

**IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT NDOLA**

*(Civil Jurisdiction)*

**APPEAL NO. 86/2021  
CAZ/08/78/2021**

**LEYMOND SAOPE KATANGALA MWALE**

*(As administrator of the Estate of Augustine  
Nsangu Mwale)*

**APPELLANT**

**AND**

**MABLE LUNGU**

**RESPONDENT**



**CORAM: Makungu, Ngulube and Sharpe-Phiri JJA**

**On 22<sup>nd</sup> February, 2023 and 24<sup>th</sup> July, 2023**

*For the Appellant: No appearance*

*For the Respondent: Mr. T. Chabu of Terrence Chabu & Co.*

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## **JUDGMENT**

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**Makungu J.A delivered the judgment of the court.**

Cases Referred to:

1. *Wilson Masauso Zulu v. Avondale Housing Project Limited* (1982) ZR 172
2. *Khalid Mohamed v. The Attorney General* (1982) ZR 49
3. *Sablehand Zambia Limited v. Zambia Revenue Authority* (2005) ZR 109
4. *Haonga and Others v The People* (1976) Z.R 200 (S.C)
5. *Fenias Mafemba v Esther Sitali* SCZ Judgment No. 24 of 2007
6. *Patel and another v Molile Holdings Company Limited* (1993-94) ZR 20

7. *Nkolongo Farm Limited v Zambia National Commercial Bank Limited and others (2007) ZR 149.*

Legislation Referred to:

1. *Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia*
2. *The Statute of Frauds, 1677*
3. *The Rules of the Supreme Court, 1965 (White Book) 1999 Edition.*

## **1.0 INTRODUCTION**

1.1 This is an appeal against the judgment of Mrs. Justice M. Mapani Kawimbe delivered in open Court on 15<sup>th</sup> December, 2020. By that judgment, the plaintiff, now respondent was declared as legal owner of house No.502/1216 Mimbula, Kasompe, Chingola. The appellant's heirs were ordered to immediately surrender the Certificate of Title to the respondent. Costs were awarded to the respondent.

1.2 In this judgment, we shall refer to the parties according to their designations in the appeal.

## **2.0 BACKGROUND**

2.1 According to the respondent's pleadings and evidence on record, Augustine Nsangu Mwale (the deceased) and the respondent

cohabited for 32 years. Back in the day, the respondent was employed as a housekeeper at Mushansha Hotel, in Chingola and the late Augustine Nsangu Mwale was a contractor.

- 2.2 House No. 505/1216 Mimbula, Chingola was allocated to the respondent by the Chingola Municipal Council in 1993 under the Presidential Housing Initiative. The deceased moved into the house with the respondent.
- 2.3 The house was offered to the respondent for sale on 10<sup>th</sup> November, 1997 at the price of K400.00. The respondent purchased it and was issued with title deeds. Sometime in 1997, not long after obtaining the title deeds, she discovered that the title deeds were missing and her search for the same proved futile. In 2019, the respondent lodged a caveat on the property on the ground that she was the legal owner thereof. Subsequently, the deceased somehow changed ownership of the property into his name.
- 2.4 That the deceased commenced divorce proceedings in 1997 in the Local Court. According to the respondent, the Local Court dismissed the case for lack of jurisdiction.
- 2.5 In 1997, the respondent commenced an action in the Subordinate Court claiming ownership of the house and

seeking an order for the appellant to surrender the title deeds to her. It is unclear as to how the Subordinate Court determined that matter. Nevertheless, in 2019 the respondent commenced a new action under cause number 2019/HK/143 in the Kitwe High Court against the deceased while he was still alive. She claimed the following reliefs:

1. *A declaration that the plaintiff is the bonafide owner of plot no. S/D1216/505 Mimbula in Chingola District of Zambia.*
2. *An order for surrender of Certificate of Title relating to plot no. S/D 505/1216 Mimbula in Chingola District of the Republic of Zambia.*
3. *An Order for cancellation of consent to assign title fraudulently executed by the defendant in his name from the plaintiff.*
4. *Damages for inconvenience.*
5. *Damages for mental anguish.*
6. *Interest on all monies found due.*
7. *Any other relief the Court may deem fit.*
8. *Costs of the action.*

### **3.0 STATEMENT OF CLAIM**

3.1 In her statement of claim, the respondent alleged *inter alia* that without her authorization and consent, the deceased got her

Certificate of Title and fraudulently executed an assignment and application for consent to assign purporting that she had assigned the property in question to him.

