

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2016/HP/2291



BETWEEN:

ALICE NGÁNDU KATENGO PLAINTIFF

AND

EVANS MWANSA 1ST DEFENDANT
MAURICE MWALE 2ND DEFENDANT
ANNE MWALE LUNGU 3RD DEFENDANT

**BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 24TH JULY, 2024 - IN CHAMBERS**

For the Plaintiff : Ms. C. Jere – National Aid Clinic for Women
For the 2nd Defendant : In Person
For the 3rd Defendant : Mrs. C.D. Choomba, Legal Aid Counsel – Legal Aid Board

JUDGMENT

CASES REFERRED TO:

1. *Rephidim Institute Limited V Attorney General (Appeal No. 256 of 2020) [2023]*
2. *Nora Mwaanga Kayoba and Alizani Banda V Eunice Kumwenda Ngulube and Andrew Ngulube (SCZ Judgment No. 11 of 2004)*
3. *Tito and Others v Waddel and Others 1997 No. 1(3) at page 322*
4. *Wesley Mulungushi v Catherine Bwale Mizi Chamba SCZ No. 11 of 2004*
5. *Lonrho Cotton Zambia Limited v Mukuka Textiles Limited SCZ No. 11 of 2002*
6. *AMG Global Trust Limited v Administrator General and Another CAZ Appeal No. 25 of 2020*
7. *Clementine Banda and Another V Borniface Mudima 2011 ZR Vol 3 162*
8. *Printing and Numerical Registry Company V Simpson (1975) ZR 106 Reported in Colgate Palmolive (Z) Inc V Abel Shemu Chuka and 110 Others SCZ Appeal No. 181 of 2005*
9. *Gideon Mundanda v Timothy Mulwani and the Agricultural Finance Company Limited and SSS Mwiinga (1987) ZR 30*

AUTHORITIES & OTHER WORKS REFERRED TO:

1. *The High Court Act Chapter 27 of the Laws of Zambia*
2. *Black's Law Dictionary the 10th Edition.*
3. *The Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia*
4. *The Housing Statutory Improvement Areas Act Chapter 194 of the Laws of Zambia*

This matter came by way of writ of summons and statement of claim filed on the 24th November, 2016. The plaintiff seeks the following:

1. *An Order that the transaction between the 1st and 2nd defendant be declared void.*
2. *An Order that the ownership of the property be reverted back to the plaintiff as the legal owner of plot No. L/5990/M Mtendere Lusaka.*
3. *An Order for specific performance for the 3rd defendant to vacate plot L/5990/M Mtendere Lusaka for the plaintiff*
4. *Costs incidental to this claim*
5. *Any other relief the court may deem fit.*

In the statement of claim it was averred that:

1. *Sometime in February, 2008, the plaintiff came across a poster advertising a piece of land in Mtedere East, Lusaka.*
2. *The plaintiff went to the said advertised plot and found the 1st defendant who said he was selling the land as an Agent on behalf of Mrs. Ressie K. Chuma who was the widow and beneficiary of the land which was part of the estate of the late Mr. Robinson Chuma.*
3. *The 1st defendant then introduced the plaintiff to the Administrator of Mr. Robinson Chuma's estate, Ms. Maureen Chuma Nyimba, the sister to the late Mr. Robinson Chuma.*
4. *The Administrator confirmed the land offer and said there were actually two plots on the land going for K6,000,000.00 (old currency) each. A search at the Ministry of Lands was*

carried out and indeed it was found that the land was owned by Mr. Robinson Chuma.

5. On the 29th day of February, 2008 the plaintiff made a down payment of K6,000,000.00 (old currency) to pay for 1 (one) plot.
6. The said transaction was actually signed for by the then Administrator Ms. Maureen Chuma Nyimba and witnessed by Ms. Ressie K. Chuma.
7. The plaintiff further paid a sum of K5,000,000 (old currency) on the 24th day of April, 2008, leaving a balance of K1,000,000 (old currency) only.
8. Sometime in June, 2008, the plaintiff paid her final K1,000,000 (old currency) through the 1st defendant after receiving instructions from Ms. Maureen Chuma Nyimba that she could do so.
9. The plaintiff ploughed the land and cleared it up, planted vegetables on the said land and further bought river sand, building sand and bricks and placed them on the land to show her presence on the land.
10. The plaintiff and the Agent (1st defendant) maintained a good relationship up until sometime in 2014 when to the plaintiff's surprise, she was summoned at Mtendere police post to answer allegations from the 3rd defendant.
11. The 3rd defendant alleged that the land was not in fact Mr. Robinson Chuma's estate but belonged to the State and had since become his. Further that, he sold to the 2nd defendant.

12. *In or around August, 2016, the plaintiff visited the land and found some men at work for Ms. Anne Mwale Lungu, whom they said was the new owner of the land.*
13. *After being contacted, Ms. Anne Mwale Lungu said she bought the land from the 2nd defendant.*
14. *The plaintiff arranged to meet the 2nd and the 3rd defendant who said they bought the land from the 1st defendant and the 2nd defendant then sold it to the 3rd defendant in that order.*
15. *When asked to produce evidence of the sale, they produced a contract of sale for September, 2008 showing a sale from the 1st defendant to the 2nd defendant.*
16. *The plaintiff went back to the Ministry of Lands to see if there were any changes to the said property but only found Mr. Robinson Chuma as the latest owner of the land.*
17. *The defendant's encroachment of the land has since caused damage and loss on the plaintiff as she is a retired government employee who relied on the same land as her capital asset.*

On the 20th December, 2016 the defendants filed their memorandum of appearance as well as their defence. The defendants admitted paragraphs 1 through 11 of the plaintiff's statement of claim. However, the defendants stated as follows in the remaining paragraphs:

1. *The defendants deny the contents of paragraph 12, 13 and 14 as the same is in the peculiar knowledge of the plaintiff and will aver as such at trial.*

2. *The defendants deny the contents of paragraph 15 through to 19 of the plaintiff's statement of claim and will aver at trial that the plaintiff's property is plot No. 5990 Mtendere, Lusaka while the one which plaintiff is claiming from the defendants is plot No. 5990 No. Mtendere and further that these two are different plots situated many meters apart.*
3. *The defendants will further aver that 3rd defendant's plot one which she is currently developing is plot No. 5990 contrary to the plaintiff's assertions that 3rd defendant is developing plot No. 5990.*
4. *The defendants therefore deny the contents of paragraph 20 of the plaintiff's statement of claim in so far as having incurred damage and loss and will aver that the plaintiff is not entitled to any of the reliefs being sought against them.*
5. *SAVE as herein expressly admitted the defendants deny each and every allegation of fact contained in the plaintiff's statement of claim as if the same were set out seriatim and specifically traversed.*

The plaintiff was heard on the 2nd November, 2022. It was her testimony that she brought this matter to court because someone had encroached on her land. That Ann Mwale Lungu and Maurice Mwale the 2nd and 3rd defendant are the people she was referring to. The court moved to Mtendere to view the property in question.

Whilst there the plaintiff identified the land. She pointed out that the size of the land was from where the poles were near the road to where barbed wire was placed up to where a church was built. It was her testimony that where the church was built slightly encroached on her land. That the breadth of the land is 15 meters. She identified two structures that were built on her land. That the first structure was a house built by Ann Mwale. The second structure was built by Able Banda. That although Ann Mwale was earlier cited as one of the people who had encroached on her land Able Mwale was later cited. According to **PW1** the space that she was claiming represented two plots namely plot 056 and 058. That plot 056 was to the extent of 15x20 so was plot 058. That she bought these plots in 2008 on the 29th April. That she bought the two plots which were in Mtendere east. That the plots were on farm 5990/M.

It was her testimony that on the 29th February, 2008 she paid the first installment of K6,000,000 rebased. That the second installment paid was K5,000 leaving a balance of K1,000.00. That the money was paid to Evans Mwansa who was the agent. That the plot she bought belonged to Maureen Chuma Nyimba the administrator and Mrs. Ressie K. Chuma the widow of the deceased Robinson Chuma. The witness identified a land offer letter at page one of her bundles of documents. The letter was dated 29th February, 2008.

In the letter the plaintiff was informed that allocation of the plots was approved. What was needed to be done in accordance with the city planning authority regulations was stated. The letters

were signed by Maureen Nyimba and Ressie K. Chuma as well as Evans Mwansa and the plaintiff. The amount paid for the plot was six million kwacha leaving a balance of one million kwacha. Those who were copied in were Ressie Chuma, Mrs. Maureen Chuma Nyimba and the Council secretary.

The witness identified the letter at page two of the bundles. The letter is dated the 24th April, 2008. It was addressed to the plaintiff. The stand numbers remain the same as well as the requirements according to the city planning authority regulations. The letter was signed by Mwansa Evans. The amount paid was five million kwacha leaving a balance of one million kwacha. The same people mentioned above were copied in.

It was her testimony that not only was Evans Mwansa the agent selling the land he was also the one demarcating land. It was her testimony that she was unable to build on her land when she purchased it because she committed funds to paying for her son's university. It was her testimony that she bought sand, blocks and stones and dug a foundation. That she put the building materials on her plot for the purpose of safe guarding the plot as an indication that the land had an owner. That in September, 2016 she received a call from neighbours who informed her that they had seen people digging a foundation on her land. She drove to the plot where she found the third defendant. It was her testimony that she told the third defendant that the plot she was digging on belonged to her. That she pointed to the building material she had placed on the land.

The third defendant when asked informed her that Maurice Mwale had sold her the plot. She asked the third defendant to stop any works on her plot. However, the following day when she went back to check she found that the third defendant continued digging. She asked some boys to level the ground this resulted in a quarrel between her and the 3rd defendant. She went to Chelstone police to report the matter. There she was advised to take her matter to court. She took her matter to the Magistrates' Court. There she was advised to bring the matter to High Court. It was her testimony that no one has title to the land in question. She referred the court to pages 3 to 7 of the plaintiff's bundle of documents. That from the documents the court will see that the plot L/5990/M belonged to Seshezi Limited who had a State lease of fourteen (14) years from 1st September, 1991. That the certificate of title for the property was L3733. Entry No. 3 dated 26th October, 1992 was evidence that the assigner was Seshezi Limited. That the Assignee was Mbelenje Ruth. The nature of the documents was a deed of transfer.

Entry Number 4 is proof that the title holder was Mbelenje Ruth holding certificate of title No. L4551. On the 26th November, 1992 Mbelenje Ruth the lessor surrendered the deed and was granted State lease for a period of ninety-nine (99) years from the 1st September, 1991.

There came a time when Mbelenje Ruth assigned the property to Chuma Robinson whose date of registration was 17th December, 1999. It was her testimony that Mr. Robinson who

is now deceased held on to the title of the land she bought. That of the people who were party to the sale of the land Maureen was still alive although she did not know her whereabouts. That property number L/5992/M is the one reflected on Ann Mwale's title of land from the City Council. That Ann Mwale's land is Plot L/5992M which she is not claiming. That her claim is plot L/5990/M. The Court was referred to the supplementary bundle filed on the 10th October, 2022 and in particular a report on the boundary for property number L/5990/M.

The plaintiff informed the court that she went to Ministry of Lands because she saw the need to establish where Plot 056 and 058 were located. That is whether or not they are located on Plot L/5990/M or L/5992/M. It was her testimony that the third respondent is on plot L/5990/M. That that is where she has built her house.

When cross examined by Mr. Mwale the plaintiff confirmed that when she went to the plot, Evans Mwansa was called to join them which he did. That she did not recall that in the discussions they had, she was told by Evans Mwansa that the plots were not hers.

When cross examined by Counsel for the third respondent the plaintiff confirmed that she transacted with an agent called Evans Mwansa. That she relied on the information from Evans Mwansa in relation to the plot she bought. That according to letters in her bundle at page 1 and 2 the final plot numbers were to be allocated by Lusaka City Council. She conceded that plot

056 and 058 were not the final numbers. That she did not produce proposed site plans of the plot numbers she referred to. According to the witness the extent of the land is as per certificate of title in her bundle. That the extent of Mr. Chuma's land is known to her. That the foundation she built was covered by those who encroached on her land. That the third defendant had an occupiers licence as proof of ownership. It was her testimony that she did not sue Lusaka City Council. Further that Lusaka City Council was not engaged for the verification in relation to the land.

That when transacting she transacted with Robinson Chuma's administrator at the time. It was her testimony that the administrator of the estate of Robinson Chuma, Maureen Chuma Nyimba was not present to inform the court that they took her to that particular plot. She conceded that the land offer letter did not give a description of where Plot L/5990/M was located. That she was not aware that the description and extent of land must be given nor did she obtain state consent.

PW2 was **Katengulu Ngoma** a Surveyor. It was his testimony that a client approached his office to find out a location for an unplanned settlement in relation to surveyed properties. It was his testimony that he was taken to a site where he managed to get coordinates for a plot. When he plotted the coordinates against the surveyed properties, he noticed that the property was falling under Lot 5990/A. That at some point he managed to get a file of the Lot from Ministry of Lands. That he noticed earlier in the year 2022 that there was a site plan done by one

of the professional planners who is currently the Surveyor General.

That they had done a site plan in the area on the same plot. He noticed that the location plan that was there was the same as the plan he produced for the unplanned settlement. He thus confirmed that the property he was taken to fall under the same plot number. That this plot number was L/5990/A. When referred to the plaintiff's supplementary bundle the witness identified the document that came from their office. He identified the documents that come through their office though at the time the court wanted a report to be done he was out on National duties. That this colleague who helped him do the images is the one who signed the report. It was his testimony that the plot he was taken to had a partially incomplete house and one which was complete. Further that the small box for the foundation was the one he was taken to. That the big box for the foundation represents Lot 5990/A. That the site plan sub A is the one on the southern side. That from the information gathered the property he was taken to fall under the same lot number.

When cross examined the witness informed the court that instructions to conduct a verification exercise came from the Surveyor General. That he was aware that it is a requirement that the Commissioner of Lands appoints an independent Surveyor where there is a dispute between land belonging to the Council and land belonging to Ministry of Lands. It was his testimony that he was engaged to do the Survey by the plaintiff.

That no authority was obtained from the third defendant. That he was not aware that the third defendant holds a certificate of title for the land. That when the verification exercise was done, he engaged Lusaka City Council. That Lusaka City Council was informed that the land was under surveyed property.

It was his testimony that the Ministry of Lands cannot offer land that has a title. He confirmed that the plaintiff's land which he surveyed has an access road.

The first defence witness to testify was Maurice Mwale. It was his testimony that in the year 2008 he bought a plot belonging to the late Robinson Chuma. That on the day of the transaction he dealt with Evans Mwansa. The witness was in the company of his family members. Evans informed them that he was an agent charged with the selling of a plot. They were shown the plot. **DW1** was given an offer letter. That the offer letter is on the file and relates to plot 5990/088. Evans sold him the plot for K7,000,000.00 old currency. He paid him K4,000,000.00 on the 15th September and the rest after two months.

According to the witness the land he bought measured 20x15 meters. That in 2014 he had a stroke he decided to sale the plot. That Ann Mwale bought the plot for K36,000.00. He recalled going to the City Council to have names changed from his to her.

That the plot number of his property was 181/07. It was his testimony that after sometime Ann Mwale phoned him. She

informed him that there was a lady claiming that the plot he sold her belonged to the same lady. He went to the plot where he found the plaintiff and her son. The witness recalled chatting with the plaintiff and thereafter phoning Evans Mwansa. That Mwansa came and in his presence informed the plaintiff that the land was not hers that her land was elsewhere. That both the plaintiff and her son agreed. The plaintiff suggested that Mwansa and herself should go to Mtendere police. After sometime he was called by an officer from Chelstone police. He was asked to go to the station with the papers for the land he bought. Present at the police station was the plaintiff and Mr. Evans Mwansa. Both the plaintiff and witness produced the papers in their possession. That the police officer concluded that both parties had bought the same land. That Mwansa said he would give the plaintiff another piece of land.

When cross examined **DW1** informed the court that he entered into a contract with Mr. Mwansa on the 19th September, 2008. That he was not aware that the contract between the plaintiff and Mwansa was earlier than his. It was his testimony that the plaintiff's documents were not given to him to read at the police station. He denied going to the Ministry of Lands over this land. That he entered into a contract to purchase the land with an agent who said he was acting for the late Robinson Chuma called Evans Mwansa. That his proof that Mr. Robinson Chuma owned the land was the offer letter.

DW2 was **Dezzy Nkoma** a witness for the 2nd defendant. This witness informed the court that he was informed by the 2nd

defendant that he wanted to buy a plot and he wanted him to be present. They went to see the plot. There they met Mwansa. That Mwansa informed them that the asking price for the plot was K7,000,000.00. That when they saw the plot the 2nd defendant paid K4,000,000.00. He later learnt that the 2nd defendant had finished paying for the plot.

That he was aware that the 2nd defendant sold the plot and that someone had turned up claiming ownership of the plot. It was his testimony that he was present when the 2nd defendant and the plaintiff met at the plot. It was his testimony that Evans Mwansa denied knowing the plaintiff. That Mwansa asked for papers and both sides gave him their documents. That when Mwansa compared the two documents he told the plaintiff that she should go to the one who sold her the plot. That he (Mwansa) did not know her. That the plaintiff's son said that if that was the case there was no issue. That after two years the 2nd defendant phoned informing him that they were wanted at Chelstone police station. That present at the station was Mwansa and the plaintiff. That at the police station Mwansa said that he did not know the plaintiff. That the plaintiff should go the person who sold her the land.

When cross examined the witness informed the court that Mr. Mwansa said he did not know the plaintiff and not that he would give her another piece of land. That he told the plaintiff that she should go to the person who sold her the plot. He denied seeing the plaintiff's letter of sale nor the 2nd defendants.

DW3 was **Jenipher Mumba** the 2nd defendant's witness. She informed the court that Mwansa was the one who sold the plot to the 2nd defendant at a sum of K7,000 which he paid in two installments.

DW4 was **Felistus Daka** the 3rd defendant's witness. She was the wife to the 2nd defendant. It was her testimony that they bought the plot for K7,000,000.00. That they paid two installments for the land. That later a lady turned up claiming ownership of the land. That Mwansa informed the plaintiff that the plot she was claiming was not hers. That the plot was in a different area.

DW5 was **Anne Mwale Lungu** the 3rd defendant in this matter. It was her testimony that she was in court over a plot she bought from Maurice Mwale. That the plot she bought was No. 181/07 Mtendere east. That her son was the one who saw a poster where a plot for sale was advertised. The poster had a phone number which they called. They spoke to an agent called Mwansa whose full names she did not know. The agent informed them that Mr. Maurice Mwale was the owner of the plot. That a decision was made to buy the plot. She was informed that the price for the plot was forty thousand kwacha (K40,000). Mr. Mwale and herself entered into negotiations and agreed on the selling price of K36,000,000.00. The full amount was paid the same day. Mr. Mwale said they should go to the Council in Kalikiliki the following morning. There Mr. Mwale explained that he had sold the plot to her. Mr. Mwale's name

was removed from the computer replacing it with hers. She paid what was required of her and a receipt was issued.

She began to build on the plot. One day the plaintiff came to the plot and told her to stop building as the plot was hers. She recalled telling the plaintiff that the Council had given her receipts and a paper to take to the civic centre so that she could obtain the land record. That the land record was later given to her. That she continued going to the council until the title deed was given to her. That after the visit from the plaintiff she phoned Mr. Maurice Mwale, informing him about the plaintiff's visit. Maurice Mwale and Evans Mwansa as well as the plaintiff met her at the plot. That Mwansa informed the plaintiff that the plot she was claiming was not hers that it belonged Maurice (2nd defendant).

When cross examined by Miss Jere the witness informed the court that she got the title deed whilst at the show grounds. That the title deed given to her was not for a sub division but the first title deed. That after payment was made a message was sent to her phone for her to go and collect the title deed. This was after a payment of K3,000.00. That her plot is in Mtendere east. Although on documents it appears as though the plot is in Ibex Hill.

SUBMISSIONS

The plaintiff submitted that an order should be made that the plaintiff is a bonafide purchaser and the legal owner of plot no.

L/5990/M Mtedere Lusaka. Reliance was placed on **section 13 of the High Court Act Chapter 27 of the Laws of Zambia** which states as follows:

“In every civil cause or matter which shall come in dependence in the court, law and equity shall be administered concurrently and the court in the exercise of the jurisdiction vested in it, shall have the power to grant and shall grant either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.”

That it is trite law that the principles of bonafide purchaser for value seek to accord protection to a party that acquires interest in property in good faith and without being aware of any third-party interest in the said property or encumbrances therein.

I was referred to the case of **Milambo (Administrator of the estate of Alfred Siandavu) and Another Mweemba (Appeal No. 9 of 2020) (2021)**.

I was referred to the definition of Bonafide purchaser for value without notice (BFPV) in **Black’s Law Dictionary the 10th Edition**.

I was further referred to the case of **Rephidim Institute Limited V Attorney General¹** where the court alluded to the serious nature of property purchase in relation to land and held that:

“It is trite law that land as valuable property calls for thorough investigations before purchase. Howarth William in his book, Land Law (Nutshells), 1994 observed as follows:

“A purchaser is under obligation to undertake full investigation of title before completing his purchase. He can only plead absence of notice if he made all usual and proper enquiries. If he does not do so, or is careless or negligent, he is deemed to have “constructive notice” of all matters he would have discovered. A person has constructive notice of all facts of which he would have acquired actual notice had he made those inquiries and inspections which he ought reasonably to have made, the standard of prudence, being that of a man of business under similar circumstances. The purchaser should inspect the land and make inquiries as to anything which appears inconsistent with the title, offered by the vendor.”

Another case I was referred to was the case of ***Nora Mwaanga Kayoba and Alizani Banda V Eunice Kumwenda Ngulube and Andrew Ngulube***² where the Supreme Court held that:

“In purchasing real properties, parties are expected to approach such transactions with much more serious inquiries to establish whether or not the property in question has encumbrances. Buying real property is not as casual as buying household goods or other personal property.”

It was submitted that the plaintiff did her due diligence by inquiring on the state of the land and ensured that she bought the land from the rightful person who was an administrator of the late Robinson Chuma and therefore has equitable rights in the property.

It was submitted that an Order for specific performance be made for the 3rd defendant to vacate plot No. L/5990/M Mtendere Lusaka for the plaintiff. I was referred to the case of ***Tito and Others v Waddel and Others 1997 No. 1(3) at page 322***³. That it was held in that case that:

“The court will decree specific performance only if it will do more perfect and complete justice than award damages.”

Another case I was referred to is the case of ***Wesley Mulungushi v Catherine Bwale Mizi Chamba SCZ No. 11 of 2004***⁴ where the court held as follows:

“The matter in dispute is land a very valuable commodity whose loss may not adequately be atoned by damages.”

On an order for the transaction relating to plot L/5990/M Lusaka that the same be declared void as far as the defendants was concerned the court’s attention was drawn to the case of ***Lonrho Cotton Zambia Limited v Mukuka Textiles Limited SCZ No. 11 of 2002***⁵ where the court held that:

“Where goods are sold by a person who is not the owner therefore and who does not sell them under the authority or with the consent of the owner the buyer acquires no better title to the goods than the seller had.”

Lastly, I was referred to the case of ***AMG Global Trust Limited v Administrator General and Another CAZ Appeal No. 25 of 2020***⁶ where the court held that:

“The 2nd respondent cannot be deemed to have acquired the property legally as the person, he bought from had no legal rights to the property that he sold. Therefore, not being an owner, he could have not passed good title to the purchaser.”

That the owner of the land in question is deceased and therefore the only person that had the legal capacity to sell the land is the administrator of the late Robinson Chuma. That the 1st defendant was not the administrator but a mere agent for the administrator who only had capacity to find potential purchasers for the administrator.

The 3rd defendant in their final submissions referred the court to ***section 33 of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia*** which provides that:

“A certificate of title shall be conclusive as from the date of its issue and upon and after the issues thereof, notwithstanding the existence in any other person of any estate or existence in any other person of any estate or interest, whether derived by grant from the President or to otherwise, which but for parts III to VII might be held to be paramount or to have priority the registered proprietor of the land compromised in such certificate shall except in case of fraud, hold the same subject only to sch encumbrances...”

That from the foregoing the 3rd defendant was legally issued a certificate of title by the Council and all procedures were followed and all necessary payments were paid.

From the evidence before me the plaintiff bought the land from Evans Mwansa who she identified as the agent for Mrs. Ressie K. Chuma the widow and beneficiary of the land that formed

part of the estate of the late Mr. Robinson Chuma.

Proof that the land once belonged to Mr. Robinson Chuma were Ministry of Lands register print outs dated the 5th October, 2016. The printouts show that the land once belonged to Sheshezi Limited. That the company were title holders of the land under certificate of title No. L3733. That Sheshezi Limited as assignor obtained a deed of transfer on 26th October, 1992 to the assignee Mbelenji Ruth. Entry number 4 according to the Ministry of Lands print out register was evidence that Ruth Mbelenji became the title holder of the land under certificate of title number L4551. Ruth Mbelenje the lessor on 26th November, 1992 filed a document, the nature of the document was a surrender of deed to the lessor the President of the Republic of Zambia. On the same date the above lessor was granted a lease for a period of 99 years from 1st September, 1991. The new certificate of title issued to Mbelenje Ruth was No. L5040. Eighth entry on the lands registry print out dated 17th December, 1999 indicates that Mbelenje Ruth the assignor assigned the property to the assignee Chuma Robinson of P.O. Box 50048.

The nature of the document was the assignment of property at 8,500,000 kwacha. The ninth entry of 17th December, 1999 indicates that the title holder was now Robinson Chuma in whose name certificate of title number L8630 was issued. The other printouts exhibited were in respect of property number L/5992/M registered on the 20th September, 1991 the Lessee was the President of Zambia and the Lessor was Sheshezi

Limited. Sheshezi Limited according to the print out assigned the property to Ranchod Rajan Kantilal, Ranchod Rohit Kantilal and Ranchod Sundeep Kantilal. The size of the land was 2.000 hectares. The nature of the document filed on 7th May, 1992 was assignment of property in the sum of 50,000 kwacha. The certificate of title number L1817 was issued to the new title holders on 7th May, 1992.

This explains how there was two properties No. 5992/M and L/5990/M. From documentary evidence before me property No. L/5990/M was the land that belonged to Chuma Robinson. Property No. L/5992/M belonged to Ranchod RaJan Kantilal, Ranchod Rohit Kantilal and Ranchod Sundeep Kantilal. As of February, 2008, when the plaintiff said she purchased the land the land was on title. The 2nd defendant stated that the property that was meant for the plaintiff was No. 5990 Mtendere and not No. 5992. The defendant in their defence firmly believed that the plaintiff's property is plot No. 5990 Mtendere that the plot which the plaintiff is claiming from them is plot 5992 Mtendere. That the two plots are different plots situated many meters apart. That the 3rd defendant was developing plot No. 5992 contrary to the plaintiff's assertion that the 3rd defendant was or has developed on plot No. 5990.

The 3rd defendant produced a certificate of title for the piece of land where she had built.

The 3rd defendant would like the court to find that since she was issued with a certificate of title by Ministry of Lands and all

procedures were followed and all the necessary payments were made to the Council that she is the rightful owner of the land where she has built her house. Although it is trite law that a certificate of title is conclusive evidence of ownership in the property to which it relates it can be nullified if fraud in acquisition is proved.

Land as valuable property calls for thorough investigation before purchase. The purchaser is under obligation to undertake full investigation of title before completing his purchase. In purchasing real properties parties are expected to approach search transaction with much more serious inquiries to establish whether or not the property in question has encumbrances. Buying real property is not as casual as buying household goods or other personal property.

From the evidence before me the plaintiff was offered a piece of land first, the 2nd defendant was offered a piece of land in September, 2008 as opposed to the plaintiff who was offered the land in April of the same year. Both dealt with Evans Mwansa who informed them that he was an agent for the owners of the land. At the point of selling the land the owner of the land was the beneficiary of Robinson Chuma the deceased. Based on the evidence before me this was the wife to the deceased Robinson Chuma.

According to the testimony of the 2nd defendant he knew that the land he paid for belonged to Mr. Chuma. When **DW2** met the agent in the presence of the plaintiff it was his testimony

that the agent informed the plaintiff that her land was elsewhere. He further stated that the agent informed the plaintiff that he would give her another piece of land. This information alone was enough for **DW2** to carry out investigations even after the so called purchase if not for his sake but for the sake of **DW5** whom he sold the land to. At no time was Lot/5990/M surrendered to the State. There was no evidence of re-entry by the Commissioner of Lands. At the time the land was offered to the 2nd defendant by Evans Mwansa the land was not available for sale. At the time the land was offered to the 3rd defendant it was subject to the plaintiff's equitable right, the plaintiff as owner in possession being a purchaser under a contract of sale deserves protection. Ministry of Lands through the Commissioner of Lands cannot allocate land that is not free or encumbered to any person. The land was not free at the time it was sold to the 3rd defendant meaning, the Commissioner of Lands did not have the authority to issue a certificate of title to the 3rd defendant. This was a case in which the issuance of a certificate of title has been successfully challenged. A court has authority to cancel a certificate of title which has been issued erroneously. I hereby order for the cancellation of the certificate of title issued to the 3rd defendant Anne Mwale Lungu.

The plaintiff was/is entitled to possession and ownership of property L/5990/M Mtendere Lusaka.

In normal circumstances the Council have the power to issue land record cards pursuant to **Section 7(1) of the Housing Statutory**

and Improvement Areas Act Chapter 194 of the Laws of Zambia which provides as follows:

“Whenever land comprised in a grant is transferred in the manner hereinafter prescribed, the Council Registrar shall, on payment of the prescribed fee, issue a Council certificate of title in favour of the transferee in such form as may be prescribed and shall thereafter;

- a) Register the Council certificate of title in the manner prescribed;*
- b) Deliver the Council certificate of title to the transferee and*
- c) File a copy thereof in the Council registry.”*

The land record is not a certificate of title and therefore not conclusive evidence of the 3rd defendant’s ownership of the land. It cannot be compared to the principal imbedded in **section 33 of the Lands and Deeds Registry Act** which I was referred to by the defendant. **Section 8 (1) of the Housing Statutory Improvement Areas Act Chapter 194** in part reads as follows:

“The Council certificate of title issued by the Registrar to any transferee of land shall not be subject to challenge except on the ground of fraud misrepresentation or mistake ”

In this case the certificate that was issued was based on misrepresentation or mistake the reason being as stated earlier that that land already had an owner (Mr. Robinson Chuma) who had a title deed in accordance with **section 33 of the Lands and Deeds Registry Act**. If one was to put forward that they both bought the land from Evans Mwansa an agent of the owners of the land 1 would still look at who was offered the disputed land first. In

the case of *Clementine Banda and Another V Borniface Mudima 2011 ZR Vol 3 162*⁷, it was held that:

“At law and in equity, the basic rule is that Estates and interest primarily rank in the order in which they are created. In equity the result is expressed more directly in the Maxim qui priores tempore potior est jure. That is, he who is earlier in time is stronger in the law. Where there are two competing equitable interests the general rule of equity is that the person whose equity attached to the property first will be entitled to priority over the other.....prior equitable interest in law can only be defeated by a bona fide purchaser for value without notice.”

It can also be argued that the 3rd defendant was fully aware of the plaintiff's interest in the land after she purchased the land from the 2nd defendant. It was not disputed that the plaintiff approached the defendant when she heard that there was activity on the land that belonged to her. According to the evidence of the plaintiff she stopped her on two occasions from carrying out any activity on the land because the land was hers. The 3rd defendant did not heed the warnings of the plaintiff and went ahead to build a small house on the property.

I have critically examined the documents before me, I am satisfied that the plaintiff followed the correct procedure and was correct to wait to effect Change of ownership from the true owner of the property. The court recognizes that the property in question belonged to the estate of the late Robinson Chuma and could only be disposed of with the authority of the beneficiary being the widow and the administrator. The plaintiff did her due diligence to ensure that the property had no

encumbrances and purchased it in good faith. The court is satisfied that the plot that the plaintiff purchased was 5990 Mtendere and not 5992 as suggested by the 2nd and 3rd defendant. I say so because according to the Ministry of Lands registry print outs plot 5992 belonged to three named title holders. The plaintiff was clear that the property she purchased belonged to the late Robinson Chuma and no one else.

I declare the transaction relating to plot 5990 Lusaka to the defendants as void this is because the land was sold by a person who is not the owner unlike the plaintiff offer of sale of land. The offer to the 2nd defendant was not made under the authority or with the consent of the owner as such the 2nd defendant did not acquire title to the land. The 2nd defendant cannot be deemed to have acquired the property legally and could not have passed good title to the 3rd defendant.

Based on the documentary evidence before me as well as the evidence of **PW1** and **PW2** the property that the plaintiff purchased fell under Lot 5990/A. The descriptions of the land given by **PW2** a Surveyor who plotted coordinates based on the file of the Lot from Ministry of Lands established that there was a site plan done by the person who is currently the Surveyor General. That the location plan was the same one as the plan he produced for the unplanned settlement. The witness described to the court the findings when he went to the site. What he described to the court was what the court observed during the scene visit that was conducted. That is that on the property was an incomplete house and one complete house.

This was the same property that the plaintiff took the court to and testified that that was the property she purchased.

There is no way that the plaintiff purchased property No. L/5992/A as that property belonged to Robinson Chuma as per documents from Ministry of Lands. The plaintiff was clear that the property she purchased belonged to Robinson Chuma. The sale was witnessed by the administrator and the widow and beneficiary of the estate of Robinson Chuma. Her evidence and the contents of the documents from Ministry of Lands tally.

Mr. Mwale informed the court that he acquired the plot in September, 2008. That he decided to sell it to **DW3** Anne Mwale Lungu in 2014. It is not clear why Mr. Mwale decided that he and **DW3** should go to the Council in Kalikiliki so that his name be removed from the computer replacing it with hers.

Both property L/5990 and L/5992 as earlier stated, from documentation filed by the plaintiff have been titled land from 26th October, 1992 (certificate of title No. L/4551) property No. L/5992/M was registered on the 26th September, 1991 and has been titled land under certificate of title L/3735 since then.

What this means is that whether it was property L/5990 or Plot L/5992 none was available for purchase by **DW2** and in turn **DW3**.

As stated earlier I order that the 3rd defendant vacates plot No. L/5990 Mtendere where she has built a house. I find as a fact

that there was a contract executed by the plaintiff and Mr. Evans Mwansa the agent appointed by the administrator of the estate of Robinson Chuma as well as his widow and beneficiary of the estate.

“A contract is defined as an agreement which is legally binding oral or written between one or more parties that is enforceable by law and must be completed.”

A valid contract creates a reciprocal rights and obligations between the parties to it. Where one party to a contract fails to perform his or her obligations or performs them in a way that does not correspond with the agreement the guilty party is said to be in breach of the contract and the innocent party is entitled to a remedy.

I am fortified by the case of ***Printing and Numerical Registry Company V Simpson (1975) ZR 106 Reported in Colgate Palmolive (Z) Inc V Abel Shemu Chuka and 110 Others SCZ Appeal No. 181 of 2005^s*** the court held that:

“If there is one thing more than another which public policy require it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be enforced by the courts of justice.”

On the totality of the evidence before me there is no doubt that there was a contract between the parties.

THE PLAINTIFF'S PRAYER.

The plaintiff claims for specific performance of the contract of sale. The court in the case of *Gideon Mundanda v Timothy Mulwani and the Agricultural Finance Company Limited and SSS Mwiinga (1987) ZR 30⁹* stated the following:

...The law concerning specific performance of contracts relating to the sale of land is quite clearly set out in paragraph 1764 of Contracts 25th Edition which reads in part:

LAND

The law takes the view that damages cannot adequately compensate a party for breach of contract of sale of an interest in a party for breach of contract for the sale of an interest in a particular piece of land or a particular house (however ordinary).

This authority is supported in countless other cases and in this case, it is quite clear that the learned trial Judge did not have his attention drawn to the fact that his discretion in relating to specific performance for the sale of land was decidedly limited.

It was held in that case that:

“A Judge’s discretion in relation to specific performance of contracts for the sale of land is limited as damages cannot adequately compensate a party for breach of contract for the sale of land.”

In the current matter, the plaintiff being the innocent party sought specific performance of the agreement of sale. It is clear that where a party to a contract is in breach, the other party may obtain an order, of the court requiring the party in breach to specifically perform his promise under the contract.

A party is entitled to specific performance of a contract where it is not possible for a person against whom a claim is made to perform the contract. Secondly the specific performance will produce hardship which would not have resulted if there was no specific performance. Thirdly that the rights of a third party acquired in good faith would be infringed by the specific performance. Fourthly specific performance would occasion hardship to a person against whom a claim is made out of proportion to the benefit likely to be gained by the claimant. Fifthly the person against whom the claim is made is the entitled, although in breach to terminate the contract or lastly the claimant committed a fundamental breach of his or her obligation under the contract but in cases where the breach is not fundamental specific performance is available to him or to her subject to his or her paying compensation for the breach.

From the totality of the evidence before me, the administrator of the deceased's estate was in breach. The administrator should have completed the transaction which she personally witnessed. In the absence of any evidence to explain why the administrator of the estate of Robinson Chuma has neglected or failed to fulfill her obligation under the contract, I find no reason why this court should not order the administrator Maureen Nyimba to specifically perform her obligations under the contract.

It is my firm view that this is a proper case in which to exercise my judicial discretion to grant an order for specific performance.

I hereby grant the order of specific performance as prayed by the plaintiff.

In the event that the administrator or and the widow of Robinson Chuma cannot be found the plaintiff is at liberty to apply for a vesting order.

The plaintiff is entitled to costs of the suit.

Leave to appeal is hereby granted.

DELIVERED AT LUSAKA THIS 24TH DAY OF JULY, 2024.


G.C. CHAWATAMA
HIGH COURT JUDGE