cancellation of sale agreement upon breach.

9.18 In ground two, the 2<sup>nd</sup> appellant contends that he is a bona fide purchaser for value without notice for the reason that the caveat lodged by the respondent is anchored on a contract of sale between the 1<sup>st</sup> appellant and the respondent that is null and void. Therefore, the 1<sup>st</sup> appellant contends that he is an innocent purchaser for value without notice.

9.19 We have already pronounced ourselves on the question of whether or not the contract of sale between the respondent and the 1<sup>st</sup> appellant was valid. For the avoidance of doubt, we stated in ground one that the contract of sale is valid, having been executed at the time that the registered owner Alfred Siandavu was alive and that **section 19 (2)** is inapplicable to the circumstances in casu.

9.20 As regards the question whether the 2<sup>nd</sup> appellant is a bonafide purchaser for value without notice, the evidence on record by the 2<sup>nd</sup> appellant is that the 1<sup>st</sup> appellant did not inform him at the time of the purchase of the land that he had earlier sold the land to the respondent. The 2<sup>nd</sup> appellant did conduct a search at the Lands Registry on 23<sup>rd</sup> July, 2006 and was accordingly satisfied that there were no encumbrances on the property. Further that he became aware of the caveat at the time he



attempted to lodge documents. The 2<sup>nd</sup> appellant only came to know of the respondent when his workers were confronted by the respondent after he began works on the land.

9.21 The 1<sup>st</sup> appellant on the other hand testified that initially he did not inform the 2<sup>nd</sup> appellant that the land in dispute was earlier sold. However, he did inform the 2<sup>nd</sup> appellant that the land had earlier been sold to the respondent.

9.22 Bona fide purchaser for value without notice (BFPV) means a good faith purchaser who buys for value without notice of any other party's claim or equitable interest against a property. Black's law Dictionary, 10<sup>th</sup> Edition defines bonafide purchaser for value as

***“Someone who buys something without notice of another's claim to the property and without actual or constructive notice of any defects on or infirmities, claims or equities against the seller's title, one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”***

9.23 Simply put where a buyer is or ought to have been aware of the other party's interest in the property, the person cannot be said to be a bona fide purchaser for value without notice. The defence of BFPV is against claims of any prior equitable owner. See **Snells Principles of Equity**. It is for the person raising the

defence that he is a bonafide purchaser for value, without notice to assume the burden of proving that he paid the purchase price in good faith, without notice, actual or constructive of the other party's claims.

9.24 The issue is whether the 2<sup>nd</sup> appellant as purchaser knew or must have known about the pre-existing equitable interest by the respondent before the transaction was complete.

9.25 We are of the view that the 2<sup>nd</sup> appellant had prior notice of the respondent's equitable interest. There was evidence adduced that the 1<sup>st</sup> appellant did inform the 2<sup>nd</sup> appellant that the land had earlier been sold to the respondent. Cardinal evidence of notice is the caveat placed by the respondent at Lands and Deeds Registry.

9.26 It is trite that a caveat upon lodgment serves as notice to all the world of the existence of an equitable interest warning prospective dealers/purchasers of that interest's existence.

9.27 We therefore do not find that the 2<sup>nd</sup> appellant is/was a bonafide purchaser for value without notice. The lower court was on firm ground by holding that he was not a bonafide purchaser for value without notice and that the respondent is the lawful purchaser of the subject land in dispute. In a nutshell, from



the evidence adduced on record, we are not satisfied that it supports a credible findings that the 2<sup>nd</sup> appellant is bonafide purchaser for value without notice of the farm in issue.

9.28 As regards ground three, it assails the grant of the order of specific performance of contract by the court below. That the 1<sup>st</sup> appellant completes the sale of stand number **F/459a/A/176** Shimabala by making available all the relevant documentation as required by law within 90 days from the date of judgment.

9.29 Specific performance like any other equitable remedy is discretionary and based on the existence of a valid enforceable contract and will not be ordered where there is an adequate alternative remedy, or where severe hardship will be occasioned. Specific performance is a decree by the court to compel a party to perform its contractual obligations granted, as earlier stated, at the court's discretion. In the **Gideon Mundanda V Timothy Mulwani and Agricultural Finance Co Ltd** and **S.S Mwiinga** <sup>(23)</sup> cases, the Supreme Court held that a judge's discretion in relation to specific performance of contract for sale of land is limited to where damages cannot adequately

compensate a party for the breach of a contract for the sale of land.

9.30 In casu, having earlier held that the contract of sale was still in place, as time of performance was not of the essence and no Notice to complete was issued to warrant breach by the 1<sup>st</sup> appellant, we are satisfied that the remedy of specific performance is the proper or appropriate order to be made in the circumstances of this case. Therefore the court below was on firm ground in ordering specific performance of contract of sale of Farm **F/459a/A/176** Shimbala by the 1<sup>st</sup> appellant.

9.31 The last ground assails the awarding of costs to the respondent on the basis of the argument advanced in the appeal that the sale was in breach of **section 19(2) of the Intestate Succession Act**, and that the land was sold by a person with no authority.

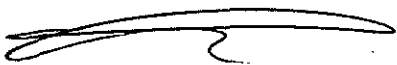
9.32 It is trite that costs of any action or matter shall ordinarily follow the event unless the court has good reasons to depart from this. The award of costs is at the discretion of the court.

9.33 Where a trial court has exercised its discretion on costs, an appellate court will only interfere where the discretion has not been exercised judicially. The court below in our view exercised




its discretion to award costs judicially by awarding costs to the respondent who succeeded in her counter claim. The appellant's claims having been dismissed. Therefore the lower court was on firm grounds by awarding costs to the respondent to be taxed in default of agreement. We see no basis to depart from the established principle that costs of any action/matter shall follow the event. There is no basis to overturn the award of costs.

9.34 For the forgoing reasons, we find no merit in the appeal. The judgment of the court below is upheld and the appeal is accordingly dismissed. Costs follow the event.

  
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M. M. Kondolo

**COURT OF APPEAL JUDGE**

  
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F. M. Chishimba

**COURT OF APPEAL JUDGE**

  
.....

P. C. M. Ngulube

**COURT OF APPEAL JUDGE**

