

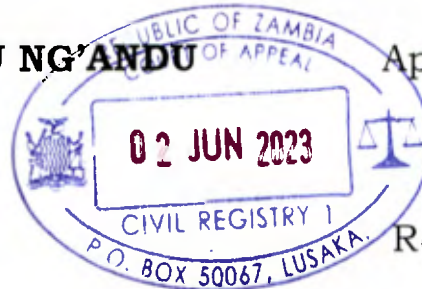
IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 91 of 2021
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

DANNY MWANACHIBENGU NG'ANDU Appellant

AND

ABRAHAM SIPAMBULEKI Respondent



**CORAM: Chishimba, Sichinga SC, and Sharpe-Phiri, JJA
on 24 March 2023 and 2 June 2023**

For the Appellant: Mrs. A. Mandandi Nyimbiri, Legal Aid Board
For the Respondent: Mr. A.C Nkausu of Messrs A. C. Nkausu and
Company

J U D G M E N T

SHARPE-PHIRI, JA, delivered the Judgment of the Court

Legislation referred to:

1. *The English Limitation Act, 1939*
2. *The Statute of Frauds, 1677.*
3. *Rules of the Supreme Court of England (White Book) 1999 Edition*

Cases referred to:

1. *Nawakwi v Lusaka City Council and another, SCZ Appeal No. 26 of 2001*
2. *Mwenya and another v Kapinga (1998) ZR 17*
3. *Match Corporation. v Choolwe and another, Appeal No. 75 of 2002*
4. *Zambia Consolidated Copper Mines v Joseph David Chileshe, SCZ Judgment No. 21 of 2002*
5. *Nkhata and others v Attorney General (1966) ZR 124*

6. *Zambia Revenue Authority v Dorothy Mwanza and others* (2010) ZR Vol. 2, 181
7. *Anti-Corruption Commission v Barnet Development Corporation Limited* (2008) Vol. 1 ZR 69
8. *Barclays Bank Plc v Zambia Union of Financial Institutions and Allied Workers* (2007) Z.R. 106
9. *William Masauso Zulu v Avondale Housing Project Limited* (1982) Z.R. 172
10. *Attorney General v Marcus Kampumba Achiume* (1983) Z.R. 1
11. *MTN Zambia Limited v Investment Bank Plc SCZ Appeal No. 155/2015*
12. *Wesley Mulungushi v Catherine Bwale Mizi Chomba* (2004) Z.R. 96
13. *Re Dellows's Will Trust* (1964) 1 W.L.R 451
14. *Clementina Banda, Emmanuel Njanje V Boniface Mudimba* (2011) Vol. 3 Z.R. 162
15. *Bryne v Kanweka* (1967) Z.R. 82
16. *Mususu Kalenga Building Limited, Winnie Kalenga v Richmans Money Lenders Enterprises* (1999) Z.R. 27
17. *Brenda Kabukabu Muntanga Sipalo and Others v Belinda Moola Muntanga-Lweendo and Another, CAZ appeal number 99 of 2019*

Other works

1. *Halsbury's Laws of England, Vol. 16, 4th Edition*
2. *Black's Law Dictionary, 8th Edition*
3. *John Mc Ghee QC, Snells Equity, (London, Thomson Reuters (Legal) Limited, 2008)*

1.0 INTRODUCTION

1.1 This case relates to real property. The appeal is against the judgment of Maka-Phiri, J of 26 February 2021 delivered in the Livingstone High Court.

1.2 By that decision, the Judge found that Danny Mwanachibengu Ng'andu (the Plaintiff) had failed to prove that his father Davison Best Ng'andu (DBN) had bought Farm no. 3162, Kalomo from John Munkombwe Chibbwalu, (the seller).

1.3 The Judge held that Abraham Sipambuleki (the Defendant) was a bonafide purchaser for value without notice of the land in issue in extent 600 hectares of Farm no. 3162, Kalomo and granted him possession of the property in issue and the costs of the action.

2.0 BACKGROUND

2.1 The Plaintiff first brought the action in the High Court on 17 March 2014 by way of Originating Summons.

2.2 By that action, the Plaintiff sought as against the Defendant the following reliefs:

- i) An order that the Applicant is the rightful owner of subdivision of Farm no. 3162 to the extent of 766 hectares.
- ii) An order for possession of the subdivision of Farm no. 3162 to the extent of 766 hectares.
- iii) An order for the sale of the piece of land to the 1st Respondent to the 2nd Respondent was invalid.
- iv) An order of injunction.

- v) Any other relief the Court will deem fit.
- vi) Costs.

2.3 By consent order entered on 25 February 2020, the parties agreed that the matter continue as though it had begun by writ of summons.

2.4 The Plaintiff's advocates filed a writ of summons and statement of claim on 10 March 2020 claiming the following:

- (i) Vacant possession of 600 hectares of the Remaining Extent of Farm no. 3162, Kalomo, in the Southern Province, which the Defendant wrongly and unlawfully occupies.
- (ii) Damages occasioned to the Plaintiff's property being Remaining Extent of Farm no. 3162, Kalomo by the Defendants cattle.
- (iii) Further or other relief.
- (iv) Costs.

2.5 The Plaintiff alleged that he is the administrator of the estate of his late father, Davison Best Ng'andu (DBN), who died on 14 February 2008. That his father had acquired the Remaining Extent of Farm no. 3162, Kalomo, from the seller and that the transaction was being processed by G.C Mubambasu of Southern Lands Bureau in Choma.

2.6 The Plaintiff stated that sometime in 2012, the Defendant had entered upon the Farm claiming to have purchased the same from an administrator of the estate of the late DBN but then changed his position when the Plaintiff informed him that he was the administrator of that estate. The Plaintiff further contended that the Defendant had refused to vacate the land despite repeated requests by the Plaintiff thus prompting the commencement of this action.

