

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

2019/HP/0812



BETWEEN:

**JOSEPH MOFFAT SHAWA
MARRIAN SHAWA**

**1ST PLAINTIFF
2ND PLAINTIFF**

AND

**MOONGA MIZINGA
LLOYD MWANAUMO**

**1ST DEFENDANT
2ND DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 12th DAY OF MAY,
2025**

For the 1st and 2nd Plaintiffs : Mr. W. Muhanga & Mr. C. Mbulo – Messrs Willis Clement and Partners Legal Practitioners & Mr. B. Mwelwa & Mr Phiri, Messrs Mwelwa Phiri and Partners
For the 1st and 2nd Defendants : Mr. M. M. Manyepa – Messrs Victor Kachaka and Co. Legal Practitioners

J U D G M E N T

CASES REFERRED TO:

1. *Printing and Numerical Registering Co. v Sampson* 1895 19 Eq 462
2. *L'Estrange v Graucob Ltd* 1934 2KB 394
3. *Wilton v Farnworth* 1948 76 CLR
4. *Holmes v Buildwell Construction Company Limited* 1973 ZR 97
5. *Chuba v The People* 1976 ZR 272
6. *Khalid Mohammed v The Attorney General* 1982 ZR 49
7. *Wilson Masuso Zulu v Avondale Housing Project* 1982 ZR 172
8. *Kapata v The People* 1984 ZR 47
9. *GF Construction 1976 Limited v Rudnap (Zambia) Limited & another* SCZ Judgment No. 18 of 1999
10. *National Drug Company Limited and Zambia Privatisation Agency v Mary Katongo* Appeal No. 79 of 2001
11. *Colgate Pamolive (Z) Inc v Able Shemu Chika and others* SCZ Judgment No 11 of 2005

12. *Sablehand Zambia Limited v Zambia Revenue Authority* 2005 ZR 109
13. *Ndongo v Moses Mulyango, Roostico Banda* 2011 Vol 1 ZR 187
14. *Kalusha Bwalya v Chadore Properties and another* 2012 ZMHC 68
15. *Kalusha Bwalya v Chadore Properties and Ian Chamunora Nyalungwe Haluperi Selected Judgment No. 20 of 2015*
16. *Sailas Ngowami and six others v Flamingo Farms Limited* SCZ No. 5 of 2019
17. *Nico Coultlis Transport Limited v Buks Haulage Limited* CAZ Appeal No. 65 of 2021
18. *Gillian Kasempa Mutinta v New Future Financial Company and Zhono Cheng Zambia Mining Materials Limited* Appeal No. 13 of 2023

LEGISLATION REFERRED TO:

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

1. INTRODUCTION

1.1 The Plaintiffs herein being, Joseph Moffat Shawa and Marrian Shawa, commenced this matter by way of Writ of Summons which was accompanied by a statement of claim on 29th May 2019, seeking the following reliefs:

- i. *A declaration that Joseph Moffat Shawa is the owner of the property known as Stand No. 755, Lusaka;*
- ii. *An Order for the cancellation of the Certificate of Title which was erroneously obtained by Moonga Mizinga based on an intended Third-Party Mortgage contract;*
- iii. *An injunction restraining Moonga Mizinga and Lloyd Mwanaumo from disposing of, interfering with, occupying, re-developing, maiming or*

- otherwise dealing with Stand No. 755, Lusaka until this matter is finally determined by the Court;*
- iv. An Order for redemption by Joseph Moffat Shawa and Marrian Shawa of the Third-Party Mortgage created against Stand No. 755, Lusaka through a Third-Party Mortgage Contract;*
 - v. Damages for inconvenience of use of Stand No. 755, Lusaka;*
 - vi. Damages for mental stress and anguish;*
 - vii. Costs of and incidental to this action; and*
 - viii. Any other relief the Court shall deem fit and just.*

2. STATEMENT OF CLAIM

- 2.1 In the statement of claim, it was stated that Joseph Moffat Shawa is the legal and registered owner of the property, known as Stand No. 755 (“the property”), Lusaka, situate in the Lusaka District of the Lusaka Province of the Republic of Zambia. Further averment was made, that Marrian Shawa is Joseph Moffat Shawa’s daughter, a businesswoman and a borrower to Moonga Mizinga.
- 2.2 It was also stated that Moonga Mizinga is a Money Lender residing in the Lusaka District of the Lusaka Province of Zambia, and a person purportedly claiming ownership of Stand No. 755, Lusaka. The assertion was that Lloyd Mwanaumo was a person intending to purchase the land in dispute from Moonga Mizinga.
- 2.3 In still averring, the contention was that Joseph Moffat Shawa acquired Stand No. 755, Lusaka from the Ministry of

Lands, and he was issued with a Certificate of Title No. 4688, on 28th July 1997.

- 2.4 Joseph Moffat Shawa and Marrian Shawa stated that in May 2016, Marrian Shawa approached Moonga Mizinga seeking to borrow money for her business operations.
- 2.5 It was alleged that Moonga Mizinga agreed to lend to Marrian Shawa, a loan for the sum of ZMW300,000.00 on the condition that the loan would be secured by a legal mortgage against land.
- 2.6 They stated that Marrian Shawa did not have real estate property at the material time, and she therefore approached Joseph Moffat Shawa, seeking to use his title deed for the property known as Stand No. 755, Lusaka, as security for the said loan, and he agreed to the proposal.
- 2.7 Further averment was made, that around May 2016, while negotiations were ongoing for the loan transaction, Marrian Shawa travelled to the Republic of Mali in North Africa on a business trip, and whilst she was in Mali, Joseph Moffat Shawa and the Moonga Mizinga signed a mortgage contract for the loan.
- 2.8 It was stated that Moonga Mizinga kept all the contractual documents for the Third-Party Mortgage transaction, and following the signing of the Mortgage contract, Moonga Mizinga transferred the sum of ZMW280,000.00 to Marrian Shawa's bank account, which was held at Standard Chartered Bank Zambia Limited.

- 2.9 The contention was that Moonga Mizinga did not transfer the full agreed amount of ZMW300,000.00. However, it was later agreed that Marrian Shawa would pay the sum of ZMW300,000.00 in full satisfaction of the loan amount, inclusive of interest.
- 2.10 In still averring, it was stated that at the time of signing the Third-Party Mortgage contract, Joseph Moffat Shawa was physically unwell, and had been unwell from that time until now.
- 2.11 The contention was that when Marrian Shawa returned from Mali, she requested a copy of the mortgage contract, but she was not, and had not been availed a copy.
- 2.12 It was stated that Joseph Moffat Shawa and Marrian Shawa had leased the property to a Mr. Sinya Mbale, a tenant, who was in current occupation of the house.
- 2.13 Joseph Moffat Shawa and Marrian Shawa stated that on or about 17th May 2019, Mr. Sinya Mbale called Joseph Moffat Shawa and Marrian Shawa and notified them that he had received a letter from Moonga Mizinga's lawyers requesting him to start remitting the rentals to Moonga Mizinga because Moonga Mizinga had become the new Landlord, by virtue of him having purchased the property from Joseph Moffat Shawa and Marrian Shawa.
- 2.14 Joseph Moffat Shawa and Marrian Shawa averred that they received this information with a sense of shock, because the only relationship that they had with Moonga Mizinga was

that of lender and borrower, as opposed to that of vendor and purchaser.

- 2.15 It was contended that following the alert, Joseph Moffat Shawa and Marrian Shawa conducted a search at the Lands and Deeds Registry at the Ministry of Lands, and they discovered that Moonga Mizinga obtained a Certificate of Title for the property in question in January 2019.
- 2.16 Joseph Moffat Shawa and Marrian Shawa stated that they further discovered that Moonga Mizinga intended to sell the said property to Lloyd Mwanaumo who had since placed a caveat against the property as an intending purchaser.
- 2.17 The assertion was that Marrian Shawa had so far paid ZMW90,000.00 to Moonga Mizinga, as loan repayment. Therefore, the amount that was currently owing to Moonga Mizinga was ZMW210, 000.00.
- 2.18 It was also stated that Marrian Shawa was in constant touch with the Moonga Mizinga for purposes of the loan repayment in this matter.
- 2.19 The averment was that the purported Notice by Moonga Mizinga requiring Sinya Mbale to start remitting the rentals to him or to vacate the property, was done in total disregard of Joseph Moffat Shawa and Marrian Shawa's interest in the property, and without Joseph Moffat Shawa and Marrian Shawa's consent.
- 2.20 They stated that they were not aware of any mortgage proceedings before any Court, which entitled Moonga

Mizinga to take possession of, or sell the property, based on the mortgage loan.

2.21 It was stated that the transfer of property, which was registered at the Ministry of Lands, was therefore illegal for reasons of fraud, misrepresentation and mistake.

2.22 The particulars of fraud or misrepresentation were stated as follows:

- a. *Moonga Mizinga presented a contract of sale to Joseph Moffat Shawa purporting it to be a Third-Party Mortgage when in fact not.*
- b. *Moonga Mizinga registered change of ownership of the property at the Ministry of Lands without the Consent or knowledge of Joseph Moffat Shawa and Marrian Shawa.*
- c. *Joseph Moffat Shawa and Marrian Shawa believed throughout the transaction that they were obtaining a loan yet Moonga Mizinga made calculated moves to change ownership of property contrary to Joseph Moffat Shawa and Marrian Shawa's intentions and beliefs.*
- d. *The alleged purchase price of ZMW 300, 000.00 which was actually the loan amount, was far below the open market value of the property in question. The open market value of the property was about Six Million Kwacha, (ZMW6,000,000.00).*

2.23 Joseph Moffat Shawa and Marrian Shawa particularized the mistake as follows:

- a. *Joseph Moffat Shawa and Marrian Shawa honestly believed that they signed a Third-Party Mortgage contract with Moonga Mizinga yet Moonga Mizinga's actions showed that a totally different document altogether may have been presented to Joseph Moffat Shawa and Marrian Shawa for signing.*
- b. *Joseph Moffat Shawa and Marrian Shawa were not and are not aware of any sale or Transfer of property at the time of borrowing money from Moonga Mizinga. Only Moonga Mizinga may have been privy to these intentions.*
- c. *The parties never agreed to the Sale and Purchase of the property at any time as this was never part of their business discussions in this matter, all discussions having been based on the intended mortgage loan contract.*

2.24 Joseph Moffat Shawa and Marrian Shawa stated that the purported sale of the property by Moonga Mizinga to Lloyd Mwanaumo was also illegal, because Moonga Mizinga did not have the requisite title to transfer to Lloyd Mwanaumo.

2.25 They contended that Moonga Mizinga intended to unceremoniously evict Joseph Moffat Shawa and Marrian Shawa from the property, which was never sold to him, but was merely mortgaged to him through a Third-Party Mortgage transaction.

3. DEFENCE

- 3.1 Moonga Mizinga denied that Joseph Moffat Shawa is still the legal and registered owner of the property, the defence being that he ceased to be the true and legal owner of the property, when he executed a Contract of Sale for the subject property.
- 3.2 Moonga Mizinga further denied that Marrian Shawa was a borrower with regard to the transaction in issue, stating that at all material times, Moonga Mizinga was a purchaser of the property.
- 3.3 The defence was further that it was within Joseph Moffat Shawa and Marrian Shawa's peculiar knowledge, and Moonga Mizinga and Lloyd Mwanaumo offered no comment on the assertion, that Joseph Moffat Shawa acquired the property from the Ministry of Lands, and was issued with a Certificate of Title No. L4668 on 29th July 1997.
- 3.4 Moonga Mizinga and Lloyd Mwanaumo stated that it was within Joseph Moffat Shawa and Marrian Shawa's common knowledge, and they offered no comment to the allegation that Lloyd Mwanaumo was at all material times a person intending to purchase the property in dispute from Moonga Mizinga.
- 3.5 It was however agreed that in May, 2016, Marrian Shawa approached Moonga Mizinga seeking to borrow money for her business operations. Moonga Mizinga's defence was that he denied, that he agreed to lend Marrian Shawa money in the amount of ZMW300, 000.00, on the condition that she

secured the payment of the money by way of a mortgage for land.

- 3.6 He stated that he had advised Marrian Shawa that he did not have the money to lend her, and that the only money that he had, was set aside to purchase an appropriate property. The defence was that Marrian Shawa had responded, stating that she was only interested in borrowing money.
- 3.7 It was also Moonga Mizinga's defence, that on several occasions after he had informed Marrian Shawa that he did not have money to lend her, that she had continued pursuing him and persuading him to lend her the money, but he had maintained that he had only money reserved to purchase a property.
- 3.8 Then a few weeks later, Marrian Shawa had approached Moonga Mizinga, and she had informed him that herself and Joseph Moffat Shawa had failed to borrow money anywhere, and they were now agreed to enter into an agreement to sell the property, Stand No 755 Lusaka.
- 3.9 The assertion relating to Marrian Shawa not having real property to pledge as security for the loan was denied, with Moonga Mizinga repeating his defence with regard to Marrian Shawa having pursued him to lend her the money, and that later herself and Joseph Moffat Shawa agreed to enter into a Contract of Sale for the property Stand No 755 Lusaka.

- 3.10 Moonga Mizinga denied the averment that Marrian Shawa travelled out of the country to Mali in May, 2016, and that during that period, Joseph Moffat Shawa and Moonga Mizinga signed a mortgage contract for the loan.
- 3.11 The defence was that Marrian Shawa was actually within Zambia at the time the Contract of Sale was executed, and she signed as a witness on the said Contract of Sale that Joseph Moffat Shawa and Moonga Mizinga executed.
- 3.12 Moonga Mizinga denied that he kept all the documents for the third-party mortgage transaction, maintaining that what was signed was documents for the sale of the property, Stand No 755 Lusaka. He further contended that the executed documents were duly availed to Joseph Moffat Shawa and Marrian Shawa.
- 3.13 Also denied, was the assertion that Moonga Mizinga only paid ZMW280,000.00 as a loan to Marrian Shawa, with the averment being that Moonga Mizinga actually paid the sum of ZMW300,000.00 as full and final payment for the purchase of the property. It was added that ZMW20, 000.00 was paid as cash, and ZMW280, 000.00 was a bank transfer to Marrian Shawa's account.
- 3.14 Moonga Mizinga also denied the allegation that the document signed was a Third-party mortgage contract, and he averred that Joseph Moffat Shawa was not in a state to have failed to understand the nature of the document that he was signing, and that Marrian Shawa could not have

failed to understand the nature of the document that she was witnessing.

- 3.15 Moonga Mizinga and Lloyd Mwanaumo further denied that Marrian Shawa was denied a copy of the mortgage, and that she had still not been availed a copy of it to date.
- 3.16 They however admitted that Joseph Moffat Shawa and Marrian Shawa had leased the property to a Mr. Sinya Mbale, who was in current occupation of the house.
- 3.17 It was also agreed that on or about 17th May 2019, Mr. Sinya Mbale called Joseph Moffat Shawa and Marrian Shawa and notified them that he had received a letter from Moonga Mizinga's lawyers, requesting him to start remitting the rentals to Moonga Mizinga, because Moonga Mizinga had become the new landlord, by virtue of him having purchased the property from Joseph Moffat Shawa and Marrian Shawa.
- 3.18 Moonga Mizinga and Lloyd Mwanaumo denied the assertion that Joseph Moffat Shawa and Marrian Shawa received this information with a sense of shock, because the only relationship that they had with Moonga Mizinga was that of lender and borrower, as opposed to that of vendor and purchaser.
- 3.19 They stated that the relationship between the parties was that of vendor and purchaser, as per the duly executed Contract of Sale.
- 3.20 The defence was also that, it was within Joseph Moffat Shawa and Marrian Shawa's common knowledge, and immaterial to this cause, that Joseph Moffat Shawa and

Marrian Shawa conducted a search at the Lands and Deeds Registry of the Ministry of Lands, and discovered that Moonga Mizinga had obtained a Certificate of Title for the property in question in January 2019, and that they further discovered that Moonga Mizinga intended to sell the said property to the Lloyd Mwanaumo, who had since placed a caveat against the property, as an intending purchaser.

- 3.21 Moonga Mizinga denied that Marrian Shawa had paid him the sum of ZMW90, 000.00 as loan repayment, and that she therefore owed him only ZMW210, 000.00. His defence was that subsequently, and unrelated to the material issues in this matter, Marrian Shawa invited him to enter into various business dealings with her involving different activities, including poultry farming, the purchase and sale of gold, emeralds, diamonds and other precious stones, as well as a scheme to build boreholes in the country of Mali
- 3.22 It was further stated that out of these business dealings, Marrian Shawa was advanced a sum of ZMW80,000.00 by Moonga Mizinga. The contention was that the result of these business dealings, was that Marrian Shawa had overtime paid back the sum of ZMW80,000.00 to Moonga Mizinga and not ZMW90,000.00.
- 3.23 Moonga Mizinga and Lloyd Mwanaumo denied that Marrian Shawa had been in constant touch with Moonga Mizinga for purposes of the loan repayment.
- 3.24 Moonga Mizinga stated that the notice which was given to Sinya Mbale, the tenant, was an exercise of his rights as the

new and legal owner of the subject property, and it needed no other person's authority to exercise the said right.

- 3.25 Moonga Mizinga agreed that there was no mortgage action before any Court, as the same were never applicable or contemplated by the parties to this action, because the transaction which was entered into, was a sale, and not a mortgage.
- 3.26 Also, in defence, Moonga Mizinga averred that Joseph Moffat Shawa executed a Contract of Sale for the property, Lusaka and that he appeared for all intents and purposes to have understood the effect. Therefore, his allegations of fraud, misrepresentation and mistake was therefore flawed, inaccurate and unfounded.
- 3.27 Moonga Mizinga contended that he presented Joseph Moffat Shawa and Marrian Shawa with a Contract of Sale and a Deed of Assignment, and Joseph Moffat Shawa and Marrian Shawa being literate and mature adults, of sound mind, understood the nature of the transaction that they entered into.
- 3.28 The defence was further that Joseph Moffat Shawa signed a Contract of Sale and a Deed of Assignment, which gave Moonga Mizinga consent to register change of ownership of the property at Ministry of lands.
- 3.29 Moonga Mizinga denied that throughout the transaction, Joseph Moffat Shawa and Marrian Shawa believed that they were obtaining a loan, yet he made calculated moves to

change ownership of the property, contrary to Joseph Moffat Shawa and Marrian Shawa's intentions and beliefs.

- 3.30 Moonga Mizinga and Lloyd Mwanaumo stated that Joseph Moffat Shawa and Marrian Shawa entered into the transaction freely, and they sold the property for the sum of ZMW300,000.00, and as such, the market value of the property was not relevant.
- 3.31 They further averred that the first two particulars of mistake as pleaded were within the peculiar knowledge of Joseph Moffat Shawa and Marrian Shawa. Moonga Mizinga and Lloyd Mwanaumo denied the third particular of mistake.
- 3.32 Moonga Mizinga repeated that Joseph Moffat Shawa signed a Contract of Sale and Deed of Assignment which gave Moonga Mizinga consent to register change of ownership of the property at the Ministry of Lands, and subsequently convey it to any third party, including Lloyd Mwanaumo.
- 3.33 It was also Moonga Mizinga's defence, that there was a legal conveyance of the property, from Joseph Moffat Shawa to himself.
- 3.34 Moonga Mizinga denied that Joseph Moffat Shawa and Marrian Shawa had suffered loss and damage, and he denied all their claims.

4. REPLY

- 4.1 Joseph Moffat Shawa and Marrian Shawa filed their Reply on 23rd October 2020, and joined issue with Moonga Mizinga and Lloyd Mwanaumo on their defence.
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5. EVIDENCE AT TRIAL

5.1 At trial, Joseph Moffat Shawa and Marrian Shawa and testified, and they called Four (4) witnesses, while Moonga Mizinga testified, and he called One (1) witness.

