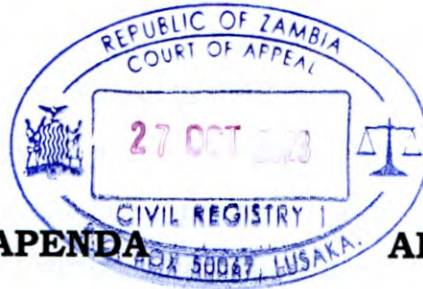


**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**

Appeal No. 194/2021

(Civil Jurisdiction)

BETWEEN:



RODNEY SAMANYIKA KAPENDA APPELLANT

AND

ENOCK KAWOKU CHITIYA 1ST RESPONDENT

ZCCM INVESTMENTS HOLDINGS LIMITED 2ND RESPONDENT

**Coram: Chishimba, Sichinga, and Ngulube, JJA
on 22nd September, 2023 and 27th October, 2023**

For the Appellant : Mr. M.G. Mumbwa of Messrs Kitwe Chambers

*For the 1st Respondent : Mr. V.K. Luswili of Messrs Iven Levi Legal
Practitioners*

For the 2nd Respondent : Mr. B. Mbilima, In-house counsel

JUDGMENT

Sichinga, JA delivered the Judgment of the Court.

Cases referred to:

- 1. Rating Valuation Consortium and D.W. Zyambo & Associates (Suing as a Firm) v The Lusaka City Council and Zambia National Tender Board (2004) Z.R. 109*
- 2. Sablehand Zambia Limited v Zambia Revenue Authority SCZ Appeal No. 56 of 2003*
- 3. Wilson Masauso Zulu Vs Avondale Housing Project Limited (1982) Z.R. 172*

4. *Nkhata And Four Others Vs The Attorney-General Of Zambia (1966) Z.R. 124*
5. *Musesha Chitundu v Joseph Kunkuta CAZ Appeal 8 of 2019*
6. *Borniface Kafula v Billings Choonga Mudenda SCZ Appeal No. 202 of 2003*
7. *Mirriam Mbolela v Adam Bota SCZ Appeal No. 146 of 2014*
8. *Elias Tembo v Maureen Chirwa, Duncan Chirwa, The Attorney General, Lusaka City Council And Peggy Kandesha Appeal No. 5 of 2018*

Legislation referred to:

1. *The Lands Act, Chapter 184 of the Laws of Zambia*
2. *The Court of Appeal Rules, Statutory Instrument No. 65 of 2016, Act No.7 of 2016, Laws of Zambia*
3. *The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia*
4. *The Intestate Succession Act, Chapter 59 of the Laws of Zambia*

Other works referred to:

1. *Black's Dictionary of Law, Bryan A. Garner- 9th Edition 2009*

1.0 Introduction

1.1 This is an appeal against the judgment of the High Court (S. M. Wanjelani, J.) dated 28th May, 2021 pursuant to which the learned Judge upheld the 1st respondent's claim that he is the legal owner of property known as Subdivision "V" of Farm 938, Mufulira, also referred to as 71 Gashi Avenue, Mufulira and refused to order cancellation the Certificate of Title.

1.2 The 2nd respondent company has been the subject of a considerable amount of litigation as a result of its employee

home ownership scheme of 1997. This is yet another case where the ownership of land is in question between two former employees of the 2nd respondent.

2.0 Background

2.1 According to the 1st respondent's statement of claim dated 7th February, 2014, the 1st respondent is the registered owner of Subdivision "V" of Farm 938, Mufulira (hereafter "the subject property"), having been offered the same by the 2nd respondent under an employee home ownership scheme, which resulted in acquisition of Certificate of Title No. L40002 in his favour on 10th December, 1999.

2.2 On 11th August 2012, the 1st respondent found that the subject property was being developed by the appellant and that his storehouse was broken into and all the items he had kept therein were missing. In an attempt to assert his ownership of the land, the 1st respondent showed his Certificate of Title to the appellant, who refused to acknowledge it, thereby prompting the 1st respondent to commence an action in the High Court claiming mainly the following reliefs:

- i) *A declaration that he is the legal owner of the property known as Subdivision "V" of Farm No. 938 Mufulira, after purchasing the same from the 2nd Defendant;*

- ii) *A declaration that there is no other person interested in the land in question as there has not been any other interest registered under this property apart from that of the plaintiff;*
- iii) *A declaration that the defendant is a trespasser and that he should hand over possession of the said Subdivision 'V' of Farm No. 938;*
- iv) *Damages for trespass;*
- v) *Costs; and*
- vi) *Interest.*

2.3 In his defence, the appellant asserted that the true owner of the subject property is the late Mubiana Mwendabai, to whom the 2nd respondent offered the property and the appellant bought it from the estate of the late Mubiana Mwendabai (hereafter called "the deceased"). That at the time he purchased the property there were neither structures nor any signs of another person having a claim over it. He averred that he was an innocent purchaser for value without notice of the defect, as he had made all the necessary inquiries regarding the subject property.

2.4 The appellant asserted further that if the Certificate of Title issued in favour of the 1st respondent related to Plot 71 Gashi, Mufulira, then it was obtained by fraud. The appellant counterclaimed the following reliefs before the lower court:

- i) An order that he is entitled to the said property;*
- ii) Further or in the alternative, a declaration that he is an innocent purchaser for value without notice of any defects;
and*
- iii) Costs.*

3.0 Decision of the High Court

3.1 The trial Judge summed up the undisputed facts as follows:

- i) The deceased and 1st respondent were both employees of the 2nd respondent;*
- ii) On 15th February, Plot No. 1 Gashi Avenue, Mufulira, was offered to the deceased;*
- iii) The deceased did not make any financial payment to the 2nd respondent in respect of Plot No. 1 Gashi Avenue, Mufulira;*
- iv) The appellant did purchase Plot No. 1 Gashi Avenue, Mufulira from the estate of the deceased and has since built a dwelling house thereon;*
- v) There is an assignment with respect to Subdivision "V" of Farm No. 938 Mufulira from the 2nd respondent to the appellant; and*
- vi) The 1st respondent is holder of Certificate of Title for Subdivision "V" of Farm No. 938 Mufulira.*

3.2 The trial Judge found that Plot No. 71 Gashi Avenue and Subdivision "V" of Farm 938 referred to the same property. In

determining the issue of whether the property was rightly sold to the 1st respondent, having first been offered to the deceased by the 2nd respondent, the learned Judge noted that the letter of offer addressed to the deceased did not make reference to payment of consideration, nor was there an indication that the deceased accepted the offer.

3.3 The Judge relied on the Supreme Court case of ***Rating Valuation Consortium and D.W. Zyambo & Associates (Suing as a Firm) v The Lusaka City Council and Zambia National Tender Board¹*** to the effect that the court can discern a clear intention of parties to create a legally binding agreement between themselves, which can be discerned by looking at the correspondence and the conduct of the parties as a whole. She found, therefore, that there was no binding agreement between the deceased and the 2nd respondent and the 2nd respondent was at liberty to offer and subsequently sell it to the 1st respondent. Further, that the assignment confirms that K300,000 was paid by the 1st respondent to the 2nd respondent.

3.4 As regards the claim for trespass, the learned Judge was of the view that although the 1st respondent had the right to the subject land, he was not in possession thereof at the time the appellant occupied it, as the latter believed that he had the right to the land based on his contract with the estate of the

deceased and other documents availed to him. On this basis, she dismissed the claim for trespass as the true positions of the parties were only determined by virtue of the judgment.

3.5 On the appellant's counterclaim that the 1st respondent obtained the Certificate of Title by fraudulent means, the lower court noted that contrary to the guidance of the Supreme Court in the case of **Sablehand Zambia Limited v Zambia Revenue Authority**² to the effect that fraud must be distinctly alleged and clearly proven, the appellant's pleadings showed that the allegation of fraud was casually pleaded with no particulars. On this basis, she dismissed the appellant's allegation of fraud.

3.6 The lower court dismissed the appellant's claim that he was an innocent purchaser for value without notice of the 1st appellant's existing interest, as he did not properly exercise due diligence in his inquiries. That for instance, had he conducted a search at the Ministry of Lands, the same would have revealed that the property was held on title by the 1st respondent. As such, the Judge found that the estate had no title to pass to the appellant as the deceased was not the owner of the property. Further, the administrator of the estate of the deceased did not obtain an order of court to sell and it has been held that a sale of a deceased person's property without such an order is null and void. She thus found that the defence of bona fide purchaser failed.

3.7 In *toto*, the learned Judge found no basis to order cancellation of the 1st respondent's Certificate of Title. She therefore declared the 1st respondent as the legal owner of the property known as Subdivision "V" of Farm 938 Mufulira, also referred to as 71 Gashi Avenue, Mufulira and that there was no other registered interest in the property. She dismissed the counterclaim.

4.0 The Appeal

4.1 Dissatisfied with the Judgment of the High Court, the appellant launched this appeal, raising five grounds as follows:

- 1. *The learned trial Court erred in law and fact when it held that there was nothing on record indicating that the late Mwendabai accepted the offer that was made to him when the evidence on record showed that the late Mwendabai was allocated Plot No. 71 Gashi Avenue, Mufulira, the 2nd Respondent;***

- 2. *The learned trial Court erred in law and fact when it held that there was no binding contract between the late Mr. Mwendabai and the 2nd defendant in respect of Plot No. 71 Gashi Avenue, Mufulira;***

- 3. *The learned trial Court erred in law and fact when it held that the plaintiff paid the sum of K300,000 for***

the purchase of Plot No. 71 Gashi Avenue, Mufulira when no proof of payment existed on record;

- 4. The learned trial Court erred in law and fact when it held that there was no basis to order cancellation of the Plaintiff's title; and***

- 5. The learned trial Court erred in law and fact when it held that the 1st defendant was not a bona fide purchaser after finding as a fact that there was no evidence that the 1st defendant acted in bad faith.***

5.0 Appellant's heads of argument

5.1 In support of this appeal, Mr. Mumbwa, counsel for the appellant, relied on the appellant's heads of argument dated 26th August, 2021. The first and second grounds of appeal were argued together. It is stated in support thereof that there is correspondence from the 2nd respondent confirming that the deceased was offered a plot and a survey number would later be communicated to him in due course.

5.2 Reference was also made to a letter dated 24th June, 1991, authored by the General Manager of the 2nd respondent company and referenced '*allocation of residential plots*', accompanied with a list of employees to be allocated houses under the home ownership scheme. The deceased's name was

second on that list of allocations in respect of Plot No. 71 Gashi Avenue Mufulira with the status of Manager.

- 5.3 That the 1st respondent was the Manager-Human Resources of the 2nd respondent at the time the name of the late F. Mwendabai was removed from the list of allocations and replaced with the name of the 1st respondent as the senior staff who was allocated Plot No. 71 Gashi Avenue, Mufulira on the list of allocations.
- 5.4 It was submitted further that the said plot and other senior staff allocations were free of charge as confirmed at the hearing by DW2 and DW3 who were employees of the 2nd respondent at the material time and benefited from the home empowerment scheme. The allocation of the said plot to the late F. Mwendabai by the 2nd respondent was neither withdrawn nor rescinded at any point for there to be no binding agreement. That in any event, no evidence exists on record for the withdrawal or retraction or rescission of the said allocation to the deceased by the 2nd respondent.
- 5.5 Based on the preceding arguments, counsel argued that the learned trial court erred in law and fact when it held that there was nothing on record indicating that the deceased accepted the offer that was made to him when the evidence on record showed that the late Mwendabai was invited by the 2nd respondent to apply for a high-cost plot. That the deceased

applied for the said plot and was successful in his application. He was allocated the said plot by the 2nd respondent, as the binding agreement between the deceased and the 2nd respondent is evident in the application of the deceased to acquire high-cost residential plot in Mufulira. Letters of 15th February, 1991, 24th June, 1991 refer.

- 5.6 Citing the case of ***Wilson Masauso Zulu v Avondale Housing Project Limited***³ and ***Nkhata and Four Others v The Attorney-General of Zambia***⁴ counsel urged us to allow the first and second grounds of appeal and dismiss the trial Judge's finding that there was no binding agreement for the sale of the subject property between the deceased and the 2nd respondent.
- 5.7 In support of the third ground of appeal, the appellant argued that there is no evidence on record to show that the 1st respondent successfully applied to the 2nd respondent for allocation of Plot No. 71 Gashi Avenue Mufulira, nor that the 1st respondent had received an offer from the 2nd respondent to purchase the said lot. Further, that there is no proof of payment on the record that the 1st respondent paid to the 2nd respondent the sum of K300,000 for the purchase of the subject property, either by way of cash payment or payroll deductions. That the 1st respondent failed to produce proof of this payment even after being subpoenaed by the court below to do so.

- 5.8 We were referred to the evidence of DW 3 to the effect that the plots were given free of charge to managers, superintendents and senior staff who were requested to apply for the plots in the vacant high-cost area by the 2nd respondent. This was confirmed by the undisputed evidence of DW3 that his assignment also showed K300,000.00 as paid by the DW3 but DW3 confirmed at trial that he did not pay the K300,000.00 because the plots were given free of charge by the 2nd respondent to senior staff under the home ownership scheme.
- 5.9 In support of the forth ground of appeal, the appellant submitted that the assignment between the 1st and 2nd respondent was registered after a period of more than 12 months from the date of its execution and as such, the same is null and void as per **Section 6 of the Lands Act¹**. Further, that the Certificate of Title of the 1st respondent shows that it is dated 10th December 1999 and as such, the Certificate of Title was issued without following the laid down procedure of **the Lands Act** in that there was no assignment to transfer an interest in Subdivision "V" of Farm 938 Mufulira from the 2nd respondent to the 1st respondent. It was submitted in this regard that transgressions of the law such as circumvention of the procedure prescribed in the law would render null and void the allocation of land.

5.10 Counsel submitted further that the only way the 1st respondent found himself on the senior staff allocation in respect of Plot No. 71 Gashi Avenue, Mufulira was because someone removed the name of the late F. Mwendabai, as it is undisputed that the 1st respondent had custody and access to the file in respect of Plot No. 71 Gashi Avenue, Mufulira when the Survey Diagram was approved in 1995.

5.11 In support of the fifth ground of appeal, the appellant submitted that he testified that he confirmed that Plot No. 71 Gashi Avenue, Mufulira was owned by the late F. Mwendabai before he bought the said property. The confirmation was done with a Mr. Tembo who was validating the documents at ZCCM Office situated in Mfunda on behalf of the 2nd respondent and this was after June 2011. The said Mr. Tembo was the 2nd respondent's witness who confirmed that he worked for ZCCM in Mufulira between May 2010 and October 2011.

5.12 As regards due diligence conducted by the appellant before purchasing the subject property, it was submitted that the appellant visited Mr. G. Sikazwe (DW3) who was on the list of the allocated plots in Gashi with the late Mr. Mwendabai. The witness testified that Plot No. 71 Gashi Avenue Mufulira belonged to the deceased. The appellant further testified that he visited Mr. O. Nkhama who was issued a plot at the same time with the late F. Mwendabai and the said Mr. Nkhama confirmed that Plot No. 71 Gashi Avenue Mufulira was owned

by F. Mwendabai. That there is also evidence on record to the effect that before purchasing the said plot, the appellant visited Mr. Tembo (Deceased) of Mufulira Municipal Council who confirmed that the said plot belonged to the Mwendabai family. On this premise, counsel argued that the learned trial court erred in law and fact when it held that the 1st respondent was not a bona fide purchaser for value after finding as a fact that there was no evidence that the 1st respondent acted in bad faith.

6.0 1st Respondent's arguments

Mr. Luswili sought to rely on the 2nd respondent's proposed heads of argument.

7.0 2nd Respondent's arguments

7.1 On 14th September, 2023, the 2nd respondent filed an ex-parte summons for leave to file heads of argument out of time pursuant to **Order 13 Rule 3 (3) of the Court of Appeal Rules**². The application was made to a single Judge of the Court who referred it to the full Court. The application was supported by an affidavit sworn by counsel in which he deposed that the 2nd respondent's heads of argument were not filed on time as counsel was unable to obtain instructions.

7.2 We considered the reason ascribed to the delay in seeking leave for extension of time to file the 2nd respondent's heads of

argument that counsel was unable to collect sufficient instructions in relation to the filing of the heads of argument. We found the reason insufficient and a lame excuse for failure to comply with the Rules of the Court.

7.3 In view of the forestated, we declined to grant the application for leave to file the heads of argument out of time. The net effect was that the respondents were not heard.

8.0 Decision of the Court

8.1 We have carefully considered the evidence on record, the impugned judgment, and the submissions by counsel for the appellant. In this appeal, we are called upon to essentially determine the propriety of the lower court's finding that the appellant is the legal owner of the subject property and that he was not an innocent purchaser for value without notice of the 1st respondent's existing interest. In our determination, we will consider whether the lower court properly applied the law in the manner it employed it in arriving at the conclusion that the property was rightly sold to the 1st respondent, despite having first been offered to the deceased by the 2nd respondent.

8.2 We will address the first three grounds of appeal together, as we are of the view that they are essentially premised on compliance with the 2nd respondent company's internal

procedures for allocation of houses or land as part of an employee home empowerment scheme, for purposes of forming a binding contract between the appellant and the 2nd respondent. The appellant has advanced lengthy submissions relating to evidence that points to the deceased's compliance with the company procedures for application for and allocation of plots, and went to the extent of suggesting that the 1st respondent during the course of employment, may have removed the appellant's name from the list of employees to be allocated plots and substituted it with his own name. This subtle allegation is not supported by evidence, nor was it before the lower court for determination. We will therefore not dwell on it.

8.3 The evidence indeed shows that the appellant did begin the process of application for a plot, which he was subsequently offered, though the lower court found no evidence of acceptance of the said offer by the appellant. In a nutshell, whereas the 1st respondent concluded the internal procedures with the 2nd respondent to the point of eventually acquiring title after execution of a deed of assignment, there appears to have been a break in the chain in terms of the procedures for allocation of land to the deceased by the 2nd respondent, to the extent that the deceased did not subsequently conclude the process of acquiring ownership and the subject property did not pass on to his estate at the time of his death. The

Administratrix of the deceased's estate, therefore, appears to have been labouring under the mistaken assumption that her late husband was the owner of the subject property at the time she purportedly sold it to the appellant when in fact not, as the 1st respondent had acquired title, which in the absence of evidence of fraudulent acquisition, conclusively establishes the 1st respondent as the owner. **Section 33 of the Lands and Deeds Registry Act**³ refers.

8.4 In our view, evidence relating to internal correspondence amongst officers of the 2nd respondent company to the effect that the deceased was earmarked to acquire the subject property does not do much to aid the appellant's claim to vitiate the 1st respondent's title. We are inclined to agree with the lower court that the evidence does not disclose a binding contract to the extent that it can be said that the deceased acquired an equitable interest in the subject property. We decline to set aside the finding of the lower court in this regard. The first three grounds of appeal are dismissed for want of merit.

8.5 As regards the fourth ground of appeal, it must be borne in mind that since the appellant did not specifically particularize allegations of fraud, the 1st respondent was not at trial for the manner in which he acquired the Certificate of Title. Rather, he asserted his ownership as a title holder and it was then for

the court to determine whether the appellant's adverse claims over the subject property could vitiate the 1st respondent's ownership vis-à-vis the manner in which the Certificate of Title was obtained.

8.6 The lower court dismissed the appellant's allegations for fraud after finding that contrary to trite law as stated in the case of ***Sablehand Zambia Limited v Zambia Revenue Authority*** *supra*, the appellant did not specifically particularize the allegations but merely made casual references. This is a finding that we affirm. We see no reason, as enunciated in the case of ***Nkhata and Four others v The Attorney-General*** *supra*, to interfere with it. We find no merit in the fourth ground of appeal and dismiss it.

8.7 We will now consider the fifth ground of appeal. In its consideration of the appellant's claim that he was an innocent purchaser for value without notice of the 1st respondent's interest, the Judge referred to evidence to the effect that the appellant purchased the property at the value of K40,000 and that although there was no evidence that the appellant acted in bad faith, he was too trusting of the people he dealt with and should have conducted independent investigations. For instance, had he conducted a search at the Ministry of Lands, the same would have revealed that the property was held on title by the 1st respondent.

- 8.8 The Judge concluded that the estate had no title to pass to the appellant as the estate was not the owner of the property. Further, the administrator of the estate of the deceased admitted that she had not obtained an order of court to sell and it has been held that a sale of a deceased person's property without such an order is null and void. She thus found that the defence of bona fide purchaser failed.
- 8.9 It appears that among the considerations for the defence of bona fide purchaser for value without notice, what mainly influenced the lower court's dismissal of this argument is that the appellant did not properly conduct due diligence, adding that had he conducted a search at the Ministry of Lands, the same would have revealed that the land was held in title by the 1st respondent.
- 8.10 In the case of ***Musesha Chitundu v Joseph Kunkuta***⁵, the purchaser carried out a due diligence exercise in relation to the property prior to executing a contract of sale by conducting a search at the Lands and Deeds Registry and the National Housing Authority. He then placed a caveat on the property after satisfying himself that there was no encumbrance and paid the purchase price. The Supreme Court upheld our finding that he was a bona fide purchaser.
- 8.11 In the present case, the appellant was purchasing property from the estate of the deceased through a personal

representative. There is no evidence on record to show that the personal representative was in possession of title in the name of the deceased, nor that the appellant conducted a search at the Ministry of Lands to confirm the proprietary status of the property. The appellant instead made inquiries from former employees of the second respondent who were familiar with internal procedures of the company, who confirmed that the property was offered to the deceased. The evidence indeed reveals that the property was in fact once offered to the deceased but that it was subsequently offered to the 1st respondent, who subsequently obtained title.

8.12 One of the legal requirements that effectively protect interested persons where the land that is subject to a sale transaction belongs to the estate of a deceased person is the requirement by the personal representative to obtain leave of court before selling the property, as per **section 19(2) of the Intestate Succession Act**⁴. The Supreme Court held in the cases of *Borniface Kafula v Billings Choonga Mudenda*⁶ and *Mirriam Mbolela v Adam Bota*⁷ that a purported sale of land belonging to an estate without the authority of the court is null and void and therefore unenforceable. In the *Borniface Kafula* case, the court went on to order a refund of the purchase price, despite the contract of sale having been executed and completed by the administrator and the

purchaser, as no authority had been obtained from the court prior to the sale.

8.13 The question we are now left to determine is whether the learned trial court correctly found that the appellant could have gone further in his due diligence in order to ascertain the proprietary status of the subject property. We are inclined to agree with the lower court in this regard. The appellant's conduct fell short of the standard of due diligence required when one is purchasing land, which both the Supreme Court and ourselves have reiterated in a number of cases, including ***Elias Tembo v Maureen Chirwa, Duncan Chirwa, The Attorney General and Lusaka City Council and Peggy Kandeshu***.⁸

8.14 The appellant herein did not satisfy himself that the land was not subject to any other interest by conducting a search at the Ministry of Lands. Had he done so, he would have discovered that the deceased was not the title holder and as such, his estate had no title which the administrator could pass on to the appellant by way of sale. In any event, the mere fact that the property was being sold by a personal representative as beneficial owner should have put him on notice to investigate whether the vendor had the authority of the court to sell the said property. We find that the fifth ground of appeal lacks merit and we accordingly dismiss it.

8.15 We uphold the holding of the court below;

“that the 1st respondent i.e. is the legal owner of the subdivision ‘v’ of Farm No. 938 Mufulira and that he is entitled to possession of the said property”.

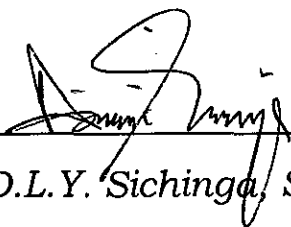
9.0 Conclusion

9.1 For reasons set out above, this appeal fails in its entirety. We award costs to the 1st respondent, to be taxed in default of agreement.



F.M. Chishimba

COURT OF APPEAL JUDGE



D.L.Y. Sickinga, SC

COURT OF APPEAL JUDGE



P.C.M. Ngulube

COURT OF APPEAL JUDGE