3.0 **DEFENCE**

3.1 The Defendant filed a defence on 30 March 2020 in which he contended that a contract of sale was entered into whereby the seller agreed to sell and the late Wilson Mwanamainda Ng'andu (WMN) agreed to buy 732 hectares of Farm no. 3162, Kalomo.

3.2 The Defendant further contended that subsequently, the late WMN offered a portion of the said Farm to him at a price of eight hundred thousand Kwacha [K800,000].

3.3 In pursuance of the said agreement, he paid a consideration of sixty thousand Kwacha [K60,000] to purchase the Farm and a contract of sale was executed to that effect.

3.4 The Defendant added that he had learned that the seller had given a written sale mandate to the late Lemmy Cheelo Siakayayi (LCS). By virtue of the Power of Attorney given to

the late Mr. Siakayayi, as Attorney, he could do in the name of the late WMN all acts and things, including taking possession of all properties of Farm no. 3162, Kalomo, sign all documents for the change of ownership of all property including the farm in Kalomo, bringing and defending any action or sign and execute any contracts, assignments, transfers in respect of the said Farm no. 3162, Kalomo.

- 3.5 By virtue of the aforementioned documents, he made various payments towards the purchase of the property to the said LCS acting under the said sale mandate. Various receipts of payment were issued and acknowledged by the late WMN.
- 3.6 The Defendant further alleged that he had been made aware of the Last Will and Testament of WMN and that some of the beneficiaries of the Will namely; Geoffrey Makweza and Derick Ng'andu had offered to sell their portions of the land of subdivision of Farm no. 3162, Kalomo to him.
- 3.7 The Defendant denied the Plaintiff's claims and contended that he was entitled to quiet possession and enjoyment of the subdivision of Farm no. 3162, Kalomo, as a bonafide purchaser for value. The Defendant urged the trial Court to dismiss the action with costs.

4.0 **REPLY**

- 4.1 In reply, the Plaintiff denied the Defendant's assertions and insisted that the seller had sold the Remaining Extent of Farm number 3162, Kalomo to DBN. He also challenged the contention that the seller had sold the farm to the late WMN and he questioned the authenticity of the contract which allegedly had the thumb print of the seller, even though WMN was educated and able to sign.
- 4.2 The Plaintiff further averred that the alleged agreements that the Defendant referred to in paragraph 4,5,6 and 7 of the Defence supposedly took place in 2011, at which time the said WMN was bed ridden having suffered a stroke and was not in a position to execute any document. The Plaintiff also made reference to the Power of Attorney allegedly having been made in 2012.
- 4.3 The Plaintiff further contended that the said purported Will was nullified by the Livingstone High Court on 9 April 2016 and cannot be relied upon and hence paragraph 12 and 13 of the Defence were null and void. The Plaintiff further pointed out that paragraph 15 of the Defence was contradictory as it alleged that the Respondent bought the Remaining Extent of Farm no. 3162, Kalomo from WMN, but further that the beneficiaries of the late WMN had also offered their portions of the land, which he already alleged to have bought.

5.0 **THE TRIAL BEFORE THE LOWER COURT**
THE PLAINTIFF'S CASE

- 5.1 The trial of the matter commenced before the High Court on 31 August 2020 with the Plaintiff calling 2 witnesses and the Defence having 4 witnesses.
- 5.2 The gist of the Plaintiff, PW1 *Danny Mwanachibengu Ng'andu*'s evidence was that his father DBN had bought a piece of land, Farm no. 3162, Kalomo from the seller on 30 September 1998. He referred the Court to a letter written to the Kalomo Council Secretary by the said the seller, confirming the sale to his father. He added that the seller had the title deeds for the property and the process of change of ownership of the property into the name of his father had commenced and that his father had paid land rates in 1998. However, his father died in March 2008 before title was obtained in his name. He was appointed as administrator of the estate of his late father and made efforts to pursue the issuance of the title deeds up to the year 2012.
- 5.3 Sometime thereafter, the Defendant took cattle onto the Farm claiming that he had bought the Farm from LCS. During cross-examination, PW1 confirmed that WMN was his father's brother, but he denied that his uncle had bought the Farm or that he was dealing with the issues relating to the Farm in question. Although he conceded that the documentation showed that there was a contract of sale

between the seller and his uncle. He denied all other assertions put to him.

5.4 The Plaintiff's second witness was his cousin, *Fredwell Mulunda*, PW2. He testified that his uncle DBN had in 1997 informed him that he had bought 766 hectares of Mayoba Farm from the seller at a price of K45,000. He later also told him in 1998 that the papers for the Farm were being processed after the seller had written to the Kalomo Council. Further, that his uncle moved onto the said Farm no. 3162, Kalomo, where he remained until his death in 2008. Following his death, his cousin DBN was appointed as administrator. He was granted the orders of appointment by the Choma Local Court.

5.5 In 2014, his cousin Danny had informed him that someone had brought cattle onto the Farm. He told his cousin to bring all the papers for the said Farm to him, which he did. Upon review, he had seen a letter written by the seller authorizing the Kalomo Council to process the title into the name of DBN. He had also seen an assignment and the title deed in the name of the seller, as the papers had not yet been processed in relation to the Remaining Extent of the Farm. The witness identified all the documents that he had seen earlier. Under cross-examination, PW2 stated that he did not recall seeing a contract of sale between DBN and the seller.