PW1 – MARRIAN SHAWA

5.2 Marrian Shawa testified that in 2016, she engaged Moonga Mizinga with a view to obtain a loan. It was her evidence, that they agreed that she would use her father's property as collateral. Her testimony was that they signed the agreement, and Joseph Moffat Shawa also signed as the owner of the property.

5.3 Marrian Shawa stated that they met at Standard Chartered Bank where Moonga Mizinga looked at the documents.

5.4 Marrian Shawa in further testifying, told the Court that she was looking for a loan in the amount of ZMW300,000.00, and that Moonga Mizinga transferred ZMW280,000.00 out of the ZMW 300,000.00 as agreed, and as shown on the bank statement.

5.5 She contended that she paid ZMW30,000.00, but they did not sign for it. Then the following month, she paid ZMW30,000.00, and Moonga Mizinga had informed her that he could not sign for it, until she paid in full. Still in her evidence, Marrian Shawa stated that in the third month, she paid ZMW14,000.00 at her residence in Ibex Hill.

5.6 She added that many months passed, and issues came up, and she informed Moonga Mizinga.

- 5.7 Her continued testimony was that, she had a contract in Mali, and Moonga Mizinga introduced her to his friend in Mali, where she was supposed to drill 50 boreholes in villages, but that contract did not work out.
- 5.8 Marrian Shawa testified that Moonga Mizinga had a friend here in Zambia, who had a rig, and he had a partner in Mali. She explained that she made payments to Moonga Mizinga's friend, but they did not give his partner in Mali, and that was how she lost the contract in Mali. It was stated that Marrian Shawa explained this to Moonga Mizinga.
- 5.9 In further testifying, Marrian Shawa stated that in 2019, the tenant at the house phoned, and informed her that there was a man there, who was saying that he had bought the house from Joseph Moffat Shawa, and that he had changed the title deed into his name.
- 5.10 It was Marrian Shawa's evidence, that she went to the Ministry of Lands to find out, because Joseph Moffat Shawa had not applied for Consent to Assign the property. Her testimony was that he had done that by himself, and there was a document at the Ministry of Lands, which stated that he had purchased the house at ZMW300, 000.00.
- 5.11 Still in her testimony, Marrian Shawa explained that a handwritten letter stated that Moonga Mizinga signed for ZMW300, 000.00, and that she was there when they signed for the documents. However, her evidence was that she did not sign the letter, and Joseph Moffat Shawa did not write the letter.

- 5.12 She told the Court that she went to the Zambia Revenue Authority (ZRA) where she found records that Moonga Mizinga had bought the house at ZMW 800, 000.00, and that he paid 40% of that amount. Marrian Shawa testified that she went to the Police who were still investigating the fraud.
- 5.13 Continuing with her evidence, she stated that when they transacted, there were bulky documents, and she was not given a copy. Marrian Shawa added that Moonga Mizinga had told her that he would send them to her, as he had not indicated his address at the time.
- 5.14 With reference to page 18 of Joseph Moffat Shawa and herself's bundle of documents, which was an attestation Clause, Marrian Shawa testified that she signed the document, but her position was that it was a misrepresentation, because inside she was signing for a loan and she did not really read the documents. Therefore, she did not know if she was signing for a loan or a sale.
- 5.15 She added that her name appeared as a witness for a loan as agreed by Moonga Mizinga, using Joseph Moffat Shawa's title deed.
- 5.16 Marrian Shawa told the Court that Joseph Moffat Shawa signed against his name explaining that they signed the documents at Standard Chartered Bank at Manda Hill, and that she went with Joseph Moffat Shawa to Moonga Mizinga and introduced him.
- 5.17 It was Marrian Shawa's evidence that pages 23 to 27 of Joseph Moffat Shawa and herself's bundle of documents was

her bank statement. She stated that page 26 showed that ZMW82,000.00 was transferred to her account, by Moonga Mizinga on 23rd May 2016, and ZMW198, 000.00, bringing the total to ZMW280,000.00.

- 5.18 The testimony that Marrian Shawa further gave, was that page 18 showed that the house was sold at ZMW300, 000.00, but there was no date on the document at the top.
- 5.19 Marrian Shawa's evidence was that she did not receive ZMW300, 000.00, and she did not know how it was made up, but she received money as a loan from Moonga Mizinga, and Joseph Moffat Shawa's title deed was collateral.
- 5.20 She referred to page 31 of her bundle of documents, testifying that it was the Lands Register for the property No. LS/755. It was stated that entry number 2 on that document, showed the title holder as Joseph Moffat Shawa, while entry number 3 showed Moonga Mizinga as in whose name the property was changed in 2016.
- 5.21 The testimony given was that sorry, Moonga Mizinga placed a caveat on the property in 2016, as an intending purchaser as per the Contract of Sale.
- 5.22 Her evidence was also that at entry number 4, Willa Mutofwe and Associates withdrew the caveat, and at entry number 5 was an assignment of the property, by Joseph Moffat Shawa to Moonga Mizinga, the assignee, at ZMW300, 000.00 as consideration.
- 5.23 Marrian Shawa further stated that entry number 6 showed Moonga Mizinga as the title deed holder, on 31st January

2019, on the same date, as the Deed of Assignment. She added that the property was currently registered in Moonga Mizinga's name.

- 5.24 Marrian Shawa continued to testify, stating that at entry number 7 at page 33, Lloyd Mwanaumo placed a caveat on the property as intending purchaser, and that he was trying to purchase the property from Moonga Mizinga. She testified that she has never met Lloyd Mwanaumo, and she did not know him.
- 5.25 Marrian Shawa, with reference to the Acknowledgment of Receipt of Payment, which was at page 5 of Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, testified that it was dated 23rd May 2016. Her evidence was that Joseph Moffat Shawa did not write on that document, and that she did not sign it.
- 5.26 She testified that she transacted with Moonga Mizinga on 23rd May 2016, at Standard Chartered Bank, and she signed the Contract of Sale, but not that document. Her evidence was further that page 26 showed that money was transferred to her on 23rd May 2016.
- 5.27 Referring to the Funds Transfer Documents which were at pages 6 and 7 of Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, Marrian Shawa stated that page 6 was a transfer of ZMW82, 000.00 on 23rd May 2016 to her from Moonga Mizinga. It was added that page 7 was a transfer slip of ZMW198,000.00 from Moonga Mizinga. Marrian Shawa's

testimony, and that it was proof that she received payment of ZMW280, 000.00 from Moonga Mizinga.

- 5.28 In further testifying, Marrian Shawa told the Court that Joseph Moffat Shawa pledged the title deed as security for the loan that she obtained, and she gave a copy of the title deed to Moonga Mizinga. It was stated that they transacted after he did a search on the Lands Register.
- 5.29 As to when the original title deed was given to Moonga Mizinga, Marrian Shawa explained that it was on 23rd May 2016, when they transacted, as collateral.
- 5.30 Her evidence was that she had not paid the loan in full, but she paid Moonga Mizinga on three occasions. Marrian Shawa stated that there were circumstances that led to her non-payment, and that she explained to Moonga Mizinga, but he changed title into his name, and stated that they should sell the house and pay for the loan, but he refused.
- 5.31 Marrian Shawa referred to pages 18 to 24 of Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, testifying that it was conversations between herself and Moonga Mizinga when she travelled to Mali, and she had updated him on the business, and she had assured him that she would pay back what she owed.
- 5.32 Also referred to, was page 30 of Joseph Moffat Shawa and Marrian Shawa's bundle of documents, with Marrian Shawa testifying that it was a letter which was given to the tenant by Moonga Mizinga to vacate the premises on 16th May 2019. With reference to paragraphs 10 to 12 of the statement of

claim which was at page 4 of Moonga Mizinga and Lloyd Mwanaumo's bundle of pleadings, and paragraphs 10 to 12 of the defence at page 9 of the same bundle of documents, Marrian Shawa's evidence was that she did not receive a cash payment of ZMW20, 000.00 from Moonga Mizinga.

- 5.33 Her testimony, with reference to paragraph 17 of the defence which was at page 10 of Moonga Mizinga and Lloyd Mwanaumo's bundle of pleadings, was that she was paid ZMW80,000.00 in relation to another transaction, and after she got the loan, she repaid some money over the first Three (3) months, and that Moonga Mizinga wanted to transfer the loan repayment to the ZMW80, 000.00 loan.
- 5.34 It was her evidence, as regards paragraph 25 of the defence which was at page 10 of Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, that there was fraud and misrepresentation, as she was not given opportunity to go through the documents.
- 5.35 Marrian Shawa testified that she signed the loan agreement without going through it, page by page, as Joseph Moffat Shawa was not well, and he did not read it, and she just looked at the first page, and she continued signing.
- 5.36 Her evidence was that it was a mistake on her part, and she did not push Moonga Mizinga to give her copies of the documents that she had signed.
- 5.37 Still in testifying, Marrian Shawa stated that there was fraud because she later came across documents, such as the Consent to Assign at the Ministry of Lands which Joseph

Moffat Shawa did not sign in 2019, as he only met Moonga Mizinga once in 2016, and he did not apply for Consent to Assign as the seller.

- 5.38 Marrian Shawa told the Court that pages 1 to 4 of Moonga Mizinga and Lloyd Mwanaumo' supplementary bundle of documents, was as a Deed of Assignment, between Joseph Moffat Shawa and Moonga Mizinga, which was registered on 31st January 2019, as shown on the right, and that on the left, it was written Certified P.I.T to the amount of ZMW40,000.00.
- 5.39 She added that on the last page, were signatures which looked like hers and Joseph Moffat Shawa's, but she did not meet Moonga Mizinga in 2019, and she did not sign the document.
- 5.40 Marrian Shawa also testified that on the Contract of Sale which was at pages 17 and 18 of Joseph Moffat Shawa and Marrian Shawa's bundle of documents, and page 2 of Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, she signed that document in 2016, but there was no date at the top of the document.
- 5.41 She added that she did not sign the Deed of Assignment and she did not know whose signature appeared against her name, and that she did not meet Moonga Mizinga in 2019.
- 5.42 Marrian Shawa also pointed out that it was not Joseph Moffat Shawa's signature on the Deed of Assignment, and it was different from that on the Contract of Sale.

5.43 In concluding her testimony, Marrian Shawa requested the Court to reverse the title, stating that they were willing to pay back Moonga Mizinga the money that he had loaned to her. It was also her evidence, that he did not change title into his name in a proper manner, as it was done fraudulently.

5.44 Marrian Shawa added that the rentals from the property was the only income for her sick father.

**CROSS EXAMINATION OF MARRIAN SHAWA BY
COUNSEL FOR MOONGA MIZINGA AND LLOYD
MWANAUMO- MR. B. MUKATUKA**

5.45 In cross examination, Marrian Shawa on being referred to paragraph 3 of the statement of claim, which was at page 3 of Moonga Mizinga and Lloyd Mwanaumo's bundle of pleadings, testified that she had not produced any document to show that Moonga Mizinga was a money lender.

5.46 She stated that paragraph 9 of the statement of claim alleged that she was in Mali when Joseph Moffat Shawa and Moonga Mizinga signed the mortgage contract. However, she testified that she was around when they transacted, and therefore, the paragraph was a mistake.

5.47 Marrian Shawa also stated in cross examination, that she had bought property before, and she knew the stages of a sale. However, her evidence was that she had never bought property from a person, but as an offer from the Ministry of Lands.

5.48 When referred to pages 1 to 4 of Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, Marrian Shawa told the

Court that it was a Contract of Sale for the property, on which the parties signed on the first page, and at page 2, Joseph Moffat Shawa signed, and she signed as a witness. She added that Moonga Mizinga also signed the contract, and that the contract price was ZMW300, 000.00.

- 5.49 Marrian Shawa told the Court that pages 3 and 4 were signed by Joseph Moffat Shawa and Moonga Mizinga. She stated that she knew the purpose of initializing a document, stating that it showed agreement with its' terms, and it prevented a party from sneaking in things, which were not agreed to.
- 5.50 Marrian Shawa's contention was that she did not go through the documents, and therefore she did not know if Moonga Mizinga sneaked in any mortgage documents. She agreed that she had not produced a loan agreement.
- 5.51 On being referred to the Acknowledgment of Receipt of Payment, which was at page 5 of Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, Marrian Shawa testified that she did not witness the document, and that she was not party to it. Her evidence was that according to the document, Joseph Moffat Shawa mandated Moonga Mizinga to do acts necessary to complete the transaction or conveyancing.
- 5.52 It was further her testimony, that Moonga Mizinga's obtaining Consent to Assign, was within the mandate of the letter, and that applying for assessment at ZRA was also part of the acts to convey property. Marrian Shawa stated that she was not aware that ZRA could put a higher assessment.

She told the Court that the assessment at ZRA was done in 2019, and that the Contract of Sale showed that the property was bought in 2016.

- 5.53 It was added that from May 2016 to January 2019 was a period of almost three (3) years.
- 5.54 Still in cross examination, Marrian Shawa testified that she was aware that land or property gains value over time, and that the value of the property in 2016, was not the same as in 2019. She stated that the value in 2019 was higher than in 2016.
- 5.55 On being referred to the Contract of Sale which was at pages 1 and 2 of Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, Marrian Shawa stated that Joseph Moffat Shawa's signature at page 1, was not consistent with that at page 2, as well as the signatures at pages 3 and 4.
- 5.56 She testified, when she was referred to the Deed of Assignment, which was at pages 1-4 of Moonga Mizinga and Lloyd Mwanaumo's supplementary bundle of documents as well as the Contract of Sale which was at page 2 of Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, that the signatures on the two documents were similar.
- 5.57 Marrian Shawa further testified that Joseph Moffat Shawa's signature on the Contract of Sale, and on the Deed of Assignment were not similar, and that he was not consistent in the signatures on the Contract of Sale.
- 5.58 She told the Court that she was aware that the lifespan of a Deed of Assignment is a year, but that she did not know why

the assignments were not dated. Marrian Shawa added that she did not know that the Ministry of Lands allowed the first page of a Deed of Assignment to be changed on being lodged, if a year had elapsed.

- 5.59 Marrian Shawa testified, when she was referred to Condition 13 of the Contract of Sale, which was at page 4 of Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, that it stated that the vendor had executed the Contract of Sale freely, and free from undue influence. However, her evidence was that the Condition was not correct.
- 5.60 She pointed out that Condition 11 stated that the purchaser would bear the costs of obtain Consent to Assign, property transfer tax, outstanding ground rent and for the Deed of Assignment. However, she stated that she did not know if it was in Order for the Moonga Mizinga to pay for Consent to Assign. Marrian Shawa knew who a purchaser was, stating that it was a buyer. She added that in this instance, it was Moonga Mizinga.
- 5.61 She admitted that according to Condition 11, Moonga Mizinga was in Order to apply for Consent to Assign and for assessment at ZRA.
- 5.62 When referred to the WhatsApp conversations which were at pages 18 to 24 of the Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, Marrian Shawa testified that those conversations did not refer to her repaying the loan.
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5.63 Her evidence was that page 21 stated that she would see the buyer for gold at 14:30 hours for her payment, and that page 24 referred to the borehole. She also testified that the discussions were with regard to the sale of gold, and the borehole, and there was nothing on the loan repayment or mortgage redemption.

5.64 In still testifying, Marrian Shawa agreed that other than the sale, she had other business dealings with Moonga Mizinga and that the Contract of Sale and the Deed of Assignment, showed that she was a mere witness, and not a party.

**CROSS-EXAMINATION OF MARRIAN SHAWA BY
COUNSEL FOR MOONGA MIZINGA AND LLOYD
MWANAUMO-MR MANYEPA**

5.65 Marrian Shawa testified that she had a deal in Mali to drill boreholes, and that Moonga Mizinga had a friend in Mali who had a company there, but he did not pay his partner in Mali. It was also her evidence, that her brother in law in Mali initiated the contract, but he could not be called because he did not receive the money.

5.66 Nevertheless, Marrian Shawa stated that he contacted her and not Moonga Mizinga, and she ascertained the position with Moonga Mizinga before travelling to Mali.

5.67 Her evidence when she was referred to part of Contract of Sale which was at page 2 of Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, was that she saw the first page as a loan document, and she did not see that page. She stated that at page 2 of Moonga Mizinga and Lloyd

Mwanaumo's bundle of documents at the top, it stated Law Association of Zambia, but she did not read it, although she signed it.

**CROSS EXAMINATION OF MARRIAN SHAWA BY
COUNSEL FOR MOONGA MIZINGA AND LLOYD
MWANAUMO- MR. MUTUTWA**

5.68 When further cross-examined, Marrian Shawa stated that she had not adduced any document to show that Moonga Mizinga was a money lender, and that it was a loan agreement. She however testified that she did not sign any document to give Moonga Mizinga the certificate of title.

RE-EXAMINATION OF MARRIAN SHAWA

5.69 Marrian Shawa clarified that she had no evidence to show that Moonga Mizinga was a money lender. It was however her testimony, that her friend who dealt in money lending introduced Moonga Mizinga to her.

5.70 She stated that they did not sign any document to give Moonga Mizinga, as she did not see it fit, because the other documents sufficed.

5.71 With reference to the WhatsApp conversations which were at pages 22 to 24 of Moonga Mizinga and Lloyd Mwanauomo's bundle of documents, Marrian Shawa testified that the conversations did not relate to a loan expressly, but referred to the issue being a loan.

5.72 She reiterated that Joseph Moffat Shawa's signatures on the Contract of Sale were not consistent because they looked different on each page, and they were not the same. With

reference to the Deed of Assignment which was in the supplementary bundle of documents that Moonga Mizinga and Lloyd Mwanaumo had filed, it was Marrian Shawa's testimony that the signature on the Contract of Sale and on the Deed of Assignment were not similar, because she did not sign the 2019 document.

5.73 Her evidence with regard to Condition 13 of the Contract of Sale which was at page 4 of Moonga Mizinga and Lloyd Mwanaumo' bundle documents, was that she did not read the document to agree with its' terms.

PW2 – JOSEPH MOFFAT SHAWA

5.74 He testified that there was a person that wanted to buy his house, but they did not buy it because he refused to sell it. Joseph Moffat Shawa stated that he did not think that he had intentions of selling it.

5.75 His testimony was further that the buyer had no authorization to buy his house, and that the buyer got involved in the house because Joseph Moffat Shawa was unwell. Joseph Moffat Shawa stated that he did not know who sold the house, and that was why he was before the Court.

5.76 It was his evidence with reference to the Acknowledgment of Receipt of Payment which was at page 5 of Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, that he could not read it, because his eye sight was very bad.

5.77 He however recalled that in 2016, he was informed that a person had bought the house, and he had objected. He

testified that there was a problem with his daughter, Marrian Shawa, explaining that she was staying in his house, and she had a business partner, and they had agreed.

5.78 By way of concluding his testimony, Joseph Moffat Shawa testified that he was equally surprised that the documents were found with Moonga Mizinga. His testimony was that he wanted his house back.

**CROSS EXAMINATION OF JOSEPH MOFFAT SHAWA BY
COUNSEL FOR MOONGA MIZINGA AND LLOYD
MWANAUMO- MR. MUKATUKA**

5.79 In cross-examination Joseph Moffat Shawa stated that he did not recall very well, and he could not recall his signature.

5.80 When referred to the Contract of Sale, which was at pages 1 to 4 of Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, his evidence was that Marrian Shawa was his daughter. It was also his testimony, that the signatures on the documents were not his. Joseph Moffat Shawa told the Court that Marrian Shawa was telling the truth as he was unwell.

5.81 He stated that he did not know anything about the signatures as testified by Marrian Shawa.

**CROSS EXAMINATION OF JOSEPH MOFFAT SHAWA BY
COUNSEL FOR MOONGA MIZINGA AND LLOYD
MWANAUMO- MR. MUTUTWA**

5.82 Still in cross examination, Joseph Moffat Shawa's evidence was that he stopped seeing very well when he stopped working. He could not recall if he was still working in 2016.

He testified that Marrian Shawa went to Mali in 2016, but he changed, stating that it was not true that she went to Mali in 2016. Joseph Moffat Shawa's evidence was first that when Marrian Shawa was in Mali, he signed some documents.

5.83 However, on being cross examined further, his testimony was that what he knew was that he did not sign some documents.

5.84 Joseph Moffat Shawa also told the Court that the property in issue was his, and that the documents were kept in his house, by his children.

5.85 He denied having told the Court that the house was sold or that people that wanted to buy the house went there in 2016.

**CROSS-EXAMINATION OF JOSEPH MOFFAT SHAWA BY
COUNSEL FOR MOONGA MIZINGA AND LLOYD
MWANAUMO- MR. MANYEPA**

5.86 It was Joseph Moffat Shawa's evidence that he could not read and recognize documents. However, he stated that the signatures on the Contract of Sale which was at pages 1 to 4 of Moonga Mizinga and Lloyd Mwanaumo's bundle of documents were not his.

PW3 – FANELLY SOKO

5.87 Fanelly Soko testified that she was at the farm when her husband, Joseph Moffat Shawa suffered his first stroke in 1998. She stated that she nursed him, and when he got better, they went back to the farm near Chongwe. Then later, they went back to town, and when he got better, she returned to the farm.

- 5.88 Fanelly Soko explained that Joseph Moffat Shawa went to their house in Woodlands, Lusaka. Then thereafter their daughter, Marrian Shawa, had informed her that they had obtained a loan. Thus, when she spoke with Joseph Moffat Shawa on the phone that evening, she had inquired how much money they borrowed for their daughter to start a business, and he had told her that it was ZMW280, 000.00.
- 5.89 It was Fanelly Soko's continued testimony, that Joseph Moffat Shawa thereafter suffered a second stroke whilst they were at the farm, in a year that she did not recall. She stated that he was unwell, and he had lost his memory.
- 5.90 Her continued testimony was that a man wrote them a letter telling them to go and view a house in Villa. However, they were surprised because they already had a house, and she did not know the person, and she could not recognize him.
- 5.91 Fanelly Soko testified that Marrian Shawa read the letter and told her that they should go and view the house, but Fanelly Soko refused, as things were not moving well.
- 5.92 She also stated that she knew about the loan, but not the sale of the house. Fanelly Soko's evidence was that she did not agree with Joseph Moffat Shawa to sell the house in Woodlands.
- 5.93 It was further her testimony, that no one bought the house, and that she was only aware of the money for Marrian Shawa's business which brought no returns. In that regard, she stated that Marrian Shawa wanted to start a business, which she did after she got a loan. However, Fanelly Soko
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did not know the conditions of that loan. Her evidence was that she just wanted her house which the other person was claiming, adding that she was also nursing their second child who was unwell.

CROSS-EXAMINATION OF FANELLY SOKO BY COUNSEL FOR MOONGA MIZINGA AND LLOYD MWANAUMO- MR. MUKATUKA

- 5.94 Fanelly Soko stated that she could identify Joseph Moffat Shawa's signature, adding that it was simple, such that anyone could sign like him. Fanelly Soko testified that she got married to Joseph Moffat Shawa in 1965.
- 5.95 When referred to the Contract of Sale which was at pages 1 to 4 of Moonga Mizinga and Lloyd Mwanauomo's bundle of documents, her evidence was that the signatures on the documents were not for Joseph Moffat Shawa.
- 5.96 She explained that she had not mastered Marrian Shawa's signature.
- 5.97 It was her testimony, when she was again referred to page 2 of Moonga Mizinga and Lloyd Mwanauomo's bundle of documents, that Marrian Shawa's signature was made up. She agreed that Marrian Shawa could know her signature, and she stated that Marrian Shawa was telling the truth, because she knew her own signature.
- 5.98 Fanelly Soko testified that in 2016, she was at the farm, and she was merely told about the transaction, and she was not present. Therefore, she could not dispute the documents.
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5.99 In further cross examination, Fanelly Soko stated that she did not know if Marrian Shawa had paid back the loan to the bank, and that she did not know the name of the bank or where the loan was obtained.

**CROSS EXAMINATION OF FANELLY SOKO BY COUNSEL
FOR MOONGA MIZINGA AND LLOYD MWANAUMO- MR.
MUTUTWA**

5.100 Fanelly Soko testified that after Joseph Moffat Shawa suffered his first stroke, he returned to Lusaka, after he could walk again, and he could read and write because everything was restored.

5.101 When referred to the Contract of Sale which was at page 2 of Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, Fanelly Soko stated that the first signature on the document was not for Joseph Moffat Shawa. Her evidence was that she knew his signature because it was just scribbled. It was also her testimony, that the signature was different from the signature that she knew.

5.102 Continuing with cross examination, Fanelly Soko stated that the documents were signed after Joseph Moffat Shawa's first stroke, and that his signature could possibly have changed, because he had a stroke.

PW4 – MONICA ZACHARIA

5.103 Monica Zacharia testified that her friend Marrian Shawa phoned her, and informed her that she wanted to borrow some money, on a date that she did not recall. Thus, Monica Zacharia had called Choongo, who told her that he knew

people who gave out loans, and that they could go to town to meet the lender.

5.104 Her testimony was that she went to town with Marrian Shawa at a take away near the Bank of Zambia, because the lender worked at Bank of Zambia. Monica Zacharia's evidence was that the man went there, and she introduced Marrian Shawa to him. It was stated that the man had told Marrian Shawa that he used the bank to give out money, and Marrian Shawa stated that she wanted to borrow ZMW280,000.00.

5.105 That was how the man had informed her that he lent money with 10% interest for a period of Six (6) months to a year. Monica Zacharia added that he had requested that a title deed be given to him.

5.106 She told the Court that Marrian Shawa to went back by herself, as Monica Zacharia had told Marrian Shawa that the man had said that he would transfer the money.

5.107 It was also her testimony, that after Two (2) days, she had called Marrian Shawa, who told her that everything was in process, and she would get the money. Monica Zacharia stated that the lender asked what the purpose for borrowing the money was, and Marrian Shawa had told him that she wanted to expand her chicken business. Monica Zacharia testified that the lender's name was Moonga.

**CROSS-EXAMINATION OF MONICA ZACHARIA BY
COUNSEL FOR MOONGA MIZINGA AND LLOYD
MWANAUMO- MR. MANYEPA**

5.108 She testified that she met Moonga Mizinga at a takeaway near the Bank of Zambia, but she did not see any documents being signed there at any other time. Her evidence was that Marrian Shawa told her that she was instructed to take her title deed there, but she did not know that Marrian Shawa did not own that title.

**CROSS-EXAMINATION OF MONICA ZACHARIA BY
COUNSEL FOR MOONGA MIZINGA AND LLOYD
MWANAUMO- MR. MUKATUKA**

5.109 Still in cross examination, Monica Zacharia told the Court that Marrian Shawa wanted to borrow ZMW280,000.00, and if she had told the Court that she wanted to borrow to ZMW300,000.00, then Monica Zacharia was telling the truth. She stated that if the amount was ZMW300,000.00 then it included interest, and Moonga Mizinga had informed them that the period was between Six (6) months and a year, and they agreed on one year.

5.110 Monica Zacharia's further evidence in cross examination, was that 10% of ZMW280, 000.00 was ZMW28, 000.00 per month. She testified that her role was to introduce Marrian Shawa, and that the agreement was made in her presence, but Joseph Moffat Shawa was not present. It was testimony that those present were herself, Marrian Shawa, Moonga Mizinga and Choongo.

5.111 When referred to paragraph 9 of the statement of claim, Monica Zacharia testified that she just escorted Marrian Shawa on the first day, and she did not know whether

Marrrian Shawa later went back with Joseph Moffat Shawa. She confirmed that she did not participate in any other meeting.

5.112 It was reiterated that Marrrian Shawa told Monica Zacharia that she had taken the title deed, and that the money would be transferred, as well as that she received the money.

CROSS-EXAMINATION OF MONICA ZACHARIA BY COUNSEL FOR MOONGA MIZINGA AND LLOYD MWANAUMO- MR. MUTUTWA

5.113 Monica Zacharia testified that she did not see any loan agreement that was signed, and that she had no evidence to show that a loan agreement was signed. She also testified that she was not present.

PW5 – BRIAN CHISI

5.114 Brian Chisi a police officer was PW5. His evidence was that this matter was reported as a criminal matter by Marrrian Shawa on 30th June 2021. He testified that Marrrian Shawa reported on behalf of Joseph Moffat Shawa, through a Power of Attorney alleging forgery and uttering of false documents.

5.115 As to the particulars of the complaint, his evidence was that Marrrian Shawa complained that she went to Moonga Mizinga, a person that she knew could give her a loan, so she could take Joseph Moffat Shawa to the hospital. It was stated that Marrrian Shawa was given ZMW350, 000.00.

5.116 Brian Chisi testified that they instituted investigations, and obtained the physical file from the Ministry of Lands, to

establish how the property was transferred from Joseph Moffat Shawa to Moonga Mizinga.

- 5.117 It was stated that they took the Deed of Assignment, and the State Consent to Assign, and subjected them to examination by a handwriting expert. He stated that when the report came back from the forensic department, Marrian Shawa had stated that she had used the property as collateral, and to her surprise, she had found that it had been changed into Moonga Mizinga's name.
- 5.118 Brian Chisi testified that he took the Deed of Assignment and the application for Consent to Assign to the Forensic Department to determine who executed the documents. He identified the Forensic Report which was produced by Mr. Zulu, and it was produced and marked 'P1'.
- 5.119 Further in his testimony, Brian Chisi stated that the report showed differences in the signature that was submitted to the forensic department. He also testified that under point 5, the conclusion showed that Joseph Moffat Shawa did not sign the application for Consent to Assign or write on the Deed of Assignment.
- 5.120 His evidence was that Marrian Shawa wrote the name, address and occupation of the vendor on page 4 of the Deed of Assignment.

**CROSS EXAMINATION OF BRIAN CHISI BY COUNSEL
FOR MOONGA MIZINGA AND LLOYD MWANAUMO**

- 5.121 Brian Chisi stated that he did not carry out the forensic examination, and that he was not present when the documents were being examined.
- 5.122 He agreed that he is not Zulu, D, the author of the documents, but stated that the said Zulu D had been subpoenaed to give testimony.
- 5.123 Brian Chisi denied that he was speculating because he had requested that the report be done. In further cross examination, he testified that Marrian Shawa wrote her name, address and occupation on the Deed of Assignment, and she asked someone to sign it. He testified that it was possible to forget to sign against one's name.
- 5.124 Brian Chisi however, stated that he was not aware that Marrian Shawa admitted to having signed a Contract of Sale.

RE-EXAMINATION OF BRIAN CHISI

- 5.125 Brian Chisi reiterated that it was possible to write one's name, address and occupation, and forget to sign against them. He stated that what was in the physical file and what they had was not totally different.

PW6 – DAVID ZULU

- 5.126 David Zulu also a police officer, testified that he was a Senior Superintendent, who was stationed at Service Headquarters, Forensic Services Department. He stated that he was trained both locally and internationally by Frost and Freeman, and he obtained an Advanced Certificate in Questioned Document Examination in the United Kingdom.

- 5.127 Further in his evidence, David Zulu testified that he was also trained at Gujarati University in India, where he obtained an Advanced Certificate in white collar crimes investigations. He also stated that he was trained at the Southern African Regional Police Chiefs Corporation in Botswana, where he obtained an Advanced Certificate in Forensic Laboratory Management.
- 5.128 He added that he possessed a Bachelor of Arts in Social Sciences, and a Masters in Defence and Security from the University of Zambia. David Zulu testified that he had been doing work as a handwriting expert for Twenty-Five (25) years.
- 5.129 His testimony in relation to the dispute which is before Court, was that on 12th December 2023, he received a question document, being an application for Consent to Assign which was dated 25th January 2019, which bore an unreadable signature. He stated that it was marked DISP 1, and a Deed of Assignment relating to the property between Joseph Moffat Shawa and Moonga Mizinga dated 2019.
- 5.130 Still in testifying, he stated that the Two (2) documents were accompanied by random specimen signature samples, and handwriting samples for Joseph Moffat Shawa and Marrian Shawa which were submitted, in Order to ascertain whether Joseph Moffat Shawa and Marrian Shawa could have written or signed on any of the segments on the Two (2) documents in question.

- 5.131 David Zulu's evidence was that the document examination and methodology, which was employed, was physical examination, and under comparison microscope. He told the Court that he effected a side by side analysis between the questioned signature on the application for Consent to Assign/Transfer, against the provided specimen signatures that were provided for Joseph Moffat Shawa.
- 5.132 It was also his testimony, that he examined the signature and handwriting on the Deed of Assignment which was at page 4, against the provided handwriting, as well as the signature specimen samples for Joseph Moffat Shawa and Marrian Shawa.
- 5.133 David Zulu's testimony was that thereafter the documents were photographed, printed, and a Zambia Police Photographic Album was compiled. He stated that he also came up with three demonstration charts which were housed in the Photographic Album, which was a 10 paged document, with a cover with a Zambia Police logo in bold sky-blue ink, and with reference QDR175/2023.
- 5.134 In his continued evidence, David Zulu testified that he prepared the photographic album, and he explained that the unreadable signature was at page 6 or 7. He identified the Photographic Album, and it was produced as 'P2'.
- 5.135 David Zulu with reference to the Photographic Album, stated that he examined the application for Consent to Assign, and he observed strong dissimilarities between the provided unreadable signature on the application for

Consent to Assign, against the random signature for Joseph Moffat Shawa.

- 5.136 His evidence was that the signature on the application for Consent to Assign was fictitious, and it did not in any way resemble Joseph Moffat Shawa's specimen signatures.
- 5.137 David Zulu also told the Court that he further observed dissimilarities on the Deed of Assignment for Joseph Moffat Shawa, and the provided specimen for Joseph Moffat Shawa. He stated that there were also dissimilarities on the upper part of Joseph Moffat Shawa's signature, and therefore, he did not append his signature or write on the documents in question.
- 5.138 It was also his testimony, that he however observed similarities on the provided specimen for Marrian Shawa and on the witness segment on the Deed of Assignment for Joseph Moffat Shawa. He stated that there were dissimilarities on the provided signatures for Marrian Shawa with those on the Two (2) documents, including those against her name on the Deed of Assignment.
- 5.139 In still testifying, David Zulu's evidence was that there were no handwriting or signature specimens for Moonga Mizinga and Siachinji Musakawere that were submitted, and therefore they were not forensically examined.
- 5.140 He stated that pages 4 and 5 showed the dissimilarities, while page 8 had a chart of the documents overview with the requested and random specimens.

- 5.141 Further testimony was given, that on Chart 2, under column 2 at page 9, were the questioned signature extracts from the application for Consent to Assign/Transfer and from the Deed of Assignment. David Zulu stated that under B, were course of business signatures for Joseph Moffat Shawa which shows eight dissimilarities. He stated that B showed angular features as opposed to oval feature. David Zulu added that under B, the signature was oval, but on A it was less oval.
- 5.142 It was also testified that the initial portion on both, provided course of business signatures on B, which showed the letter M as shown by the arrows 3 and 3A.
- 5.143 David Zulu's testimony was that his conclusions were at point 5.0 at page 5 of the Photographic Album, which showed that Joseph Moffat Shawa did not write or sign on the Two (2) documents, while Marrian Shawa wrote on the witness part of the Deed of Assignment, even though she did not sign against her name.
- 5.144 He stated that 'P1' was a preliminary report that he authored, and it contained information from the album. David Zulu testified that the Two (2) documents, being the requested specimen signatures from Marrian Shawa, were obtained on request. He explained that random specimen signatures were previous writings that had nothing to do with the matter at hand.
- 5.145 David Zulu also told the Court that the source of the signatures from the Ministry of Lands were on the

application for Consent to Assign and the Deed of Assignment which were marked as DISP 1. He further stated that he was not privy to where the investigations officer got them, but testified that QDR was a Questioned Document Register, in which they entered the cases that they received.

5.146 It was David Zulu's continued testimony that he was the head of the Questioned Document Department, and he supervised it. He stated that he was aware of the cases that passed through the Unit, and at one point he was asked to account for a QDR whose number was before number 175. He added that it was not in relation to this matter, but it had the names Joseph Moffat Shawa and Marrian Shawa with Two (2) Deeds of Assignment, One (1) of which was in question and the other, a random specimen signature.

5.147 In concluding his testimony, David Zulu testified that he was not tasked to handle the matter, but the purpose was to ascertain whether or not a signature on one Deed of Assignment was the same as on the other Deed of Assignment which was submitted, as a sample of person's signature that had been submitted.

**CROSS-EXAMINATION OF DAVID ZULU BY COUNSEL
FOR MOONGA MIZINGA AND LLOYD MWANAUMO**

5.148 In cross-examination, David Zulu's testimony was that he was not aware that a Contract of Sale was signed between Joseph Moffat Shawa and Moonga Mizinga. He stated that the Contract of Sale was not submitted for examination.

David Zulu added that he did not know that a Contract of Sale came before a Deed of Assignment.

- 5.149 On being referred to page 7 of the Photographic Album 'P2', his evidence was that Nine (9) documents were submitted to him. David Zulu's evidence was further that he used 2 and 4 in the chart, and his report addressed all the other documents, and they were mentioned at page 7. He also stated that they were grouped as random specimen samples, but they were not specifically mentioned.
- 5.150 David Zulu still in cross examination, testified that the random specimen samples for Joseph Moffat Shawa span from the years 1987 to 2010, and not 2016.
- 5.151 He agreed that over time there were variations in people's handwriting and signatures. It was stated that from 1987 to 2010 there were variations.
- 5.152 David Zulu when referred to the affidavit which was filed in support of an application for an Order of injunction, which was dated 29th May 2019, testified that Joseph Moffat Shawa's signature on that document, was different from those at page 7 of the Photographic Album 'P2'.
- 5.153 His testimony when he was referred to page 2 of Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, was that it was a Contract of Sale.
- 5.154 David Zulu testified, when he was referred to the special conditions of sale at page 4 of the same bundle of documents, that the signature on that page did not appear like that of Joseph Moffat Shawa.

- 5.155 He stated that according to the affidavit dated 29th May 2019, the signature was for Joseph Moffat Shawa, and it was not consistent with the signatures that were presented to him. It was testified that when David Zulu did the examinations, he formed opinions expertly.
- 5.156 In further cross examination, David Zulu stated that Two (2) handwriting experts examining the same signature and requested specimen signatures would not arrive at Two (2) different opinions. He testified that the individual characteristics remained the same, but variations would be there over time.
- 5.157 When referred to the cover of the Photographic Album 'P2', David Zulu's evidence was that there was an error on the reference number, which read as QDR105/2020, explaining that the correct number was at page P1 of the report.
- 5.158 He testified that he paid attention to detail, and that there was another QDR, but his QDR was 175/2023. His testimony was that he was aware of QDR 401/2022, but he was not sure of the number, but the cases.
- 5.159 Testifying further on the document, David Zulu stated that it was produced under his supervision, and he was aware that the conclusions in that report differed from his conclusions.
- 5.160 As to what his conclusions were, he explained that he concluded that Marrian Shawa wrote her name, occupation and address on the Deed of Assignment, but she did not

sign against those details. David Zulu also stated that Marrian Shawa wrote on that page as a witness.

5.161 He added that no Contract of Sale was submitted and that Joseph Moffat Shawa and Marrian Shawa did not submit the documents which were filed into Court for examination.

RE-EXAMINATION OF DAVID ZULU

5.162 In re-examination, David Zulu clarified that looking at the signature with the naked eye, it showed change, but as handwriting experts, they looked for individual characteristics.

5.163 His evidence was further that a forensic examination was not done, by only a naked eye and they used equipment.

5.164 That marked the close of the case for Joseph Moffat Shawa and Marrian Shawa.

DWI – MOONGA MIZINGA

5.165 In defence, Moonga Mizinga testified that sometime between April and May 2016, he was looking for property to buy at ZMW300, 000.00. His testimony was that he engaged an estate agent named Clive Choongo to help him find a property. He told the Court that Clive Choongo initially took him to see a property in Chalala, but he did not like it, and he had told him to continue with the search for a property.

5.166 Moonga Mizinga testified that a few days later, Clive Choongo took him to see the property in issue in Woodlands. His evidence was that they found Joseph Moffat Shawa and Marrian Shawa at the property, who took them around to view the property.

- 5.167 It was further his evidence, that he expressed interest in purchasing the property, but to his surprise Joseph Moffat Shawa and Marrian Shawa stated that they did not want to sell the property, but they wanted to borrow money and use the property as security.
- 5.168 Moonga Mizinga told the Court that he was taken aback, and he had told Joseph Moffat Shawa and Marrian Shawa that he had ZMW300, 000.00 to buy property, and he was not interested in lending them money. He stated that he had advised them to borrow from the banks, and that was how their visit on that day ended.
- 5.169 In his continued testimony, Moonga Mizinga's evidence was that he had advised Clive Choongo to continue searching for a property to buy. He explained that for a period of about Two (2) weeks, he kept receiving multiple phone calls from Marrian Shawa, who was trying to persuade him to lend them money, and to use the property as security.
- 5.170 Moonga Mizinga testified that with each passing day, the number of phone calls increased, and the frequency kept going up. He added that it was clear to him that they were desperate for money.
- 5.171 His further evidence was that he refused to lend them money because he wanted to purchase a property. Then on a particular day, Marrian Shawa phoned him and told him that they had failed to borrow money from the banks, and therefore they had decided to sell the property at ZMW300,000.00.

- 5.172 Moonga Mizinga told the Court that he proceeded to engage a lawyer, Mumba Muziya, from Infinity Horizon Legal and Business Consultants, and he had asked him to do due diligence on the property. It was also his testimony, that he had asked Mumba Muziya for his legal opinion, as to whether there was anything from a legal stand point, that could stop him from buying the property at ZMW300,000.00.
- 5.173 Continuing with his testimony, Moonga Mizinga stated that a few days later, Mumba Muziya reverted to him, and advised him that the property was free from encumbrances, and that from his view, nothing legally stopped him from purchasing a property in Woodlands at ZMW300, 000.00.
- 5.174 That was how thereafter, they had discussed the preparation of the documents because he wanted Mumba Muziya to prepare the documents. However, prior to that, Mumba Muziya had asked Moonga Mizinga to ask Joseph Moffat Shawa and Marrian Shawa, which law firm would represent them in the transaction.
- 5.175 His testimony was that, he got in touch with Marrian Shawa who advised him that she had consulted with Joseph Moffat Shawa, and they had decided not to engage a law firm to represent them because it would be an unnecessary cost, and because conveyancing documents were standard documents.
- 5.176 Moonga Mizinga further stated that they could read and understand the documents that Mumba Muziya would

prepare, and they gave a go ahead for him to prepare the documents.

- 5.177 His evidence was that Mumba Muziya prepared the documents, being a Contract of Sale, a Deed of Assignment, and at a later stage, an Acknowledge of Receipt of Payment.
- 5.178 With reference to Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, he stated that the Contract of Sale was at pages 1 to 4, and that the Acknowledgment of Receipt of Payment was at page 5 of the said bundle of documents.
- 5.179 Moonga Mizinga further referred to Moonga Mizinga and Lloyd Mwanaumo's supplementary bundle of documents, testifying that the Deed of Assignment was at pages 1 to 4 of those bundles of documents.
- 5.180 Still in his testimony, he stated that after the documents were prepared, they arranged and met at Standard Chartered Bank at Manda Hill Mall Branch in a meeting room. Moonga Mizinga testified that present at the meeting, were his wife, Musanda Sachinji, himself, Joseph Moffat Shawa, Marrian Shawa and Mumba Muziya.
- 5.181 He testified that they took time to read through all the documents, page by page, starting with the Contract of Sale which Moonga Mizinga and Joseph Moffat Shawa signed on every page after reading it. Then, thereafter they signed the Deed of Assignment.
- 5.182 He referred to pages 1 to 4 of Moonga Mizinga and Lloyd Mwanaumo bundle of documents, testifying that Marrian

Shawa witnessed for Joseph Moffat Shawa, while Munsanda Sachinji was his witness on the Contract of Sale and the Deed of Assignment.

- 5.183 Moonga Mizinga also stated that he paid ZMW20, 000.00 directly to Joseph Moffat Shawa, and he transferred the ZMW280,000.00 which was in his bank account, to Marrian Shawa's bank account, as instructed by Joseph Moffat Shawa. He added that the amount reflected immediately, because they both banked with Standard Chartered Bank.
- 5.184 It was also his testimony, that Marrian Shawa printed out a copy of her bank statement, which showed that she had received the money. Then thereafter, Mumba Muziya had advised that there was need to prepare an Acknowledgment of Receipt of Payment because ZMW20, 000.00 was paid as cash, and ZMW280, 000.00 into an account other than Joseph Moffat Shawa's account.
- 5.185 Moonga Mizinga still in his evidence, stated that Mumba Muziya drafted the Acknowledgement of Receipt of Payment in pen, and it was read through. It was his testimony that Joseph Moffat Shawa wrote his name in the space which was provided on the document, and thereafter, he signed the document.
- 5.186 Moonga Mizinga testified that page 5 of Moonga Mizinga and Lloyd Mwanaumo bundle of documents, was the said Acknowledgment of Receipt of Payment, adding that the names Joseph Moffat Shawa were written by Joseph Moffat Shawa himself, and that the first signature was for Joseph

Moffat Shawa, while the second one was his, and the third one was for Mumba Muziya.

- 5.187 His continued testimony was that by signing the Acknowledgement of Receipt of Payment, Joseph Moffat Shawa acknowledged having received the sum of ZMW300,000.00 as full and final payment for the sale of his property to him.
- 5.188 Moonga Mizing testified that thereafter, Joseph Moffat Shawa handed over to him, the original title deed for the property, and copies of his and Marrian Shawa's National Registration Cards (NRC). Moonga Mizinga's evidence was that, that was how he bought the property.
- 5.189 He told the Court that it was not the intention of the parties that he would take up vacant possession of the property immediately. Moonga Mizinga in that regard, testified that the transaction was done on 23rd May 2016, and there was a clause in the contract, which stated that he would only take up vacant possession on 24th November 2016, because Joseph Moffat Shawa and Marrian Shawa requested for time to relocate the people who were living in the house.
- 5.190 His evidence was further that he got copies of the documents, and Joseph Moffat Shawa and Marrian Shawa were given a copy of the contract, and they parted company. Thereafter, Moonga Mizinga started waiting for November in Order to take up vacant possession of the property.
- 5.191 Moonga Mizinga stated that after that, they transacted, and unrelated to that transaction, he had other business

dealings with Marrian Shawa, the main one being a contract to drill boreholes in Mali.

5.192 In respect of that contract, Moonga Mizinga testified that Marrian Shawa had a purported brother-in-law in Mali, and through him, she got a contract to drill boreholes in Mali. His evidence was that it was a very lucrative contract to drill boreholes in multiple locations in Mali. Moonga Mizinga added that however, Marrian Shawa did not have money for mobilization, and ZMW80, 000.00 was needed to visit the sites where the boreholes were to be drilled.

5.193 He testified that Marrian Shawa asked him to partner with her, because she did not have ZMW80, 000.00, and he agreed to advance her ZMW80, 000.00, and in turn, he would have a 30% stake in the Mali contract, while she would have a 70% stake in the contract.

5.194 It was also Moonga Mizinga's evidence, that they identified a drilling company, which was owned by an Asian man named Mr. Raji. Thus, himself and Marrian Shawa had meetings with him to prepare for the contract.

5.195 Moonga Mizinga stated that it was also time for him to take up vacant possession of the house, and he reminded Marrian Shawa on two separate occasions. However, she had explained that she had been very busy, and she had not had time to find a suitable place to move the people who were staying in the house. It was stated that Marrian Shawa requested for more time, and Moonga Mizinga granted her the request in light of the Mali contract.

- 5.196 Further in his testimony, Moonga Mizinga's evidence was that he took precaution when he did not take up vacant possession in November, by placing a caveat on the property in early December 2016.
- 5.197 He stated that himself, Marrian Shawa and Mr. Raji had their final meeting in relation to the Mali contract at Smugglers' Inn. He testified that he gave Marrian Shawa the ZMW80, 000.00 in the presence of Mr. Raji, pursuant to the Mali contract. Moonga Mizinga also stated that Marrian Shawa and Mr. Raji bought air tickets, and they travelled to Mali a few days later using the ZMW80, 000.00.
- 5.198 His testimony was that they had communication challenges when they were in Mali, and when they eventually returned, they had a meeting where Marrian Shawa was quick to inform him that her brother-in-law was arranging an even bigger contract, and they should start preparing for it.
- 5.199 Moonga Mizinga stated that he was taken aback, because he first wanted to talk about the contract for which they had travelled before discussing the bigger contract.
- 5.200 It was his evidence, that Marrian Shawa had told him that the Mali contract was unsuccessful. Moonga Mizinga told the Court that he was unhappy to hear that because he was the only person who had put money towards it. He testified that Marrian Shawa agreed to refund him the ZMW80,000.00, so that they could start on a clean slate on the bigger contract.

- 5.201 Moonga Mizinga added that the ZMW80, 000.00 was the money that was mentioned in the statement of claim as relating to the property, when in fact, not.
- 5.202 His testimony was that they began to prepare for the contract by saving money, but it was difficult to communicate with Marrian Shawa during that period. Moonga Mizinga explained that he was told that she was in and out of the country, and with the passage of time, it was clear to him that the bigger contract would not materialize.
- 5.203 Further in his testimony, Moonga Mizinga stated that in early 2019, he decided to proceed to convey the property in his name, and he engaged Willa Mutofwe, a firm of lawyers to do the conveyancing on his behalf. He testified that he was issued a certificate of title in his name.
- 5.204 He went on to state that thereafter, he engaged Sondashi and Company, who wrote to the people who were staying in the house, informing them that he was the new owner of the house. He testified that later, Sondashi and Company informed him that he had been sued, and that ownership of the property had been challenged.

**CROSS-EXAMINATION OF MOONGA MIZINGA BY
COUNSEL FOR JOSEPH MOFFAT SHAWA AND MARRIAN
SHAWA**

- 5.205 In cross examination, Moonga Mizinga testified that the documents which were signed were, a Contract of Sale, a Deed of Assignment and an Acknowledgment of Receipt, which were prepared by Mumba Muziya, his lawyer.

- 5.206 On being referred to the Contract of Sale which was at pages 1 to 4 of Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, he stated that Condition 3 stated that Infinite Horizon and Business Consultants were the purchaser's agents. He explained that, that was where Mumba Muziya came from.
- 5.207 Moonga Mizinga also testified that he understood the condition as stating that, he as purchaser was represented by Infinite Horizons and Business Consultants.
- 5.208 It was also his evidence, that he went to the bank where the documents were signed, and Joseph Moffat Shawa and Marrian Shawa had no lawyers at the time. Moonga Mizinga testified that he had dealt with real property before, as a purchaser, and that a lawyer represented both parties in the preparation of the documents.
- 5.209 The continued testimony that was given in cross examination, was that in this case, the lawyer that was representing Moonga Mizinga as a buyer prepared the Contract of Sale. Moonga Mizinga told the Court that he was not aware that a seller prepares a Contract of Sale.
- 5.210 His evidence was further that the lawyer also drafted the Acknowledgement of Receipt of Payment in his own handwriting, but that the lawyer did not provide any document on headed paper, to show that he dealt with the property for him.
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- 5.211 Moonga Mizinga did not agree that in the absence of any documents, it was difficult to state that the lawyer prepared the documents, as he would testify.
- 5.212 Further in cross examination, his testimony was that he bought the property at ZMW300, 000.00, and he agreed that Joseph Moffat Shawa and Marrian Shawa both testified that they wanted a loan of ZMW200, 000.00. Moonga Mizinga agreed that he did not inform the Court so.
- 5.213 He also stated that Jospheh Moffat Shawa and Marrian Shawa were desperate for the money. It was his evidence that he was not aware that the property could be purchased for ZMW1,000, 000.00.
- 5.214 Moonga Mizinga testified that ZRA valued the property at ZMW800, 000.00, and that he paid tax based on that amount. He conceded that he did not have any evidence of the tax payment before Court.
- 5.215 It was further testified that it was not correct that Moonga Mizinga did not pay tax, but he had the property transferred into his name. He added that he did not participate in the conveyancing of the property, stating that a law firm did so. Therefore, he did not have the value that was given at the Ministry of Lands.
- 5.216 When referred to part of the Contract of Sale, which was at page 2 of Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, Moonga Mizinga testified that ZMW300,000.00 was indicated as the purchase price, and that was the value that was given to the lawyer. His evidence
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was that the ZRA value came in 2019, when the conveyancing was done after the Contract of Sale was executed in 2016.

5.217 Still in cross examination, Moonga Mizinga's evidence was that he submitted the documents to a firm of lawyers that did the conveyancing, and he stated that they should have submitted the documents.

5.218 He testified that at the time of the contract, ZRA had not valued the property, and that he was aware that a property could not be conveyed, unless the tax which was valued by ZRA was paid. Moonga Mizinga did not know that the tax receipt was submitted to the Ministry of Lands. His position was that Willa Mutofwe and Associates gave him copies of the documents which were submitted to the Ministry of Lands.

5.219 Further in cross-examination, Moonga Mizinga when referred to Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, stated that page 2 did not state that Willa Mutofwe and Associates prepared the document, and that neither did the documents in his bundle of documents.

5.220 His evidence was that he gave his lawyers, the Contract of Sale, the Deed of Assignment, the Acknowledgement of Receipt of Payment and copies of the NRCs.

5.221 Moonga Mizinga agreed that David Zulu had testified that Joseph Moffat Shawa and Marrian Shawa did not sign the Deed of Assignment. However, his position was that the signatures on the Deed of Assignment were not forged

because he saw them sign. It was also agreed that Joseph Moffat Shawa testified that he signed the contract, but not the Deed of Assignment.

5.222 He reiterated that Mumba Muziya wrote the Acknowledgement of Receipt of Payment, and Moonga Mizinga's testimony was that he knew nothing about Consent to Assign documents. He however testified that Joseph Moffat Shawa gave him authority to convey the property into his name, but agreed that this did not extend to forging his signature.

5.223 Moonga Mizinga stated that he did not know how the Consent to Assign was obtained, but his lawyers did the conveyancing. He could not recall if the Consent to Assign came from Joseph Moffat Shawa and Marrian Shawa.

5.224 When referred to paragraphs 3.1 and 3.2 at page 2 of the Photographic Album 'P2', Moonga Mizinga's evidence was that the said document showed that the Deed of Assignment and the application for Consent to Assign were examined.

5.225 He stated that page 3 under paragraph 4(a), stated that there were strong dissimilarities on the handwriting on the application for Consent to Assign with Joseph Moffat Shawa's random specimen samples, compared with those that were on the Deed of Assignment.

5.226 Moonga Mizinga agreed that it was opined that Joseph Moffat Shawa did not sign on the Consent to Assign and the Deed of Assignment. However, he did not know if such a

document was a forgery. Moonga Mizinga admitted that under 5.0, it stated that Joseph Moffat Shawa did not write or sign on the Deed of Assignment.

5.227 When referred to page 8(a) of 'P2', Moonga Mizinga testified that DISP 2 was the Deed of Assignment which he submitted to his lawyers. He also stated that he did not know DISP 1. Moonga Mizinga's testimony was that the Contract of Sale, the Deed of Assignment and the Acknowledgement of Receipt of Payment were prepared on 16th May 2016, and 23rd May 2016.

5.228 He agreed that Joseph Moffat Shawa and Marrian Shawa had denied having signed the Deed of Assignment. Moonga Mizinga testified that he was in good terms with them on 23rd May 2016, and he believed that they were ready to give him a document to transfer ownership of the property. It was also his testimony, that he recalled Joseph Moffat Shawa and Marrian Shawa signing the Deed of Assignment, but not any other documents.

5.229 Further in cross examination, Moonga Mizinga stated that the documents were purportedly forged.

5.230 His evidence was that he did not know the effect of transfer of the property into his name using forged documents, and that it was an opinion, that they were a nullity.

5.231 Moonga Mizinga stated that he had subpoenaed Oliver Nsama Mulenga to testify about the report that he prepared. He testified that the law firm that represented him submitted the documents to Oliver Nsama Mulenga.

- 5.232 When referred to the Forensic Report which was dated 16th April 2022, Moonga Mizinga testified that page 2 stated that the Acknowledgement of Receipt of Payment dated 23rd May 2016, a Contract of Sale, a Deed of Assignment and an affidavit were submitted to Oliver Nsama Mulenga. It was also his evidence, that the documents were submitted as Joseph Moffat Shawa and Marrian Shawa denied having signed the documents.
- 5.233 It was Moonga Mizinga's testimony, that he did not know if Joseph Moffat Shawa and Marrian Shawa were involved when the documents were submitted. He testified that the expert found that Joseph Moffat Shawa signed the Deed of Assignment.
- 5.234 Further in cross examination, Moonga Mizinga's evidence was that he did not know that by virtue of Oliver Nsama Mulenga's report, Joseph Moffat Shawa signed the application for Consent to Assign. He stated that he instructed the lawyers to have a report done after Joseph Moffat Shawa and Marrian Shawa declined having signed.
- 5.235 Moonga Mizinga's testimony was that he did not give nitty-gritties on how the expert review was to be done, explaining that his lawyers had leeway in that regard. He testified that he was not aware of the work of the experts.
- 5.236 Moonga Mizinga further testified that there was no loan, and that the ZMW 300, 000.00 was the purchase price and not the loan. He stated he did not know the value of the property at the time. Also, in cross examination, Moonga

Mizinga's evidence was that he bought the property based on his assessment, and that there was no professional value.

- 5.237 He went on to testify that he viewed the property prior to purchasing it, with an estate agent. Moonga Mizinga reiterated that he was looking for a property to buy. His position was that he became aware of the property through an estate agent, Clive Choongo, whom he had known for a long time, and he had asked him to look for a property for him to buy. Moonga Mizinga testified that prior to that, Clive Choongo took him to view a property in Chalala area.
- 5.238 His testimony was that he read the statement of claim before he filed his defence. However, he did not recall whether the statement of claim alleged that Joseph Moffat Shawa and Marrian Shawa engaged an agent to find a buyer for the property. Moonga Mizinga testified that he did not know why the statement of claim did not state so.
- 5.239 His evidence when he was referred to part of the certificate of title for Stand No 755 Lusaka which was in Moonga Mizinga's names, and was at pages 8 to 11 of Joseph Moffat Shawa and Marrian Shawa's bundle of documents, was that his defence did not speak about an agent. However, he had mentioned it in his testimony.
- 5.240 Moonga Mizinga also stated that paragraph 6 of his defence stated that Joseph Moffat Shawa and Marrian Shawa approached him to borrow money, and that he had told them that he only had money to buy property. It was his
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testimony, that he was not in the business of lending money and that buying properties was once off.

- 5.241 The testimony that was further given, was that Joseph Moffat Shawa and Marrian Shawa did not approach Moonga Mizinga to buy property, but rather, he engaged an agent to look for property for him to buy. Moonga Mizinga added that the agent took him with a view to purchase the property, and he expressed interest in buying it. However, Marrian Shawa stated that she wanted to borrow money, and not to sell the property.
- 5.242 He reiterated that he found Marrian Shawa at the property, and she stated that she wanted to borrow money. Moonga Mizinga denied that it was afterthought that he had testified that he was taken to the property, to view it, so that he could buy it.
- 5.243 His position was that he gave his full testimony to his lawyers, prior to the drafting of his defence, and that the facts were important as they made up the full story. Moonga Mizinga testified that paragraph 7 of his defence stated that the decision to sell was made several weeks after Marrian Shawa had informed him that she wanted to borrow money from him.
- 5.244 Moonga Mizinga also told the Court in cross examination, that the agent did not mention the price of the property, when he took him to see it. It was his testimony that he engaged an agent to look at the property, and he went to

view the property without knowing how much it was being sold at.

- 5.245 The evidence that Moonga Mizinga further gave, was that they agreed on the price of ZMW300, 000.00, after Joseph Moffat Shawa and Marrian Shawa failed to borrow the money, as he told them that he had only that amount to buy property. Moonga Mizinga also testified that he did not know that a house in Woodlands could cost ZMW300,000.00.
- 5.246 His evidence was that according to the agent, there was a network of agents, and he learnt about the sale through the network of agents. Moonga Mizinga stated that his lawyer was Mumba Muziya, and he was not aware that Mumba Muziya was not a lawyer, but that he would testify as his witness.
- 5.247 Moonga Mizinga further expressed ignorance on the assertion that Mumba Muziya was attached to Counsel for Joseph Moffat Shawa and Marrian Shawa's law firm, as a student at one point, but he engaged him as his lawyer. However, he did not verify if he was a lawyer, stating that his neighbour introduced him as a lawyer.
- 5.248 In his continued testimony in cross examination, Moonga Mizinga stated that he did not doubt the information, and Clive Choongo was one of his witnesses. It was further his evidence, that Mumba Muziya prepared a Contract of Sale, Deed of Assignment and the Acknowledgment of Receipt of

Payment, and that he went through the documents page by page.

- 5.249 He told the Court that after he went through the documents, they were signed at the same time, and the witnesses on the documents were the same. Moonga Mizinga's evidence was that he had heard the other witnesses testify that Joseph Moffat Shawa's signature on the Contract of Sale was different from that on the Deed of Assignment, but that he saw him sign both documents.
- 5.250 On being referred to the Deed of Assignment, which was at page 2 of Moonga Mizinga and Lloyd Mwanauomo's supplementary bundle of documents, Moonga Mizinga's testimony was that it stated 2019 in the first paragraph. He agreed that 2019 was not the same as 2016.
- 5.251 It was also his evidence, on being referred to the signature page of the Deed of Assignment, at page 4 of Moonga Mizinga and Lloyd Mwanauomo's supplementary bundle of documents, and part of the Contract of Sale at page 2 of Moonga Mizinga and Lloyd Mwanauomo bundle of documents, that Joseph Moffat Shawa's signatures on both documents looked the same to him.
- 5.252 Moonga Mizinga further testified that his witness was Munsanda Siachinji, his wife, whom he stated would not testify as his witness.
- 5.253 Further in respect to the Two (2) documents, his evidence was that the address on one was stated in full, but not in full on the second document, as the number was missing.

Moonga Mizinga testified that the documents were signed on the same day.

- 5.254 In continued cross examination, Moonga Mizinga stated that Willa Mutofwe and Associates applied for Consent to Assign, and they would not testify as his witness.
- 5.255 When referred to the Deed of Assignment which was at page 1 of Moonga Mizinga and Lloyd Mwanaumo's Supplementary bundle of documents, it was Moonga Mizinga's evidence that Willa Mutofwe and Associates filed the said Deed of Assignment at the Ministry of Lands.
- 5.256 He agreed that it was not indicated so on the document, and Moonga Mizinga did not know if the Lodgment Schedule was before Court.
- 5.257 Moonga Mizinga's testimony on being referred to both bundles of documents that himself and Lloyd Mwanaumo had filed, testified that there was no Lodgment Schedule. He stated that the Consent to Assign bore the names Willa Mutofwe and Associates. He also testified that it was not the first conveyancing that he had done, but he did not understand the conveyancing process, and therefore, he did not know that the vendor applied for Consent to Assign.
- 5.258 Moonga Mizinga testified that he paid for Property Transfer Tax sometime in 2019.
- 5.259 His continued testimony was that Infinite Horizon was Mumba Muziya's company, but he did not know if it was a law firm. He stated that a person could tell another where they worked if they trusted that person or the person could

verify the place of work. Moonga Mizinga stated that his intelligence had not changed, with the change in his position.

- 5.260 His further evidence was that Property Transfer Tax was paid on ZMW800, 000.00, but he did not know whether the ZRA assessment was before the Court.
- 5.261 Moonga Mizinga testified that he had known Lloyd Mwanaumo for some time, and that Lloyd Mwanaumo expressed interest in buying the property at some point. He added that Lloyd Mwanaumo bought the property, but the transaction as reversed due to this case.
- 5.262 Still in cross examination, Moonga Mizinga testified that to his knowledge, Joseph Moffat Shawa and Marrian Shawa obtained an injunction restraining transactions on the property.
- 5.263 His evidence, when he was referred to the Acknowledgment of Receipt of Payment which was at page 5 of Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, was that the acknowledgment was not typed, because they met at Standard Chartered Bank, and they did not have typing facilities. He stated that it was signed at the same time as the Contract of Sale and the Deed of Assignment.
- 5.264 Moonga Mizinga testified that the first ZMW20,000.00 was paid, and thereafter, ZMW280,000.00 was transferred, adding that on the same day, they signed the Acknowledgement of Receipt of Payment. He also stated

that there was no specific reason why Mumba Muziya witnessed the Acknowledgement of Receipt of Payment.

- 5.265 Moonga Mizinga denied having prepared the Acknowledgement of Receipt of Payment, testifying that Mumba Mizinga did. He did not know why the lawyer stated in the Acknowledgment of Receipt of Payment, that it was entered into freely and without undue influence.
- 5.266 His testimony was that there was a bank transfer slip for the transfer of ZMW280,000.00 which was at pages 6 and 7 of his and Lloyd Mwanaumo's bundle of documents. Moonga Mizinga's testimony was that the money was sent to Marrian Shawa, as verbally instructed by Joseph Moffat Shawa, as they transacted at Standard Chartered Bank at Manda Hill in a meeting room.
- 5.267 He further testified that there was no narration of a land transaction on the documents, and that the narration was not always there, although it was important. It was also Moonga Mizinga's evidence that he transferred the money, and that the Court would know the purpose of the transfer, from the other documents, such as the Contract of Sale and the Deed of Assignment. He added that the Deed of Assignment of 2016, reflected the events of 2016.
- 5.268 It was also testified that paragraph 4 of the Deed of Assignment at page 4, stated that duty was payable on a value of ZMW300,000.00. Moonga Mizinga stated that his lawyers registered the Deed of Assignment, and he could

not recall the sale price of the house to the Lloyd Mwanaumo.

5.269 His testimony was that he met the Lloyd Mwanaumo after the proceedings commenced, but he did not agree that Lloyd Mwanaumo would not be part of the proceedings. His position was that Lloyd Mwanaumo opted out of the proceedings, and to Moonga Mizinga's knowledge, no such documents were filed. It was his evidence that the bundle of documents read that they were for Moonga Mizinga and Lloyd Mwanaumo.

5.270 Moonga Mizinga testified that he was not a money lender, and apart from the allegation in this matter, he had not lent money to any person. He admitted having heard Joseph Moffat Shawa's testimony that he did not sell the property, but that it was collateral.

5.271 By way of concluding the cross examination, Moonga Mizinga stated that he worked for Bank of Zambia as Assistant Director Strategy and Change, and that he ranked about fourth in position from the position of Bank Governor.

DW2 – OLIVER NSAMA MULENGA

5.272 Oliver Nsama Mulenga, a Detective Chief Inspector testified that he was based at the Zambia Police Headquarters under the Forensic Department, as a handwriting expert. His testimony was that he was a Handwriting and Questioned Document Expert, who was trained locally by an expert from the UK.

- 5.273 He further testified that he was trained at Gujarati University in Gujarati State in India where he obtained a Certificate in Handwriting and Questioned Documents. He stated that he had worked for 9 years in that field.
- 5.274 Oliver Nsama Mulenga told the Court that he received, analysed, and gave expert opinion on cases from the Drug Enforcement Commission (DEC), the Anti-Corruption Commission (ACC), the Zambia Police Service, the Judiciary, the Examinations Council of Zambia, Law firms and other people who also requested.
- 5.275 His evidence was that when he received a document, it was accompanied by requested specimen samples or random specimen samples.
- 5.276 Oliver Nsama Mulenga stated that when examining the documents, Two (2) methods were used, that is the physical and optical methods. He stated that the physical method compared side by side, the disputed documents and the random samples. It was also his testimony that the optical method involved use of random machines such as microscopes, magnifying glass, computers and printers.
- 5.277 With regard to this matter, Oliver Nsama Mulenga's evidence was that on 14th April 2022, he received some documents from Robson Malipenga and Company, which requested the examination of documents which were in question, being a copy of a Deed of Assignment, an Acknowledgement of Receipt of Payment dated 23rd May 2016, a contract and conditions of sale for the property as

well as an affidavit which was filed in support of summons for an interim injunction, as random specimen samples bearing the signature for Joseph Moffat Shawa.

5.278 He stated that on receiving the documents, he verified and checked, and they qualified for laboratory standard. Thus, Oliver Nsama Mulenga examined the Three (3) documents in question, against the provided random sample on the affidavit which was filed in support of the application for an order of injunction.

5.279 He further testified that his findings were that, he observed strong similarities between the signature on the Deed of Assignment, and the Contract of Sale as well as on the Acknowledgment of Receipt of Payment against the signature which was on the affidavit which was filed in support of the summons for an order of injunction, which was signed by Joseph Moffat Shawa.

5.280 Oliver Nsama Mulenga's evidence was that he made two charts, being Chart 1 and Chart 2, and indicated the extract of the signature on the document in question, and on the affidavit. He stated that he then drew his conclusion, indicating his expert opinion that the signature on the Deed of Assignment, the Contract of Sale and the Acknowledgement of Receipt of Payment, matched or had similarities with the signature which was on the affidavit which was filed in support of the summons for an order of injunction, and he ruled out forgery.

- 5.281 Oliver Nsama Mulenga told the Court that he prepared four photographic albums, which he could identify from the Police logo, QDR number, his name and the office of the Inspector General of Police, the green colour and his signature.
- 5.282 The Court admitted that Photographic Album into evidence, and it was marked as 'D1'.
- 5.283 In still testifying, Oliver Nsama Mulenga stated that a lot of factors affected a person's signature, such as health conditions, stress, period of time, as accuracy of the signature showed variation of signature and that fear affected signature. He added that the time frame for the random and signatures would show consistency in Five (5) years, and that beyond that, there would be variations.
- 5.284 Oliver Nsama Mulenga also testified that the best samples for comparison were those done within a period of Five (5) years and below, as beyond that, the signature showed variation.
- 5.285 He stated that after preparing the report, he handed it over to the law firm, Robson Malipenga and Company. Further testimony was given, that earlier in the year, Oliver Nsama Mulenga's supervisor had asked him for the report, and he had availed it to him. Oliver Nsama Mulenga testified that he shared it with his supervisor, Senior Superintendent, David Zulu, and the law firm.

**CROSS-EXAMINATION OF OLIVER NSAMA MULENGA BY
COUNSEL FOR JOSPEH MOFFAT SHAWA AND MARRIAN
SHAWA - MR. MUHANGA**

- 5.286 In cross examination, Oliver Nsama Mulenga's evidence was that his supervisor called him earlier in the year, on a date that he could not recall. He testified that it was not true that he worked on the report without his supervisor knowing what he was doing. Oliver Nsama Mulenga explained that he was second to his supervisor, and that he did not work on the report without his supervisor's knowledge.
- 5.287 He stated that he did not know if he needed his supervisor's authority to examine the documents, but he did not go about his work without his supervisor's knowledge. Oliver Nsama Mulenga told the Court that his supervisor was aware that he did the examination in 'D1'.
- 5.288 In further cross examination, he explained that a QDR was a Questioned Document Register, and that the case was booked in their book, by number and the year that they received the case. Narrowing it down to this case, Oliver Nsama Mulenga's evidence was that the QDR on 'D1' was 40/2022, and that he received a letter from Malipenga and Company on 14th April 2022, although the said letter was not before Court.
- 5.289 He nevertheless explained that the letter was addressed to the Inspector General of Police, attention, the Officer in Charge. Oliver Nsama Mulenga agreed that he was not the Officer in Charge, but he stated that he worked on the

instruction from the Officer in Charge. He stressed that he received the letter from Messrs Robson Malipenga and Company.

5.290 Still in cross examination, Oliver Nsama Mulenga testified that it was not true that the letter should have been directed to the Inspector General of Police, as they sent it to the requestor, and they worked on behalf of the Inspector General of Police. He further stated that he directly worked with the law firm in this case.

5.291 It was Oliver Nsama Mulenga's evidence that 'P2' was address to the Divisional Criminal Investigations Officer.

5.292 However, he took the position that a person could walk into his office, and ask for documents to be examined, and he could send that person a report. Oliver Nsama Mulenga stated that he was just learning that there was hierarchy in the police, and that his supervisor had to know about the QDR register.

5.293 Further in cross examination, Oliver Nsama Mulenga testified that the Government paid him for handling requests from members of the public, and that it paid him his monthly salary. His evidence was that Binwell Mpundu, Legal Counsel from Robson Malipenga, took some samples to him. However, Oliver Nsama Mulenga did not know where Counsel got the samples from, but he took them straight to him.

5.294 Oliver Nsama Mulenga agreed that the samples did not pass through any police hierarchy. He further agreed that

Malipenga and Company did not say that they were lawyers against Joseph Moffat Shawa. It was however his testimony, that the affidavit was taken as a random specimen sample for Joseph Moffat Shawa.

5.295 Further evidence was given that Five (5) years was a procedure, as signatures and handwriting changed over time, and Oliver Nsama Mulenga looked at the date when the signature was done. He stated that the Acknowledgment of Receipt of Payment was signed on 23rd May 2016, and the Contract of Sale was also signed in 2016.

5.296 Still in cross examination, Oliver Nsama Mulenga testified that from 2016 to 2022, was almost Six (6) years, which was beyond the Five (5) years that a signature could vary. He told the Court that the Deed of Assignment had no date.

5.297 He was referred to the said Deed Assignment which was at page 2 of the Moonga Mizinga and Lloyd Mwanauimo's supplementary bundle of documents, and Oliver Nsama Mulenga testified that it showed the date as 2019.

5.298 His evidence was that he was given the same Deed of Assignment, and he had looked at the date. Oliver Nsama Mulenga denied that he had stated that it was dated 2016. Nevertheless, he agreed that it was important to state the date in his report, and that it was not irrelevant.

CROSS-EXAMINATION BY COUNSEL FOR JOSEPH MOFFAT SHAWA AND MARRIAN SHAWA- MR. MWELWA

5.299 Oliver Nsama Mulenga on being referred to page 5 of the Photographic Album 'P2', stated that the conclusion was in

accordance with their standards. When referred to the conclusion at page 4 of 'D1', his evidence was that there was no difference in the conclusions, and that he made findings and did his conclusion.

- 5.300 It was agreed that Oliver Nsama Mulenga's conclusion did not give a basis, and that his supervisor Mr Zulu's report did.
- 5.301 He stated that his supervisor did not report to the Divisional Criminal Investigations Officer, but that they both reported to C3, a Deputy Commissioner. It was explained that a Divisional Investigations Officer was based at Lusaka Division.
- 5.302 Oliver Nsama Mulenga still in cross examination, testified that 'P2' was directed to the requesting officer, and that a person had to forward the report to the requestor. He stated that in his case, Robson Malipenga & Company requested, but he did not know where they got the samples from.
- 5.303 His evidence was that he did not know if the samples were tampered with, and that Robson Malipenga and Company as well as the supervisor, would know where they got the samples from. Oliver Nsama Mulenga added that the samples were submitted in a criminal matter, and they could therefore be traced.
- 5.304 His testimony was that the documents came from a lawyer, Binwell Mpundu who was representing the Defendant, and he could explain where he got the samples from.

5.305 When referred to the second last page of 'D1', Oliver Nsama Mulenga testified that it was the last part of an affidavit and that the full affidavit was not before Court. He stated that it was not a standard to put the whole document in a report.

5.306 Oliver Nsama Mulenga on being referred to page 8, of 'P2' reiterated that putting a full document was not the standard, and that the documents in 'P2' were full documents. He stated that in his report, the affidavit was not in full, but there was an extract of it. Maintaining that the full document was not in his report, Oliver Nsama Mulenga stated that he did not know if it was before Court. He testified that he did not know if manipulation could be ruled out.

**CROSS-EXAMINATION OF OLIVER NSAMA MULENGA BY
COUNSEL FOR JOSPEH MOFFAT SHAWA AND MARRIAN
SHAWA- MR. B. PHIRI**

5.307 It was Oliver Nsama Mulenga's testimony that from the extract in 'D1', he could discern where it came from, as he prepared it. However, he did not know who prepared the full document.

RE-EXAMINATION OF OLIVER NSAMA MULENGA

5.308 In re-examination, Oliver Nsama Mulenga stated that he could tell that the extract was from an affidavit which was filed in support of an application, as it had Joseph Moffat Shawa's signature. He stated that his explanations were illustrated in Charts 1 and 2, and that his conclusion was brief.

5.309 It was also clarified that the documents were signed in 2016 and 2019, and that the Contract of Sale was signed in 2016. Oliver Nsama Mulenga's evidence was that he examined the document in 2022.

5.310 That marked the close of the case for Moonga Mizinga and Lloyd Mwanauomo.

6. DECISION OF THIS COURT

6.1 I have considered the evidence and the submissions.

FACTS NOT IN DISPUTE

6.2 It is common cause, that in May 2016, Marrian Shawa approached Moonga Mizinga to enter into a transaction which involved the payment of money to her by Moonga Mizinga. The facts which are further not in dispute, are that on 23rd May 2016, Moonga Mizinga transferred ZMW82,000.00 and ZMW198,000.00 to Marrian Shawa's bank account which was held at Standard Chartered Bank.

6.3 It is further not in contention, that on 29th July 1997, Joseph Moffat Shawa became the owner of the property, which is known as Stand No 755 Lusaka.

6.4 The facts which are also not in contention, are that ownership of the said property Stand No 755 Lusaka, was on 31st January 2019, transferred to Moonga Mizinga after the certificate of title for Stand No 755 Lusaka was handed over to Moonga Mizinga.

FACTS IN DISPUTE

6.5 It is in dispute whether Joseph Moffat Shawa, Marrian Shawa and Moonga Mizinga entered into a loan agreement

or a Contract of Sale for the property Stand No 755 Lusaka with Moonga Mizinga.

- 6.6 Also, in contention, is whether Moonga Mizinga fraudulently acquired ownership of the property Stand No 755 Lusaka, and therefore the transfer of the property into his names should be set aside for being fraudulent.

ANALYSIS

WHETHER THE PARTIES ENTERED INTO A LOAN AGREEMENT OR A CONTRACT OF SALE

- 6.7 The first issue is whether the parties entered into a loan agreement or a Contract of Sale.
- 6.8 In the statement of claim, Joseph Moffat Shawa and Marrian Shawa averred that in May 2016, Marrian Shawa approached Moonga Mizinga to borrow ZMW300,000.00 for her business operations. The contention was that Moonga Mizinga agreed to give Marrian Shawa, the loan, if she could secure it against a legal mortgage against land. It was also stated that Marrian Shawa approached Joseph Moffat Shawa so that she could use his certificate of title for the property Stand No 755 Lusaka, as security for the loan.
- 6.9 It was their averment that Joseph Moffat Shawa agreed to the proposal.
- 6.10 In her testimony, Marrian Shawa stated that Moonga Mizinga transferred ZMW280,000.00 out of the ZMW300,000.00 as agreed, which was shown on her bank statement. Her evidence was also that she paid back ZMW30,000.00, and that in the second month, she paid
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back another ZMW30,000.00. However, she did not sign for those payments because Moonga Mizinga informed her that she could only sign, after paying back the loan in full.

- 6.11 It was also Marrian Shawa's testimony that she paid a further ZMW14,000.00 in the third month. Thereafter, she stated that months passed by, and issues came up, and she had informed Moonga Mizinga.
- 6.12 Her evidence was that later, the tenant who rented the property, informed her that a man had told him that he had bought the house from Joseph Moffat Shawa, and he changed title into his name. Marrian Shawa stated that she conducted a search at the Ministry of Lands, because Joseph Moffat Shawa had not applied for Consent to Assign the property, and she discovered that Moonga Mizinga had purchased the property at ZMW300,000.00.
- 6.13 Marrian Shawa denied having signed a handwritten letter that stated that Moonga Mizinga had signed for the ZMW300,000.00, and it was also her position that Joseph Moffat Shawa did not author the letter. Marrian Shawa further stated that the records at ZRA, showed that Moonga Mizinga bought the property at ZMW800,000.00, and that he paid 40% at ZRA for the property.
- 6.14 In still testifying, Marrian Shawa's evidence was that she was not provided a copy of the documents that she signed with Moonga Mizinga. She agreed that she signed the Contract of Sale, but her position was that it was a misrepresentation, because she thought that she was signing for a loan, and she

did not really read the documents. Therefore, she did not know if she was signing a loan or a sale.

- 6.15 Marrian Shawa with reference to her bank statement, testified that on 23rd May 2019, Moonga Mizinga transferred ZMW300,000.00 to her. Then later, she gave Moonga Mizinga the original certificate of title as collateral.
- 6.16 Joseph Moffat Shawa on the other hand, testified that the purchaser had no authorization to purchase his house.
- 6.17 Fanelly Soko, who is the wife to Joseph Moffat Shawa and mother to Marrian Shawa in her testimony, told the Court that Marrian Shawa told her that they had obtained a loan, and that Joseph Moffat Shawa had told her that it was in the amount of ZMW280,000.00. She stated that she knew about the loan, and that she did not agree that the house should be sold.
- 6.18 Monica Zacharia, one of the other witnesses who was called by Joseph Moffat Shawa and Marrian Shawa, testified that she went with Marrian Shawa to meet the person from whom Marrian Shawa wanted to get a loan, in the amount of ZMW280,000.00. Monica Zacharia explained that he had told Marrian Shawa that he gave out loans at 10% interest for a period of Six (6) months to a year, and that a title deed would have to be given to him.
- 6.19 Her evidence was that Marrian Shawa later told her that everything was in process, and she would get the money. In cross-examination, Monica Zacharia testified that she did not see any loan agreement which was signed.

- 6.20 In their submissions, Joseph Moffat Shawa and Marrian Shawa maintained that Marrian Shawa approached Moonga Mizinga so that she could obtain a loan for use in her business operations, stating that Moonga Mizinga admitted so in his defence.
- 6.21 They further submitted that Moonga Mizinga at first denied that he was approached for a loan, but Marrian Shawa's last response was the insistence on a loan. It was submitted that the defence had not disputed that Moonga Mizinga refused to comply with the last request for the actual use of the money as sought by Marrian Shawa, or the need for the funds.
- 6.22 Thus, the intention of obtaining the money was made clear from inception, as being a loan.
- 6.23 Moonga Mizinga on the other hand, testified that he was looking for a property to purchase at ZMW300,000.00. He stated that he had instructed an estate agent, Clive Choongo to look for a property for him to buy. It was also Moonga Mizinga's testimony that Clive Choongo took him to the property, and he was surprised to learn that Joseph Moffat Shawa and Marrian Shawa did not want to sell the property, but to borrow money.
- 6.24 He stated that Marrian Shawa kept calling him to persuade him to lend her the money, and it was clear to him that they were desperate for money. Then on a particular day, Marrian Shawa had phoned him, and told him that they had decided to sell the property at ZMW300,000.00.

- 6.25 Moonga Mizinga's evidence was that he had proceeded to engage a lawyer, Mumba Muziya, to do due diligence on the property, and he later prepared a Contract of Sale, a Deed of Assignment, and an Acknowledgement of Receipt of Payment.
- 6.26 His testimony was that thereafter, they met at Standard Chartered Bank, Manda Hill Branch, where all the parties read through all the documents, page by page, and Joseph Moffat Shawa and himself signed on every page of the Contract of Sale, Thereafter, they signed the Deed of Assignment.
- 6.27 It was also Moonga Mizinga's evidence, that Marrian Shawa was Joseph Moffat Shawa's witness, while Munsanda Sachinji witnessed his signature.
- 6.28 Moonga Mizinga testified that he paid ZMW20,000.00 directly to Joseph Moffat Shawa, and transferred ZMW280,000.00 to Marrian Shawa's bank account, as instructed by Joseph Moffat Shawa. Moonga Mizinga stated that thereafter, Mumba Muziya drafted the Acknowledgement of Receipt of Payment, and he signed the document.
- 6.29 He testified that he was then handed the original certificate of title, and copies of Marrian Shawa and Joseph Moffat Shawa's NRC's.
- 6.30 In submitting, as to whether there was a loan agreement or an agreement to sell the property Stand No 755 Lusaka to Moonga Mizinga, Moonga Mizinga and Lloyd Mwanawumo

stated that Joseph Moffat Shawa and Marrian Shawa had not produced a memorandum in writing, suggesting that there was a loan agreement, between Marrian Shawa and Moonga Mizinga.

6.31 In support of that submission, they relied on **Section 4 of the Statute of Frauds 1677** which provides that:

“No Action shall be brought upon any contract for the sale or other disposition of land or interest in land unless the agreement upon which such action shall be brought or some Memorandum or Note thereof shall be in writing and signed by the parties to be charged therewith or some other person thereunto by him lawfully authorized.”

6.32 Moonga Mizinga and Lloyd Mwanaumo submitted that Moonga Mizinga produced a duly signed Contract of Sale for the purchase of the property, and he testified that he was engaged several times on different days for the purchase of the property, and he agreed to purchase it. Thus, the signing of the contract signified *consensus ad idem*.

6.33 It was also submitted that the Courts have, in a plethora of cases, held that where contractual obligations are established, liberty to contract must be upheld, and the parties to an agreement must be held accountable for their obligations under a contract.

6.34 In support of that submission, reliance was placed on the cases of **Colgate Pamolive (z) Inc v Able Shemu Chika and others** ⁽¹¹⁾, **Kalusha Bwalya v Chadore Properties and**

another ⁽¹⁴⁾ as well as **Printing and Numerical Registering Co. v Simpson** ⁽¹⁾.

- 6.35 Further in submission, it was stated that in order to prove that what was entered into, was a sale agreement, Joseph Moffat Shawa and Marrian Shawa had produced a bundle of documents, which contained a certificate of title for Joseph Moffat Shawa, and another for Moonga Mizinga, a Contract and Conditions of Sale, a statement of account showing transfer of money, and they further called a handwriting expert who tendered a photographic album.
- 6.36 It was also stated that a look at the Contract of Sale, clearly showed that it had the words 'Contract and Conditions of Sale'. Therefore, they found it hard to believe that Joseph Moffat Shawa and Marrian Shawa did not see those words, but they instead saw the words or believed that they saw the words 'loan agreement'.
- 6.37 Further submission was made, that Joseph Moffat Shawa and Marrian Shawa had the choice of walking away, the moment that they discovered that the documents that were before them, did not relate to a loan.
- 6.38 As authority in support of that submission, reliance was placed on the cases of **L'Estrange v Graucob Ltd** ⁽²⁾ and **Wilton v Farnworth** ⁽³⁾.
- 6.39 It was also submitted, that there was an attempt to paint a picture that Moonga Mizinga was a money lender, but as established, there was no loan agreement. The submission was further that such evidence was extrinsic, and ought to
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be treated as such, as was stated in the case of ***Holmes v Buildwell Construction Company Limited*** ⁽⁴⁾.

- 6.40 Marrian Shawa in the statement of claim, contended that she entered into a Third-Party Mortgage with Moonga Mizinga for the amount of ZMW300,000.00, and that Joseph Moffat Shawa's property was pledged as collateral for the said loan.
- 6.41 Moonga Mizinga on the other hand, denied that a Third-Party Mortgage was entered into, contending that a sale agreement for the property at ZMW300,000.00 was executed.
- 6.42 The evidence on record, shows that Marrian Shawa testified that she signed the Contract of Sale. However, she gave a rider, that the said Contract of Sale was a misrepresentation because she was signing for a loan, and she did not really read the documents.
- 6.43 Therefore, she did not know if she was signing for a loan or sale. Moonga Mizinga in denying that position, testified that they read through all the documents page by page, starting with the Contract of Sale, which Joseph Moffat Shawa and himself signed on each page. He added that Marrian Shawa also witnessed the document.
- 6.44 As rightly argued by Moonga Mizinga and Lloyd Mwanaumo in their submissions, a proponent of the cause of action, bears the burden of proof. In the case of ***Khalid Mohammed v The Attorney General*** ⁽⁶⁾ the Supreme Court held that:

“A plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment.”

- 6.45 That decision was restated with approval in the case of ***Wilson Masuso Zulu v Avondale Housing Project*** (7).
- 6.46 In this matter, Marrian Shawa and Joseph Shawa have alleged that they obtained a loan from Moonga Mizinga for which the property Stand No 755 Lusaka was pledged as security or collateral. They stated that they did not sell the property.
- 6.47 A perusal of the documents which are on record reveals that there are no documents that point to a Third-Party Mortgage, or any other type of loan agreement.
- 6.48 The document which is at pages 1 to 4 of Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, shows that it is titled as a Contract of Sale between Joseph Moffat Shawa and Moonga Mizinga, as vendor and purchaser respectively. It also shows that it was entered into in 2016 for the property, Stand No 755 Lusaka, at a consideration of ZMW300,000.00. The witnesses to the contract were Marrian Shawa and Munsanda Sachinji.
- 6.49 Marrian Shawa alleged that she did not know what she was signing at the time of transacting with Moonga Mizinga.
- 6.50 In the statement of claim, she particularized mistake, stating among other things, that Joseph Moffat Shawa and herself honestly believed that they signed a Third-Party Mortgage

contract, but a totally different document altogether may have been presented to them for signing.

- 6.51 *Mistake* is defined in ***Black's Law Dictionary by Bryan A. Garner, 9th Edition, Thomson Reuters, 2009*** at page 1092 as:

“An error, misconception or misunderstanding. The situation in which either (1) the parties in a contract did not mean the same thing or (2) at least one party had the belief that did not correspond to the facts or law. As a result, the contract may be voidable.”

- 6.52 On the same page, *mistake of fact* is defined as:

“A mistake about a fact that is material to the transaction, any mistake other than a mistake of law.”

- 6.53 In the case of ***Kalusha Bwalya v Chadore Properties and Ian Chamunora Nyalungwe Haluperi*** ⁽¹⁵⁾ the Supreme Court held the following with regard to mistake vitiating a contract:

“The law on mistake as a vitiating factor in contract, is well settled. The validity of a contract may be impaired by mistake. Such mistake could be common, mutual or unilateral. A common mistake occurs where both parties to an agreement are suffering from the same misapprehension - where the offer and the acceptance correspond. A mutual mistake occurs

where the parties have negotiated at cross-purposes. A unilateral mistake occurs where one party only is mistaken while the other party knows, or is deemed to know of the mistake. A Court will declare the contract void where the mistake is operative, that is to say, where there is a mistake of fact which prevents the formation of any contract. An operative mistake is an exceptional occurrence. It is exceptional to the general rule of contract that the parties are bound by the terms of their agreement, and must rely on their contractual stipulations for protection from the effects of facts unknown to them.

It is not clear from the submissions of the learned counsel for the appellant whether the appellant's claim here is that there was a mutual mistake as to the subject matter of the contract, or a unilateral mistake as to the nature of the documents signed and sealed.

The pleadings and the evidence all show that the respondents did not suffer from any misapprehension as to the nature of the transaction they were entering into with the appellant. From the evidence available they were clear it was a sale agreement. It is the appellant who claims to have been afflicted by a mistaken

belief as to the nature of the agreement he was concluding with the first respondent.

Taking further the argument that the appellant was laboring under a unilateral mistake as to the nature of the documents that he signed, the general rule ought to be firmly borne in mind. And this is the rule that the learned counsel for the respondent referred to in her submissions on ground one. It is that a person is bound by the terms of any instrument which he signs and seals even though he did not read it, or did not understand its contents. The English cases of L'Estrange v. Graucob and Blay v. Pollard and Morris," speak eloquently to this rule.

...

An exception to the general rule,...That mistake should have been due to, firstly, some condition such as blindness, as was the case in the Thoroughgoods case", illiteracy, or senility of the person signing, as happened in Foster v. Mackinnon.' Secondly, where there is a trick or fraudulent misrepresentation or mistake as to the nature of the document, provided that the person who raises the issue took all reasonable precaution before signing it.

In Carlisle and Cumberland Banking Co. v. Bragg' a party was induced to sign a guarantee in the

belief that it was a document concerning insurance. The court held that the guarantee was not binding because the signing party had been induced to sign by fraudulent falsehood.”

- 6.54 In this matter, it has been seen that Marrian Shawa testified that she honestly believed that she signed a Third-Party Mortgage contract with Moonga Mizinga. Moonga Mizinga’s evidence was however, that the parties went through the documents together, page by page, and they were signed.
- 6.55 The case of ***Kalusha Bwalya v Chadore Properties and Ian Chamunora Nyalungwe Haluperi*** ⁽¹⁵⁾ which has been cited above, guides that there are three types of mistakes; common mistake, unilateral mistake and mutual mistake.
- 6.56 Applying the above to this matter, Marrian Shawa contends that there was mutual mistake, as the agreement was negotiated at cross paths, as she mistakenly thought that she was signing a loan agreement, and not a sale agreement, as she was the negotiating party, even though Joseph Moffat Shawa was the contracting party.
- 6.57 In the ***Kalusha Bwalya v Chadore Properties and Ian Chamunora Nyalungwe Haluperi*** ⁽¹⁵⁾ the Supreme Court acknowledged that the parties in that matter, did not suffer from any misapprehension as to the nature of the transaction that they were entering into, and the evidence was clear that it was a sale transaction.
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6.58 The Contract of Sale which is at pages 1-4 of Moonga Mizinga and Lloyd Mwanaumo's bundle of documents at page 1 clearly states as follows:

***“Law Association of Zambia
Contract and Conditions of
Sale relating to:***

Stand No. 755, Lusaka.”

6.59 Further, at page 2, on which Joseph Shawa is alleged to have signed as vendor, and Marrian Shawa signed as a witness to the agreement, a fact which she admitted having done, the same wording as at the first page appears. Therefore, the document clearly reads, that it was an agreement for the sale of the property, Stand No 755 Lusaka.

6.60 As the wording of the document was clear, and from her testimony, Marrian Shawa cannot be said to have suffered from any misapprehension as to the nature of the document that she signed as a witness, although she negotiated the transaction, it was clearly a Contract of Sale.

6.61 It will further be noted, that there is no evidence on record that suggests that Marrian Shawa is illiterate, and she could have possibly been unable to determine that she was signing a Contract of Sale, as opposed to a loan agreement. The record shows that she testified in English, and she answered all the questions that she was asked in English. Further, she read all the documents that were referred to her in English.

- 6.62 As for Joseph Moffat Shawa, he was the contracting party with Moonga Mizinga, as a seller. He did not testify that he was unable to read, and therefore, he did not understand the nature of the document that he was signing.
- 6.63 Joseph Moffat Shawa however stated that he was unwell having suffered a second stroke, and he was unable to read the Contract of Sale and the Acknowledgment of Receipt of Payment. Fannelly Soko, his wife, testified that he suffered a second stroke after the disputed Contract of Sale was signed in 2016, even though he had suffered a first stroke in 1998.
- 6.64 It was her evidence that Joseph Moffat Shawa had returned to his full form, and he had been able to read and write after he suffered the first stroke. Joseph Moffat Shawa denied that he had signed the contract of sale.
- 6.65 Marrian Shawa testified that at the time the Contract of Sale was signed at the Bank, she had gone there with Joseph Moffat Shawa, but he was unwell.
- 6.66 When all the parties testified in this matter, neither had really challenged the other on whether the Contract of Sale was read page by page as alleged by Moonga Mizinga. Marrian Shawa did however state that she did not pay attention to reading the document, as she thought that what she was signing, was a loan agreement.
- 6.67 Therefore, Marrian Shawa has failed to show that she signed the Contract of Sale as a witness, even though she negotiated the transaction by mistake.

- 6.68 As for Joseph Moffat Shawa the contracting party to the Contract of Sale, when he was cross examined, he testified that he could not recall very well, and he could not recall his signature. He however denied that the signatures on the Contract of Sale were his. Whilst testifying that he had stopped seeing, Joseph Moffat Shawa could not recall in which year that was.
- 6.69 He did nevertheless state that he signed some documents, but he changed to say that he did not sign some documents.
- 6.70 From this testimony, it can be seen that Joseph Moffat Shawa was not a very credible witness, from the way that he answered the questions, possibly owing to his ill health. I did note that this witness was in a wheelchair at the time of his testimony, and I was informed by his Counsel, that he had recently suffered a stroke, and his speech was impaired.
- 6.71 I will return to the issue of Joseph Moffat Shawa having signed the Contract of Sale by mistake, as I deal with the claim for cancellation of the Contract of Sale on the ground of mistake, misrepresentation or fraud.
- 6.72 Coming to *misrepresentation*, it is defined in ***Black's Law Dictionary by Bryan. A Garner, 9th Edition, Thomson Reuters 2009*** at page1091 as:
- “The act of making a false or misleading assertion about something with the intent to deceive. The word connotes not just written or spoken words, but also any other conduct which amounts to a false assertion.”***

6.73 As already seen, Marrian Shawa testified that she did not pay attention to read the document that she signed at Standard Chartered Bank when the money was transferred into her account by Moonga Mizinga.

6.74 In the ***Kalusha Bwalya v Chadore Properties and Ian Chamunora Nyalungwe Haluperi*** ⁽¹⁵⁾ case, the Supreme Court concluded the following with regard to misrepresentation:

“In the present case, the appellant did not provide any evidence acceptable to the lower court, of fraudulent misrepresentation on the part of the respondent, as to the nature of the document the appellant was to sign. He is a literate individual who is fairly exposed both as a football player and soccer administrator as his own evidence in the court below shows. He is not unfamiliar to contracts.”

6.75 As seen above, I have concluded that Marrian Shawa is literate as she can read in English, and she testified in English. Therefore, she has not successfully satisfied me that the Contract of Sale which as a result of the transaction that she negotiated with Moonga Mizinga was presented to her to sign as a witness with misrepresentation.

6.76 ***Cheshire and Fifoot Law of Contract 4th Edition at page 25*** states that:

“a contracting party, unlike a tortfeasor, is bound because he has agreed to be bound. Agreement,

however, is not a mental state but an act, and as an act, is a matter of inference from conduct. The parties are to be judged not by what is in their minds, but by what they have said or written or done”.

6.77 While the above relates to a contracting party, it equally applies to Marrian Shawa, as she is the person that negotiated the agreement, pursuant to which documents were executed, which are in issue in these proceedings.

6.78 Marrian Shawa has therefore not successfully established that the Contract of Sale was executed based on misrepresentation.

WHETHER MOONGA MIZINGA ACQUIRED THE PROPERTY FRAUDULENTLY AND IN CONSEQUENCE THE CERTIFICATE OF TITLE TO STAND NO 755 LUSAKA WHICH WAS ISSUED IN HIS NAME SHOULD BE CANCELLED?

6.79 The next issue for determination is whether or not Moonga Mizinga fraudulently acquired ownership of the property Stand No 755 Lusaka.

6.80 In the statement of claim, Joseph Moffat Shawa and Marrian Shawa particularized the fraud that they alleged.

6.81 Those particulars stated that Moonga Mizinga that Moonga Mizinga presented them with a Contract of Sale purporting it to be a Third-Party mortgage and that he changed ownership of the property at the Ministry of Lands without their consent or knowledge.

- 6.82 The assertion was also that Joseph Moffat Shawa and Marrian Shawa were led to believe that they were obtaining a loan and yet Moonga Mizinga made calculated moves to change ownership of the property into his names. The allegation was further that the alleged sale price of ZM300,000.00 which was the loan amount, was far below the open market value of the property being Six Million Kwacha (K6,000,000.00).
- 6.83 Marrian Shawa testified that there was fraud because she came across a Consent to Assign at the Ministry of Lands which Joseph Moffat Shawa did not sign, as he had only met Moonga Mizinga once in 2016.
- 6.84 When referred to the Deed of Assignment, Marrian Shawa's evidence was that she did not know whose signature appeared against her name, as she did not sign it, and that it was also not Joseph Moffat Shawa's signature on the Deed of Assignment, as it was different from that on the Contract of Sale.
- 6.85 In cross-examination, Joseph Moffat Shawa, when referred to the Contract of Sale, testified that the signatures on the documents did not belong to him. Fanelly Soko also testified that the signatures on the Contract of Sale did not belong to Joseph Moffat Shawa.
- 6.86 David Zulu, the Forensic Expert who was called as a witness by Joseph Moffat Shawa and Marrian Shawa, testified that he examined the application for Consent to Assign, and the Deed of Assignment, against the random specimen signature

samples and handwriting samples for Joseph Moffat Shawa and Marrian Shawa.

- 6.87 He concluded that there were strong dissimilarities between the provided unreadable signature on the Consent to Assign against the random signatures for Joseph Moffat Shawa. David Zulu also testified that the signature on the Consent to Assign was fictitious, and it did not in any way resemble Joseph Moffat Shawa's specimen signatures.
- 6.88 He also noted dissimilarities on the signature on the Deed of Assignment for Joseph Moffat Shawa, against his random specimen signatures which were provided. Thus, he concluded that Joseph Moffat Shawa did not append his signature on the documents in question, being the application for Consent to Assign and on the Deed of Assignment.
- 6.89 In relation to Marrian Shawa, David Zulu stated that she wrote down her name, address and occupation on the Deed of Assignment, but she did not append her signature against those details. He found that the signature against Marrian Shawa's details on the Deed of Assignment was not hers.
- 6.90 In their submissions, Joseph Moffat Shawa and Marrian Shawa stated that the law is clear on certificates of title which are obtained fraudulently.
- 6.91 **Section 33 of the Lands and Deeds Registry Act Chapter 185** of the Laws of Zambia was cited, which provides that:
“A Certificate of Title shall be conclusive as from the date of its issue and upon and after the issue

thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise, which but for Parts III to VII might be held to be paramount or to have priority; the Registered Proprietor of the land comprised in such Certificate shall, except in case of fraud, hold the same subject only to such encumbrances, liens, estates or interests as may be shown by such Certificate of Title and any encumbrances, liens, estates or interests created after the issue of such Certificate as may be notified on the folium of the Register relating to such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever:

- (a) Except the estate or interest of a proprietor claiming the same land under a current prior Certificate of Title issued under the provisions of Parts III to VII; and*
- (b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and*
- (c) Except so far as regards any portion of land that may be erroneously included in the Certificate of Title, evidencing the title of*

such Registered Proprietor by wrong description of parcels or of boundaries.”

- 6.92 Joseph Moffat Shawa and Marrian Shawa submitted that fraud must be specifically pleaded, as required by ***Order 18 Rule 8 of the Rules of the Supreme Court of England (1965) 1999 edition***. They stated that they did so in the statement of claim.
- 6.93 It was also submitted that despite having difficulty testifying due to ill health, Joseph Moffat Shawa stated that he never sold the house. It was submitted that it was thus clear that the Deed of Assignment was disputed, and that the Contract of Sale alone was insufficient to transfer the land.
- 6.94 As authority, the case of ***Ndongo v Moses Mulyango, Roostico Banda*** ⁽¹³⁾ was cited.
- 6.95 It was submitted that Marrian Shawa stated that she thought that she was entering into a loan agreement, and that was what she believed she was signing for, and she hurriedly did so, because Joseph Moffat Shawa was sick at the time, and they were going to the hospital.
- 6.96 The submission was further that Marrian Shawa testified that the document was a misrepresentation, because inside, she was signing for a loan, but she did not really read the document, and she did not know if it was a loan or a sale.
- 6.97 Marrian Shawa was categorical on the allegations of fraud. She testified that there was fraud because she was not given an opportunity to go through the documents, and she signed

without going through them page by page, because Joseph Moffat Shawa was unwell.

- 6.98 It was submitted that the said evidence was not rebutted, and in cross examination, she testified that she did not go through the document. Therefore, she did not know if Moonga Mizinga sneaked in any mortgage documents.
- 6.99 It was further submitted that Marrian Shawa testified that she saw the first page as a loan document. Therefore, it was argued that having seen the first page as a loan, she was made to believe that she was signing a loan.
- 6.100 Further submission was made, that Moonga Mizinga did not avail copies of the documents that were signed to Joseph Moffat Shawa and Marrian Shawa. Thus, he took advantage of the situation. It was also submitted that if it was a genuine sale transaction, why would the documents be hidden from them, adding that those facts were not rebutted at trial.
- 6.101 With regard to the Acknowledgement of Receipt of Payment, it was submitted, that it was strange that while the purported sale of the property was made with Joseph Moffat Shawa, payment was made to Marrian Shawa without any evidence of instructions to do so. Joseph Moffat Shawa and Marrian Shawa, also questioned why Marrian Shawa did not sign the said document, as the recipient of the funds.
- 6.102 The further submission was that Joseph Moffat Shawa was never referred to the Acknowledgement of Receipt of Payment to confirm whether or not, he signed the document.

Therefore, the assertion that he received the funds was never confirmed.

6.103 It was also stated that the document placed emphasis on its' voluntariness, when it is trite that every party to a contract enters into it voluntarily. Also pointed out, was that the said document was also witnessed by Mumba Muziya, who was also the person that drafted it, and he was a legal representative for Moonga Mizinga.

6.104 On the other hand, Moonga Mizinga testified that he met with Joseph Moffat Shawa, Marrian Shawa, and his wife Munsanda Sachinji at Standard Chartered Bank, where they read through all the documents, and they signed on all the pages of the Contract of Sale.

6.105 Thereafter, they signed the Deed of Assignment. Moonga Mizinga stated that Mumba Muziya drafted the Acknowledgement of Receipt of Payment which Joseph Moffat Shawa signed.

6.106 In relation to the Consent to Assign, Moonga Mizinga's testimony, was that he did not know how it was obtained, as his lawyers, Willa Mutofwe did the conveyancing. He also could not recall if the Consent to Assign came from Joseph Moffat Shawa and Marrian Shawa.

6.107 Oliver Nsama Mulenga who testified on behalf of Moonga Mizinga and Lloyd Mwanumo stated that he examined the Deed of Assignment, the Acknowledgement of Receipt of Payment, and the Contract of Sale against the affidavit which

was filed in support of an application for an Order of injunction, which bore Joseph Moffat Shawa's signature.

6.108 He concluded that there were similarities on all the signatures on the said documents, and therefore, he ruled out forgery.

6.109 The submission with respect to the Acknowledgement of Receipt of Payment, was that it was telling that Joseph Moffat Shawa and Marrian Shawa submitted other documents for expert examination, but they left out the Acknowledgement of Receipt of Payment. It was stated that this showed that they did not dispute that Joseph Moffat Shawa signed it.

6.110 It is trite that allegations of fraud must be clearly and distinctly pleaded, and evidence must be led at trial to prove the fraud as alleged.

6.111 ***Order 18 Rule 12 of the Rules of the Supreme Court of England 1965 (1999 edition) White Book*** in that regard, provides that;

“12. Particulars of pleading

Subject to paragraph (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing, particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies;...”

6.112 In the case of ***Sablehand Zambia Limited v Zambia Revenue Authority*** ⁽¹²⁾, it was held that:

“1. Where fraud is an issue in the proceedings, then a party or wishing to rely on it must ensure that it is clearly and distinctly alleged. Further, at the trial of the cause, the party alleging fraud must equally lead evidence, so that the alleging fraud must equally lead evidence, so that the allegations is clearly and distinctly proved.

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

6.113 In this matter, Joseph Moffat Shawa and Marrian Shawa particularized the fraud that they allege. I have already dealt with the issue of mistake and misrepresentation on the part of Marrian Shawa in signing as a witness on the Contract of Sale which she negotiated.

6.114 The allegations of fraud among other things, alleged that Moonga Mizinga registered change of ownership of the property at the Ministry of Lands without Joseph Moffat Shawa and Marrian Shawa’s consent or knowledge.

6.115 In leading evidence at trial, Marrian Shawa testified that there was fraud, because she came across a Consent to Assign at the Ministry of Lands, which Joseph Moffat Shawa did not sign, as he only met Moonga Mizinga once in 2016.

- 6.116 In his testimony, Moonga Mizinga stated that the parties went through the documents page by page, and thereafter, they signed them. It was his evidence, as regards the Consent to Assign, that he did not know how it was obtained, but his lawyers did the conveyancing. Further, he could not recall if the Consent to Assign came from Joseph Moffat Shawa and Marrian Shawa.
- 6.117 It is worth noting that the evidence by the Two (2) handwriting experts who testified for each of the parties in this matter, was at variance. Further of note, is that the Two (2) handwriting experts did not consider the exact same documents in conducting their analysis.
- 6.118 David Zulu examined the Consent to Assign and the Deed of Assignment against the random handwriting and signature samples for Joseph Moffat Shawa and Marrian Shawa.
- 6.119 He concluded that there were strong dissimilarities on these documents in relation to the random specimen signatures that Joseph Moffat Shawa provided. The only similarity that David Zulu noted, was Marrian Shawa's handwriting on the Deed of Assignment with regard to the writings of her name, address and occupation against the random specimen samples that she provided.
- 6.120 Oliver Nsama Mulenga on the other hand, examined the Acknowledgement of Receipt of Payment, the Contract of Sale, as well as the Deed of Assignment against an affidavit

which was filed in support of summons for an order of injunction which was signed by Joseph Moffat Shawa.

6.121 Oliver Nsama Mulenga concluded that the signatures on the documents were genuine, and were signed by Joseph Moffat Shawa.

6.122 In cross examination of Oliver Nsama Mulenga, his authority to examine the questioned documents was tested, as he was a junior officer in comparison with David Zulu, his supervisor.

6.123 In the case of ***Nico Coultlis Transport Limited v Buks Haulage Limited*** ⁽¹⁷⁾, the Court of Appeal held that:

“An expert witness is one with knowledge or experience of a particular field or discipline beyond that of the layman, whose duty is to give impartial opinion on particular aspects of matters within his expertise which are in dispute. As a rule of practice, an expert witness should always be qualified in Court before giving evidence. This is done by asking questions to determine expertise and failure to properly qualify an expert may result in exclusion of his evidence. Accounting to us is an exact science.”

6.124 A perusal of the Photographic Albums which were produced by both parties, show that both Oliver Nsama Mulenga and David Zulu spoke to their qualifications as Forensic Handwriting Experts. However, their conclusions on the

documents that were submitted to them for examination were not the same.

6.125 In the case of ***Chuba v The People*** ⁽⁵⁾, it was held that:

“The gravamen of the judgment is in our view a correct statement of the law, and it is also accepted law that, as in the case to which we have referred, the evidence of a handwriting expert is an opinion only, and the matter is one on which the court has to make a finding. It is for this reason that in addition to his opinion the expert should place before the court all the materials used by him in arriving at his opinion so that the court may weigh their relative significance.

...

The principle is that the opinion of a handwriting expert must not be substituted for the judgment of the court. It can only be a guide, albeit a very strong guide, to the court in arriving at its’ own conclusion on the evidence before it...”

6.126 As noted above, a perusal of the Photographic Album, ‘P2’ which was produced by David Zulu, shows that he concluded that the signatures on the documents which were provided as random specimen samples of Joseph Moffat Shawa’s signatures namely, a lease agreement dated 28th May, 2005, an affidavit of birth dated 3rd March, 2007, a caveat that he registered on 23rd April, 2010, voters registration record application dated 2001, a lease dated 29th

July 1992, applications for leave dated 4th February, 1992 and 18th March, 1987, a handwritten note dated 1st January, 1976 and Five (5) typed letters dated 3rd July 1987 and 30th July 1987, were different from those which were on the application for Consent to Assign and on the Deed of Assignment.

- 6.127 An analysis of those signatures in comparison with the Deed of Assignment and the Application for Consent to Assign/Transfer, in David Zulu's opinion showed that there was slight similarity and strong dissimilarities respectively.
- 6.128 The handwriting on the Deed of Assignment and the random specimen sample were said to show a strong similarity in the manner in which Marrian Shawa wrote down her name.
- 6.129 David Zulu's conclusion on examining the writings on the Deed of Assignment and the random specimen samples that she provided, was that Marrian Shawa wrote her name, address and occupation on the Deed of Assignment, but she did not sign against her name.
- 6.130 Moonga Mizinga and Lloyd Mwanaumo argued in their submissions, that it was Oliver Nsama Mulenga's evidence that a person's signature is bound to change over time due to factors, such as passage of time and illness. Therefore, handwriting experts are supposed to use specimen samples which are not more than Five (5) years old.
- 6.131 In light of that testimony, it will be observed that all of the documents on which there were random specimen writings

and signatures for Joseph Moffat Shawa, which David Zulu used to compare with the writings and signatures on the application for Consent to Assign and the Deed of Assignment were more than five (5) years old, in relation to when the application for Consent to Assign and the Deed of Assignment were executed.

6.132 When Oliver Nsama Mulenga testified, his evidence relating to the requirement to use random specimen samples that were executed not more than Five (5) years earlier was not challenged.

6.133 In this matter, Fanelly Soko testified that Joseph Moffat Shawa suffered two strokes, one in 1998 and the other sometime after Marrian Shawa informed her that they had borrowed ZMW280,000.00 to start a business. Fanelly Soko also stated that the documents were signed after Joseph Moffat Shawa's first stroke, and that his signature could possibly change because he had a stroke.

6.134 In view of the above, it would safe to conclude that Joseph Moffat Shawa's signature may have changed, even slightly after having suffered Two (2) strokes.

6.135 Therefore, on the face of it, use of random specimen samples for Joseph Moffat Shawa which were executed a period of over Five (5) years prior to the documents in issue being executed, may not have produced the most accurate results.

6.136 On the other hand, all the documents that were submitted to Oliver Nsama Mulenga were within a five (5) year period of

execution, in relation to the documents which are in question.

- 6.137 A further analysis of the Photographic Album 'D1' which was produced by Oliver Nsama Mulenga, shows that he opined that the signatures on the questioned documents were similar to that on the Contract of Sale and the Acknowledgment of Receipt of Payment.
- 6.138 It is however noteworthy that Joseph Moffat Shawa's signature on the affidavit which was filed in support of an application for an order of injunction, which was filed on 29th May, 2019, and which was provided as his random specimen signature sample, while it has similarities with the signatures on the Contract of Sale and the Acknowledgment of Receipt of Payment, has a slight variance.
- 6.139 Marrian Shawa despite having disputed signing the Contract of Sale in the belief that it was a loan agreement, did not deny that Joseph Moffat Shawa and herself signed that document at Standard Chartered Bank. However, the signatures on the Contract of Sale were denied by both Joseph Moffat Shawa and Fanelly Soko as being that for Joseph Moffat Shawa.
- 6.140 The Photographic Album which was produced by Oliver Nsama Mulenga shows that he did not examine the signature on the application for Consent to Assign/transfer, and yet it was a major questioned document in this matter.
- 6.141 Moonga Mizinga testified that he did not know how the Consent to Assign was obtained, as his lawyers, Willa

Mutofwe and Associates, did the conveyancing. A reading of the application for Consent to Assign/transfer in the Photographic Album 'P2', shows that it does not indicate that Willa Mutofwe and Associates filed the application for Consent to Assign/Transfer in January 2019, at the Ministry of Lands.

6.142 In relation to the same, it was also argued that the lawyer who was used by Moonga Mizinga in the transaction was not a qualified lawyer. It was submitted that the Court should take judicial notice of that fact.

6.143 In response, it was submitted that it was not denied that Mumba Muziya was not admitted to the bar at the time of the transaction, but a lawyer by definition in **Section 2 of the Law Association of Zambia Act**, includes a student of law. Therefore, Mumba Muziya qualified to be referred to as a lawyer.

6.144 With respect to a Court taking judicial notice of any matter, the Supreme Court in the case of **Kapata v The People** ⁽⁸⁾ held that:

“It is trite law that judicial notice is the cognisance taken by the court itself of certain matters which are so notorious, or clearly so established, that the need to adduce evidence of their existence is deemed unnecessary. This is simply a common sense device by which the court's time and the litigant's expenses are saved. It is important, however, that, in taking judicial notice

of (notorious) facts, courts should proceed with caution. Thus, if there is room for doubt as to whether a fact is truly notorious, judicial notice should not be taken of it.”

- 6.145 In this matter, the Court cannot take judicial notice of the fact that Mumba Muziya is not a qualified lawyer. It would have been prudent for Joseph Moffat Shawa and Marrian Shawa to adduce documentary evidence to support that assertion.
- 6.146 The Consent to Assign/transfer as earlier observed, shows that David Zulu concluded that the signature on that document did not in any way resemble or have similarity with Joseph Moffat Shawa’s signature.
- 6.147 He made the same conclusion as regards Marrian Shawa’s signature on the Deed of Assignment. Oliver Nsama Mulenga made no conclusion with respect to Marrian Shawa’s signature as a witness on the Deed of Assignment, entailing that David Zulu’s conclusion that Marrian Shawa did not sign against her name and particulars on the Deed of Assignment remains credible testimony.
- 6.148 This begs the question as to who completed the sale transaction between Joseph Moffat Shawa and Moonga Mizinga, as the vendor is required to apply for Consent to Assign property, and the signature on the document does not indicate that it was done on behalf of the vendor, Joseph Moffat Shawa.

- 6.149 Joseph Moffat Shawa who is alleged to have signed the Contract of Sale and the Deed of Assignment denied having done so. There is nothing on the record to show that Joseph Moffat Shawa is illiterate. His evidence was that he used to work prior to becoming unwell, and the documents in the Photographic Album 'P2', which were used as random specimen samples of his handwriting and signatures show that he was able to read and write.
- 6.150 However, it on record that Joseph Moffat suffered Two (2) stroke, one in 1998 and one after the Contract of Sale was executed.
- 6.151 That notwithstanding, it has been seen that the analyses by the Two (2) handwriting Experts Davi Zulu and Oliver Nsama Mulenga are at variance, as to whether Joseph Moffat Shawa did sign the Deed of Assignment.
- 6.152 David Zulu's conclusion was based on him having examined the lease agreement dated 28th May, 2005, an affidavit of birth dated 3rd March, 2007, a caveat that he registered on 23rd April, 2010, voters registration record application dated 2001, a lease dated 29th July 1992, applications for leave dated 4th February, 1992 and 18th March, 1987, a handwritten note dated 1st January, 1976 and Five (5) typed letters dated 3rd July 1987 and 30th July 1987, against the application for Consent to Assign and the Deed of Assignment dated 25th January, 2019.

- 6.153 The evidence as given by Oliver Nsama Mulenga was that the handwriting and signature of a person may vary after a period of Five (5) years.
- 6.154 David Zulu in cross examination, when referred to the affidavit which was filed in support of an application for an Order of injunction, which was dated 29th May 2019, testified that Joseph Moffat Shawa's signature on that document, was different from those at page 7 of the photographic album 'P2'.
- 6.155 His testimony when he was referred to page 2 of Moonga Mizinga and Lloyd Mwanauomo's bundle of documents, was that it was a Contract of Sale.
- 6.156 David Zulu also testified, when he was referred to the special conditions of sale which were at page 4 of the same bundle of documents, that the signature on that page did not appear like that of Joseph Moffat Shawa.
- 6.157 He stated that according to the affidavit dated 29th May 2019, the signature was for Joseph Moffat Shawa, and it was not consistent with the signatures that were presented to him. It was testified that when David Zulu did the examinations, he formed opinions expertly.
- 6.158 In further cross examination, David Zulu stated that Two (2) handwriting experts examining the same signature and requested specimen signatures would not arrive at Two (2) different opinions. He testified that the individual characteristics remained the same, but variations would be there over time.

- 6.159 As for Oliver Nsama Mulenga's examination, he compared Joseph Moffat Shawa's signature on the Contract of Sale and the Deed of Assignment against that which was on affidavit which Joseph Moffat Shawa deposed to in support of an application for order of injunction on 2019. He found that Joseph Moffat Shawa signed all the documents.
- 6.160 Oliver Nsama Mulenga drew his conclusion that Joseph Moffat Shawa signed the application for Consent to Assign and the Deed of Assignment based on the similarities that he observed on the signatures on the affidavit which was filed in support of the application for an order of injunction dated 29th May, 2019, the Contract of Sale, as well as the Deed of Assignment.
- 6.161 While David Zulu and Oliver Nsama Mulenga arrived at different conclusions in their analysis, it will however be seen from the Photographic Album 'P2' under 4.2, at page 4, that David Zulu gave detailed reasons why he concluded that Joseph Moffat Shawa did not sign the application for Consent to Assign based on the random specimen samples that were obtained for Joseph Moffat Shawa.
- 6.162 David Zulu in cross examination agreed that a person's writing and signature will vary over time, but what they as handwriting experts looked for, were the individual characteristics, in their examination.
- 6.163 From the documents that were used in the examination, it can be observed that David Zulu used random specimen signatures for Joseph Moffat Shawa which were signed over

a period from 1987 to 2010, while Oliver Nsama Mulenga used documents which were signed between 2016 and 2019.

6.164 Oliver Nsama Mulenga's evidence was that handwriting and signature will change over a period of Five (5) years, thus use of handwriting and signature specimens executed during that period provides a more accurate analysis.

6.165 While that may be the position, I have stated that David Zulu used random specimen signatures from 1987 to 2010, spanning over about Twenty-Three (23) years to draw his conclusions. He concluded that Joseph Moffat Shawa did not sign the disputed documents.

6.166 If any, the use by David Zulu of the random specimen signatures and writings for Joseph Moffat Shawa over that period, served the use of bringing out any variations in the writings and signatures for Joseph Moffat Shawa, having acknowledged that handwriting and signature varies over time.

6.167 David Zulu was not cross examined further on how those variations, affected his drawing of the conclusion that Joseph Moffat Shawa did not sign the application for Consent to Assign and the Deed of Assignment.

6.168 At page 5 of 'P2', David Zulu stated that the terminal segment in the provided random signatures in Column B for Joseph Moffat Shawa was characterized by an emphasized hiatus while the questioned signatures in Column A were devoid of a hiatus as labelled 6 and 6A.

- 6.169 Oliver Nsama Mulenga testified that he examined the signatures on the Contract of Sale, the Deed of Assignment and the Acknowledgment of Receipt of Payment against the affidavit which was filed in support of the application of the order of injunction which was dated 29th May, 2019. His conclusion was that all these documents were signed by Joseph Moffat Shawa.
- 6.170 I have pointed out that David Zulu in his evidence, stated that the hiatus was present on Joseph Moffat Shawa's signature on all the random specimen signatures that were obtained, but it was missing from the application for Consent to Assign and the Deed of Assignment.
- 6.171 The hiatus was a distinguishing feature on Joseph Moffat Shawa's signature, and it is demonstrated on points 6 and 6A on Chart Two at page 9 of the Photographic Album 'P2'.
- 6.172 ***Black's Law Dictionary by Bryan A. Garner, 9th Edition, Thomson Reuters, 2009 at page 796*** defines *hiatus* as:
- "A gap between the time when a parent application ceases to be pending by (abandonment or issuance) and the time the continuing application is filed. A hiatus breaks the chain of continuity, so that late applications are not entitled to the effective filing date."***
- 6.173 Applying the definition generally, it entails that a hiatus is a gap, pause break or absence.
- 6.174 In relation to Joseph Moffat Shawa's signature, as demonstrated on Chart Two at page 9 of 'P2' by the arrows

6A on Column A being the disputed signatures, and the arrows 6 on Column B being the random specimen signatures, it can be seen that in the random specimen signatures in Column B, there is a gap in the signature between the letters w and a which is not there in the disputed signatures in Column A, which were on the application for Consent to Assign and the Deed of Assignment.

6.175 The Deed of Assignment was examined by Oliver Nsama Mulenga against the signature for Joseph Moffat Shawa, which was on the affidavit which was filed in support of an application for an Order of injunction on 29th May, 2019.

6.176 A very careful perusal of that affidavit which is actually on the Court record, shows that it has a hiatus, which is present on the random specimen signatures for Joseph Moffat Shawa as noted at page 9 of 'P2'.

6.177 In view of that, I believe the evidence which was given by David Zulu, as to why he concluded that Joseph Moffat Shawa did not sign the Deed of Assignment and the application for Consent to Assign. This is more so, as Moonga Mizinga who is the person who testified that he instructed the lawyers, Willa Mutofwe and Associates to obtain State Consent to Assign, testified that he did not know how that document was obtained, and whether it was obtained from Joseph Moffat Shawa and Marrian Shawa.

6.178 Further, Oliver Nsama Mulenga did not give details as to why he concluded that Joseph Moffat Shawa did not sign the

impugned documents, other than state that his conclusion was based on similarities in the signatures.

6.179 I accordingly find that Joseph Moffat Shawa did not sign the application for Consent to Assign and the Deed of Assignment.

6.180 There is also the question of whether Joseph Moffat Shawa did in fact sign the Acknowledgment of Receipt of Payment which Moonga Mizinga alleged was signed on the same date as the Contract of Sale and the Deed of Assignment in the meeting room at Standard Chartered Bank.

6.181 Oliver Nsama Mulenga examined that document and he concluded that Joseph Moffat Shawa signed it.

6.182 Moonga Mizinga's evidence was that the said Acknowledgment of Receipt of Payment was signed after the money was transferred to Marrian Shawa as it immediately reflected in her account, as they both banked with Standard Chartered Bank.

6.183 When Joseph Moffat Shawa testified, he was not challenged on whether he signed the said Acknowledgment of Receipt of Payment. In the submissions, Joseph Moffat Shawa and Marrian Shawa stated that if at all the document was executed, why wasn't Marrian Shawa the person who received the money not a signatory to the document?

6.184 Unfortunately, Moonga Mizinga was not questioned on that document. However, whether it was signed by Joseph Moffat Shawa or not does not really make a difference having found that Joseph Moffat Shawa did not sign the application for

Consent to Assign and the Deed of Assignment, which were crucial documents in transferring the property Stand No 755 Lusaka to Moonga Mizinga.

6.185 The totality of the evidence in this matter, shows that Marrian Shawa signed as witness to the Contract of Sale. However, in view of the peculiar signature for Joseph Moffat Shawa which has a hiatus between the letters w and a on his signature, it more probable than not, he did not sign the Contract of Sale which is at pages 1-4 of Moonga Mizinga and Lloyd Mwanaumo's bundle of documents, as the hiatus is absent on the signature against his name.

6.186 I have found that Joseph Moffat Shawa did not sign the application for Consent to Assign and the Deed of Assignment which were essential documents to convey the property to Moonga Mizinga.

6.187 This position stated in the case of ***GF Construction 1976 Limited v Rudnap (Zambia) Limited & another*** ⁽⁹⁾ and was reiterated in the case of ***Ndongo v Moses Mulyango, Roostico Banda*** ⁽¹³⁾ where it was held that:

“We take judicial notice of the fact that a Contract of Sale of Land does not per se transfer ownership of land to the buyer. Much more is required. There must be a deed of assignment executed by the parties which must be lodged with Registrar of Lands together with the necessary consents or licences.”

6.188 In terms of ownership of land, **Section 33 of the Lands and Deeds Registry Act**, provides that a certificate of title is conclusive from its date of issue as ownership of land, in the absence of fraud.

6.189 In the case of **Sailas Ngowami and six others v Flamingo Farms Limited** ⁽¹⁶⁾ where the Appellants sought cancellation of the certificate of title, which was issued to the Respondent on the basis of failure to follow the procedure for converting customary land into statutory tenure, the Supreme Court stated as follows:

“On the facts, the learned High Court Judge found that fraud in the issuance of the said certificate of title was not pleaded and proved as required, and therefore, the certificate of title could not be cancelled. This position effectively supports the Respondents stand.

The appellants however, are of the view that it is not only fraud properly pleaded and proved that would justify the cancellation of a certificate of title. Other instances short of fraud such as failure to follow procedures for land alienation would according to the appellants have the same effect. We have carefully addressed our minds to section 33 of the Lands and Deeds Registry Act upon which the lower Court Judge appeared to have anchored his decision.

The Section provides that....

Section 34 then stipulates instances when an action for possession or other action for recovery of land can be sustained against a registered proprietor holding a certificate of title. These instances include the case of a mortgagor against a mortgagee in default, in the case of the President as against the holder of a State lease in default, the case of a person deprived or claims any land included in a certificate of title of the land by misdescription etc....

Our view of all these requirements is that notwithstanding the mandatory rendition of section 33 of the Act, fraud is not the only ground upon which a certificate of title may be cancelled. Some of the instances set out in section 34 may equally lead to cancellation of a certificate of title.

...

Other transgressions of the law such as circumvention of the procedure prescribed in the law, which would render null and void the allocation of land, would be just as fatal.”

6.190 Joseph Moffat Shawa and Marrian Shawa pleaded that the change of ownership of Stand No 755 Lusaka was obtained without their consent or knowledge and hence it was fraudulent. I have found that Joseph Moffat Shawa did not sign the application for Consent to Assign and the Deed of Assignment.

- 6.191 It has been seen from the case of ***Ndongo v Moses Mulyango, Roostico Banda*** ⁽¹³⁾ that the Supreme Court found that a contract of sale of land, does not per se transfer ownership of land to the buyer, and a mere payment of a deposit towards the purchase price does not transfer ownership to the buyer, as much more is required.
- 6.192 Therefore, the Contract of Sale itself, even though Marrian Shawa who was obtaining the money signed it as a witness did not transfer ownership of the property Stand No 577 Lusaka to Moonga Mizinga, from Joseph Moffat Shawa. The parties needed to execute the Deed of Assignment as well as obtain all the other necessary authorities to change ownership, such as Consent to Assign to transfer ownership of the property to Moonga Mizinga without fraud.
- 6.193 Having established fraud in the transfer of ownership of Stand No 755 Lusaka from Joseph Moffat Shawa to Moonga Mizinga and that fact that it is more probable than not, that Joseph Moffat Shawa did not sign the Contract of Sale, in line with the decision in the case of ***Sailas Ngowami and six others v Flamingo Farms Limited*** ⁽¹⁶⁾ the certificate of title which was issued to Moonga Mizinga for Stand No 755 Lusaka on 31st January, 2019, as evidenced by the Lands Register which is at page 32 of Joseph Moffat Shawa and Marrian Shawa's bundle of documents it is bound to be cancelled.
- 6.194 It follows that having fraud in the obtaining of the certificate of title, any mistake or misrepresentation to Joseph Moffat

Shawa on the nature of the agreement that he is alleged to have signed, and which I have found is more probable than not that he did not do so, is of little consequence.

6.195 The Registrar of Lands and Deeds is accordingly directed by this Judgment, to cancel the said certificate of title for Stand No 755 Lusaka which was issued to Moonga Mizinga on 31st January, 2019. By virtue of the finding, the sale of the property Stand No 755 Lusaka by Moonga Mizinga to Lloyd Mwanaumo falls away as Moonga Mizinga is not the legal owner of the property.

6.196 Joseph Moffat Shawa accordingly succeeds on his claim that he is the legal owner of the property Stand No 755 Lusaka.

WHETHER JOSEPH MOFFAT SHAWA AND MARRIAN SHAWA SHOULD PAY MOONGA MIZINGA THE SUM OF ZMW300, 000.00 THAT MARRIAN SHAWA OBTAINED FROM MOONGA MIZINGA?

6.197 Joseph Moffat Shawa and Marrian Shawa in their submissions stated that this case is no different from that the Supreme Court case of *Gillian Kasempa Mutinta v New Future Financial Company and Zhono Cheng Zambia Mining Materials Limited* ⁽¹⁸⁾, save for the 'buy-back' clause which was in the Contract of Sale in that case.

6.198 It was therefore stated that this Court should adopt in totality, the facts and circumstances in all aspects of that case, as being the same or similar to this matter.

6.199 A reading of that case, reveals that the Supreme Court considered the totality of the evidence in concluding that it was a loan transaction, and not a sale transaction.

6.200 At pages J30 and J31 they held that:

“The 1st respondent is a purchaser, and the second respondent is a purchaser as well. The appellant has in the contract agreed with the 1st respondent to “ ... buy back the properties ... ” before 11th January, 2018 and the purchaser will accordingly reserve the properties including the land, houses and the appurtenant for 6 months if the vendor refunds the total amount of 67800.00\$ (Sixty-Seven Thousand Eight Hundred Us dollars) to the purchaser before the 11 day of January 2018.” It is not clear how the 2nd respondent would have achieved this feat because by that time, the 2nd respondent would have been the title holder. Further, it refers to a “refund.” It would be illogical to sell a property and thereafter request a refund within six months. The contract of sale further states that the “ purchaser will ensure to transfer or hand back the certificate of title and relevant documents to the vendor ... ” It defies logic as to why a purchaser who has sold to a third party would still want to transfer or hand back a certificate of title to a vendor.

We take the view that, contrary to what the Court of Appeal held, the evidence on record in this matter does not lead to the conclusion that this was a contract with a buy back clause. When the contract is considered with all the other evidence, it all points to the conclusion that this was a loan and not a sale. The contract itself vacillates between a loan and a sale but leans more towards a loan. The ordinary and natural meaning of the contract leads to the conclusion that it was meant to be a loan and not a sale. The evidence of the appellant together with her witnesses and bank statement all show that this was a loan. The 1st respondent's own witness described it as a loan.”

6.201 The evidence in this matter shows that the Contract of Sale did not indicate an intention on the part of the parties that they had entered into a loan transaction. However, the evidence on record shows that Marrian Shawa signed the Contract of Sale as a witness, and she also wrote her name and other particulars on the Deed of Assignment, but she did not sign against her name.

6.202 This gives credibility to her assertion, that she approached Moonga Mizinga to obtain a loan in the amount of ZMW300,000.00. Marrian Shawa also testified that she did not read the Contract of Sale but she just signed it as she thought that it was loan agreement that she was signing. This evidence is supported by the fact that Joseph Moffat Shawa

did not sign the application for Consent to Assign and the Deed of Assignment.

6.203 Therefore, it can be reasonably concluded that Marrian Shawa approached Moonga Mizinga to obtain a loan which she secured by providing the certificate of title which belonged to her father Joseph Moffat Shawa for Stand No 755 Lusaka. Marrian Shawa did sign the Contract of Sale as a witness, but I have found that Joseph Moffat Shawa may not have.

6.204 However, the signing of the Contract of Sale by Marrian Shawa as a witness, was just meant to provide security for the repayment of the loan. It was not an agreement to sell the property, Stand No 755 Lusaka.

6.205 Marrian Shawa testified that she had paid back ZMW90, 000.00, leaving a balance of ZMW210, 000.00. Her testimony was that she paid back Moonga Mizinga money from the loan on Three occasions, but she did not sign any acknowledgement of payment, because Moonga Mizinga advised her that the same would be done upon full payment.

6.206 Moonga Mizinga on the other hand testified that he gave the ZMW80, 000.00 which Marrian Shawa paid back for transaction unrelated to the one before Court. He denied that she paid back ZMW90, 000.00.

6.207 Therefore, it is just Marrian Shawa's word that she did in fact pay back a total of ZMW90, 000.00 leaving a balance of ZMW210, 000.00.

6.208 Joseph Moffat Shawa and Marrian Shawa in their pleadings prayed for an Order to redeem the Third-Party Mortgage which was created against Stand No 755 Lusaka.

6.209 It is trite that there is an obligation that is placed on Courts to enforce contracts, that are entered into by parties of full age and of competent understanding, when they are entered into freely and voluntarily.

6.210 This position was stated in the case of ***Printing and Numerical Registering Company v Simpson*** ⁽¹⁾ which was quoted in the case of ***Colgate Palmolive (Z) Inc. v Able Shemu and 110 Others*** ⁽¹¹⁾ where it was stated as follows;

“If there is one thing more than another which public policy requires, 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 courts of justice.”

6.211 Further, in the case of ***National Drug Company Limited and Zambia Privatisation Agency v Mary Katongo*** ⁽¹⁰⁾, it was held that:

“it is trite that once parties have voluntarily and freely entered into a legal contract, they become bound to abide by the terms of the contract, and that the role of the Court is to give efficacy to the contract when one party has breached it, by respecting, upholding and enforcing the contract.”

6.212 I have found that there is no evidence to show that a Third-Party legal mortgage was created. However, having found that the certificate of title for Stand No 755 Lusaka was pledged as security for the loan, there was an equitable mortgage.

**CLAIM FOR PAYMENT FOR DAMAGES INCONVENIENCE,
QUIET POSSESSION, MENTAL STRESS AND ANGUISH**

6.213 While this claim was pleaded by Joseph Moffat Shawa and Marrian Shawa, no evidence was led to prove the same. I accordingly dismiss the claim.

7. CONCLUSION

- 7.1 I have found that Joseph Moffat Shawa did not convey the property Stand No 755 Lusaka to Moonga Mizinga by way of sale. The property was security for a loan. I have further found that Moonga Mizinga obtained title to the property Stand No 755 Lusaka fraudulently.
- 7.2 In view of the fact that the evidence is not clear as to how much was obtained as a loan amount and how much interest accrued according to the agreement, as well as how much was actually paid back, if the parties do not agree on the same, an application shall be made to assess the said amount by the Registrar.
- 7.3 The amount found due with interest thereon up to the time the matter was commenced, shall carry interest, from the date of issue of the Writ of Summons until Judgment, and thereafter, at the Bank of Zambia lending rate until payment.

7.4 Joseph Moffat Shawa and Marrian Shawa having succeeded on the claim that Joseph Moffat Shawa is the legal owner of Stand No 755 Lusaka, and for an order for the cancellation of the certificate of title which was issued to Moonga Mizinga, while Moonga Mizinga having lent money to them which is due to be assessed, I order that each party shall bear their own costs of the action. Leave to appeal is granted.

DATED AT LUSAKA THE 12th DAY OF MAY, 2025

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE

