

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 144/2022

HOLDEN AT LUSAKA

*(Civil Jurisdiction)*

**B E T W E E N:**

**WILLIAM MANJOWE**



**APPELLANT**

**AND**

**THOMAS MWEZANISE**

**1<sup>ST</sup> RESPONDENT**

**ZAMBIA TELECOMMUNICATIONS COMPANY  
LIMITED**

**2<sup>ND</sup> RESPONDENT**

**LUSAKA CITY COUNCIL**

**3<sup>RD</sup> RESPONDENT**

**CORAM: KONDOLO SC, MAJULA, BANDA-BOBO JJA**

**On: 23<sup>rd</sup> May, 2024 and 20<sup>th</sup> June, 2024**

*For the Appellant: Mr. C. Chungu on behalf of Legal Aid Board*

*For the Respondent: Mr. H.M. Mulunda of Messrs Hibajene Mulunda  
Advocates*

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

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**KONDOLO SC JA**, delivered the Judgment of the Court.

CASES REFERRED TO:

**1. Wilson Masauso Zulu v Avondale Housing Project Ltd (1982) ZR**

**172**

2. **Shawaz Fawaz & Prosper Chelelwa v The People (1995-97) ZR 106**
3. **Sithole v The State Lotteries Board (1975) ZR 106**
4. **Galaunia Farms Limited v National Milling Company Limited & Another (2004) ZR 1**
5. **Sablehand Zambia Limited v Zambia Revenue Authority (2005) ZR 109 (SC)**
6. **National Justice Compania Naviera SA v Prudential Assurance (1987) 379**
7. **Chibwe v Chibwe SCZ/38/2000**
8. **Giraffe Bus Services Limited v Abel Lwitikiko Mwandemwa SCZ/4/2001**

## **1.0 INTRODUCTION**

- 1.1 This is an appeal against the Judgment of Hon. E.L. Musona delivered on 30<sup>th</sup> November, 2021 under **Cause No. 2012/HP/0519.**
- 1.2 In the High Court, the Appellant was the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Respondent was the Plaintiff.
- 1.3 All the sums of money in this Judgment shall be characterized in rebased kwacha amounts.

## **2.0 BACKGROUND**

- 2.1 The dispute in the lower Court arose from a land transaction in which the Appellant and the 1<sup>st</sup> Respondent were both

claiming ownership of Plot LB/04/30 Chingwele Village, Chazanga Compound.

2.2 The 1<sup>st</sup> Respondent claimed to have purchased the land from the Appellant but the Appellant denied ever selling the land to the 1<sup>st</sup> Respondent.

2.3 The 1<sup>st</sup> Respondent leased part of the land to the 2<sup>nd</sup> Respondent who erected a communications tower on it at an agreed rent of K1,000 per month. The lease was for 15 years with rent to be reviewed every three years.

2.4 The 2<sup>nd</sup> Respondent paid the 1<sup>st</sup> Respondent 6 months' rentals in advance but declined to pay the next installment of rentals on the ground that the Appellant was claiming ownership of the land.

2.5 The refusal spurred the 1<sup>st</sup> Respondent into commencing an action by writ of summons.

### **3.0 HIGH COURT PROCEEDINGS**

#### **3.1 Plaintiff's Case (1<sup>st</sup> Respondent)**

3.2 The 1<sup>st</sup> Respondent sought, inter alia, the following reliefs;

- 1. Payment of all monthly rent due and payable by the 1<sup>st</sup> Defendant to the Plaintiff for the period of the tenancy agreement as at the date***

- of judgement hereof less the K6,000 paid in the initial six months' rental advance pay;*
- 2. A declaration that the Plaintiff is the lawful and rightful owner of Plot LB/04/30 Chingwele Village, Chazanga Compound having bought it from the 2<sup>nd</sup> Defendant.*
  - 3. An Order that the 1<sup>st</sup> Defendant Pays the rental amount due to the Plaintiff*
  - 4. Damages for trespass to land and inconvenience as against the 2<sup>nd</sup> defendant*
  - 5. Damages for loss of use of land and inconvenience as against the 2<sup>nd</sup> Defendant*
  - 6. – 9. (Various injunctive relief)*
  - 10. A declaration that the aforesaid piece of land is a statutory improvement area under the Lusaka City Council effective 11<sup>th</sup> March, 1999 and the traditional authorities have no authority over it.*
  - 11. Damages for breach of contract as against the 1<sup>st</sup> Defendant.*