THE DEFENCE

- 5.6 The first witness for the defence was the Defendant himself, *Abraham Sipambuleki*, DW1. He testified that he was looking to buy a Farm and in 2011 he heard that WMN was selling land. He met with WMN who notified him that he had land for sale at Mayoba. Sam took him to see the boundaries of the Farm at Kalomo, where the land was shown to him by Geoffrey Mankweza.
- 5.7 After seeing the Farm, he had agreed with WMN to buy 600 hectares of land at a price of K800,000. The agreement was made in the presence of LCS, Sam and WMN's wife. He signed a contract of sale with WMN and paid some money through LCS. He referred the Court to the said documents and the receipts of the payment made. The payments were made through LCS, who had been given a Power of Attorney by WMN.
- 5.8 Under cross-examination, DW1 confirmed that soon after making payments for the land, he took his cattle to the farm and he began erecting a wire fence. He later learned that WMN had given some other people land and he negotiated with Geoffrey Makweza to buy 40 hectares of the land. In 2014, as he was trying to fence the farm, DBN stopped the people he had sent to do the works and later took the matter to Court. He said that the Plaintiff had seen him coming onto the farm to meet with WMN over the land and that he did not

say anything. He therefore disputed that the Plaintiff's father owned the land.

5.9 Under cross-examination, DW1 reconfirmed that there was a contract of sale between him and WMN. He also confirmed that the seller had appended his thumb print to the document although he was educated and could sign but conceded that the seller was unwell at the time of execution of the document. Upon being quizzed on whether he had made inquiries with the people in occupation of the Farm, DW1 said he had asked Geoffrey Makweza. He was a cousin to WMN and was staying at the Farm. He conceded that he did not consult DBN about why he was in occupation of the farm.

5.10 He also conceded that he did not undertake searches at the Kalomo District Council to inquire if WMN was the owner of the Farm; although he had checked the records at the Ministry of Lands where he had established that the seller was the owner. He referred to the exhibits of the searches he had conducted.

5.11 The second witness for the defence was the seller *John Munkombwe Chibbwalu*, DW2. He testified that he was the owner of the farm in question and that he had sold it to WMN in 1996. Upon being quizzed as to why DW2 had written a letter addressed to the Council Secretary indicating that he had sold the farm in question to DBN yet had told the Court

that he had in fact sold it to WMN, DW2 explained that although he had sold the farm to WMN in 1996 and WMN had paid for the farm, WMN had in 1998 requested him to write a letter to the Council to put the farm into the name of his younger brother DBN. He said WMN had told him that he had bought the farm for his brother. He also said that he had handed the farm over to WMN.

5.12 In 2009, WMN told him telephonically that they had not obtained the title deeds to the farm in DBN's name and that his brother had since died. He therefore requested that DW2 travel to Livingstone, so the title be placed into his (WMN's) name. In 2012, Mr. Siakayayi had reached out to him and taken him to see WMN who was unwell. He was presented with a document which he signed.

5.13 Under cross-examination, DW2 conceded that there were no documents before the Court which showed that he had sold the farm to WMN. He confirmed that according to the paperwork, he had sold it to DBN. However, he explained that the date on the contract of sale before the Court was incorrect as it was signed in 2012 and not 1996.

5.14 The third witness for the defence was *James Ng'andu*; DW3. His evidence was that DBN and WMN were his brothers, who were both deceased. He recalled that WMN had notified them that he had bought a farm in Mayoba area from the seller. He had gone with DBN and Amon Chipuma to see the farm

Wilson had bought. After viewing the farm, WMN had requested DBN to settle onto the farm to look after it, which he agreed to do. He was never aware that WMN indicated that he had bought the farm for DBN. He was not aware of any of the paperwork relating to the property as he was not educated.

5.15 The defence's last witness was *Nsama Oliver Mulenga*, DW4, a detective inspector with the police. His evidence was that he was a handwriting expert in the forensic department. He confirmed that Constable Mulenga had given him a document entitled 'disputed document' in which a signature on the document was disputed. The document was given to him together with sample signatures of the Plaintiff and the Defendant. He had examined the document to ascertain the owner of the signature and had presented a report indicating his findings. According to DW4, the Plaintiff was alleged to have signed the said disputed document.

6.0 **THE DECISION OF THE LOWER COURT**

6.1 After considering the evidence of the witnesses at the trial, the learned trial Judge found that John Munkombwe Chibbwalu was the registered owner of Farm no. 3162, Kalomo, as evidenced by the Certificate of title dated 16 January 2009 exhibited in the Plaintiff's bundle of documents. The Judge also noted that it was not in dispute that the said Mr Chibbwalu had sold the farm in 1996 and

therefore had no claim to the said farm; and that the real issue in controversy was in relation to the purchase of the farm from DW2 in 1996. According to the trial Judge, the issue for determination was whether DW2 had sold the Farm to DBN or WMN.

6.2 The Judge found as a fact that John Chibbwalu had sold his farm no. 3162, Kalomo to WMN in 1996, but that no contract of sale was executed between the parties at the time of the sale. Her finding was based on the evidence of DW2, the owner and seller of the farm who she believed. The Judge attached more weight to his evidence since he was the seller of the farm in question and the author of the letter to the Council Secretary. The Judge noted that the Plaintiff was not present at the time of sale of the farm.

6.3 She also found that the Kalomo District Council had acted on the letter from DW2 and made a recommendation to the Commissioner of Lands for a subdivision of Farm number 3162, Kalomo to be issued in favour of DBN. She also found that the process of change of ownership of the Farm to DBN had not completed and the registered title holder was still DW2. The Judge found that despite State's Consent to Assign and various receipts having been issued, these were not proof of DBN's ownership of the land in question.

6.4 In relation to the 'disputed document' of 7 November 2011, in which there was a purported acknowledgment by the

Plaintiff in the said letter that the late DBN was a caretaker of the farm in issue while the purchaser was WMN, the Judge accepted the expert evidence of DW4 that the signature on the disputed document was that of the Plaintiff. The Judge accordingly found that the estate of the late DBN did not accrue any proprietary rights in the farm.

