

**THE SUPREME COURT FOR ZAMBIA  
HOLDEN AT LUSAKA  
(CIVIL JURISDICTION)**

**SCZ/8/05/2023**

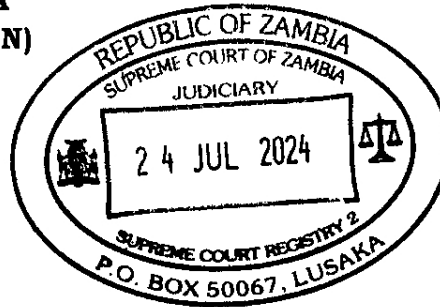
**BETWEEN:**

**JAYESH SHAH**

AND

**MWENDA MWIMANENWA NYAMBE**

**MAUREEN MWANGALA MWENDA**



**APPLICANT**

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

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

**CORAM: Malila CJ., Wood and Kabuka JJS**

**on 7<sup>th</sup> July, 2023 and 24<sup>th</sup> July, 2024**

*For the Applicant:* Mr. J. A. Wright of Messrs Wright Chambers

*For the 1<sup>st</sup> Respondent:* No Appearance

*For the 2<sup>nd</sup> Respondent:* No Appearance

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## **R U L I N G**

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**Malila, CJ** delivered ruling of the Court.

**Cases referred to:**

1. *Mwansa and Another v. Mpofu and Another* SCZ Judgment No. 34 of 2018
2. *Bidvest Food Zambia Limited & Others v CAA Import & Export* SCZ Appeal No 56 of 2017
3. *Collet v Van Zyl Brothers Limited* (1966) 65
4. *Chishala Karabasis Nivel and Another v. Laston Mwale* SCZ Appeal No. 161 of 2015
5. *Zlatan Zlatkoarnautovic v. Stanbic Bank* SCZ/08/14/2020
6. *Consolidated Copper mines v. Matala* (1995-1997) Z.R. 144.
7. *Nkhata and Others v. The Attorney General* (1966) ZR 124
8. *The Attorney General v. Marcus Achiume* [1983] ZR 1

9. *Zambia Revenue Authority v. Dorothy Mwanza and Others* [2010] ZR 181 Vol. 2
10. *Abdul Ebrahim Dudhai, Arshad Abdulla Dudhai and Gulam Farid Patel trading as Musa Dudhia and Co; (a Law Firm) v Sanmukh Ramanlal Patel and First Alliance Bank* SCZ/8/15/2022.
11. *Nakasamu v Kakoma & Others* CCZ Appeal of 2021
12. *Zinka v. The Attorney General* (1990-92) ZR 73
13. *Josephine Kabwe v Dominic Kapasa* Selected Judgment No. 4 of 2014
14. *Savenda Management Services v. Stanbic Bank Zambia* Selected Judgment No. 10 of 2018
15. *K.V. Wheels Construction Limited v Investrust PLC* SCZ/8/29/2021
16. *African Banking Corporation (Z) Limited (TIA BancABC) v. Plinth Technical Works Limited* Selected Judgment No. 28 of 2015
17. *Christine Malosa Banda v. Copperbelt Energy Corporation and Two Others* S.C Appeal No. 187 of 2013
18. *Nkongolo Farm Limited V. Zambia National Commercial Bank and Others* (2005) Z.R 78.
19. *Benson Munganama v. Fridah Ngoma and The Attorney General* SCZ Appeal No 186 of 2015
20. *New Plast Industries v. The Commissioner of Lands and The Attorney-General* (2001) Z.R. 51
21. *In Afrope Zambia Limited v. Anthony Chate and Others* SCZ Appeal Number 160 of 2016 we said that:
22. *YB And F Transport Limited v. Supersonic Motors Limited* SCZ Judgment No. 3 of 2000
23. *Kuta Chambers (Sued as a firm) v. Concillia Sibulo* SCZ Judgment No. 36 of 2015

**Legislation referred to:**

1. *The Rules of the Supreme Court of England 1965 (Whitebook) 1999 Edition*
2. *The Lands and Deeds Registry Act, Cap. 185 of the Laws of Zambia*

**1.0 INTRODUCTION**

- 1.1** This is a renewed application for leave to appeal to this Court. The renewal was prompted by the single judge's

decision to allow leave to appeal to this Court on one out of the 10 proposed grounds of appeal presented by the applicant. That ground questioned the award of costs by the Court of Appeal to a party who did not participate in the appeal.

- 1.2 The single judge rejected the other nine proposed grounds of appeal on account of the fact that they sought to correct what the applicant considered sheer misdirections by the Court of Appeal. She was of the view that this cannot be the basis for granting leave to appeal to the Supreme Court.

## **2.0 BACKGROUND FACTS**

- 2.1 The applicant had, before the Court of Appeal, unsuccessfully challenged a decision of the High Court given in favour of the 2<sup>nd</sup> respondent. The dispute concerned ownership of a parcel of land sold to the applicant by the 1<sup>st</sup> respondent.
- 2.2 The applicant purchased a subdivision from the 1<sup>st</sup> respondent for US\$ 125,000.00 and agreed to rent it back to the 1<sup>st</sup> respondent. The rent was pegged at US\$5,000.00 per month. The 1<sup>st</sup> respondent initially paid rent from

September to December 2009. Rentals for the month of January, 2010 were only paid partially. The 1<sup>st</sup> respondent then stopped making rental payments altogether. Subsequently, the applicant commenced an action in the High Court against the 1<sup>st</sup> respondent for the recovery of the unpaid rent.

**2.3** The 1<sup>st</sup> respondent's mother (the 2<sup>nd</sup> respondent) later joined, by consent of both parties, the proceedings in the High Court. Having now become a party to the action, she claimed that she in fact owned Farm No. F441a/12. This is the farm that was subject of the transaction between the applicant and the 1<sup>st</sup> respondent and formed the basis of the action in the High Court. The 2<sup>nd</sup> respondent claimed that she held Certificate of Title No. L 4300A in respect of that farm.

**2.4** She strenuously argued that the transaction between the applicant and the 1<sup>st</sup> respondent was defective as the subdivision was sold without her authorisation. She denied having executed a deed of gift granting the 1<sup>st</sup> respondent ownership of her farm or any part of it.

- 2.5** She testified that she had reported both the applicant and the 1<sup>st</sup> respondent to the police on account of what she perceived as an illegal transaction involving her land.
- 2.6** The applicant insisted that the 1<sup>st</sup> respondent properly sold him the property and that at no point did he reveal to him that it belonged to the 2<sup>nd</sup> respondent. He argued that the transaction was valid at law, at least to the extent that he believed that the land in question belonged to the 1<sup>st</sup> respondent when he purchased it.
- 2.7** The 1<sup>st</sup> respondent argued, in a nutshell, that he never sold the property to the applicant but that the land was merely used as collateral to obtain a loan from the applicant. The 1<sup>st</sup> respondent admitted to forging documents to enable him unscrupulously create a subdivision of Farm No. F441a/12 (“the subdivision”) which he subsequently purported to sell to the applicant.
- 2.8** After reviewing the evidence before him, the trial judge found that the 1<sup>st</sup> respondent admitted having fraudulently created the subdivision and later obtained a certificate of title in respect of that subdivision.

- 2.9** The trial judge noted that a *bona fide* purchaser for value is protected from actions by a deprived owner in cases involving property acquired from a fraudulently registered proprietor.
- 2.10** The judge went on to examine the inconsistencies in the Land Registry records presented before him and found that the issuance of the certificate of title to the 1<sup>st</sup> respondent was irregular. Additionally, he observed that the deed of gift relating to the subdivision did not appear in the registry.
- 2.11** In the trial Court's view, the glaring irregularities relating to the subdivision ought to have put the applicant on inquiry as to the genuineness of the transaction with the 1<sup>st</sup> respondent. Ultimately, he found that the applicant was not a *bona fide* purchaser and was not entitled to the land in question.
- 2.12** He also held that the applicant could not enforce the tenancy agreement with the 1<sup>st</sup> respondent as he had no valid title over the property in question. He, however, ordered the 1<sup>st</sup> respondent to refund the purchase price to

the applicant less the amount the 1<sup>st</sup> respondent paid as rent.

**2.13** Discontented with the decision of the High Court, the applicant appealed to the Court of Appeal. The Court of Appeal refused to reverse the decision of the High Court.

**2.14** The Court of Appeal noted that the applicant's argument that fraud was not specifically pleaded was unfounded as the 1<sup>st</sup> respondent raised the issues of fraud in his evidence-in-chief. Further, that the 2<sup>nd</sup> respondent was categorical at trial that she did not execute a deed of gift in favour of the 1<sup>st</sup> respondent. Therefore, the applicant was well aware of the allegations of fraud and did not object to them.

**2.15** The Court of Appeal referred to our decision in **Mwansa and Another v. Mpofu and Another** <sup>(1)</sup> where we stated, in relation to fraud, that if a party has neither pleaded nor outlined facts that disclose fraud but has adduced evidence of fraud at trial, and that evidence has not been objected to, the court is required to consider it.

**2.16** With regard to the applicant's argument that he was a *bona fide* purchaser for value without notice of any defect in title,

the Court of Appeal observed that there were glaring anomalies revealed by the printout from the Ministry of Lands. The Court further noted the conspicuous discrepancies in the Lands Register, the assignment and the certificate of title. According to the Court, these should have put the applicant on notice as to the legitimacy of the transaction with the 1<sup>st</sup> respondent. It thus refused to accept that the applicant was a *bona fide* purchaser for value without notice.

**2.17** Ultimately, the Court of Appeal dismissed the applicant's appeal. Unfazed by the decision of the Court of Appeal, the applicant sought leave to appeal the judgment in terms of section 13 of the Court of Appeal Act No. 7 of 2016. That application for leave to appeal failed.

**2.18** The Court of Appeal held the view that the application for leave did not raise any issues of public importance, nor were there any compelling reasons for the intended appeal to be heard by this Court. The Court of Appeal also concluded that the intended appeal had no prospects of success. It accordingly refused to grant leave to appeal.



**2.19** The applicant then applied for leave before a single judge of this court. In her ruling, the single judge opined that the proposed appeal sought to correct what the applicant considered to be errors made by the Court of Appeal.

**2.20** It was the judge's view that the basis upon which the application was made was not compelling. She, however, found legitimate the issue on costs, namely; that the Court of Appeal should not have granted costs to a party that did not appear at the hearing of the appeal. Consequently, she granted leave to appeal on that single issue only.

**2.21** Displeased with the single judge's take on his proposed grounds of appeal, the applicant has now renewed the application for leave to appeal before the full Court. The motion is supported by an affidavit and submissions.

### **3.0 THE RENEWED APPLICATION FOR LEAVE BEFORE THE FULL COURT: THE APPLICANT'S CASE**

**3.1** The affidavit in support of the notice of motion was sworn by Jonathan Andy Wright, Counsel for the applicant. He stated that he would be relying on the affidavit sworn by Jayesh Shah filed before the single judge.

**3.2** The intended grounds of appeal appear in the draft memorandum of appeal exhibited in the supporting affidavit. They are couched in the following terms:

**1. That the learned judges of the Court of Appeal misdirected themselves in law and fact when they failed to take any or sufficient weight of the following to wit:**

**(i) That it was the learned trial judge who wrongly invoked Order 28 rule 7 (i) of the Rules of the Supreme Court [1999] Ed; instead of Order 28 rule 8 (i) of the said Supreme Court Rules.**

**(ii) That the learned trial judge, having wrongly invoked Order 28 rule 7(i) instead of Order 28 rule 8 (i) of the rules of the Supreme Court; whether the learned judge trial judge was cloth[ed] with the requisite jurisdiction to proceed in the manner as he did in the circumstances of the case.**

**(iii) The effect of not invoking and/or of invoking Order 28 rule 8 (i) of the rules of the Supreme Court.**

**2. That the learned judges of the Court of Appeal misapplied the law when they failed to distinguish the case of Mwansa & Another v. Mpofo and Another [Appeal No. 34 of 2018] from the facts of this appeal and/or failed to appreciate that in the circumstances of this case [assuming proper direction were given vide Order 28 rule 8 (i) of the Rules of the Supreme Court] and its effect thereof, fraud ought to have been specifically pleaded and particularised and not to be inferred.**

- 3. That the learned judges of the Court of Appeal misdirected themselves in the law and/or misapprehended the facts on the record; when they held that the learned trial judge 'gave what appears to be an 'order for directions', on how the matter is to proceed after the 2<sup>nd</sup> Respondent had been made a party and filed an affidavit in opposition to the appellant's originating summons. And that 'the filing of written submissions by particular dates after which trial would be held was sufficient for the purposes of fulfilling the requirements of Order 28 rule 8 (i) of the Rules of the Supreme Court.**
- 4. That the learned judges of the Court of Appeal misdirected themselves in law when they held that the appellant is not an innocent purchaser for value without notice as the appellant did not apply due diligence and/or was negligent in investigating title on the basis "of glaring anomalies revealed by a printout of the Register relating to the sold property and the discrepancies between the said register and the assignment on the one hand and the Certificate of Title on the other", without taking any and/or sufficient account of the following to wit;**

  - (i) That the print-out on page 150 was dated 21<sup>st</sup> April, 2021; that 589 days after the contract of sale between the appellant and the 1<sup>st</sup> respondent and/or after title was issued to the appellant on 9<sup>th</sup> September, 2009.**
  - (ii) That the print-out on pages 147-149 relates to a property the appellant did not purchase.**

**(iii) That the issue of the size of the property and who had assigned the purchased property to the appellant was not in contention in the lower Court.**

**(iv) That there is no evidence that the appellant is/was responsible for the anomalies and/or for the discrepancies in the printout and/or between the assignment and the certificate of title.**

**(v) The effect of section 59 of the Lands and Deeds Registry Act. Cap. 185 of the Laws of Zambia.**

**5. That the finding and/or holding by the learned judges of the Court of Appeal that “the appellant’s curiosity should have also been raised by the fact that the certificate of title was issued the same day the Deed of Gift was registered,” is not supported by the evidence and/or is against the weight of the evidence on the record.**

**6. That the learned judges of the Court of Appeal misdirected themselves in law when they failed to address all the issues that were before them particularly;**

**(i) Whether the learned trial judge breached the rules of natural justice ‘audi alteram partem’, in the circumstances of the case.**

**(ii) Whether the learned trial judge was right and/or wrong in law when he ordered that the 1<sup>st</sup> respondent should pay back the purchase price.**

**7. That the learned judges of the Court of Appeal wrongly exercised their discretion as to costs.**

**3.3** The applicant filed an affidavit supporting his application dated 1<sup>st</sup> March 2023. We note that the bulk of the affidavit

contains narrations of what transpired before the lower Courts. Much of those narrations are on the record and some have been summarised in this ruling, or at least the relevant portions have been. Therefore, we will not rehash all the narrations contained in the applicant's affidavit.

**3.4** The applicant averred that on 7<sup>th</sup> September 2009, he entered into a contract of sale with the 1<sup>st</sup> respondent for the purchase of the subdivision. Subsequent to that transaction, the applicant leased the purchased property to the 1<sup>st</sup> respondent.

**3.5** The 1<sup>st</sup> respondent soon fell into rental arrears, prompting the applicant to commence an action in the High Court in December 2010. The aim of that action was to recover unpaid rentals and to evict the 1<sup>st</sup> respondent from the property.

**3.6** The 1<sup>st</sup> respondent filed an affidavit in opposition in which he alleged fraud. Trial ensued and the 2<sup>nd</sup> respondent was joined to the proceedings following which she too filed an affidavit in support of her claim and also alleged fraud.

- 3.7** According to the deponent, the trial judge failed to give direction as to how the matter should proceed after the allegations of fraud were raised by the respondent.
- 3.8** This misdirection, according to the deponent, raises an issue of law of public importance requiring resolution by the Supreme Court.
- 3.9** The applicant went on to aver that the transaction with the 1<sup>st</sup> respondent was valid. He added that other additional documents such as the contract of sale, lodgement schedule, consent to assign and property transfer tax clearance certificate show the 1<sup>st</sup> respondent as the assignor or seller.
- 3.10** He asserted that he is not responsible for the glaring anomalies as he lodged all the requisite documents and was issued a certificate of title relating to property No. F/441a/12/A which was registered in the 1<sup>st</sup> respondent's name at the time of the transaction. He added that his advocates conducted due diligence on the property prior to the contract including contacting the 1<sup>st</sup> respondent's advocates.

**3.11** The applicant stated that the Court of Appeal did not address all the issues before it such as questions of jurisdiction, whether the trial judge was on firm ground when he ordered repayment of the purchase price, whether the trial court breached the rules of natural justice, and whether the trial court correctly exercised its discretion as to costs.

**3.12** He averred that the trial court clearly found that the alleged fraud was on the part of the 1<sup>st</sup> respondent as opposed to the applicant.

**3.13** According to the applicant, he has been in possession of the original certificate of title in relation to the subdivision he purchased from the 1<sup>st</sup> respondent since September 2009. In conclusion, he urged the Court to grant his application for leave to appeal.

#### **4.0 THE APPLICANT'S SUBMISSIONS**

**4.1** The applicant filed voluminous submissions supporting the seven proposed grounds of appeal. The applicant's counsel spoke to these submissions.

- 4.2 Mr. Wright contended that the proposed grounds of appeal raised issues that constituted points of law of public importance. He referred us to the case of **Bidvest Food Limited & Others v. CAA Import and Export**<sup>(2)</sup> where we discussed what constituted a point of law of public importance and what would essentially convince us to grant leave to appeal to this Court.
- 4.3 Learned Counsel argued that while it is not every case that must grace the Supreme Court, the door must be left open to allow the Supreme Court clarify jurisprudence on issues of public interest. He contended that the proposed appeal presents an opportunity for the Court to settle the law on pertinent issues relating to purchase and registration of land.
- 4.4 It was argued that the appeal specifically asks the Court to address the issue of whether a purchaser who has not committed any fraud and followed all requisite procedures can be deprived of property properly purchased. He buttressed his point by referring us to sections 33 and 59 of the Lands and Deeds Registry Act which, in his view,



provide that a certificate of title issued to a *bona fide* purchaser for value is conclusive proof of title.

4.5 Counsel's contention was that if the questions in the appeal are not resolved, certificates of title will be cancelled on account of errors in the printouts from the Lands and Deeds Registry.

4.6 Mr. Wright also addressed the applicant's dissatisfaction with the trial Court's failure to properly invoke the provisions of Order 28 Rule 8 of the White Book and the effect it had on the proceedings. Order 28 rule 8(1) of the White Book provides that:

**Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.**

4.7 Counsel for the applicant also submitted that the failure to give the requisite order for directions departed from the

normal course and raised a novel point of law which this Court should settle.

- 4.8** Learned Counsel referred to the portion of the Court of Appeal judgment where the Court found that the trial judge issued what “appeared” to be an order for directions stating that, that order was sufficient for the purposes of fulfilling the requirement of Order 28 rule 8(1) of the White Book.
- 4.9** In the same vein, the learned counsel also advanced the questions whether an order for directions to file submissions fulfils the requirement of Order 28 Rule 7 and Order 28 Rule 8 of the White Book, and whether an order to file submissions can substitute an order for directions under the said Orders.
- 4.10** Mr. Wright argued that the power vested in the Court under Order 28 rule 8 is discretionary. He referred us to the case of **Collet v. Van Zyl Brothers Limited**<sup>(3)</sup> where it was held that discretionary powers must be exercised judiciously.
- 4.11** Counsel also argued that the record shows that the trial Court did not give an order for directions at all. He referred us to the case of **Chishala Karabasis Nivel and Another v. Laston**

**Mwale**<sup>(4)</sup> where we stated that the act of deeming proceedings to have been properly commenced saves a court from otherwise acting without jurisdiction.

4.12 He argued that the holding by the Court of Appeal that the trial Court invoked the powers under Order 28 rule 8 of the White Book was erroneous and not supported by evidence as no such order was given by the trial Court. He added that the net effect was for the Court to lose jurisdiction as per the decision in **Chishala Karabasis Nivel and Another v. Laston Mwale**<sup>(4)</sup>. To support his argument, learned Counsel referred us to the case of **Zlatan Zlatkoarnautovic v. Stanbic Bank**<sup>(5)</sup> where the Court stated that jurisdiction is everything and that no step taken is valid where a court lacks the requisite jurisdiction.

4.13 Mr. Wright referred us to the cases of **Bidvest Food Limited & Others v. CAA Import and Export**<sup>(1)</sup>, **Consolidated Copper mines v. Matale**<sup>(6)</sup>, **Nkhata and Others v. The Attorney General**<sup>(7)</sup>, **The Attorney General v. Marcus Achiume**<sup>(8)</sup> and **Zambia Revenue Authority v. Dorothy Mwanza and Others**<sup>(9)</sup> in which cases the entrenched principle was reiterated that appellate courts

will not routinely interfere with findings of fact made by a trial court unless such findings are perverse was espoused.

**4.14** Mr. Wright contended that the issue of whether an order for directions should “appear” to be an order for directions in fulfilment of Order 28 Rule 8 of the White Book has not been litigated upon in our jurisdiction. He further contended that this is a compelling ground for this court to grant leave to appeal. To support his argument, Counsel referred us to the case of **Abdul Ebrahim Dudhai, Arshad Abdulla Dudhai and Gulam Farid Patel trading as Musa Dudhia and Co; (a Law Firm) v. Sanmukh Ramanlal Patel and First Alliance Bank<sup>(10)</sup>**. According to Mr. Wright, the import of the decision in this case is that, the fact that a matter has not been litigated before is a compelling reason to grant leave to appeal.

**4.15** Learned Counsel also argued, in the alternative, that if the Court of Appeal was right in holding that the trial Court gave orders for direction, then uncertainty would be created by contradictory precedents.

**4.16** Mr. Wright further argued that the conflicting precedents stemmed from the Court of Appeal's conclusion that the

trial court's directions for parties to file submissions satisfied the provisions of Order 28 Rule 8(1) of the White Book was not supported by existing jurisprudence. According to Mr. Wright, this contradicted our decision in **Chishala Karabasis Nivel and Another v. Laston Mwale**<sup>(4)</sup> where we held that:

**If, however, the learned trial judge had resorted to Order 28 Rule 8 of the Rules of the Supreme Court and deemed the action to have commenced by way of writ of summons and clearly noted this fact and guided the parties accordingly, the act of deeming the proceedings to have commenced properly would have saved the proceedings from suffering the consequences of the court lacking jurisdiction.**

**4.17** It was argued that given the fact that the trial Court allowed trial to proceed at a time when the 1<sup>st</sup> respondent had not filed any opposition into Court suggested that the matter was not ripe for trial, thereby exposing the applicant to trial by ambush. He further argued that this raised a further question of whether the trial Court had jurisdiction to commence trial prematurely after the close of the plaintiff's case. In support of the proposition that courts frown upon trial by ambush, we were referred to the cases of **Nkasamu v.**

**Kakoma and Others<sup>(11)</sup>** and **Zinka v. The Attorney General<sup>(12)</sup>** as authority.

4.18 Counsel argued that the allegations of fraud were raised after the applicant had closed its case and the fraud was not pleaded let alone particularised. He cited the case of **Chishala Karabasis Nivel and Another v. Laston Mwale<sup>(4)</sup>** as authority for the argument that fraud must be pleaded and particularised.

4.19 Counsel for the applicant argued that the Court of Appeal erred in its application of the law by failing to distinguish the case of **Mwansa and Another v. Mpofu and Another<sup>(1)</sup>** from the specifics of this appeal. Further, that the Court of Appeal did not fully grasp the circumstances of this case that required fraud to be specifically pleaded.

4.20 Mr. Wright submitted that as a result of how the proceedings were conducted, two of our decisions on how to plead fraud were now in conflict namely, **Mwansa and Another v. Mpofu and Another<sup>(1)</sup>** and **Chishala Karabasis Nivel and Another v. Laston Mwale<sup>(4)</sup>**.

4.21 Mr. Wright contrasted the Court of Appeal's holding which placed reliance on the case of **Mwansa and Another v. Mpofu and Another**<sup>(1)</sup>. He referred us to an excerpt from the Court of Appeal Judgment where the Court, in his view, misapplied our decision.

4.22 According to counsel, the application of the principle outlined in the **Mwansa and Another v. Mpofu and Another**<sup>(1)</sup> by the Court of Appeal and the facts in casu contradicted what was held in the case of **Chishala Karabasis Nivel and Another v. Laston Mwale**<sup>(4)</sup>. He argued that this uncertainty brought by the conflicting decisions was good ground to grant leave to appeal.

4.23 Learned Counsel submitted that although in most instances the sale and purchase of real property involves two or more individuals, the transaction is not entirely private. He further submitted that the transaction required dealings with relevant public authorities, namely, the Zambia Revenue Authority, and the Lands and Deeds Registry Department.

- 4.24 Consequently, Mr. Wright argued that just as it was held in the **Bidvest**<sup>(2)</sup> case, this matter hinges on public interest as it raises matters of public importance.
- 4.25 Learned counsel also stated that the intended appeal aims to prompt the Supreme Court to clarify whether a purchaser, who is not involved in any fraudulent activity and has diligently followed all procedures, including obtaining a certificate of title, can still be stripped of his property due to alleged negligence or failure to conduct due diligence.
- 4.26 It was Counsel's contention that the authenticity of certificates of title would be questioned if it was shown that printouts had any errors despite **Section 33 of the Lands and Deeds Registry Act** stating that a certificate of title is conclusive proof of ownership.
- 4.27 Further, Counsel submitted that a question that needed this Court's consideration was whether the rights of an innocent purchaser who did not act fraudulently could be ignored on the basis of errors and omissions that were not attributable to the innocent purchaser. We were referred to our decision



in **Josephine Kabwe v. Dominic Kapasa**<sup>(13)</sup> where we held that it was not possible to ignore the rights of an innocent purchaser without a proper basis.

**4.28** Mr. Wright contended that the Court of Appeal failed to consider all the issues raised in the appeal before it, particularly whether the trial court breached the rules of natural justice in the circumstances of the case.

**4.29** Furthermore, counsel submitted that the trial court's procedure raised doubts as to its jurisdiction by commencing the trial prematurely after the plaintiff's case had been concluded.

**4.30** At the hearing of the application, Mr. Wright, for the most part, recapped the written submissions filed into Court. For this reason, we do not wish to restate those arguments in this ruling. Suffice to state that the same have been considered.

## **5.0 THE RESPONDENT'S CASE**

**5.1** The 1<sup>st</sup> respondent filed a concise affidavit opposing the application. He stated that the applicant's application has

not disclosed any novel issue which requires the intervention of the Supreme Court.

**5.2** It was contended that section 13 of the Court of Appeal Act requires that a party moving the court for leave to appeal must show that there is a matter of public importance that requires to be resolved. Further, that the intended appeal has no prospects of success and there are no compelling reasons for the appeal to be heard by the Supreme Court.

**5.3** We were referred to the case of **Savenda Management Services v. Stanbic Bank Zambia**<sup>(14)</sup> where we explained the rationale for restricting appeals to the Supreme Court. The Court was implored to refuse to grant the applicant leave to appeal as his application lacks merit.

## **6.0 ANALYSIS AND DECISION**

**6.1** We have painstakingly considered the application for leave made by the applicant as well as the submissions and arguments advanced by Counsel for the parties.

**6.2** This motion brings into focus section 13(3) of the Court of Appeal Act which is the basis upon which we allow parties aggrieved with decisions of the Court of Appeal to bring their

grievances to this Court. This court is being called upon to determine whether the application for leave to appeal raises a point of law of public importance; has prospects of success or there is some other compelling reason for the appeal to be heard.

**6.3** In recent years and in several of our decisions, we have explained that since the introduction of the Court of Appeal the role of our Court has changed. We put this point aptly in the **Bidvest**<sup>(2)</sup> case when we stated that:

**...the Constitution elevated the Supreme Court to a level above an ordinary appellate court. Its original role of hearing appeals from the High Court and other quasi-judicial bodies having effectively been assumed by the newly created Court of Appeal, means that its role in the appellate structure has necessarily changed. In our view, even without the benefit of learning from the experience of other jurisdictions with court structures such as our country has now adopted following the enactment of the amended constitution, it would not have been the intention of the framers of the amended Constitution that the Court of Appeal and the Supreme Court should be performing the same or even a similar function.**

**6.4** We must emphasise here that all litigants must keep the guidance we gave above in mind as they approach our Court to seek audience.

- 6.5 We have carefully perused the intended grounds of appeal presented by the applicant. The first three intended grounds of appeal relate to an order for directions issued by the trial Judge.
- 6.6 Mr. Wright argued that, contrary to the Court of Appeal's holding, the trial Judge wrongly invoked the provisions of Order 28 rule 7 of the White Book as opposed to Order 28 rule 8(1) of the White Book. In his view, the trial Court ought to have deemed the matter before him as having been commenced by way of writ of summons. Thereafter, he should have issued the appropriate order for directions.
- 6.7 In Mr. Wright's opinion, this apparent misdirection by the trial Judge raised a question of law of public importance worthy for us to resolve.
- 6.8 In our recent decision in **K.V. Wheels Construction Limited v. Investrust PLC<sup>(15)</sup>**, we discussed different authorities outlining what amounted to a question of law of public importance and held as follows:

**The authorities on the point agree that for an appeal to be regarded as one raising a point of law of public importance it need not necessarily be one that raises a difficult**

**question of law; it must raise important questions of law, that is to say, a question that presents uncertainty on the state of the law requiring authoritative clarification. Such question must additionally affect a wider audience of the public than the immediate litigants in the appeal.**

6.9 We note that Mr. Wright has not enlightened us on how the Court of Appeal's holding that the trial Judge gave an order for directions in line with Order 28 rule 8(1) of the White Book could possibly upset existing precedents that shape our jurisprudence.

6.10 This Court has time and again given guidance on how Courts must proceed when matters commenced by Originating Summons become potentially contentious. In the **Chishala Karabasis Nivel and Another v. Laston Mwale<sup>(4)</sup>** case, which has been heavily relied upon by the applicant, we stated that:

**Notwithstanding commencement of an action through a wrong mode, Order 28 Rule 8 of the Rules of the Supreme Court (White Book) (1999 edition) allows a judge to deem a matter that has been commenced by originating summons as having been commenced by writ of summons.**

6.11 Further, in **African Banking Corporation (Z) Limited (TIA Banc ABC) v. Plinth Technical Works Limited<sup>(16)</sup>** we stated in that:

**Where, in a matter begun by originating summons, it appears to the court that the matter should have commenced by writ of summons, the court has power under Order 28 Rule 8 RSC at any stage of the proceedings, to order that the proceedings should continue as if the matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings and give further directions on the conduct of the matter.**

**6.12** Our view is that the law on applicability of Order 28(8) of the White Book is clearly settled. We have given sufficient guidance as to when that provision can be properly invoked.

**6.13** In the **Bidvest<sup>(2)</sup>** case we were emphatic that this court should not be used as an avenue to constantly correct errors made by lower courts. Especially on positions that we have given clarity time and again. In the **Bidvest<sup>(2)</sup>** case, we had this to say:

**As is the case in other jurisdictions such as the United Kingdom and the United States, it is not and cannot be the proper role of the Supreme Court to routinely correct errors made by lower courts.**

**6.14** In any event, the particular circumstances of this case show that no prejudice could have been occasioned to the applicant as he went ahead and opposed the affidavit filed by the respondents even after the allegations of fraud were

raised. He also went ahead and filed submissions supporting his position. In essence, he had an opportunity to ventilate his views regarding the allegations made by the respondents.

**6.15** In the **K.V. Wheels Construction Limited v. Investrust PLC**<sup>(15)</sup>, we stated that a point of law arises when a question presents uncertainty on the state of the law requiring authoritative clarification which must affect a wider audience. The view we hold is that the authorities from this Court on Order 28 rule 8(1) of the White Book do not require any further clarification. At least not in the context presented by the applicant.

**6.16** Mr. Wright has also argued that leave to appeal be granted as its refusal will lead to conflicting decisions. He argues that as things stand, there is a state of uncertainty and contradiction between our decision in the **Chishala Karabasis Nivel and Another v. Laston Mwale**<sup>(4)</sup> and the decision of the Court of Appeal relating to the holding that the trial judge properly issued an order for directions. His fear was that the lower courts may be tempted to adopt the reasoning of the Court of Appeal.

6.17 What we can glean from Mr. Wright's arguments is that the applicant is dissatisfied with the Court of Appeal's application of the principles we enunciated in **Mwansa and Another v. Mpofo and Another**<sup>(1)</sup>. It seems to us that Counsel's arguments are that the contradiction, if any, only arises as a result of the Court of Appeal's application of that case to the facts and not from the principles established by that case.

6.18 Our view is that this argument cannot stand. It is trite law that decisions of this Court are binding on the Court of Appeal and all other lower Courts. Therefore, the applicant cannot call upon us to resolve a contradiction between our decision and that of the Court of Appeal. This line of argument clearly flies in the face of the established principle of *stare decisis*.

6.19 Mr. Wright further contends that the other contradiction is between our decision in **Mwansa and Another v. Mpofo and Another**<sup>(1)</sup> and in **Chishala Karabasis Nivel and Another v. Laston Mwale**<sup>(4)</sup>. Unfortunately, the arguments before us do not explain the contradiction that would require our intervention.



**6.20** In any event, our reading of the two cases is that they do not in any way present a contradiction. In both cases we emphasised the need for allegations of fraud to be distinctly and particularly proved. In the **Chishala Karabasis Nivel and Another v. Laston Mwale<sup>(4)</sup>** case, we stated that:

**Any charge of fraud must be pleaded with utmost particularity and fraudulent conduct must be distinctly alleged and proved and is not to be left to be inferred from the facts.**

**6.21** In **Mwansa and Another v. Mpofu and Another<sup>(1)</sup>**, relied upon by the Court of Appeal, we stated that:

**“...we agree with Counsel for the Appellants that it is settled law that fraud must be distinctly alleged and proved”.**

This remains the position that this Court has taken in a plethora of cases.

**6.22** However, we are alive to the fact that in the same case we went further and guided that:

**Some decided cases, however, seem to suggest that a party relying on fraud does not necessarily have to mention the word "fraud" in the pleadings. That it is enough for that party to simply set out sufficient and distinct facts that disclose fraudulent conduct.**

6.23 We then went ahead and referred to our previous cases where this view was embraced, namely: **Christine Malosa Banda v. Copperbelt Energy Corporation and Two Others**<sup>(17)</sup> and **Nkongolo Farm Limited v. Zambia National Commercial Bank and Others**<sup>(18)</sup>. In the latter case we went as far as stating as follows:

**...we hold that there was evidence adduced before the High Court by the appellant on the misrepresentation by the 3<sup>rd</sup> respondent, which evidence was not objected to by the respondents. The Court has an obligation to weigh that evidence.**

6.24 Clearly, we have given sufficient guidance on how fraud must be pleaded and how courts must treat unopposed evidence of fraud presented before them. It would appear to us that it is these views on unopposed evidence of fraud that the Court of Appeal may have sought solace in when resolving the question, whether or not fraud was particularised and pleaded.

6.25 Our view is that there is no compelling reason for us to grant leave to appeal on the basis of the above arguments.

**6.26** We now turn to the questions raised in proposed grounds 4 and 5. The questions relate to issues of due diligence that prospective purchasers of land ought to engage in prior to completing their transaction. Counsel for the applicant advanced several questions for our determination. The contention mainly stemmed from the discrepancies on the Lands Register printout and the Court of Appeal's holding in light of those discrepancies.

**6.27** We have in several cases guided purchasers of land to conduct thorough due diligence when purchasing land. In the case of **Benson Munganama v. Fridah Ngoma and The Attorney General**<sup>(19)</sup> we made the following observation:

**...A closer look at the advertisement would have alerted the appellant that that the duplicate title deeds that were being applied for related to 7 hectares and not 851 square metres. The Gazette notice also shows the same error which should have put the appellant on notice. All these red flags were there for the appellant to take heed... but he chose not to. He cannot be said to be an innocent purchaser for value without notice.**

**6.28** We are of the view that the issues of errors in documents pertaining to purchase of land have already been dealt with by this Court. We have in the past given the necessary

caution that indeed, prospective purchasers of land that do not take note of any red flags during the purchase process risk having their certificates of title cancelled.

**6.29** Our view is that there is nothing novel in the arguments presented by Mr. Wright with regard to cancellation of title owing to errors on key documents.

**6.30** In any event, the questions raised by Mr. Wright under this intended ground of appeal concern findings of fact relating to the glaring discrepancies regarding the transaction. It is settled law that we are extremely reluctant to disturb findings of fact made by a trial court unless it is shown that the findings are not premised on the evidence before the Court or the findings are ultimately misconceived. In **The Attorney General v. Marcus Achiume**<sup>(8)</sup> we stated that we can only disturb findings of fact if we are:

**...satisfied that the findings in question were either perverse, or made in the absence of any relevant evidence or upon a misapprehension of facts, or that they were findings which, on a proper view of the evidence, no trial Court acting correctly can reasonably make.**

6.31 Our perusal of both the judgment of the High Court and Court of Appeal clearly show that the issue of discrepancies was thoroughly considered. Our view is that this is not an appropriate case for us to interrogate the findings of fact further by granting leave to appeal.

6.32 Under the intended ground 6, the applicant argues that the Court of Appeal did not address all the issues presented before it particularly the question whether or not the applicant was denied the right to be heard. Further, that the Court of Appeal failed to address the question whether or not the 1<sup>st</sup> respondent ought to have been ordered to refund the purchase price.

6.33 As we noted earlier in this ruling, the record will show that the applicant had an opportunity to oppose the affidavits filed by the respondents and he also filed written submissions. It is trite law that the presentation of evidence during any legal proceedings can be either oral or written. If evidence is provided through an affidavit, the individual who deposed to the facts in the affidavit cannot claim that they were denied a hearing simply because they did not present oral evidence. In the case of **New Plast Industries v. The**

**Commissioner of Lands and The Attorney-General**<sup>(20)</sup> we put the point this way:

**The content of what amounts to the hearing of the parties in any proceedings can take either the form of oral or written evidence. Where the evidence in support of an application is by way of affidavit, the deponent cannot be heard to say that he was denied the right of a hearing simply because he had not adduced oral evidence.**

**6.34** Therefore, we hold the view that the applicant cannot properly argue that he was never heard when he had the opportunity to present and did in fact present affidavit evidence.

**6.35** With regard to the question as to whether the 1<sup>st</sup> respondent should have been ordered to refund the applicant the purchase price, it was the finding of the trial Court that the 1<sup>st</sup> respondent had no title to pass to the applicant. Therefore, it is only proper to expect that the 1<sup>st</sup> respondent is ordered to pay back the purchase price to the applicant.

**6.36** The last intended ground of appeal relates to costs. We are alive to the fact that the single judge granted leave to appeal to this Court on the question of costs alone. We note that the basis for allowing leave on the issue of costs was on

account that Counsel for the respondent did not appear at the hearing of the appeal.

**6.37** The legal principles governing the award of costs are firmly established in our laws. We have reiterated these principles in numerous authorities. In **Afrope Zambia Limited v. Anthony Chate and Others**<sup>(21)</sup> we said that:

**We have ... stated in a number of authorities that costs are in the discretion of the court.**

**6.38** Further, in **YB And F Transport Limited v. Supersonic Motors Limited**<sup>(22)</sup> we held that:

**The general principle is that costs should follow the event; in other words, a successful party should normally not be deprived of his costs, unless the successful party did something wrong in the action or in the conduct of it.**

**6.39** We are of the view that since the legal principles relating to costs are clear and settled, there is nothing new that this Court will be adding to the already existing jurisprudence. To push the point further, a Taxing Officer/Master will only award costs that have been reasonably incurred.

**6.40** Therefore, even at taxation a party must show the costs they are claiming have in fact been incurred, otherwise no costs

will be awarded. In **Kuta Chambers (Sued as a firm) v. Concillia Sibulo**<sup>(23)</sup> we had this to say:

**The party and party costs, that is to say all the costs necessary to enable the adverse party to conduct or defend the litigation, excluding luxuries, will generally be awarded to the successful party. The object of these costs is to indemnify the successful party against the expenses to which he has been put by the unsuccessful party. We must also stress that the effect of this is to give the successful litigant a full indemnity for all costs reasonably incurred by him in relation to the action...**

6.41 We are alive to the fact that a party may be condemned in costs for so many reasons. It may not matter whether or not the winning party in fact appeared to defend the appeal. Without attempting comprehensiveness, a party may be condemned to pay costs for several reasons including, for example, the conduct of that party or their legal practitioner, the nature of the litigants or the nature of the proceedings.

6.42 We mention these examples to merely illustrate that the principles which we have espoused in **Afrope Zambia Limited v. Anthony Chate and Others**<sup>(21)</sup>, **YB and F Transport Limited v. Supersonic Motors Limited**<sup>(22)</sup> and many other cases in relation



to the award of costs are by their nature sufficiently flexible and adaptable to allow courts employ discretion.

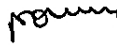
**6.43** While we note that the Court of Appeal did not explain why the respondents were awarded costs despite their non-attendance at the hearing of the appeal, courts may generally have other reasons for awarding costs or condemning a party in costs.

**6.44** As we have intimated earlier, ultimately a party must prove at taxation item by item that they are indeed entitled to costs failure to which a Taxing Officer is not mandated to award any costs. Similarly, the respondents will have to prove before a taxing officer that they in fact incurred costs.

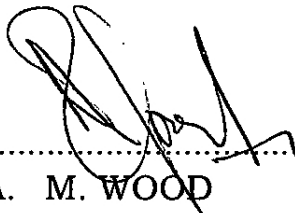
**6.45** In any event and for purposes of illustration only, even our rules, particularly Rule 16 (2) of the Supreme Court Rules, allow a party not to attend an appeal hearing. This means that should that party be awarded costs, it is not expected that costs for that hearing will be awarded at taxation.

6.46 In the circumstances and for the reasons we have given, we hold the view that the single judge should not have granted leave to appeal on the question of costs.

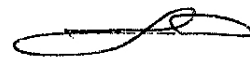
6.47 The net effect of our decision is that leave to appeal to this Court is denied on all proposed grounds of appeal. The motion is dismissed for lack of merit. Costs to the 2<sup>nd</sup> respondent.



.....  
Mumba Malila  
**CHIEF JUSTICE**



.....  
A. M. WOOD  
**SUPREME COURT JUDGE**



.....  
J. K. KABUKA  
**SUPREME COURT JUDGE**