- 3.2 Further, that he caused Chingola Municipal Council to transfer the property to himself but paid no consideration to her. She claimed that as a result of the matters complained of, she had suffered loss and damage.

#### **4.0 DEFENCE AND COUNTERCLAIM**

- 4.1 There was a defence and counterclaim filed in the lower court wherein it was alleged that the respondent did not buy the said house with her own money. That in 1986 the appellant applied to Chingola Municipal Council for allocation of the house in issue to himself. However, he encountered some 'complications', which prompted him to request the respondent if he could acquire the house in her name and she agreed. He alleged that he gave the respondent the sum of K400.00 to pay for the house. That he kept the respondent's title deeds because the respondent always knew that the house was his.
- 4.2 The appellant further alleged that he changed ownership of the house with the full consent of the respondent who wrote a letter

to the Council requesting for change of ownership. That upon changing ownership to himself, he proceeded to Zambia National Commercial Bank (ZANACO) where he obtained a loan facility for his business project. He then handed over the title deeds to the bank as security for the debt.

4.3 He stated that he later obtained a loan from the Citizens Economic Empowerment Commission (CEEC) who had paid off the loan he owed to ZANACO. In turn, CEEC obtained the title deeds for the house as collateral. He stated that the respondent was aware of the said loans. He also claimed that the acrimony between him and the respondent was due to the fact that he had requested her to leave his house as they were not legally married. The appellant disputed all the claims in the statement of claim.

4.4 In the counterclaim, the appellant averred that on 29<sup>th</sup> December, 2008 a legal assignment of the property in issue was executed between the appellant and the respondent. That on 26<sup>th</sup> October, 2010 the appellant entered into a mortgage with ZANACO to secure a loan of K25 million (unrebated), which the respondent was fully aware of.

## **5.0 REPLY AND DEFENCE TO COUNTERCLAIM**

5.1 In reply, the respondent joined issue with the appellant on his defence.

5.2 In defence to counterclaim, the respondent denied having consented to the loan acquisition and to pledging of the title deeds as collateral.

5.3 The respondent also denied having received K400.00 from the appellant for the purchase of the house. She averred that the deceased illegally and fraudulently changed ownership of the house from her name to his.

5.4 The particulars of fraud and illegality were indicated as follows:

*(a) Forging the respondent's signature effecting change of ownership of the house from the respondent to the late Augustine Nsangu Mwale.*

*(b) Executing a consent to transfer ownership of the house from the respondent to the deceased without the plaintiff's knowledge and genuine consent.*

5.5 Augustine Nsangu Mwale passed away before trial commenced and so he was substituted with the administrator of his estate.

## **6.0 RESPONDENT'S EVIDENCE AT TRIAL**

6.1 The evidence adduced by the respondent was in accordance with the background stated above. She added that she did not report the issue of her missing title deeds to the police because the matter was in Court. That the Local Court did not adjudicate on the issue of the house but dismissed the divorce case for want of jurisdiction. She denied ever signing any document of change of ownership of the house.

## **7.0 APPELLANT'S EVIDENCE AT TRIAL**

7.1 The appellant gave evidence that his late father Augustine Nsangu Mwale, told him about the dispute he had with the respondent over the house in 2006. That he had accompanied his father to Chingola Municipal Council on a few occasions but never actually attended the meetings because his father was secretive.

7.2 That the divorce proceedings were instituted when the respondent evicted the deceased from the house in issue. He relied on the counterclaim. He further stated that he was not aware of the existence of an assignment or a deed of gift between the respondent and the deceased.



## 8.0 DECISION OF THE LOWER COURT

- 8.1 After considering the evidence on record and the submissions made by the parties, the lower Court identified the main issue as: who between the parties is the rightful owner of the house?
- 8.2 The learned trial Judge stated that according to **section 33** of the **Lands and Deeds Registry Act<sup>1</sup>**, a Certificate of Title serves as conclusive proof of land ownership and the implication is that it extinguishes all other claims against the proprietor. It may however, be cancelled on grounds of impropriety or fraud under **Section 34** of the same Act.
- 8.3 The trial Judge proceeded to state the uncontested facts as follows: That the respondent was offered the house by Chingola Municipal Council. She paid the purchase price from her terminal benefits and was issued with a certificate of title.
- 8.4 That the purported marriage between the parties was not established but rather, conjured out of the respondent in cross examination by the appellant's counsel. That the defence filed herein did not make any reference to a marriage but that the parties cohabited from 1995. The trial Judge therefore held that no matrimonial rights were created between the parties upon which the appellant could seek a share of the property in issue.

8.5 That the circumstances of how the respondent's certificate of title went missing were not established but there was evidence that the appellant obtained loans from ZANACO and CEEC. Although the appellant argued that the respondent was aware of his financial needs, he did not prove that he obtained the respondent's consent to obtain the loans using the certificate of title as collateral.

8.6 The Judge further found that, **Section 4 of the Statute of Frauds 1677<sup>2</sup>** was not complied with as there was no evidence of a deed of gift.

8.7 That the respondent's defence to counterclaim; that the appellant changed ownership of the house by forging her signature and effecting change of ownership of the house from her to himself was not challenged. The Judge therefore took it that the respondent had proved her claims.

8.8 The Judge pointed out that apart from stating in his counterclaim that the documents for change of ownership were legitimate, the appellant did not show at trial that he did not commit the fraud. In support of this finding, she relied on the appellant's evidence that his late father was a very secretive person who never actually gave his son (DW) details of his

dealings with the Chingola Municipal Council. The Judge was of the view that since the late Augustine Nsangu Mwale was the only one who knew about his own dealings, no one else could “valiantly defend his actions.” Additionally, that the appellant had the onus of proving his counterclaim that the change of ownership of the house was legitimate. The counterclaim was therefore dismissed for lack of merit.

8.9 It was held that the legal owner of the house in issue is the respondent and that the beneficiaries of the estate should immediately return the respondent’s Certificate of Title to her. Further, the consent to assign obtained by the appellant was cancelled.

8.10 The respondent’s claims for damages for inconvenience, mental anguish and interest were dismissed for lack of evidence.

## **9.0 THE APPEAL**

9.1 In the memorandum of appeal filed herein, the appellant has raised five grounds of appeal couched as follows:

- 1. The learned trial Judge erred both in law and fact when she declared the respondent as the legal owner of House No. 1216 Mimbula, Chingola when she had***

*failed to prove the allegations of fraud and forgery to the requisite standard.*

- 2. The learned trial Judge erred both in law and fact in finding that the plaintiff's allegations of fraud and forgery were not challenged when in fact the plaintiff was challenged in cross examination to the extent that she was shown to be untruthful when she denied her own lease in her bundle of documents.*
- 3. The learned trial Judge erred and misdirected herself both in law and fact when she found that no matrimonial rights were created between the parties when in fact the plaintiff conceded in cross examination that they were married for 32 years.*
- 4. The learned trial Judge erred in law when she found that the plaintiff paid the purchase price of the house from her terminal benefits in the absence of any proof of such benefits.*
- 5. The learned trial Judge erred both in law and fact when she ordered the defendant's heirs to return the Certificate of Title when the same is not in their*

*possession but in possession of CEEC who advanced the loan facility to the couple.*

## **10.0 APPELLANT'S HEADS OF ARGUMENT**

- 10.1 The appellant relied on the heads of argument dated 30<sup>th</sup> April, 2021 wherein it was submitted on his behalf under the 1<sup>st</sup> ground of appeal that the respondent did not prove to the required standard that she was the legal owner of the subject property. That she even failed to substantiate her allegations of fraud and forgery against the late Augustine Nsangu Mwale. We were referred to the cases of **Wilson Masauso Zulu v Avondale Housing Project Limited**<sup>1</sup> and **Khalid Mohamed v The Attorney-General**<sup>2</sup> on the principle that the plaintiff bears the burden of proving his or her allegations whatever may be said of the opponent's case.
- 10.2 To this end, it was contended that since the respondent did not prove the alleged fraud, she was not entitled to a judgment in her favour.
- 10.3 On ground 2, counsel for the appellant submitted that during cross examination, the respondent was challenged and discredited on her allegations of fraud. The respondent was

shown to be an untruthful witness when she denied her own signature on the lease agreement which she executed with Chingola Municipal Council. Further that, the respondent was challenged on her failure to report to the police her allegation that the documents of change of ownership were forged by the late Augustine Ngangu Mwale. In support of this submission, reliance was placed on the case of **Sablehand Zambia Limited v Zambia Revenue Authority**<sup>3</sup> where the Supreme Court guided that:

*“Allegations of fraud must, once pleaded, be proved on a higher standard of proof, than on a mere balance of probabilities because they are criminal in nature.”*

10.4 Counsel further contended that, the trial Judge should have attached less weight to the evidence of the respondent because she was shown to be untruthful on a material point. To buttress this submission, reliance was placed on the case of **Haonga and Others v The People**<sup>4</sup> where it was held that:

*“Where a witness has been found to be untruthful on a material point, the weight to be attached to the remainder of his testimony is reduced.”*

10.5 In support of the 3<sup>rd</sup> ground of appeal, counsel submitted that during cross examination, the respondent told the trial Judge that she was married to the late Augustine Nsangu Mwale for 32 years. Therefore, the trial Judge erred when she stated that no matrimonial rights were created between the parties. Under the circumstances, the learned trial court ought to have made an appropriate order as to the share of matrimonial properties though not specifically pleaded by the parties as the parties had pleaded "*any other relief*".

10.6 As regards the 4<sup>th</sup> ground of appeal, counsel for the appellant submitted that the respondent did not adduce any evidence to support her claims that she had bought the house with her terminal benefits, especially that, the late Augustine Nsangu Mwale stated in his pleadings that he had given the respondent the money to purchase the house.

10.7 In support of the 5<sup>th</sup> ground of appeal, counsel submitted that the trial Judge acknowledged that the respondent and Augustine Nsangu Mwale had acquired a loan facility from the CEEC when they lived together. Therefore, it was clear that the heirs of the late Augustine Nsangu Mwale were not in possession of the Certificate of Title in respect of the subject

house. That, the trial Judge should have either joined CEEC to the proceedings or ordered the respondent to pursue the issue of the Certificate of Title with CEEC.

## **11.0 RESPONDENT'S HEADS OF ARGUMENT**

11.1 The respondent relied on the heads of argument dated 26<sup>th</sup> April, 2022. To counter the 1<sup>st</sup> ground of appeal, the respondent's counsel submitted that the trial Judge was on firm ground when she declared the respondent as legal owner of the house in question as the allegations of fraud and forgery against the appellant were proved to the required standard.

11.2 We were referred to **Section 33 of the Lands and Deeds Registry Act** which states that:

*“A certificate of title shall be conclusive as from the date of its issue and upon and after its issue thereof, notwithstanding the existence of any other estate or interest, whether derived by grant from the president or otherwise.”*

11.3 Counsel submitted that, the import of the above provision is that the appellant's claim against the respondent cannot succeed because the respondent held title to the property. That



a Certificate of Title can only be successfully challenged with evidence of impropriety or fraud according to **Section 34 of the Lands and Deeds Registry Act**. That in casu, the appellant did not adduce sufficient evidence to prove impropriety or fraud against the respondent. On the contrary, the respondent had adduced sufficient evidence to prove fraud and forgery on the part of the late Augustine Nsangu Mwale: that he had fraudulently changed ownership of the house into his names by forging her signature on the consent to assign.

11.4 In opposing ground 2, counsel submitted that the trial Judge was on firm ground in finding that the plaintiff's allegations of fraud and forgery were not challenged.

11.5 On ground 3, counsel submitted that the lower court was on firm ground in holding that there were no matrimonial rights created between the respondent and the deceased as the parties were merely cohabiting. In support of this position, we were referred to the case of **Fenias Mafemba v Esther Sitali**<sup>5</sup>, where the couple who had simply cohabited for 14 years were held not to have been married.

11.6 In response to ground 4, counsel submitted that the source of funds used by the respondent in purchasing the house was

never in dispute before the lower court. Rather, the main issue for determination was who between the two parties was the rightful owner of the subject house. For this reason, counsel contended that the appellant's submissions on this ground cannot stand.

11.7 There was no response to ground 5.

## **12.0 OUR ANALYSIS AND DECISION**

12.1 We have considered the evidence on record and the arguments made by both parties.

12.2 The 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal are related and will be tackled together as follows: It is trite law that generally, the plaintiff bears the burden of proof see **Wilson Masauso Zulu v. Avondale Housing Project Limited**<sup>1</sup> and **Khalid Mohamed v. The Attorney General**<sup>2</sup>.

12.3 The lower Court's main reason for finding that fraud was proved by the respondent as shown at page J14 paragraph 29 was that the defence to counterclaim was not challenged. Other reasons were that the appellant did not prove that the respondent agreed with him that bank loans be obtained and the house be pledged as security for the loans. Further that **Section 4** of the

**Statute of Frauds 1977** was not complied with considering that the parties were “*basically friends with no relationship.*”

12.4 There are numerous authorities on the legal principles that any charge of fraud, undue influence or misrepresentation must be pleaded with utmost particularity and that fraudulent conduct must be distinctly alleged and as distinctly proved. That the standard of proof is higher than on a balance of probabilities, and there is no presumption of fraud. These cases include **Sablehand Zambia Limited v Zambia Revenue Authority** supra, **Patel and another v Molile Holdings Company Limited**<sup>6</sup> and **Nkolongo Farm Limited v Zambia National Commercial Bank Limited and others**<sup>7</sup>.

12.5 In the present case, the respondent did not give particulars of the alleged fraud and illegality in her statement of claim but in the Reply and Defence to Counterclaim. The particulars were that the appellant forged her signature on the documents of change of ownership and that the respondent was not aware of the appellant's intentions and did not genuinely consent to the transfer of ownership. She also claimed that she did not consent to the obtaining of the loans and pledging of title deeds for the house as collateral.

12.6 According to the authorities mentioned in paragraph 12.4 hereof, the respondent bore the burden of proving her allegations of fraud to a standard higher than a balance of probabilities. Although the respondent succeeded in specifically pleading fraud, she lamentably failed to prove fraud to the required standard. As she was contending that she had not signed the transfer to the appellant, the respondent ought to have called a handwriting expert to show that she was not the one who signed the documents authorizing the Council to transfer ownership of the house from herself to the deceased.

12.7 A handwriting expert should have been given samples of the genuine handwritings or signatures of the deceased and the respondent to analyze as against the signatures on both the letter dated 25<sup>th</sup> April, 2008 relinquishing title to the house and the application for consent to assign dated 14<sup>th</sup> July 2008 purportedly signed by the respondent (at pages 94 and 95 of the record of appeal respectively).

12.8 There being no evidence of fraud, the fact that the reply and defence to counterclaim was not challenged or rebutted, did not suffice for the court to find that fraud was proved to the required standard. We therefore hold that the lower court misdirected

itself in finding that fraud was proved through the Reply and Defence to Counterclaim.

12.9 As stated in the case of **Khalid Mohamed v The Attorney General**<sup>2</sup>:

*(i) The appellate court may draw its own inferences in opposition to those drawn by the trial court although it may not lightly reverse the findings of primary facts.”*

*(ii) A plaintiff cannot automatically succeed whenever a defence has failed, he must prove his case.”*

12.10 Following our holding under paragraph 12.8 that the lower court misdirected itself in finding that fraud was proved through the Reply and Defence to counterclaim, we further hold that under the circumstances, the issue of **Section 4 of the Statute of Fraud 1977** was neither here nor there as it was not pleaded by either party. Therefore, the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal are upheld.

12.11 The 3<sup>rd</sup> ground of appeal challenges the lower court’s finding that no matrimonial rights existed between the parties. We hold that their lengthy cohabitation did not constitute a

marriage: See the case of **Fenias Mafemba v Esther Sitali** supra. The parties in the present case did not show that they went through the legal or traditional procedures to create a valid marriage between them. Neither party pleaded that they were legally married, therefore, the lower Court rightly found at paragraph 28 of the judgment that *“the purported marriage between the parties was not established but rather conjured out of the plaintiff in cross – examination considering that the defence did not make reference to a marriage but rather that the parties cohabited from 1995.”*

12.12 Consequently, the Judge aptly held that no matrimonial rights were created between the parties. It is unclear how the divorce proceedings ended as neither witness shed enough light on that. It follows that ground 3 is also bereft of merit.

12.13 As for the 4<sup>th</sup> ground of appeal, which contends that the Judge erred in finding that the respondent had paid for the house from her terminal benefits without evidence to this effect, the respondent adduced evidence that the deceased was not working when she bought the house and that he started working 3 years later. That she had retired from her job and paid for the house using her retirement benefits. However,

there is no evidence on record to prove that she purchased the house using her retirement benefits. It is therefore possible that the deceased as a businessman, gave her the money to pay for the property as he had pleaded in defence. Therefore ground 4 fails.

12.14 Coming to the 5<sup>th</sup> ground of appeal which contends that the trial Judge erred by ordering the appellant's heirs to return the certificate of title when it was not in their possession, we note that in her pleadings, the respondent talked about a "certificate of title." However, in his pleadings, the appellant only mentioned "title deeds". The letter dated 25<sup>th</sup> April, 2008 from the respondent to the Chingola Municipal Council applying for change of ownership of the subject property also refers to a title deed.

12.15 The record of appeal shows no evidence of a copy of a certificate of title, number of a certificate of title or a printout from the Lands and Deeds Registry indicating that either party holds a certificate of title of the property in issue.

12.16 We are therefore of the view that there were possibly different title deeds than a certificate of title, especially that the house is in the statutory improvement area and it formerly belonged to the Council.

12.17 Considering the evidence of the loan obtained by the appellant from CEEC which purportedly has possession of the title deeds in the appellant's names, the CEEC as an interested party ought to have been joined to the proceedings to shed more light on the nature of title deeds it purportedly holds as collateral for the loan.

12.18 It is clear from the record that the beneficiaries of the deceased's estate are not in possession of any certificate of title. Therefore, the lower court's order that they should return the certificate of title to the respondent was erroneous and it is hereby set aside. This entails that the 5<sup>th</sup> ground of appeal also succeeds.




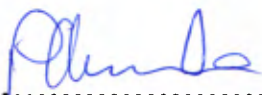
### 13.0 CONCLUSION

13.1 In sum, the appeal succeeds on ground 1,2,4 and 5 except 3.

This is a substantial win and we therefore grant costs here and in the court below to the appellant, the same to be taxed in default of agreement between the parties.

13.2 For avoidance of doubt, this entails that house No. 505/1216 Mimbula Kaompe, Chingola, belongs to the estate of the late Augustine Nsagu Mwale.

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**C.K. MAKUNGU**  
**COURT OF APPEAL JUDGE**

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**P.C.M. NGULUBE**  
**COURT OF APPEAL JUDGE**

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**N.A. SHARPE - PHIRI**  
**COURT OF APPEAL JUDGE**