6.5 The trial Judge further held as follows:

“It is undeniable that the late Wilson Mwanamainda Ng’andu sold 600 hectares of Farm number 3162 to the Defendant at the purchase price of K800,000,000 (unrebased) in 2011. The Defendant paid the purchase price as evidenced by receipts shown in the Defendant’s bundle of documents. The contract of sale executed between Wilson Mwanamainda Ng’andu and the Defendant is dated 25 October 2011. The late Wilson Mwanamainda Ng’andu thumb printed on the said document and as such he did not sale [sell] through the Power of Attorney. The Plaintiff’s questioning of the thumb print cannot be sustained in the absence of evidence that it was not authentic. The Plaintiff’s own averment was that Wilson Mwanamainda Ng’andu was incapacitated at the time due to illness and as such it was not unusual that he pressed his thumb print on the sale contract instead of indorsing [endorsing] his signature on it. The Defendant’s undisputed evidence was that prior to the execution of the contract of sale,

he had verbal discussions with the late Wilson Mwanamainda Ng'andu and what was agreed verbally was subsequently reduced in writing. I therefore find nothing unauthentic with the contract of sale signed between the late Wilson Mwanamainda Ng'andu and the Defendant.”

6.6 Further, the learned Judge addressed the issue of whether it was illegal for the late WMN to have taken back the farm following the demise of DBN. The Judge found that this was a gratuitous gift which he could retrieve as the late DBN had not paid for it. The Judge therefore concluded that the Plaintiff had failed to prove his case on a balance of probabilities and the Plaintiff had failed to show that his father DBN had bought the farm from DW2.

6.7 The Judge held that the Defendant was a bona fide purchaser for value without notice and that he was entitled to possession thereof. She also awarded costs to the Defendant.

7.0 **THE APPEAL**

7.1 Being dissatisfied with the judgment of Maka-Phiri, J of 26 February 2021, the Plaintiff (hereinafter Appellant) filed a notice and memorandum of appeal on 15 March 2021 respectively advancing 3 grounds of appeal as follows:

- (1) The learned trial Judge erred both in law and facts when she held that the Defendant is a bonafide purchaser for value without notice of the land in extent of 600 hectares of Farm number 3162 and as such he is entitled to possession without due regard to the interest of the Plaintiff.**

- (2) The learned trial Judge erred both in law and fact when she held that the Defendant prior to execution of the contract of sale had verbal discussions with the late Wilson Mwanamainda Ng'andu and what was agreed verbally was reduced in writing after 16 years.**

- (3) The learned Judge erred both in law and facts when she disregarded in totality the evidence on record.**

8.0 THE APPELLANT'S ARGUMENTS IN SUPPORT

8.1 The Appellant filed his Heads of Argument on 4 May 2021. The first ground of appeal contends that the Court erred when finding the Defendant, a bona fide purchaser for value without notice of the land. Counsel submitted that it is well entrenched law that a purchaser must undertake land searches or due diligence to ascertain the status in terms of legal ownership and rights of any person in possession or occupation of the said land and failure to do so is fatal.

8.2 Counsel argued that the Respondent did not at the time he was buying land at Mayoba inquire from the Appellant as to his interests in the Farm. This is evidenced at pages 213 and 221 of the record of appeal.

8.3 The Court's attention was drawn to several cases, namely; **Nawakwi v Lusaka City Council and another¹, Mwenya and another v Kapinga², Match Corporation v Choolwe and another³.**

8.4 The Appellant argued that the Respondent was not a purchaser for value without notice as he was aware of the presence of the Appellant being in occupation and possession of the Remaining Extent of Farm.

8.5 The second ground is that the Judge in the Court below erred by holding that the Respondent had had verbal discussions with the seller prior to reducing the agreement to writing after 16 years. On this issue, the Appellant submitted that the sale of the land to the Respondent by Wilson Ng'andu after 12 years is statute barred. Counsel referred to **Section 4(3) of the English Limitation Act¹** which states that:

“No action shall be brought by any other person to recover any land after expiration of 12 years from the date on which the right of action accrued to him, or if it first accrued to same person thought whom he claims to that person.”

- 8.6 Counsel referred to the letters shown at pages 112 and 113 of the record of appeal and cited the case of **Zambia Consolidated Copper Mines Limited v Joseph David Chileshe**⁴ in support of *“the general principle that once time has started to run, it continues to do so until proceedings are commenced or the claim is barred.”*
- 8.7 Counsel for the Appellant argued in the alternative that the documents at pages 223 and 224 of the record of appeal reveal that the late WMN bought a piece of land for his brother in 1996 and the letter of sale is in the form of a recommendation letter to the Kalomo District Council by the seller. According to counsel, this was an irrevocable gift. Once a gift is granted, it is a contract wherein there is a declaration by the donor WMN to transfer the said Farm number 3162 to DBN who accepted it and took possession of the farm from 1998 to 2008 when he died. Counsel argued further that no claim was made by WMN until 2012, 16 years after, as evidenced by pages 227 and 233 of the record of appeal where he purported to sign a contract between the seller and himself.
- 8.8 The further argument is that the Appellant’s father paid ground rates and other fees for issuance of the title deed of the property into his name as shown at pages 120 to 123 of the record of appeal.

8.9 In the third ground of appeal, the Appellant argued that the trial Judge erred when she disregarded the evidence on record in totality. Counsel argued that there was sufficient evidence on record to ascertain that the Appellant's father had bought the land in question, which was totally disregarded as not being proof of ownership. These include:

- (i) The ground rents payments in the Appellant's name (at pages 117,120 to 123 of the record of appeal);
- (ii) The letter of recommendation to Kalomo Council (page 112 of the record of appeal) by the seller having sold the land to the Appellant and that he would not have any further claim over the land;
- (iii) Letter of recommendation by Kalomo District Council to the Commissioner of land in favour of the Appellant's father (page 113 of the record of appeal); and
- (iv) Approval of Planning Authority to survey the said land for subdivision in favour of the Appellant's father (page 127 of the record of appeal).

8.10 Counsel argued further that by disregarding all the evidence above, the trial Judge's decision was perverse, misapprehended the facts and misinterpreted the evidence.

8.11 The Appellant's counsel referred the Court to the cases of **Nkhata and others v Attorney General**⁵ and **Zambia Revenue Authority v Dorothy Mwanza and others**⁶ and urged this Court to set aside the judgment of the lower Court.

8.12 Counsel argued that the letters at page 112 of the record of appeal is a memorandum or note of the sale of land in issue, contrary to the position of the lower Court who stated that it is not a note or memorandum to qualify it as a contract of sale of land because it lacked consideration.

8.13 The Court's further attention was drawn to pages 224 to 231 of the record of appeal wherein the original owner had confirmed that he had signed paper work for the sale of the land to DBN and nothing to WMN until 2012 when a contract of sale was executed (shown at pages 144, 224, 230 and 233 of the record of appeal).

8.14 Counsel argued that WMN's thumb print on the said contract (see pages 210 and 234 of the record of appeal) was challenged by the Plaintiff as the said WMN was said to be unwell and no witness called to confirm his execution of the contract.

9.0 **RESPONDENT'S OPPOSING ARGUMENTS**

9.1 The Respondent filed his Heads of Argument on 24 September 2021.

- 9.2 The gist of his arguments in ground one is that it is undisputed that DW2 was the registered owner of the land. This is evidenced by the Certificate of Title to the land (shown at pages 104 to 115 of the record of appeal) and in line with the **Anti-Corruption Commission v Barnet Development Corporation Limited**⁷ case in which it was held that a Certificate of Title is conclusive evidence of ownership. Counsel submitted that the argument that the Respondent may not have conducted due diligences or searches to ascertain who the owner was, does not change the registered ownership of the land in question.
- 9.3 Counsel argued that the trial Judge properly identified the base as to who was entitled to possession of land when she made her findings at page 23, line 9 to 17 of the record of appeal. Counsel submitted that the Court had found no evidence of a sale of land between the seller and the late DBN from which the Appellant could have derived an interest. The Court was referred to pages 23 lines 17 to 22 and page 24 lines 1 to 6 of the record of appeal.
- 9.4 Counsel also argued that the Court had found that the late DBN had no express interest in the land and no recognized interest in the land to be passed onto the Appellant. Counsel argued therefore that the Judge was on firm ground when she found that the Appellant had failed to prove his case that his father was a purchaser of the farm.

- 9.5 In ground two, the Appellant laments that the trial Judge erred by holding that the Respondent had had verbal discussions with the late WMN prior to execution of the contract of sale and that the verbal agreement was only reduced to writing after 16 years and consequently it was statute barred. Counsel argued that the Appellant did not address the first part of this ground in its arguments and the Court should consider it as abandoned.
- 9.6 On the second part of the Appellant's argument that the action is statute barred is contradictory as the Appellant brought the action to Court. Counsel for the Respondent argued that the Appellant had not raised the issue of the matter being statute barred in the Court below and cannot therefore raise the issue in the Appeal Court. This is in line with the holding of the Supreme Court in the case of **Barclays Bank Plc v Zambia Union of Financial Institutions and Allied Workers**⁸ where the Court held that an issue of the applicability of a statute not being canvassed in the Court below could not be raised in the Supreme Court.
- 9.7 On the issue of reversing of findings of fact made by a trial Judge, counsel for the Respondent argued that in line with the many decisions of the Court, namely the cases of **William Masauso Zulu v Avondale Housing Project Limited**⁹, **Attorney General v Marcus Kampumba Achiume**¹⁰ and **MTN Zambia Limited v Investment Bank Plc**¹¹, an appeal Court would need to be satisfied in line with the Supreme

Court for Zambia decision that “*the findings of fact in question are perverse or made in the absence of any relevant evidence or upon a misapprehension of facts or that they were on a proper view of the evidence, no trial Court acting correctly could reasonably make*”. Counsel submitted that in the present case, there is no basis whatsoever to find that DW2 sold the land in issue to the late DBN, upon which the Appellant would lawfully be entitled.

9.8 On the Appellant’s alternative argument at pages 223 and 224 of the record of appeal that the late WMN bought the land for his young brother, DBN as an irrevocable gift. Counsel for the Respondent argued that there was no law cited for the proposition made that once a gift is granted, a contract exists and the property transfer. Counsel argued that if there was indeed a gift between the brothers, WMN and DBN, it ought to have been properly made as a deed of gift and would need to have been evidenced in writing. Counsel referred to pages 24, line 14 to 20 where the Court relied on the authority of **Mulungushi v Chomba**¹².

9.9 On the third ground of appeal, in which the Appellant argues that the trial Judge disregarded the evidence on record in totality, counsel for the Respondent argued that the evidence relied on by the Appellant is insufficient to prove that his late father DBN either paid consideration for the purchase of the land or that he acquired it by deed of gift. Counsel submitted that the trial Judge was on firm ground when after evaluating

all the evidence, found that the Appellant had failed to prove that his father DBN had bought Farm no. 3162 from DW2. This was firmly in line with the evidence of DW2, at pages 223, line 23, where DW2 states that “*that was my farm and I sold it to Wilson Ng’andu*”.

9.10 Counsel for the Respondent concluded by submitting that the law was clear – he who asserts must prove that which he asserts. He argued that in this case, the Appellant had asserted that his late father DBN bought Farm no. 3162 from DW2. DW2 disputed this fact and the Appellant did not provide a contract of sale to prove this assertion. Counsel further argued that although the Appellant also attempted to argue that his father acquired the property as a gift from his brother Wilson Ng’andu, he did not produce a deed of gift to prove this assertion.

9.11 Relying on the authority of **Re Dellovs’s Will Trust**¹³ where it was held that “*The more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it*”. Counsel urged this Court to dismiss the appeal with costs for lack of merit.

10.0 **THE HEARING OF THE APPEAL**

10.1 The appeal was heard on 24 March 2023. The Appellant and the Respondent were represented by Counsel as indicated earlier.

10.2 Counsel for the Appellant and the Respondent relied on their Heads of Argument of 4 May 2021 and 24 September 2021 respectively.

10.3 On ground 3, counsel for the Appellant referred to page 147 of the record of appeal which is the offer letter for Farm number 3162, Kalomo. She stated that the Court below did not establish the fact that the letter of offer shows that it was not signed by WMN as there is the use of the word “for”.

10.4 Counsel also conceded that this issue had not been raised in the Court below. She referred the Court to the document at page 112 of the record of appeal that the Appellant relied on and urged the Court to consider this document with the initial contract at page 144 of the record of appeal.

11.0 **ANALYSIS AND DECISION OF THIS COURT**

11.1 We have carefully reviewed the evidence on record and the arguments of the respective counsel. The grounds of appeal herein have been set out in paragraph 7.1 of this judgment.

11.2 We now turn to address the first ground of appeal in which the Appellant contends that the Judge erred by finding that the Respondent was a bona fide purchaser for value and entitled to possession of the property in question without considering the interest of the Appellant.

11.3 The Appellant argued that the Respondent was not a bona fide purchaser for value without notice as he was aware that the Appellant was in possession of the Remaining Extent of Farm no. 3162, Kalomo but he did not undertake a due diligence to ascertain the status of the occupiers of the Farm in line with precedent. The Respondent contended that the seller was the registered owner of the property, and the Appellant had no express interest in the land.

11.4 Before addressing the first ground of appeal, it is necessary to give a brief background of the matter relating to Farm no. 3162, Kalomo, in the Southern Province of Zambia (the property). The undisputed evidence on record shows that John Munkombwe Chibbwalu (the seller) was the registered title holder of the property in extent of 3283 acres. A search printout from the Lands Register (pages 114-115 of ROA) reveals a Certificate of Title was issued to him on 20 September 1989.

11.5 The evidence of the seller shown at pages 223 to 227 of the ROA, reveals that he sold a portion of his property to the late WMN in 1996 who paid him in full for the land. No contract of sale was executed between the seller and WMN at that time. Later in 1998, WMN notified the seller that he had bought the farm for his brother, DBN, and introduced his brother to the seller. WMN then requested the seller to write to the Kalomo District Council to register ownership of the Farm in the name of his brother DBN.

11.6 The seller complied and his correspondence to the Council, exhibited at page 112 of ROA, reads as follows:

**“ John Chibwalu
Box 60647
Livingstone**

30th September 1998

**The Council Secretary
Box 620061
Kalomo**

Dear Sir,

Re: Subdivision of Farm No. 3162

I wish to inform you that I have today the 30 September 1998 sold the remaining part of my Farm number 3162 to Mr. Davison Best Ng'andu of box 630160, Choma.

I will have no further claim on this piece of land. I have got title deeds for this Farm number L1467. You go ahead to processing the papers for subdivision in his favour. The farm is 766 hectares.

Yours faithfully

John Munkombwe Chibwalu”

11.7 The seller's letter to the Kalomo Council Secretary was copied to the Commissioner of Lands and DBN. The Kalomo District Council acted on the letter of the seller and made a recommendation to the Commissioner of Lands on 16 October 1998 for the Remaining Extent of Farm no. 3162, Kalomo to be subdivided in favour of DBN.

11.8 DBN moved onto the farm in question in 1998 where he and his family remained in possession of the Remaining extent of the property and pursued the subdivision of the property.

11.9 The evidence, at pages 120 to 123 of ROA, reveals various receipts for payments made by DBN towards the subdivision of the property to be registered in his name.

- Receipt issued to DBN in 2002 for payment of K200,000 (unrebased) for diagram fees for F/3162/RE, Kalomo (page 117 of ROA).
- Receipt issued to DBN on 2 June 2003 for payment of K731,000 for costs for application for duplicate title for F/3162 lost title (page 120 of ROA).
- Receipt issued to DBN on 5 June 2003 for payment of K3,011,00 (unrebased) for costs towards issuance of title deed F/3162/RE (page 121 of ROA).
- Receipt issued to DBN on 8 July 2003 for payment of K3,000,000 (unrebased) towards part payment of outstanding ground rent bill on F/3162 (page 122 of ROA).
- Receipt issued to DBN on 10 August 2003 for part payment of K1,300,000 (unrebased) towards outstanding ground rentals on F/3162 (page 123 of ROA).

11.10 Following the payments made and relevant processes undertaken, notification of planning approval of the subdivision in favour of DBN was issued on 12 December 2008. The seller's property was eventually subdivided, and a separate certificate of title No. 83249 (shown at pages 104-111 of ROA) was issued to the seller on 16 January 2009 for the Remaining Extent of Farm no. 3162, Southern Province (F/3162/RE, Kalomo) being 736.0340 hectares. By this

date, DBN had passed on. He died on 14 March 2008 (as shown at page 128 ROA). His family remained on the remaining portion of the property. The Respondent entered onto the same property sometime in 2012 following alleged sale agreement purportedly entered in 2011 with the seller, WMN and himself, and a dispute arose between the parties.

11.11 The Appellant brought a claim seeking possession of the Remaining Extent of Farm no. 3162, Kalomo. The learned Judge in the Court below declined to grant the relief sought contending that the Respondent was a bona fide purchaser for value without notice.

11.12 The question of whether the Respondent is a bona fide purchaser of F/3162/RE, Kalomo for value without notice, is the first issue for consideration under this appeal. *Bona fide Purchaser* is defined by **Black's Law Dictionary**² as,

'One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in 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.'

11.13 The history of the doctrine of bonafide purchaser for value without notice was considered by Dr Matibini SC J, as he then was, in his judgment in the case of **Clementina Banda, Emmanuel Njanje V Boniface Mudimba**¹⁴. He quoted the learned author of **Snells Equity**³ and summarized his conclusion of the elements to be satisfied in considering the doctrine in the manner reproduced below:

“The learned author of Snells Equity, states in paragraph 4-21, at page 65, that an important qualification to the basic rule of first in time priority of interests is the doctrine of bona fide purchaser for value without notice, which demonstrates a fundamental distinction between legal and equitable interests in some kinds of property. (See Macmillan v Bishopsgate Trust (No. 3) (12) at 1001). The learned author of Snells Equity, (supra) goes on to state in paragraph 4-22 at page 65-66 that:

“The doctrine is most easily understood by an example taken from a disposition of unregistered land. A legal estate, or interest was generally enforceable against any person who took the property, whether, or not he had notice of it. This followed from the basic rule of priority that interests in property rank in the order in which they were created. If V sold to P land over which W

had a legal right of way, P took the land subject to W's right even if he was ignorant of it. But historically, it was different for equitable rights: a bona fide purchaser for valuable consideration who obtained a legal estate at the time of his purchase without notice of a prior equitable right was entitled to priority in equity as well as at law. He took free of the equitable interest. In such a case equity followed the law. The purchaser's conscience was in no way affected by the equitable right. So there was no justification for invoking the jurisdiction of equity against him where there was equal equity the law prevailed. The onus lay on the purchaser to prove that he was a bona fide purchaser for value, and also that he took without notice of the equitable interest.”

11.14 Dr Matibini SC J, went on to conclude as follows;

“In sum, the following requirements need to be fulfilled when relying on the doctrine:

a) a purchaser must act in good faith;

b) a purchaser is a person who acquires an interest in property by grant rather than operation of law. The purchaser must also have given value for the property;

c) the purchaser must generally have obtained the legal interest in the property; and

d) the purchaser must have had no notice of the equitable interest at the time he gave his consideration for the conveyance. A purchaser is affected by notice of an equity in three cases:

(i) actual notice; where the equity is within his own knowledge;

(ii) constructive notice; where the equity would have come to his own knowledge if proper inquiries had been made; and

(iii) imputed notice; where his agent as such in the course of the transaction has actual, or constructive notice of the equity.”

11.15 We are alive to the fact that the doctrine of bona fide purchase for value without notice is founded on well entrenched legal principals, however, its sustenance is anchored on actual evidential facts presented before Court from case to case. In the present case before us, the learned Judge in the lower Court has found that the Respondent was a bona fide purchaser for value without notice of any adverse claims.

11.16 We remain cognizant of the guidance of the Supreme Court in numerous authorities including the case of **William Masauso Zulu**, that for an Appellate Court to reverse any findings of fact, it must be satisfied that such findings in question are either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts.

11.17 According to the Respondent's version on record, the seller agreed to sell 732 hectares of the property known as Farm 3162, Kalomo to WMN in 1996 and contracts were executed between these parties. WMN subsequently offered a portion of the land to him which he contracted to buy in 2011. WMN gave a sale mandate and power of attorney to LCS to deal with a portion of the property being Farm 3162, Kalomo and by virtue of these mandates, he paid the purchase monies to LCS, which were acknowledged by WMN.

11.18 A close review of the evidence on record reveals some inconsistencies. Contrary to the contention of the Respondent above, there was no contract of sale executed between the seller and WMN in 1996 in relation to a portion of Farm 3162, Kalomo. This was confirmed by the seller, who clearly stated that no such contract existed between the parties in 1996 and that the document exhibited at page 144 of ROA was not the document he had signed. The learned Judge in the lower Court clearly stated that she believed the testimony of the seller as owner of the land and established that a contract of sale of land was not signed in 1996.

- 11.19 Therefore, from all the evidence on record, we accept that a contract of sale for the property was not executed between the seller and WMN in 1996. Hence the contract of sale, (shown on page 144 of the ROA) purportedly signed in Kalomo on 10 October 1996 is not authentic.
- 11.20 The seller testified further that he had been requested to meet with WMN in 2012, which he had done and that WMN had directed LCS to draw up a document for him to sign. The seller stated that he had gone with LCS into Livingstone town where a document was prepared, which he signed and left it with LCS, but was not the document produced at page 144 of the ROA. The seller confirmed that he did not see WMN sign that document in 2012. The purported document referred to by the seller was not produced before the Court.
- 11.21 That notwithstanding, the Respondent contends that WMN agreed to sell him a portion of this property on 25 October 2011 and a contract of sale was executed between them (see pages 148-151 of the ROA). The property is described therein as 600 hectares of Farm no. 3162, Kalomo and not the Remaining Extent of Farm no. 3162, Kalomo in extent 732 hectares.
- 11.22 Further, there is no valid evidence on record relating to a sale of the property in question from the seller to WMN, therefore any subsequent onward sale of the property from WMN to the Respondent would be irregular given that WMN

would not have been the proprietor of the property at the time.

11.23 There are also inconsistencies in relation to the purported sale of the property from WMN to the seller. For instance, the letter of offer from WMN to the Respondent is dated 15 November 2011, but the contract of sale was purportedly executed prior to that on 25 October 2011. A letter of offer typically comes before the contract. Further, the Respondent contends that he dealt with LCS by virtue of a sale mandate and power of attorney. However, the power of attorney was issued on 8 November 2012, evidently a year after the contract of sale was apparently executed.

11.24 As at that date, the certificate of title for the Remaining Extent of Farm no, 316, Kalomo had already been issued in 2009. If WMN had intended to sell the particular property to the Respondent, a proper description would have been made based on the separate certificate of title issued for the property in question. Also notably, the correspondence from WMN dated 25 October 2011 (shown at page 49 of the ROA) refers to him advising the Respondent that the subdivision and placement of permanent beacons would be undertaken after payment of the balance of purchase monies. This clearly shows that, the parties could not have been referring to the same property.