- 3.3 The 1<sup>st</sup> Respondent filed a statement of claim averring that he purchased the subject land from the Appellant at the sum of K850,000 and he paid the purchase price in full.
- 3.4 He also paid the sum of K90,000 to Mr. J.A. Mbimba the previous owner of the land which was the balance that had remained unpaid when the Appellant purchased the subject land from Mr. Mbimba.
- 3.5 The 1<sup>st</sup> Respondent was given an ownership document by Headman Chingwele but unknown to him the area where the land is located was, on 11<sup>th</sup> March, 1999, declared an Improvement Area (Chazanga Compound) pursuant to **Statutory Instrument No. 32 of 1999** and it fell under the jurisdiction of Lusaka City Council and was now numbered 31/85 Chazanga Compound.
- 3.6 The 1<sup>st</sup> Respondent leased part of the property to the 2<sup>nd</sup> Respondent by a lease dated 2<sup>nd</sup> August, 2011 for a term of 15 years at a rental of K1,000 per month, payable 6 months in advance. The 2<sup>nd</sup> Respondent paid the first instalment of K6,000.
- 3.7 That despite written reminders, the 2<sup>nd</sup> Respondent had neglected to pay rentals since January 2012.

3.8 That despite having sold the property to the 1<sup>st</sup> Respondent, the Appellant had been purporting to be owner of the premises and interfering with the tenants' quiet enjoyment. That he had even tried to change ownership of the premises into his name and tried to collect rentals from the 2<sup>nd</sup> Respondent but had failed.

3.9 The 1<sup>st</sup> Respondent called 7 witnesses including himself as PW1. He testified that when he paid for the land he invited Mr. Shadrek Mungende and Mr. Chulu to witness the transaction whilst the Appellant invited Kennedy Phiri and Peter Manjowe as witnesses. The letter of sale as well as the acknowledgement of payment were produced in Court. The Appellant did not have his National Registration Card so Peter Manjowe offered that his National Registration Card be used for purposes of identity. He reiterated that he paid the balance of K90,000 owed to Mr. Mbimba from whom the Appellant had originally purchased the subject property.

3.10 He told the trial Court that after the Appellant failed to get rentals from the 2<sup>nd</sup> Respondent, he attempted to refund the 1<sup>st</sup> Respondent who declined. He reported the matter to the police but the matter was thrown out and he then wrote to

the Council objecting to the 1<sup>st</sup> Respondent being issued with an occupancy license and whose issuance is now pending the outcome of this case.

- 3.11 That the Appellant was actually in occupation of the property and had evicted one of the tenants and was receiving rentals from the remaining one.
- 3.12 PW2 Shadreck Mungende testified that he together with other people witnessed the letter of sale being signed by the parties. That the Appellant informed the 1<sup>st</sup> Respondent that he didn't have his national registration card with him.
- 3.13 In the view that we take, of this case we see no need to repeat the evidence of PW3, PW4, PW5 and PW6 save to state that it is on record.
- 3.14 PW7 was Detective Inspector Oliver Mulenga of Zambia Police Forensic Laboratory. He said he was a handwriting expert and was engaged by the 1<sup>st</sup> Respondent's Advocates to authenticate signatures on a letter of agreement and letter of sale.
- 3.15 He told the Court that he received random specimen samples in the form of a membership card of the Movement

for Multiparty Democracy (MMD) bearing the names William Manjowe and an affidavit.

3.16 He further explained that he conducted an examination by comparing the specimen samples to the agreement and letter of sale and concluded that the Appellant had appended his signature to the agreement and letter of sale.

3.17 His testimony with regard to the lease granted to the 2<sup>nd</sup> Respondent was basically the same as averred in the statement of claim.

**3.18 2<sup>ND</sup> Defendant's Case (Appellant)**

3.19 The Appellant settled a defence averring that at no time did he sell the plot to the 1<sup>st</sup> Respondent and when the Appellant went to work in South Africa, he entrusted the property to the 1<sup>st</sup> Respondent who was his brother-in-marriage.

3.20 That the 1<sup>st</sup> Respondent had forged letters purporting to show that the Appellant had sold him the property.

3.21 That though the said land had been declared an improvement area the consent of traditional rulers was still required.



- 3.22 That the Appellant was not harassing tenants and the 2<sup>nd</sup> Respondent but simply trying to enforce his proprietary rights.
- 3.23 The Appellant called 4 witnesses including himself as DW1.
- 3.24 DW1 testified that in 1981, he bought a plot which was now marked as Plot No. 04/30 from Mazangati in Chingwele village and not from Mbimba.
- 3.25 That in 1999 he went to South Africa and left the property in the care of the 1<sup>st</sup> Respondent who was his brother-in-marriage. Upon returning to Zambia he noticed the 2<sup>nd</sup> Respondents tower on his plot.
- 3.26 He disputed the authenticity of the letter of sale and stated that the MMD membership card was not his.
- 3.27 He denied being a trespasser on the plot and stated that the rentals for the towers should be paid to him.
- 3.28 In cross examination DW1 said he didn't know that Mazangati was also called Mbimba. He admitted that the 1<sup>st</sup> Respondent paid Mbimba the balance of K90,000 which the Appellant was still owing from the sale.
- 3.29 In further cross examination, DW1 said he had no proof that he had left Zambia for South Africa.

- 3.30 DW2 Francis Chate, stated that during the material period, he was MMD Acting Provincial Chairman for Lusaka Province and testified that he was familiar with the procedure for issuance of MMD membership cards. When shown the MMD membership card which had been produced in Court, he said he was not in charge of operations in the area where that Card was issued and did not know what actually transpired when it was issued.
- 3.31 DW3 was Smart Nguni, he told the Court that in 2010 he was Acting Headman when the 1<sup>st</sup> Respondent approached him to obtain ownership documents. He was however aware that the land belonged to the Appellant who was in South Africa at the time.
- 3.32 DW3 explained that when he was shown the letter of sale he issued ownership papers to the 1<sup>st</sup> Respondent. When the Appellant returned, he raised a dispute and DW3 called for a meeting but the 2<sup>nd</sup> Respondent didn't turn up so he issued another land ownership record in favour of the Appellant.
- 3.33 DW4 was Kennedy Phiri whose purported signature appeared as a witness on the letter of sale. He disputed that the

signature was his and he denied ever witnessing the sale of the disputed plot.

#### **4.0 HIGH COURT ANALYSIS & DECISION**

- 4.1 The learned trial Judge noted that none of the parties was in possession of an occupancy certificate for the disputed land but found as a fact that the ground rent was being paid by the 2<sup>nd</sup> Respondent.
- 4.2 The learned trial Judge stated that he had looked at the disputed signatures on the letter of sale and the MMD membership card.
- 4.3 The lower Court further noted the evidence of PW7 and stated that he was satisfied with his qualifications and experience and noted that the evidence of a handwriting expert was opinion evidence but admissible in Court. He stated that he had no reason to doubt the expert opinion of PW7.
- 4.4 According to the learned trial Judge, the Appellant had tried to raise the defence of *alibi* by suggesting that he could not have signed the letter of sale on 20<sup>th</sup> January, 1999 as he was away in South Africa on that date. Musona J noted that the Appellant did not disclose the date he travelled to South

Africa and when challenged he failed to prove the day he exited Zambia.

4.5 The trial Court held that the 1<sup>st</sup> Respondent was the rightful owner of the disputed plot and ordered as follows;

- 1. Payment of all monthly rentals from the 2<sup>nd</sup> Respondent be paid to the 1<sup>st</sup> Respondent for the remaining period of the tenancy less the K6,000 which was paid earlier. That the rental arrears to be paid with interest at short term bank deposit rate from the date when this matter was filed into court until date of Judgment and thereafter, at current Bank of Zambia lending rate.**
- 2. That the Appellant pays the 1<sup>st</sup> Respondent damages for trespass to land, inconvenience and damages for loss of use of land to be assessed by the Registrar.**
- 3. That the Appellant yields vacant possession and quit enjoyment of the subject plot.**
- 4. That the Lusaka City Council may issue to the 1<sup>st</sup> Respondent an occupational license or other**

**document of similar effect by whatever name called.**

## **5.0 APPEAL**

5.1 Riled by the outcome of the High Court proceedings, the Appellant promptly appealed, fronting one ground of appeal as follows;

- 1. The Court below erred in law and in fact when it held that the 1<sup>st</sup> Respondent herein purchased the land in dispute from the Appellant based on signature verification evidence from the contract of sale and the MMD card, which documents were both not authenticated and whose signatures were not authenticated against a confirmed sample.**

## **5.2 Appellant's Arguments**

5.3 The Appellant submitted that the examination of signatures by the handwriting expert was conducted using signatures on documents which the Appellant had disputed.

5.4 That no sample signature was obtained from the Appellant who had disputed signing the letter of sale and

acknowledgement receipt and denied that the MMD membership card was his. It was further pointed out that all these documents were provided to PW7 by the 1<sup>st</sup> Respondent's Advocates.

5.5 The Appellant opined that a comparison of signatures requires a confirmed sample of writings or signature to compare against the disputed inscription. That no attempt was made to obtain a sample from the Appellant, meaning that a proper consideration of the evidence before Court would have been that the signatures on the disputed documents were not confirmed.

5.6 On account of the foregoing we were urged to interfere with the lower Court's finding of fact that the signature on the letter of sale was signed by the Appellant. The case of **William Masauso Zulu v Avondale Housing Project Ltd** <sup>(1)</sup> was cited on an appellate Court's power to interfere with a trial Court's findings of fact.

5.7 The Appellant's further argument was that the trial Judge made no findings of his own with regard to the signatures and simply adopted PW 7's report. In support of this argument he cited the case of **Shawaz Fawaz & Prosper Chelelwa v The**

**People** <sup>(2)</sup> in which it was held that the expert's evidence is his own opinion and the Court must draw its own conclusions.

5.8 Also cited was the case of **Sithole v The State Lotteries Board** <sup>(3)</sup> where it was held as follows;

*“The function of a handwriting expert is to point out similarities or differences in two or more specimens of handwriting and the court is not entitled to accept his opinion that these similarities or differences exist but once it has seen for itself the factors to which the expert draws attention, it may accept his opinion in regard to the significance of these factors.”*

5.9 It was submitted that it was not sufficient for the trial Judge to simply say that he had no reason to doubt the evidence of PW7 without analyzing and weighing the value of the expert evidence.

5.10 The Appellant's final argument was that the 1<sup>st</sup> Respondent had to prove his case and could not succeed merely because the Appellant's defence had failed such as the Appellant's failure to show when he left Zambia for South Africa. The case of **Galaunia Farms Limited v National Milling Company**

**Limited & Another** <sup>(4)</sup> was cited where it was held that “A *Plaintiff must prove his case and if he fails to do so, the mere failure of the opponents defence does not entitle him to judgement automatically.*”

5.11 The Appellant prayed that the appeal be allowed.

## **6.0 1<sup>st</sup> RESPONDENTS ARGUMENTS**

6.1 The 1<sup>st</sup> Respondent filed heads of argument in opposition in which he pointed out that PW1 and PW2 testified that they witnessed the disputed letter of sale and the acknowledgement of receipt of the payment of K850,000 being signed by the Appellant and the 1<sup>st</sup> Respondent. It was on this basis, opined that the trial Judge’s findings in that regard were based on relevant evidence, and more so that during the trial, the Appellant did not challenge the evidence of PW1 and PW2. That in the circumstances there was no basis for this Court to interfere with the lower Court’s finding of fact that the appellant had signed the letter of sale.

6.2 It was argued that the learned trial Judge was perfectly entitled to rely on the expert opinion of the handwriting expert PW7 because PW7 had demonstrated how he arrived at his conclusions.



6.3 It was further submitted that the Appellant's evidence in the lower Court seemed to point to the defence of fraud and the Respondent cited the case of **Sablehand Zambia Limited v Zambia Revenue Authority** <sup>(5)</sup>. In the cited case, it was held that allegations of fraud must be distinctly pleaded, and because they are criminal in nature, they must be proved by clear and distinct evidence on a standard higher than a mere balance of probabilities.

## 7.0 HEARING

7.1 At the hearing, both parties relied on the respective heads of argument filed into Court which they augmented *viva voce*.

## 7.2 Appellant's Submissions

7.3 It was submitted that expert evidence placed before Court must be properly researched and based on sufficient data and in support, cited the case of **National Justice Compania Naviera SA v Prudential Assurance** <sup>(6)</sup>. That *in casu*, the expert evidence presented to the Court was not based on all the evidence before Court and the learned trial Judge relied on a signature that was not authenticated.

7.4 That consequently, the trial Court rendered a decision in the absence of concrete evidence contrary to the guidance given

in the case of **Chibwe v Chibwe** <sup>(7)</sup> where the Supreme Court held that a Judgment must be based on the evidence on record.

7.5 The argument with regard to the duty of the Court to arrive at its own conclusion was reiterated.

#### **7.6 1<sup>st</sup> Respondent's Submissions**

7.7 It was submitted that with regard to the expert evidence, it was enough for the learned trial Judge to state that he had no reason to doubt the expert opinion, as that is the manner in which he made his own observation.

7.8 The 1<sup>st</sup> Respondent further submitted that the expert opinion was not the only evidence upon which the trial Court decided in favour of the 1<sup>st</sup> Respondent because it also took note of the evidence of PW1 and PW2.

#### **8.0 ANALYSIS & DETERMINATION**

8.1 We have considered the record of appeal and the arguments advanced by the parties.

8.2 On the issue of the learned trial Judge simply accepting the opinion of PW7 without analyzing any of the evidence and without making its own findings, a further reading of the holding in the case cited by the Appellant of **Sithole v The**

**State Lotteries Board** *supra* supports the Appellant's submission. Baron DCJ stated as follows;

*"I can well see that there may be circumstances in which an expert, by reason of the very nature of the subject on which he is giving his opinion, is unable to present any documentary or pictorial evidence to the court, and in such cases the court has nothing more on which to rely to assist it in coming to a conclusion than the explanations and reasoning of the expert; and where two experts differ in such a case the court is left to choose between the two opinions. But the present is not such a case, and where there is in fact documentary or pictorial evidence which formed the basis of the expert's opinion it is necessary for these documents to be properly proved and for the court to see for itself the various points on which the expert bases his conclusions. The court is entitled to accept an expert's interpretation of evidence where that interpretation is based on special training and skill, but it is not entitled to accept as factually existing something which the expert says he can see but which*

*the court itself is unable to see. If the court were entitled in such cases blindly to accept what the expert says, obvious difficulties would arise where two experts differ; the court would then have no basis whatever on which to assess which of the experts had given the more cogent evidence. I am satisfied that Mr Dumbutshena's submissions in this regard are correct and that the learned judge should not have relied on the evidence of the expert on this issue. (emphasis is ours).*

- 8.3 In the case of **Giraffe Bus Services Limited v Abel Lwitikiko Mwandemwa** <sup>(8)</sup> the Respondent had, in the lower Court claimed that the Appellant his employer, had allowed him to take a direct tenancy of the house he lived in from Lusaka City Council. He produced a letter to that effect which the Appellant claimed was a forgery.
- 8.4 The Appellant called a handwriting expert who testified that he had conducted tests and established that the letter was a forgery. However, after analyzing the expert evidence, the trial Court rejected it as unsatisfactory.

- 8.5 On appeal the Respondent argued that the learned trial Judge should have accepted the expert evidence. The Supreme Court, reacted by commending the trial Judge for adhering to the guidance it had earlier given in the **Sithole Case** *supra* and reiterated that trial Courts must not blindly accept the evidence of expert witnesses. That it is for the Court to decide after seeing the points highlighted by the expert whether to accept his opinion or not.
- 8.6 When a Court accepts the evidence of an expert witness, the Court must provide its own view and explain why it has accepted the evidence. In the Judgment appealed against, the learned trial Judge simply recounted the evidence of the expert witness and neither made any findings of its own nor explained why he had accepted the evidence apart from saying that, *“I have seen no reason to doubt the findings of PW7 who was an expert witness”*. The way the trial Judge said this implies that the evidence of expert witnesses must be accepted simply because they are experts, which is a misdirection. The Appellant therefore succeeds on this argument.

- 8.7 We agree with the Appellant that the 1<sup>st</sup> Respondent had to prove his case in Court, even where the Appellant failed to prove anything.
- 8.8 We note that the learned trial Judge placed much capital on the expert witness evidence.
- 8.9 Quite interestingly the 1<sup>st</sup> Respondent seems to have walked down the same path as the lower Court as his arguments all revolve around the issue of the expert witnesses' testimony and no arguments have been offered in relation to the other evidence on record.
- 8.10 Therefore, a necessary question to be asked is whether PW7's evidence was the only available evidence supporting the 1<sup>st</sup> Respondent's claims. In other words, can the 1<sup>st</sup> Respondent's case succeed without PW7's evidence?
- 8.11 In the **Giraffe Bus Services Case** *supra* the Supreme Court proceeded to consider some of the other evidence on record. It noted that the Respondent therein was paying his own rent and living in the disputed house for years after he had left employment and before any attempt was made by the Appellant to reclaim the house. That those factors were more consistent with his story than that of the Appellant.

- 8.12 *In casu*, the 1<sup>st</sup> Respondent stated that the Appellant sold him the property and signed a letter of sale whilst the Appellant denied ever doing so. They both produced witnesses to support their respective positions. In the absence of the letter of sale we have considered other evidence on record.
- 8.13 We note that 1<sup>st</sup> Respondent was paying the ground rent and that he paid the balance of the purchase price to Mr. J.A. Mbimba, from whom the Appellant had purchased the property. These two pieces of evidence were not disputed by the Appellant and he offered no explanation why the 1<sup>st</sup> Respondent would extend such a favour to him.
- 8.14 In the circumstances we find that the two pieces of evidence add credibility to the 1<sup>st</sup> Respondent's account of events and to borrow from the reasoning in the **Giraffe Bus Services Case** *supra* we find that these factors were more consistent with his story than that of the Appellant. The only inference we can arrive at is that the 1<sup>st</sup> Respondent paid the balance of the purchase price in satisfaction of the transaction in which the Appellant was selling the subject land to the 1<sup>st</sup> Respondent.

8.15 We therefore find that the 1<sup>st</sup> Respondent purchased the land from the Appellant and the 1<sup>st</sup> Respondent is therefore the lawful owner of **Plot LB/04/30 Chingwele Village, Chazanga Compound**

8.16 This appeal consequently fails with costs to the 1<sup>st</sup> Respondent subject to the provisions of the Legal Aid Act.



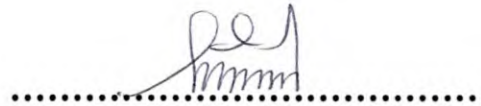
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**M.M. KONDOLO SC**  
**COURT OF APPEAL JUDGE**



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**B.M. MAJULA**  
**COURT OF APPEAL JUDGE**



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**A.M. BANDA-BOBO**  
**COURT OF APPEAL JUDGE**