11.25 Further, it is not in dispute that the Respondent did not make any inquiries with the Appellant about his status on the land. This was confirmed by the Respondent and his counsel in the heads of argument. This was contrary to the principles established by the Supreme Court in the case of **Mwenya and Randee v Kapinga** regarding constructive notice of an intending purchaser of land, which principle was also re-echoed in the **Clementina Banda case** cited above. The Respondent conceded at the trial, as shown at pages 213 and 221 of the ROA, that he did not make inquiries into the Appellant's occupation of the land. Therefore, the Respondent cannot be said to be a purchaser for value without notice as propounded by the Supreme Court in the **Mwenya v Kapinga case**.

11.26 We are also of the view that had the Respondent conducted due diligence when commencing the purported purchase of the disputed land, he would have known that Kalomo District Council was in the process of subdividing and titling the subject land in favour of DBN. Based on the foregoing reasons, we are of the view that the Respondent cannot be considered to have been a bona fide purchaser for value without notice of prior adverse claims over the Remaining Extent of Farm no. 3162, Kalomo.

11.27 Further, before concluding on this ground, we wish to comment on the fact that there was no counterclaim by the Respondent in the Court below. Therefore, the issue of the

Defendant's status in relation to the land or its entitlement to possession was not an issue that was placed before the lower Court for the Court's determination.

11.28 We are of the view that the learned trial Judge erred by making a determination that the Defendant was a purchaser for value without notice when this relief was not before the Court. It was held in the case of **Bryne v Kanweka**¹⁵ that parties are bound by their pleadings and evidence outside pleadings is ordinarily excluded as inadmissible. In the same vein, the Courts are precluded from making determinations on issues not pleaded before it. Based on the foregoing, the findings of the learned Judge in the lower Court were wrong and ought not to have been made on matters not pleaded. The first ground of appeal therefore succeeds.

11.29 On the second ground of appeal, the appellant advanced that the trial Court erred both in law and fact when she held that the Respondent, prior to execution of the contract of sale, had verbal discussions with WMN and that what was agreed verbally was reduced in writing after 16 years. The appellant contended that the learned trial Judge's accepting that the Respondent had had verbal discussions with the seller to reduce an agreement to writing after 16 years was erroneous as the sale of land becomes statute barred after a period of 12 years.

11.30 The Respondent contended that the issue of the transaction being statute was not raised in the lower Court and can therefore not be brought up in the Court of Appeal.

11.31 Our position on this ground resonates with the argument advanced by the Respondent. The Supreme Court has firmly guided in the case of **Mususu Kalenga Building Limited, Winnie Kalenga v Richmans Money Lenders Enterprises**¹⁶ that where an issue was not raised in the court below, it is not competent for any party to raise it on appeal. For the said reason, this second ground of appeal fails accordingly.

11.32 The third ground of appeal alleges that the lower Court disregarded all the evidence in the Court below, which proved that the Appellant's father, the late Davison Best Ng'andu had bought the Remaining Extent of Farm no. 3162, Kalomo.

11.33 The evidence on record undoubtedly reveals DBN's interest in the Remaining Extent of Farm no. 3162, Kalomo, the same having been gifted to him from his brother WMN. There is no evidence of DBN having bought the subject property although the letter from the seller to the Kalomo District Council indicates this. Therefore, the Appellant's assertions in this regard were misplaced.

11.34 That notwithstanding, we are cognizant of the fact that our determinations in ground 1 of the appeal, and the evidence of the seller in the trial Court, which was not disputed that, in the course of WMN paying the purchase price for the subject parcel of land, he had indicated that he was buying the subject property for his brother DBN. Further, there is overwhelming evidence as adduced earlier which confirms all the steps that DBN (as donee) undertook to act on the gift and to subdivide the Remaining Extent of Farm no. 3162, Kalomo. It cannot be disputed that arising from the same, the trial Court ought not to have arrived at a conclusion that the late DBN was merely a caretaker without proprietary interest in the subject land.

11.35 Had the learned Judge in the Court below, properly addressed her mind to the series of events, evidence of process of change of ownership and undisputed intention of WMN to purchase the subject property in favour of DBN, under whose estate the Appellant is claiming, she would not have arrived at the conclusion that she did.

11.36 In casu, the seller has confirmed the purpose and intention for which WMN bought the subject parcel, being for the benefit of DBN under whose estate the Appellant falls. The evidence also illustrates a long and laborious process that DBN had undertaken to perfect his title. We are of the view that the Appellant's interest in the said parcel of land cannot be overlooked considering the foregoing.

11.37 Although, the lower Court determined that WMN had a right to rescind his gift to DBN, a fact which confirms that the initial purchase was made for the benefit of DBN, there is no cogent evidence on record that affirms that WMN did or could have rescinded his gift to DBN. The further evidence on record conceded by DW1, DW2, and DW3, shows that WMN, had in fact, suffered a stroke in 2008, and was mentally and physically incapacitated. Therefore, the likelihood of the rescission, if at all it had been done, is unlikely to hold water under the circumstances.

11.38 In the case of **Brenda Sipalo**¹⁷, we had affirmed a gift of property in issue therein even when it was not in writing. In the same vein, we uphold the validity of the gift of the subject parcel of land by WMN who purchased the said land from the seller for the benefit of DBN.

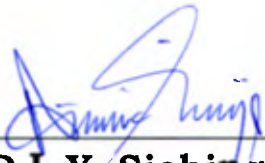
11.39 Given the foregoing account relating to the Appellant's interest in the said Remaining Extent of Farm no. 3162, Kalomo, it is our view that the trial Court misapprehended evidential facts relating to the Appellant's interest in the said land. We accordingly find that the Appellant, as Administrator of the estate of the late Davison Best Ng'andu, is entitled to possession of the Remaining Extent of Farm no. 3162, Kalomo. This ground of appeal is accordingly successful.

12.0 CONCLUSION

12.1 The appeal succeeds in the main. The Respondent to bear the Appellant's costs of the appeal, to be agreed and in default of agreement to be taxed.



F.M. Chishimba
COURT OF APPEAL JUDGE



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



N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE