

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

2019/HP/1912

BETWEEN:

YASIR BUX

LIDIA PRISCILLA CHULU

(Suing in her capacity as Administrator of
the estate of the late David Tentani Mwanza)

AND

ROSE KAYANDA

JESUS SOULS WINNING MINISTRIES

BRIGHT KANGWAYI

1ST PLAINTIFF

2ND PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

3RD DEFENDANT



**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN
OPEN COURT, ON 4TH DAY OF DECEMBER, 2023.**

For the 1st & 2nd Plaintiffs:

Ms. K. Parshotam & Mrs. L. S. Chirwa –
Andrew and Partners.

For the 1st, 2nd & 3rd Defendants:

Mr. B Sitali – Butler and Co. Legal
Practitioners.

JUDGMENT

CASES REFERRED TO:

1. *Wesley Mulungushi v Catherine Mizi Chomba* (2004) Z.R. 96;
2. *Kajimanga v Chilemya* – SCZ Appeal No. 50 of 2014;
3. *Peter Militis v Wilson Kafuko Chiwala* – SCZ Judgment No. 3 of 2009;
4. *Mulenga Kasepa v Christopher Mulenga* – Appeal No. 235 of 2013;
5. *Steadman v Steadman* (1974) 2 ALL E.R. 977;
6. *Zambia Railways Limited v Pauline S Mundia, Brian Sialumba* (2008) Vol. 1 Z.R. 287 (S.C);

7. *Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others* (2005) Z.R. 138;
8. *Aubrey Kabwe (suing in his capacity as the administrator of the estate of the Late Rosemary Mwanza) v Charles Wilson Nkhoma* (2012) Z.R. 14;
9. *Attorney General v Kakoma* (1975) Z.R. 273;
10. *Anti-Corruption Commission v Barnet Development Corporation Limited* (2008) Vol. 1 Z.R. 69 (S.C.);
11. *Sithole v State Lotteries Board* (1975) Z.R. 106; and
12. *Mhango vs. Ngulube* (1983) Z.R. 61.

LEGISLATION REFERRED TO:

1. *The Lands and Deeds Registry Act, Chapter 185, Volume 12 of the Laws of Zambia;*
2. *The Statute of Frauds, 1677; and*
3. *The Rules of the Supreme Court of England, 1999 edition, London Sweet & Maxwell.*

OTHER WORKS REFERRED TO:

1. *Hugh Beale, Chitty on Contracts, 29th Edition, (Sweet and Maxwell, 2004).*

1 INTRODUCTION

1.1 The 1st and 2nd Plaintiffs, Yasir Bux and Lidia Priscilla Chulu, who is the Administrator of the estate of the late David Tentani Mwanza (“Deceased”), respectively, claim that the 1st, 2nd and 3rd Defendants, Rose Kayanda, Jesus Souls Winning Ministries and Bright Kangwayi, respectively, are illegally occupying the 1st Plaintiff’s land, known as the Remaining Extent of Plot No. 137, Matero, Lusaka (“Subject Property”), which land he purchased from the Deceased. The Plaintiffs seek, *inter alia*, an eviction order. The Defendants claim that they purchased the Subject Property from the Deceased and now seek, *inter alia*, specific performance of the sale agreement in

respect of the Subject Property. Accordingly, this Judgment is in respect of the reliefs sought by the parties herein.

2 BACKGROUND

2.1 The background to this matter is that sometime in May, 2018, the 1st Plaintiff paid consideration towards the Subject Property, to the Deceased and ownership of the Subject Property was transferred to the 1st Plaintiff, who is now the title holder of the Subject Property. Upon purchase of the Subject Property, the 1st Plaintiff requested the Defendants to vacate the Subject Property to no avail. The Defendants claim that they bought the Subject Property from the Deceased and thus they have resisted all attempts to have them evicted from the Subject Property. It is against this backdrop that the Plaintiffs launched this action.

3 PLEADINGS

3.1 The Plaintiffs herein issued a Writ of Summons, dated 29th November, 2019, with *inter alia*, claims for the following reliefs: -

1. *An order evicting the Defendants from the Remaining Extent of Plot No. 137 Matero, Lusaka;*
2. *A declaration that the 1st Plaintiff is the legal and rightful owner of the said piece of land;*

3. *An Order that the 1st Plaintiff do get possession of the said piece of land;*
4. *An Order demolishing any structures illegally built by the Defendants; and*
5. *Damages;*

3.2 By Statement of Claim, the Plaintiffs averred, *inter alia*, that they are Zambian Nationals, while the 1st Defendant is the Bishop of the 2nd Defendant Church, which is registered with the Registrar of Societies and operating on the Subject Property and the 3rd Defendant is a member of the said church.

3.3 The Plaintiffs stated that sometime in May, 2018, the 1st Plaintiff paid some consideration towards the Subject Property to the Deceased and that ownership of the Subject Property was transferred to the 1st Plaintiff, who now holds the title deed to the Subject Property. The Plaintiffs further stated that the 1st Plaintiff did, on several occasions, request the Defendants to vacate the Subject Property but to no avail. Rather than vacating the Subject Property, the Defendants alleged that they bought the Subject Property from the Deceased.

3.4 The 1st Plaintiff inquired about the alleged sale from Deceased as he had conducted due diligence and had not discovered any caveat or encumbrances on the Subject

Property at the time of transfer. In response, the Deceased stated that sometime in 2002 and 2003, the 1st Defendant pressurised the Deceased to sell the Subject Property to her, at which point the Deceased advised her that he was not selling any portion of the Subject Property since it had not been subdivided by the relevant authorities.

3.5 The Deceased asserted that at no point did he sell the Subject Property to the Defendants but that he only accepted the sum of K3,000.00 from the 1st Defendant at her request for the purposes of safe keeping. It was further asserted that the Deceased did, on several occasions, request the 1st Defendant to collect her monies but she refused to do so. It was also asserted that the Deceased and the 1st Defendant commenced negotiations for the 1st Defendant to have a portion of the Subject Property measuring 14 by 28 meters, but these negotiations failed, which caused the 1st Defendant to inflict violence on the Deceased and led to the Deceased reporting the 1st Defendant at Matero Police Station. In response to the call out by Matero Police Station, the 1st Defendant reported the Deceased at Central Police Station for fraud.

3.6 It was affirmed that the Deceased had made an application to Lusaka City Council for the subdivision of the Subject Property and during investigations conducted by the Police, it was determined that Lusaka City Council could

not subdivide the Subject Property in public interest and that it could only be used for purposes of public interest. Upon receiving this guidance, the Deceased requested the Defendants to vacate the Subject Property but to no avail. Later, several persons vacated the Subject Property save for the Defendants and a few of the 2nd Defendant's members, who remained adamant that they were the *bona fide* purchasers of the Subject Property.

- 3.7 The 1st Plaintiff averred that the Defendants do not have any legal right to the Subject Property and that despite several requests, the Defendants have refused and/or neglected to vacate the Subject Property alleging that they bought it from the Deceased.
- 3.8 By the Defendants' amended Defence and Counter-claim, dated 16th November, 2020, the Defendants averred, *inter alia*, that at the time the 1st Plaintiff purportedly bought the Subject Property from the Deceased, the Deceased had already sold the Subject Property to the 2nd Defendant, as far back as 2004.
- 3.9 The Defendants further averred that if the 1st Plaintiff had visited the Subject Property before purportedly purchasing it, he would have discovered that it was occupied by the 2nd Defendant, as there are church buildings and other structures on the Subject Property. The Defendants also averred that the money paid to the Deceased was not for

safe keeping but was consideration for the sale of the Subject Property.

- 3.10 It was affirmed that the 1st Defendant reported the Deceased to the Police, who directed the Deceased to complete the transfer of the Subject Property to the 2nd Defendant, but each time the Defendants followed up with the Deceased he was elusive. It was further affirmed that the 1st Plaintiff is not the legal owner of the Subject Property as the Deceased fraudulently purported to sell the Subject Property to the 1st Plaintiff.
- 3.11 The Defendants averred that they were introduced to the Deceased by an estate agent and that when they met the Deceased, he confirmed that he was selling the Subject Property for the sum of K5,000.00.
- 3.12 In the company of other church members, the 1st Defendant went to see the Deceased again and he showed her the Subject Property that he was selling. The Deceased told them that the Subject Property that he was selling to them extended from Muzilikazi Road to the teacher's houses at St. Steven School.
- 3.13 On or about 19th January, 2004, in the company of a church elder, Emma Sabola, the 1st Defendant went to the Deceased and made a down payment of K3,000.00 for the Subject Property, which was duly acknowledged by the

Deceased. After paying the balance of K2000.00, the 1st Defendant's church took possession of the Subject Property and constructed a temporal structure on the Subject Property. The Defendants also constructed other structures on the Subject Property, which houses orphans and widows who are looked after by the church.

3.14 The Defendants kept following up with the Deceased for the title deed but he became evasive. Later, the Deceased went to the Subject Property and started constructing a wall fence around the Subject Property, including the portion which he had sold to the 2nd Defendant. In response to a query as to why he was doing so, the Deceased stated that he was merely securing the Subject Property from party cadres who had threatened to encroach his land.

3.15 In 2018, the Deceased went to the 1st Defendant's home with a request that the widows and orphans living on the Subject Property should vacate the Subject Property. The 1st Defendant denied this request on the basis that the Subject Property had been bought by the 2nd Defendant.

3.16 Later, the 1st Defendant was informed that the 1st Plaintiff herein had purchased the Subject Property, on which the 2nd Defendant was located and she was requested to meet with the Deceased at Levy Junction Mall. At the meeting which was attended by the estate agent, the church elder,

Dr. Chishimba and two others, the Deceased conceded that he had sold the Subject Property to the Defendants in 2004. This information was conveyed to the 1st Plaintiff at a meeting held at Manda Hill Shopping Mall by Deacon Yolanda and Dr. Chishimba.

3.17 The Defendants aver that the purported sell by the Deceased to the 1st Plaintiff of the Subject Property that had already been sold to the Defendants amounts to fraud. The particulars of fraud were set out as follows: -

- i. On 19th January, 2004, the Deceased received a payment of the sum of K3,000.00 from the Defendants as payment for the land in issue, which payment was duly acknowledged by the Deceased;
- ii. On 4th March, 2004, the Deceased received a further payment of K2,000.00 from the Defendants being the balance of the purchase price for the land in issue, which amount was acknowledged by the Deceased;
- iii. Having received the full purchase price of K5,000.00 from the Defendants in 2004, the Deceased in 2018 or thereabout, went ahead and purportedly sold the same piece of land to the 1st Plaintiff;

- iv. Having already sold the same land to the Defendants, the Deceased had no authority to sell the same land to the 1st Plaintiff;
- v. Having already sold the land in issue to the Defendants, it was fraudulent for the Deceased to sell the same land to the 1st Plaintiff;
- vi. Since the land in issue had already been sold to and belonged to the Defendants, the Certificate of the Title incorporating the said land issued to the 1st Plaintiff was fraudulently procured.

3.18 By the Defendants' Counter-claim, the Defendants claimed, *inter alia*, the following reliefs: -

- i. *An Order for Specific Performance by the Deceased of the agreement for the sale of land, which the Deceased had agreed to sell to the 1st and 2nd Defendant;*
- ii. *A declaration that the 2nd Defendant is the lawful and legal owner of the land which the Deceased had agreed to sell to the Defendants;*
- iii. *An order that the purported sell and assignment of the portion of the land, which the Deceased had already sold to the 2nd Defendant, to the 1st Plaintiff is null and void for fraud and illegality;*

iv. An order that the Certificate of Title issued to the 1st Plaintiff be cancelled in so far as it incorporates the portion of land which the Deceased had sold to the 2nd Defendant; and

v. Damages.

3.19 By the Plaintiffs' Reply and Defence to the Amended Defence and Counter-claim, it was averred, *inter alia*, that the Deceased had not at any time sold the Subject Property to the Defendants. It was further averred that the 1st Plaintiff was advised by the Deceased that the Defendants did not have a right to be on the Subject Property and that in fact, there was no agreement between the Deceased and the Defendants for either the sale of the Subject Property or indeed for the Defendants to be there. The 1st Plaintiff was also advised that any structures erected were illegally erected, on which basis the 1st Plaintiff proceeded to purchase the Subject Property from the Deceased.

3.20 It was asserted that the monies which the Deceased received from the 1st Defendant was not consideration of any sale and that the Deceased maintains that it was received merely for safe-keeping. It was further asserted that the Deceased was not being evasive and that at no time was he directed to complete any sale by the Police. It was also asserted that it was following the Police's investigations that it was determined that the application

for subdivision had been rejected by the Lusaka City Council and that the Defendants had made applications to the Lusaka City Council without the consent of the Deceased. Following this discovery, there was no reason for the Deceased to continue discussions with the Defendants and therefore, he requested them to vacate the Subject Property.

3.21 It was affirmed that the 1st Plaintiff is the legal owner of the Subject Property, which was legally passed on to him, as no part of the Subject Property was sold to the 2nd Defendant at any point.

3.22 By the Plaintiffs' defence to the Counter-claim, the Plaintiffs maintained that the sums of money received from the Defendants was for safe keeping at the request of the 1st Defendant. Upon noticing that the Defendants were erecting illegal structures, the Deceased asked them to remove them as it was not their land but to no avail. This forced the Deceased to report the Defendants to the Police and it was discovered that the 1st Defendant had fraudulently used his signature at Lusaka City Council, but had no authority to erect any building on the Subject Property in view of which she was arrested, as well as for the violence inflicted on the Deceased.

3.23 It was asserted that since there was nothing outstanding between the Deceased and the Defendants, the 1st Plaintiff

was not obliged to hand over any title deed and could erect a wall fence on the Subject Property to prevent squatters from entering the Subject Property.

3.24 It was further asserted that there was no fraud on the Deceased's part as there was no agreement of sale between him and the Defendants and that the Plaintiffs have time and time again requested the Defendants to vacate the Subject Property and to remove their illegal structures but to no avail.

3.25 The Plaintiffs denied any fraud on the Deceased's part and averred that they shall maintain what has been stated in that the Deceased, at no point, sold the Subject Property to the Defendants and that therefore, the Deceased denies all the particulars of fraud. Further, It was averred that the Subject Property being his, the Deceased was well within his rights to sell the same to the 1st Plaintiff.

4 EVIDENCE AT TRIAL

4.1 At trial, **PW1** was the 1st Plaintiff, **Yasir Jabir Bux**, aged 32 years old, an Accountant and Business Man. PW1 testified, *inter alia*, that he bought the Subject Property from the Deceased sometime in 2018. He stated that he conducted a search at the Ministry of Lands and found that the Subject Property was free from any encumbrances. PW1 went to view the Subject Property

where he found a number of people on it. When he inquired from the people that he found there, they told him that the Subject Property belonged to the Deceased herein. He was told that some people were living there with the Deceased's permission and some without his permission. They told him that they would leave the Subject Property if the Deceased told them to. PW1 stated that some of the squatters were doing business, whilst others lived there or preached from there.

4.2 PW1 stated that as his inquiries revealed that the Deceased was the owner of the Subject Property, he proceeded with executing a Contract of Sale, which was shown at pages 6 to 9 of the Plaintiff's Bundle of Documents. PW1 further stated that when all the legal costs were paid, he went to the Subject Property to erect a wall fence and requested all the squatters to move out.

4.3 PW1 testified that all the squatters moved out except for the Defendants. PW1 and the Deceased tried to talk to the Defendants by holding a meeting with them at Manda Hill Shopping Mall. At the meeting, the Defendants presented him with some documents given to them by the Deceased, but the said documents had no details on them. PW1 referred the Court to pages 22 and 23 of the Plaintiff's Bundle of Documents containing copies of the documents that were shown to him.

- 4.4 When PW1 inquired about the Defendants from the Deceased, the Deceased told him that they had given him money for safe keeping. The Defendants told PW1 that they owned the Subject Property but could not produce any documents to this effect. PW1 told them to vacate the Subject Property and to sort out any issue they had with the Deceased.
- 4.5 PW1 was told by the Deceased that he had tried all that he could to sort out the issue with the Defendant amicably, but to no avail. This resulted in the Plaintiffs seeking the Court's redress. PW1 asserted that it had been four years since he purchased the Subject Property but that he has been unable to develop it. He produced a copy of the Certificate of Title issued in his name, which is shown at pages 15 to 21 of the Plaintiff's Bundle of Documents. PW1 requested the Court to order a demolition of the structures on the Subject Property and to be compensated.
- 4.6 When cross examined, PW1 testified, *inter alia*, that when he went to the Subject Property with the Deceased, there was no one preaching but that he was informed from his inquiries that others on the premises were preachers. He stated that he found structures on the Subject Property.
- 4.7 When referred to page 3 of the Defendants' Bundle of Documents, PW1 testified that when he went to the Subject Property, he did not see the structure depicted in

the said document. He stated that the structure in the image was a permanent structure and that he only learnt of it later. PW1 was further referred to pages 4 and 6 of the Defendants' Bundle of Documents and he stated that he had seen the images depicted on the two documents.

4.8 PW1 affirmed that when he met the Defendants at Manda Hill, they told him that they had bought the Subject Property from the Deceased and showed him a receipt of payment dated 20th January, 2004, that the Deceased had signed, which is shown at pages 1 and 2 of the Defendant's Bundle of Documents. PW1 reiterated that the Deceased told him that he was keeping their money for safe keeping and he believed him. PW1 stated that he visited the Subject Property but that he did not go to each and every structure and that he only learnt of the big structures built by the church from the Deceased.

4.9 PW1 stated that he was not angry at the Deceased as he had told him that there were a lot of squatters on the Subject Property. PW1 agreed that he was issued with a Certificate of Title many years after the Defendants' receipts were issued. PW1 testified that he was not aware that the Defendants also bought the whole Subject Property from the Deceased.

- 4.10 PW1 conceded that he had not produced any documents to show that Lusaka City Council refused the Deceased to subdivide the Subject Property.
- 4.11 When re-examined, PW1 reiterated that he did not visit each and every structure on the Subject Property.
- 4.12 **PW2** was **Lidia Priscilla Chulu Mwanza**, who is a retired District Education Standard Officer. PW2 testified, *inter alia*, that the 1st Plaintiff was a business partner of her late husband, who is the Deceased herein. She stated that the Deceased died in 2021.
- 4.13 It was the testimony of PW2 that she met the Defendants at St. Stevens Secondary School and it was the first time that she met them. She stated that the Deceased informed her that they were the persons who were interested in the Subject Property and the Deceased told them that he was not selling the Subject Property. The Deceased permitted the Defendants to set up a temporal structure for a church as they had insisted that they wanted to be congregating there. The permission was conditional, firstly, that the Defendants only put up a temporal structure. The second condition was that whenever he wanted them to leave, they should be ready to do so. He also told them that the portion of land he was going to give them was 14 by 28 meters and emphasised that the space was not sold to them but was on temporal basis like the other church.

4.14 Later, when PW2 learnt from the Deceased that he was having problems with the Defendants, she visited the Subject Property and found that a slab was being built by the Defendants on the Subject Property. A year later after her visit in 2006, PW2 went to station herself at the Subject Property as she had found out that the 1st Defendant was putting up concrete structures without asking the Deceased. With permission of the Deceased, PW2 set up 45 temporal structures in order to prevent the 1st Defendant from getting any more land. PW2 stayed at the Subject Property for over two years doing business.

4.15 It was PW2's testimony that the next report that she received was when the 1st Defendant reported that her maize had been slashed. PW2 rushed to the Subject Property, while the Deceased went to the Police. The issue was resolved, but four structures were built by the Deceased on the portion of the Subject Property which had the 1st Defendant's maize.

4.16 PW2 asserted that the Deceased told the 1st Defendant to stop erecting structures and to move from the Subject Property but she refused to do so. Subsequently, the Deceased sold the Subject Property to the 1st Plaintiff.

4.17 PW2 further asserted that she accompanied the Deceased to meet the Defendants at Levy Park Mall where the 1st Defendant was asked to vacate the premises. The 1st

Defendant refused to vacate stating that she had bought the Subject Property but the Deceased told her that he had not sold her the Subject Property. The said meeting did not yield any positive results.

- 4.18 PW2 also testified that after the death of the Deceased, she was appointed Co-Administrator of the Deceased's estate. In December, 2021, she requested to meet the 1st Defendant because the 1st Defendant had informed her that the Defendants wanted to have a discussion with her. She requested the 1st Defendant to vacate the Subject Property, but the 1st Defendant told her that she would get back to her. PW2 was informed by the 1st Plaintiff that the Defendants had refused to vacate the Subject Property.
- 4.19 When cross examined, PW2 testified that the documents at pages 1 and 2 of the Defendants' Bundle of Documents contained receipts of payment in the total sum of K5,000.00, which were acknowledged and signed by the Deceased. She stated that the Deceased told her that he received the monies pending negotiations and that the said sums were supposed to be kept overnight for safe keeping. This occurred on 19th and 20th January, 2004.
- 4.20 PW2 stated that she wondered why the Deceased accepted the money for safe keeping. She further stated that she did not know what the negotiations were about and could have been for a temporal structure or for land or for

business. PW2 also stated that the Defendants were not around when the Plaintiff applied for subdivision of the Subject Property nor were they involved in the process of subdivision as the application was done in 1997. PW2 insisted that the Deceased did not sell the Subject Property to the Defendants.

4.21 PW2 affirmed that she was present when the Deceased sold the Subject Property to the 1st Plaintiff in 2018. At the time, there were 45 temporal structures on the Subject Property, which were occupied by squatters who paid rentals to PW2 and the Deceased. She stated that she never received rentals from the 1st Defendant. PW2 further stated that the structures were burnt in 2009 and the squatters went back to living in structures made from plastics. She also stated that the Defendants' structure was still there.

4.22 PW2 asserted that the 2nd Defendant's structure was visible if you looked closer but if one was far, they could miss it as it was surrounded by other structures. PW2 further asserted that she was not aware if the 1st Plaintiff was aware of these structures or whether he saw them.

4.23 PW2 testified that the Deceased sold the Subject Property to the 1st Plaintiff for the sum of K2,000,000.00 (rebased) in 2018. PW2 stated that when the Defendants built a

permanent structure on the Subject Property, the Deceased did not commence Court action.

4.24 When re-examined, PW2 testified that the Subject Property was purchased by the Deceased in 1995 and was meant for a secondary school with about eight to ten teachers' houses only. Later, when business started booming on the Subject Property, the Deceased made an application to Lusaka City Council for subdivision of the Subject Property for other purposes.

4.25 **PW3** was **Moses Muzengeza**, who is a Reverend and Teacher by profession. PW3 testified, *inter alia*, that he knew the 1st Plaintiff as the person that purchased the Subject Property from the Deceased. He stated that the Deceased was his employer from 1991 to 2021, when he passed on.

4.26 PW3 asserted that before the Subject Property was sold, it was very open, such that people would move on to it and create shelters using plastics. The Deceased sent the PW3 on several occasions to warn the squatters from invading the Subject Property. He further asserted that a group of people led by the 1st Defendant went to see the Deceased and asked if they could buy land from him, but the Deceased refused. The 1st Defendant and her people kept asking the Deceased but he refused to sell the Subject Property to them. Later, the Deceased allowed them to put

up a temporal structure on 14 by 28 meters of the Subject Property.

4.27 To PW3's surprise, the 1st Defendant organised a Surveyor, doubled the measurements from what she was told by the Deceased and put up permanent structures. PW3 tried to stop them from building permanent structures but they continued to do so. A meeting was convened at Levy Park Mall to address the issues, but nothing was resolved.

4.28 When cross examined, PW3 testified that he is an ordained Reverend at the Pentecostal Holiness Church. PW3 stated that he used to run errands for the Deceased and he was present on several occasions when the Defendants visited the Deceased but was not present on 19th January, 2004, when they met the Deceased. He further stated that if the Deceased had agreed to sell the Subject Property to them, he would know even if he was not there. PW3 also stated that he was not present when the 1st Defendant gave the Deceased the money.

4.29 PW3 affirmed that the 1st Defendant reported the Deceased to the Police for fraud but could not remember the Police directing the Deceased to give her the title to the Subject Property. PW3 stated that he met the 1st Plaintiff at Arcades when the Deceased wanted to sell the Subject Property to him in 2018. He further stated that the meeting at Levy Mall with the Defendants happened when

the Subject Property had already been sold to the 1st Plaintiff.

4.30 PW3 asserted that the reason the Deceased wanted the Defendants to vacate the Subject Property was because it could not be subdivided. PW3 stated that he escorted the 1st Plaintiff to view the Subject Property when he bought it. He also stated that the 1st Plaintiff was shown the church structure.

4.31 There was no re-examination conducted.

4.32 **PW4** was **Mafuvu Ntanda**, who is a Street Vendor. He testified, *inter alia*, that he knew the Deceased and that the Subject Property was occupied by many people, including two churches. He stated that the Subject Property had a lot of people living in tents. PW4 further stated that when the 1st Defendant's maize was slashed, he heard the Deceased telling the 1st Defendant that he did not want people on the Subject Property and that they would be removed. PW4 also stated that he moved from the Subject Property.

4.33 There was no cross examination conducted.

4.34 **PW5** was **Charles Lipota**, who is employed as a Stores Officer at Government Stores. PW5 testified, *inter alia*, that he knew the Deceased as the owner of the Subject Property, on which the New Apostolic Church was

squatting and which church engaged him for administrative purposes in 2016. Later, he learnt that the church was told to move away from the Subject Property as the Deceased was selling it. He also stated that the New Apostolic Church had a temporal structure on the Subject Property as they were only squatting there.

4.35 When cross examined, PW5 stated that the Apostolic Church was a squatter on the Subject Property and that he would not know if someone bought the Subject Property from the Deceased. He also stated that there was another church on the Subject Property, which had built a permanent structure, but that he would not know if that church had bought the Subject Property.

4.36 There was no re-examination conducted and that marked the close of the Plaintiffs' case.

4.37 **DW1** was **Sunday Mwewa**, who is a Business Man. DW1 testified that in 2004, the Deceased told him that he was selling the Subject Property. At that time, DW1 was an Estate Agent. The Deceased took DW1 to the Subject Property, which is behind Buseko market. Two weeks later, the church secretary of the 2nd Defendant went to DW1 and told him that the church was looking for land to build a church. DW1 told her that there was land that was available.

4.38 DW1 took the church secretary and the Pastor of the church to meet the Deceased and at the said meeting they agreed on the purchase price of K5,000.00. The Pastor said that she had no money that day and would pay the following day. When they made the payment, DW1 was not there. After two weeks DW1 met the Pastor in town who told him that they had bought the Subject Property. Thereafter, DW1 went to the office of the Deceased to claim his commission. The Deceased told him that the company would pay him. DW1 went there three times but he was not paid the commission.

4.39 As time went by, the Deceased followed DW1 at the market and told him that he wanted to refund the church the money that he had received from them. Later, DW1 met the Deceased and his wife at Levy Shopping Mall where they had convened with the members of the church to discuss the refund of the money. The said meeting was not fruitful.

4.40 When cross examined, DW1 testified that he is a Business Man at Matero market. He stated that as an Estate Agent, when he took someone to view land, the owner of the land had to be present. However, when he took the 1st Defendant to view the Subject Property, the Deceased was not present. He further stated that he had put up posters

at the shop on properties being sold and that the Subject Property was being sold for K5,000.00.

4.41 DW1 asserted that the Deceased was selling the Subject Property; which he had said he would subdivide as it was a very big plot of about 300 metres. DW1 could not remember how many plots the Deceased intended to subdivide that the Subject Property into. The Deceased told him that he was selling one plot of the Subject Property which was to be subdivided. The Deceased wanted to subdivide a piece for the church and told DW1 that he only wanted to build a car park or church because the land was big. The Subject Property was not subdivided at the time and the Deceased told DW1 that he would only sell a piece of the Subject Property.

4.42 DW1 testified that the market value of K5,500.00 for the piece of the Subject Property that the Deceased wanted to sell was okay at the time. DW1 stated that he attended one meeting with the Deceased when the Deceased went to his office to tell him that he was selling part of the Subject Property. DW1 and the Deceased used to meet thereafter when DW1 was claiming for his commission. DW1 met the Deceased almost five times regarding this piece of the Subject Property. The first time was when the Deceased took him to view the Subject Property and the other four times were when DW1 was following up on his

commission. DW1 stated that his commission was K500.00 and that he did not report the Deceased to the Police when he failed to pay him his commission. DW1 also stated that he was sure that the Deceased sold the Subject Property to the 1st Defendant but that he was not there when the 1st Defendant paid the purchase price to the Deceased.

4.43 In re-examination, DW1 testified that prior to the meeting at Levy Mall, the Deceased had informed DW1 that he wanted to refund the Defendants.

4.44 **DW2** was **Rose Kayanda**, the 1st Defendant herein, who is a Bishop at the 2nd Defendant Church. DW2 testified, *inter alia*, that in January, 2004, DW2 went to the church after she had sent the church secretary to look for land to buy. After the secretary met DW1, she informed DW2 that she had found land to buy, which was located behind Buseko market.

4.45 DW1 met with DW2 and other member of the church, and he showed them the Subject Property. After viewing the Subject Property, DW2 told DW1 that the church was interested in buying the Subject Property. They went to the Deceased's office and found him there. They agreed that the Subject Property would be sold for the sum of K5,000.00. Later that week, on 19th January, 2004, DW2 took K3,000.00 to the Deceased. On 4th March, 2004,

DW2 paid the balance in the sum of K2,000.00 to the Deceased. The receipt of these sums of money were acknowledged by the Deceased in writing.

4.46 DW2 stated that the Deceased also showed them the Certificate of Title which was registered in his name and gave them a diagram as the Deceased's property was very big. After he showed them the Subject Property, DW2 told the Deceased that she would start building, to which he had accepted as they had finished paying him the purchase price for the piece of land of Subject Property. She asked the Deceased about the subdivision and he said that once he had paid for it, he would proceed with the subdivision. DW2 thanked him as he had relieved them of the burden of renting for orphans.

4.47 DW2 testified that she and the rest of the church members started clearing the land and built a temporal structure on the Subject Property, which they used as a church. In 2005, the church built a foundation and put the footing. The church continued to operate from there till 2007, when they started seeing problems. DW2 stated that they had built a permanent structure for the church and a copy of the images showing the church were produced at pages 3 to 4 of the Defendants' Bundle of Documents.

4.48 DW2 asserted that in 2007, she was informed that some people had slashed the maize that was planted on the

premises of the church. When she arrived at the church, she was told that it was the 1st Plaintiff that had slashed the maize. She approached the 1st Plaintiff who informed her that it was the Deceased who had taken him there. Thereafter, she reported the matter to the Police. The Police advised the Deceased to give the Defendants their subdivision.

4.49 DW2 further asserted that in 2019, she saw the Deceased building a wall fence at the church and when she approached the Deceased, he told her that he was doing it to prevent cadres encroaching on the Subject Property. Subsequently, DW2 was informed by the Deceased that the Lusaka City Council had refused him to subdivide the Subject Property and he requested her to sell back the piece of land of the Subject Property to him to which she refused. Soon thereafter, the Deceased asked DW2 to meet him at Levy Park Mall. She was informed that the Deceased wanted to return the purchase price that she had paid him for the subdivision and to pay for the building. Nothing was resolved at the said meeting.

4.50 A year after the incident, DW2 met with the 1st Plaintiff at Manda Hill Shopping Mall and he informed her that he had purchased the whole of the Deceased's Subject Property from the Deceased. DW2 told the 1st Plaintiff that the church would not leave the Subject Property as it had been

bought a long time ago. DW2 stated that the 1st Plaintiff asked if he could buy the piece of land of the Subject Property off her but she refused.

4.51 When cross examined, DW2 testified that she met the Deceased for the first time in 2004, when she wanted to purchase the Subject Property. She stated that it was the church that paid for the piece of land of the Subject Property but conceded that the acknowledgments of receipt of the sums of money on pages 1 and 2 of the Defendants' Bundle of Documents do not make mention of the 2nd Defendant. She stated that she had gone to the Ministry of Lands with the Deceased to verify the Certificate of Title and the Ministry of Lands confirmed that everything was in order with the Subject Property. DW2 further stated that she did not place a caveat on the Subject Property.

4.52 DW2 asserted that there was no one occupying the piece of land of the Subject Property that the church had purchased when it was bought. She conceded that from acknowledgements of receipt, the Court cannot know that she was paying for the purchase of a piece of land of the Subject Property. She stated that she never sued the Deceased as she was waiting for the subdivision from him so that she could process the title.

- 4.53 DW2 testified that she had bought 152.4 square metres of the Subject Property from the Deceased but that she did not specify the size in her pleadings as it was the Deceased who was supposed to indicate the size of the piece of land that she had paid for. She conceded that there was nothing before Court to show that the church bought the piece of land from the Deceased.
- 4.54 In re-examination, DW2 stated that to her knowledge, the subdivision of the Subject Property has not been done.
- 4.55 **DW3** as **Bright Kangwayi**, who is employed as a Secretary by the 2nd Defendant. DW3 testified, *inter alia*, that in 2004, he received information that someone was selling land. Upon checking the status of the Subject Property, the church released funds and it was given to the Bishop to go and make a down payment. A copy of the receipt issued in respect of the deposit was produced at page 2 of the Defendants' Bundle of Documents. Later, the church raised K2,000.00 and the final payment was made. A copy of the receipt issued in respect of that payment was produced at page 1 of the Defendants' Bundle of Documents.
- 4.56 Later, a temporal structure was put up on the Subject Property and the members of the church started worshipping there. Subsequently, a permanent structure was built and a borehole was dug at the premises. A copy

of the images of the church were produced at pages 3 to 4 of the Defendants' Bundle of Documents. In 2007, when the church cultivated maize, DW3 was informed that the maize was being slashed. This matter was reported to the Police and the Police advised the church to wait for a subdivision of land of the Subject Property from the Deceased. DW3 continued to push the Deceased for the subdivision.

4.57 DW3 affirmed that in 2019, he saw some people digging a foundation in the yard of the church and when he inquired, he was told by the Deceased that he was protecting the whole of the Subject Property from cadres. Later, the Deceased went to the Bishops house to inform her that he had sold part of the Subject Property and requested the church to sell its land back to him, to which the Bishop refused. Later, at a meeting at Levy Junction attended by DW3, the Bishop, the Deceased and his wife, they failed to resolve the issue of Subject Property.

4.58 Subsequently, the church received summons from the 1st Plaintiff and soon thereafter, the 1st Plaintiff met the Bishop and DW3 at Manda Hill Shopping Mall. The 1st Plaintiff informed them that he had bought the Subject Property from the Deceased.

4.59 When cross examined, DW3 stated that the Defendants' pleadings do not mention the portion of land on the

Subject Property that they had bought. DW3 stated that he was not present when the payment was being made for the piece of land on the Subject Property and that the acknowledgment of receipts of payment on pages 1 and 2 of the Defendants' Bundle of Documents do not state what the negotiations were for but that they were proof that they owned a portion of land on Subject Property. He stated that the church got permission from the Deceased to build on a portion of land on the Subject Property. Finally, he stated that when the 1st Plaintiff bought the Subject Property, all the people on it vacated the Subject Property except the 2nd Defendant.

4.60 There was no re-examination conducted and that marked the close of the Defendants' case. The Court gave the parties an opportunity to file their written submissions within a specified time frame.

5 SUBMISSIONS

5.1 By the Plaintiffs' submissions filed on 7th November, 2022, the Plaintiffs' Counsel gave an account of the evidence adduced at trial and stated that the issue for determination in this case was whether the Defendants purchased any land from the Deceased to entitle them to remain on the Subject Property or indeed obtain ownership.

5.2 Counsel submitted that the purported contract of sale that the Defendants wish to rely on was too vague and uncertain to qualify as such. He argued that it is a requirement of the law of contract that the parties should enter into agreements, which are certain in their terms. In fortifying this argument, Counsel cited the learned authors of ***Chitty on Contracts***¹, as follows: -

“An agreement may lack contractual force because it is so vague or uncertain that no definite meaning can be given to it...”

5.3 It was Counsel’s submission that all transactions relating to land should be evidenced in writing and could take the form of notes produced by the Defendants. He further submitted that for transactions to qualify as contracts for the sale of land, they have to meet certain minimum requirements, such as being sufficiently evidenced in writing, contain the names of the parties to the contract and all essential terms of the contract. In fortifying his submissions, Counsel cited the case of ***Wesley Mulungushi v Catherine Mizi Chomba***¹, as follows: -

“...for a note or memorandum to satisfy Section 4 of the Statute of Frauds, the agreement need not be in writing. A note or memorandum of it is sufficient provided it contains all the material terms of the contract, such as names or adequate identification of the subject matter and nature of the consideration...”

- 5.4 Counsel contends that the notes that the Defendants are relying on do not refer to the Subject Property being purchased nor have the Defendants shown that the 2nd Defendant is an entity capable of owning land as DW2 stated that the church was registered with PACRA whilst DW3 stated that it was registered with the Ministry of Home Affairs and the Registrar of Societies. It was further contended that there was no reason for the Defendants to continue to be in occupation of the Subject Property.
- 5.5 Counsel submitted that the 1st Plaintiff did everything required of a purchaser to deduce title, was issued a Certificate of Title and is therefore the legal and rightful owner of the Subject Property. He cited **Section 33 of *The Lands and Deeds Registry Act***¹, in support of the foregoing submission.
- 5.6 It was Counsel's argument that the Defendants have pleaded fraud against the Plaintiffs but have not led evidence in this regard. They Defendants alleged that since the Deceased received the sum of K5,000.00 as the full purchase price, it was fraudulent for him to sell the Subject Property to the 1st Plaintiff. Counsel submitted that the Defendants had to prove this fraud on the part of the Deceased, which they did not do. The case of ***Kajimanga v Chilemya***² was cited in support of the

foregoing submission. In the said case, the Supreme Court held as follows: -

“An allegation of fraud must not only be clearly and distinctly alleged but it must also be clearly and distinctly proved by evidence. The standard of proving an allegation of fraud is higher than the civil law standard of proof.”

- 5.7 Further, Counsel contended that the Defendants had the onus to prove the counter-claims and allegations against the Plaintiffs but have failed to do so. He went on to add that the Defendants, in their pleadings, have not clearly, precisely and concisely stated whether it is the Subject Property or a portion of the Subject Property, and if they seek a portion of the Subject Property, the size of the portion of land that they purchased. He added that there is no contract of sale produced before this Court by the Defendants nor approval from the relevant authorities allowing permanent structures to be built. Finally, Counsel submitted that for this Court to grant the reliefs that the Defendants seek, their pleadings ought to have been precise and concise. Based on the foregoing, Counsel contended that the Defendants’ claims cannot be sustained.
- 5.8 By the Defendants’ submissions filed on 12th December, 2022, the Defendants’ Counsel gave an account of the Defendants’ evidence and submitted that the legal issue

for determination was whether there was a contract for the sale of the Subject Property between the Defendants and the Deceased.

5.9 Counsel set out the following as the issues to be resolved to determine the legal issue: -

- i. Was there an agreement between the Deceased and 2nd Defendant for the sale of land;*
- ii. Was the K5,000.000.00 (unrebased) given to the Deceased for safe keeping;*
- iii. If there was an agreement between the Deceased and the 2nd Defendant for the sale and purchase of land, was such an agreement enforceable; and*
- iv. Whether the Deceased's decision to sell the land already been sold to the 2nd Defendant to the 1st Plaintiff amounts to fraud.*

5.10 On whether there was an agreement between the Deceased and the 2nd Defendant for the sale of land, it was submitted that the evidence on record clearly shows that the Deceased had land to sell and that he made the offer to the 2nd Defendant, which it accepted and proceeded to make a payment of K5,000,000.00 and it was accepted by the Deceased. Counsel argued that all the elements for a contract to be valid were all present in this matter. He submitted that under the doctrine of promissory estoppel,

having relied upon and acted on the promise made by the Deceased, the 2nd Defendant is entitled to enforce the oral contract for the sale to it of the land even in the absence of a written contract. Counsel contended that there was an agreement for the sale and purchase of land between the Deceased and the 2nd Defendant.

5.11 On whether the sum of K5,000,000.00 (unrebased) was given to the Deceased for safe keeping, it was submitted that the matter in *casu* bears an uncanny similarity to the case of ***Peter Militis v Chiwala***³, wherein the Respondent who had reneged on an oral agreement to re-assign a property to the Appellant stated that the K70,000.00 paid by the Appellant was not meant to be part of the purchase price but merely a loan from the Appellant. In that case, the Supreme Court stated as follows: -

“Like the learned judge we are not convinced by the respondent’s argument that the K70,000.00 the appellant paid for the purchase of the disputed property on behalf of the respondent was a loan to the respondent. Apart from being too much an amount of money at that time, ...even if they were very good friends, the amount involved was too much to support a friendship in which the respondent needed the appellant more than the appellant needed him.”

5.12 Counsel went on to submit that it does not stand to sense or logic that a church that was looking after widows and

orphans, would have given a huge sum of K5,000,000.00 (unrebased) in 2004 to the Deceased for safe-keeping. Therefore, it was submitted that the money paid to the Deceased was not for safe-keeping, but was payment for the land.

5.13 On if there was an agreement between the Deceased and the 2nd Defendant for the sale and purchase of the Subject Property, was such an agreement enforceable, it was submitted that the Supreme Court in the said case of ***Peter Militis v Chiwala***³ held that an oral contract for the sale of land is enforceable. Counsel urged this Court to associate itself with the wisdom in the ***Peter Militis v Chiwala***³ case and hold that the oral agreement for the sale of land entered into by the Deceased and the 2nd Defendant is enforceable.

5.14 Counsel contended that the two receipts for the sums of K2,000,000.00 and K3,000,000.00 (unrebased) do not constitute the contract of sale in this matter as the contract between the Deceased and 2nd Defendant was an oral one and it is enforceable. Counsel submitted that ***Section 4 of The Statute of Frauds***² was not specifically pleaded by the Plaintiffs as a defence against the Defendants' Counter-claim or as a basis for advancing its claims. Counsel cited ***Order 18, Rule 8 of The Supreme***

Court Practice³ on the application of **The Statute of Frauds**² as follows: -

“Statute of Frauds or Section 4 of the Law of Property Act must be specifically pleaded if the Defendant desires to rely on it.”

5.15 Counsel further cited the case of **Mulenga Kasepa v Christopher Mulenga**⁴, in support of the foregoing and submitted that since **Section 4** of **The Statute of Frauds**² was not specifically pleaded by the Plaintiffs, it cannot be deployed as a defence against the 2nd Defendants’ Counter-claim.

5.16 Counsel argued that the doctrine of part performance is an exception to the requirement for contracts for the sale of land to be evidenced in writing. The case of **Steadman v Steadman**⁵ was cited for its holding that the mere payment of money can be considered as an act of part performance and therefore, proof of the existence of an enforceable contract notwithstanding the absence of a written contract. Counsel contends that there could have been no other reason why a church, which was looking after orphans, would have given a substantial amount to the Deceased in 2004 and that the payment amounted to part performance as to take the land transaction outside the purview of **Section 4** of **The Statute of Frauds**².

- 5.17 On whether the Deceased's decision to sell land which had already been sold to the 2nd Defendant amounts to fraud on the part of the Deceased, it was submitted that the 1st Plaintiff knew or ought to have known that there were someone's structures on the Subject Property but he decided to go ahead and purchase the Subject Property from the Deceased. It was submitted that there was no way the 1st Plaintiff would have missed the permanent structures on the Subject Property had he bothered to view the Subject Property.
- 5.18 Counsel submitted that the acts of fraud had been proven to the required standard in that the evidence had been adduced showing that in 2004, the Deceased sold the same land and received the sum of K5,000,000.00 (unrebated) from the 2nd Defendant. In 2018, the Deceased went on to sell the same land to the 1st Plaintiff, which amounts to fraud that has been proven to the required standard.
- 5.19 With regard to the Counter-claim and cancellation of the title deed issued to the 1st Plaintiff, Counsel submitted that **Section 33** of **The Lands and Deeds Registry Act¹**, clearly stipulates instances under which a Certificate of Title may be revoked. He went on to submit that the sale and assignment of the Subject Property to the 1st Plaintiff by the Deceased was fraudulently done and is tainted with

illegality as the Deceased had already sold the Subject Property to the 2nd Defendant in 2004. The 1st Plaintiff also knew or ought to have known that the land he was buying or part of it had already been occupied and was owned by someone else. Therefore, the Certificate of Title issued to the 1st Plaintiff should be revoked.

5.20 On whether the 2nd Defendant is entitled to hold land in Zambia, it was submitted that the 2nd Defendant is a Zambian entity and is entitled to own land in Zambia. On the 2nd Defendant's failure to register a caveat, it was submitted that the 2nd Defendant is not legally obligated to register a caveat on the property.

6 CONSIDERATION AND DECISION OF THE COURT

6.1 I have considered the pleadings and evidence adduced before this Court. I have also considered the spirited submissions and authorities cited, for which I am grateful to Counsel.

6.2 The Plaintiffs claim, *inter alia*, for an order evicting the Defendants from the Subject Property, a declaration that the 1st Plaintiff is the legal and rightful owner of the Subject Property, an order that the Plaintiff gets possession of the Subject Property, an order demolishing any structures illegally built by the Defendants and damages.

- 6.3 On the other hand, the Defendants are counter-claiming, *inter alia*, for an order for Specific Performance by the Deceased of the agreement for the sale of the land, a declaration that the 2nd Defendant is the lawful and legal owner of the land, which the Deceased had agreed to sell to the Defendants, an order that the purported sale and assignment of the portion of the land to the 1st Plaintiff, which the Deceased had already sold to the 2nd Defendant, is null and void for fraud and illegality, an order that the Certificate of Title issued to the 1st Plaintiff be cancelled in so far as it incorporated the portion of land, which the Deceased had sold to the 2nd Defendant and damages.
- 6.4 The burden to prove the allegations against the Defendants lies with the Plaintiffs who must adduce evidence to prove the facts on which they base their claims. Similarly, in a Counter-Claim, the same expectation of the Plaintiff to prove its claim against the Defendant becomes the position and expectation of the Defendants to prove the Counter-Claim against the Plaintiffs.
- 6.5 In the case of ***Zambia Railways Limited v Pauline S Mundia, Brian Sialumba***⁶, it held that: -

“The standard of proof in a civil case is not as rigorous as the one obtaining in a criminal case. Simply stated, the proof required is on a balance of probability as opposed to beyond all reasonable doubt in a criminal case. The old adage is true that he who asserts a claim

in a civil trial must prove on a balance of probability that the other party is liable...

6.6 Additionally, in the case of ***Mazoka and Others v Mwanawasa and Others***⁷, the Supreme Court held as follows: -

“As regards burden of proof, the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity.”

6.7 The facts in this case are that the Deceased was the registered owner of the Subject Property. Sometime in May, 2018, the 1st Plaintiff entered a contract for the sale of the Subject Property from the Deceased, at the purchase price of K2,000,000.00. Consequently, the ownership of the Subject Property was transferred to the 1st Plaintiff.

6.8 The Deceased alleges that he and the 2nd Defendant entered into negotiations for the purchase and sale of a portion of the Subject Property sometime in 2004, which negotiations failed. He further acknowledged receipt of the sums of K3,000,000.00 and K2,000,000.00 (unrebased) on 19th January, 2004 and 4th March, 2004, respectively, from the 1st Defendant and alleges that the said sums were given to him for safe keeping.

6.9 On the other hand, the Defendants allege that the 2nd Defendant purchased a portion of the Subject Property from the Deceased in 2004 and that the sums of money

paid to the Deceased by the 1st Defendant was the purchase price in consideration of the agreement for the sale of a portion of the Subject Property. The Defendants further allege that the Deceased fraudulently sold the Subject Property to the 1st Plaintiff by selling the portion of land that he had already sold to the 2nd Defendant.

6.10 On my analysis of the facts on record, I find that the following are the legal issues for determination: -

1. Whether there was a contract of sale of a portion of land of the Subject Property between the Deceased and the 2nd Defendant; and
2. Whether the 1st Plaintiff is entitled to a declaration that he is the legal owner of the Subject Property and an Order evicting the Defendants from the Subject Property.

6.11 I shall address the legal issues in the manner that I have identified them, starting with whether there was a contract of sale of a portion of land of the Subject Property between the Deceased and 2nd Defendant. If it is determined that there was a contract of sale of a portion of land of the Subject Property between the Deceased and the 2nd Defendant, it would entail that the 2nd Defendant herein had acquired an equitable interest in part of the land of the Subject Property, which interest would have a bearing

on the ownership rights of the 1st Plaintiff. In the case of ***Aubrey Kabwe (suing in his capacity as the administrator of the estate of the Late Rosemary Mwanza) v Charles Wilson Nkhoma***⁸, it was held as follows: -

“Equity treats a contract to do a thing as if the thing were already done, though only in favour of persons entitled to enforce the contracts specifically, and not in favour of volunteers.”

6.12 In the said case, it was further held as follows: -

“Squatters build on their own risk, and if the owner of the land withdrew their permission or licence or if they decide to demolish a structure built in the absence of any permission or other lawful relationship, the squatter's losses though very much regrettable are not recoverable in a Court of law.”

6.13 The Plaintiffs allege that 1st Plaintiff is the registered owner of the whole of the Subject Property and that he had on several occasions requested the Defendants to vacate the Subject Property but to no avail. Rather than vacating the Subject Property, the Defendants allege that they bought a piece of land of the Subject Property from the Deceased. In their pleadings, the Deceased stated that at no point did he sell a piece of land of the Subject Property to the Defendants, but only accepted money from the 1st

Defendant, at her request, for the purposes of safe keeping.

6.14 The Defendants allege that the Deceased sold a portion of the Subject Property to the 2nd Defendant in 2004 and that therefore, the subsequent sale of the whole of the Subject Property to the 1st Plaintiff by the Deceased was fraudulent. To support this assertion, at trial, DW1, an Estate Agent, stated that he introduced the 1st Defendant to the Deceased as an intended purchaser of a portion of the Subject Property, which the Deceased intended to sell. He stated that after they met, the Deceased told the 1st Defendant that the portion of land that had been shown to her by DW1, was being sold for K5,500,000.00 (unrebased), which was negotiated to K5,000,000.00 (unrebased). DW1 stated that after a period of time he was told by the 1st Defendant that she had purchased the Subject Property and DW1 began pursuing the Deceased for his commission.

6.15 DW2, the 1st Defendant herein, testified that she paid the Deceased the sum of K3,000,000.00 (unrebased), towards the purchase price of a portion of the Subject Property, on 19th January, 2004, receipt of which was duly acknowledged by the Deceased in writing. Later, on 4th March, 2004, DW2 paid the Deceased the sum of K2,000,000.00 (unrebased), as final payment towards the

purchase price of a portion of the Subject Property being sold by the Deceased.

6.16 Though the Deceased by his pleadings admits that he received the said sums of money from the 1st Defendant, he denies that it was payment for the sale of a portion of the Subject Property and asserted that the money was meant for safe keeping. Further, the Deceased acknowledged that there were negotiations for the sale of a portion of the Subject Property to the 1st and 2nd Defendant, but stated that the negotiations failed and that therefore, there was no agreement for the sale of land between himself and the 2nd Defendant.

6.17 From the foregoing, it is clear that the Plaintiffs and the Defendants have advanced directly conflicting testimonies. The Supreme Court in the case of **Attorney General v Kakoma**⁹, guided as follows regarding conflicting statements: -

“A court is entitled to make findings of fact where the parties advance directly conflicting stories, and the court must make those findings on the evidence before it and having seen and heard the witnesses giving that evidence.”

6.18 Based on the foregoing authority and my analysis of the evidence on record, I find that the basis of the Defendants’ claim to a portion of the Subject Property was the sum of

K5,000,000.00 (unrebased), paid in two instalments to the Deceased, which sum was acknowledged to have been received by the Deceased in writing.

6.19 On my analysis of the said acknowledgments of receipt, produced on pages 1 and 2 of the Defendants' Bundle of Documents, I find that the document on page 2 clearly shows that the Deceased received the sum of K3,000,000.00 (unrebased), from the 1st Defendant, on 19th January, 2004. The said acknowledgment was couched as follows: -

"I acknowledge receipt of the sum of three million Kwacha (K3,000,000.00) from Mrs R.C.M. Kayanda. The money will be kept by me overnight pending negotiations to be completed tomorrow the 20th of January, 2004. No part of the money shall be used by me till negotiations have been completed.

T.D. Mwanza."

6.20 The second acknowledgment of receipt, dated 4th March, 2004, shown at page 1 of the Defendants' Bundle of Documents, was couched as follows: -

"I acknowledge receipt of two million Kwacha (K2,000,000.00) from Mrs R.C.M. Kayanda. This is the balance after the earlier payment of three million

Kwacha (K3,000,000.00) made on 19th January, 2004.

T.D. Mwanza.”

6.21 On my analysis of the said documents and the evidence on record, I find that the foregoing acknowledgments of receipt of the sums of money are an indication that the Deceased received sums of money from the 1st Defendant. The first document indicates that the 1st Defendant was making payment to the Deceased, which payment was to be kept overnight and that the Deceased was not to use a part of it till negotiations were completed the next day. This, in my view, is an indication that the said sum was not paid to the Deceased as part payment of an agreed sum for the purchase of the Subject Property. Further, the said document does not indicate the subject of the negotiations nor does it offer an indication as to whether or not the negotiations related to the sale of a portion of the Subject Property.

6.22 The second document is an acknowledgement by the Deceased, of the receipt of a balance from the 1st Defendant, made in relation to the initial payment that was made. Again, the said acknowledgment makes no reference to the sale of a portion of the Subject Property.

6.23 I note that the Defendants' Counsel in his submissions raised issue with the Plaintiffs' reliance on **Section 4 of The Statute of Frauds**² in challenging the validity of the acknowledgments of receipt as proof of the existence of an agreement for the sale of the Subject Property, on the basis that they do not satisfy the requirements of that section. The import of **Section 4 of The Statute of Frauds**² was discussed in the case, cited by Counsel for the Defendant, of **Wesley Mulungushi v Catherine Mizi Chomba**¹ as follows: -

“...for a note or memorandum to satisfy Section 4 of the Statute of Frauds, the agreement need not be in writing. A note or memorandum of it is sufficient, provided it contains all the material terms of the contract such as names, or adequate identification of the subject matter and nature of consideration.”

6.24 However, as rightly submitted by the Defendants' Counsel, **Section 4 of The Statute of Frauds**² was not specifically pleaded by the Plaintiffs as required under **Order 18, Rule 8 of The Rules of the Supreme Court**³, which provides as follows: -

“Statute of Frauds or Section 4 of the Law of Property Act must be specifically pleaded if the defendant desires to rely on it.” (Court's emphasis)

6.25 At this stage, I find it necessary to reproduce paragraph 2 of the Plaintiffs' Reply and paragraphs 10 and 17 of the Plaintiffs' Defence to the Counter-claim, as follows: -

"Paragraph 2 of the Reply

In reply to paragraph 6 of the Defence, the 1st Plaintiff shall aver that he was advised by the Deceased that the Defendant did not have a right to be on the property and that in fact there was no agreement between the Deceased and the Defendants for either the sale of the land or indeed for the Defendants to be there...

Paragraphs 10 and 17 of the Defence to the Counter-claim

10. In response to paragraphs 28, 29, 30 and 31, the Deceased shall maintain what was stated in the Defence that since there was no agreement between him and the Defendants, he could do what he wanted with his land including slashing land and selling the land to someone else....

17. The Deceased shall aver that there has been no fraud on his part as there was never an agreement of sale between him and the Defendants and that he and the 1st Plaintiff have time and time again requested them to vacate the land in question but to no avail..."
(Court's emphasis)

6.26 From the foregoing paragraphs, I note that although the Plaintiffs herein did not specifically refer to **Section 4 of The Statute of Frauds**² in their pleadings, the Plaintiffs did plead that there was no agreement for the sale of a portion of the Subject Property between the Deceased and the 2nd Defendant.

6.27 In my view, a Party need not cite the applicable law verbatim for him or her to be availed a statutory defence. He will be allowed such a defence as long as he or she makes it clear, in his pleadings, what facts he intends to adduce at trial. I therefore find that by the paragraphs highlighted above, the Plaintiffs had complied with the rules as regards pleadings. Therefore, the Defendants' Counsel's contention lacks merit.

6.28 Moreover, in the case of **Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others**⁷, the Court held as follows: -

“In a case where any matter not pleaded is let in evidence, and not objected to by the other side, the court is not and should not be precluded from considering it. The resolution of the issue will depend on the weight the court will attach to the weight of the unpleaded issues.”

6.29 In this case, the issue was raised during trial of whether there was anything signed apart from the receipts between the Deceased and 2nd Defendant in relation to the sale of

the portion of the Subject Property and the size of the portion of the Subject Property that was purchased. Additionally, the Defendants' witnesses testified that there was nothing before Court to show that the church bought a piece of land of the Subject Property from the Deceased. The foregoing, in my view is an indication that at trial, the Plaintiffs demonstrated that the basis of their claims against the Defendants was that there was no written agreement for the sale of a portion of the Subject Property.

6.30 I would like to point out that the case of ***Peter Militis v Wilson Kafuko Chiwala***³, cited by the Defendants' Counsel in their submissions, to support their assertion that an oral contract for the sale of land is enforceable, is distinguishable from this case, as in the ***Peter Militis v Wilson Kafuko Chiwala***³ case, at the stage that the oral contract was entered into, there was no need for a written contract of sale because the Respondent was not the legal owner of the disputed property and therefore, there was nothing he could assign. In this case, however, the Deceased was the legal owner of the Subject Property and a written contract or agreement of sale was required to be executed before the Subject Property or a portion thereof was transferred to another party. Therefore, the ***Peter Militis v Wilson Kafuko Chiwala***³ case is not applicable to the facts of this case.

6.31 On my analysis of the two acknowledgements of receipt signed by the Deceased, I find that they fall short of the requirements of a memorandum to satisfy **Section 4 of The Statute of Frauds**², as it does not indicate the names of the Deceased or the 2nd Defendant, who the 1st Defendant alleges entered into an agreement for the sale of a portion of the Subject Property. Further, the said document does not give the dimensions or description of the property to be purchased nor the purpose of the sums of money received by the Deceased.

6.32 I note further, that at trial, PW2 testified that various business activities were being conducted on the Deceased's Subject Property and that the sums of money received by the Deceased could have been payment for a temporal structure, for land or for business. This, in my view, gives an indication that the Deceased and the Defendants did not enter into a conclusive agreement for the sale and purchase of land.

6.33 Even in the event that this Court found that there was an oral agreement for the sale of a portion of the Subject Property to the 2nd Defendant, which in this case it does not, this Court would be at pains to establish the dimensions of the portion of the Subject Property that was allegedly sold and whether it was in fact the 2nd Defendant that purchased the Subject Property from the Deceased,

as the Defendants herein have not adequately established these facts.

6.34 Therefore, I find that the said acknowledgments of receipt do not support the Defendants' assertions that a contract for the sale of the Subject Property was entered into between the Deceased and 2nd Defendant. Consequently, the Defendants have failed to establish the 2nd Defendant's equitable interest in a portion of the Subject Property. Therefore, as the 2nd Defendant has no legal or equitable claim to a portion of the Subject Property, all the Defendants' claims to a portion of the Subject Property have no merit and are accordingly dismissed.

6.35 This brings me to the consideration of the second legal issue of whether the 1st Plaintiff herein is entitled to a declaration that the 1st Plaintiff is the legal and rightful owner of the Subject Property and an Order evicting the Defendants from the remaining extent of the Subject Property.

6.36 The 1st Plaintiff alleges that he is the current registered owner of the Subject Property that he purchased from the Deceased. The 1st Plaintiff exhibited a copy of a Certificate of Title issued in relation to the Subject Property on page 14 of the Plaintiffs' Bundle of Documents.

6.37 **Section 33** of **The Lands and Deeds Registry Act**¹, provides as follows in part with respect to the protection of a holder of a Certificate of Title: -

“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...”

(Court’s emphasis)

6.38 Although a Certificate of Title is a protected document by virtue of the foregoing provision, **Section 34 (1) (c)** of **The Lands and Deeds Registry Act**¹ lists fraud as one of the exceptions under which the production of a Certificate of Title would not be deemed to be conclusive evidence of ownership of land as follows: -

“(1) No action for possession, or other action for the recovery of any land, shall lie or be sustained against the Registered Proprietor holding a Certificate of Title for the estate or interest in respect to which he is registered, except in any of the following cases;

(c) the case of a person deprived of any land by fraud, as against the person registered as proprietor of such land through fraud, or against a person deriving otherwise than as

transferee bona fide for value from or through a person registered through fraud.”

6.39 The import of the foregoing provisions of ***The Lands and Deeds Registry Act***¹ were discussed in the case cited by Counsel for the Defendant, of ***Anti-Corruption Commission v Barnet Development Corporation Limited***¹⁰, as follows: -

“Under Section 33 of the Lands and Deeds Registry Act, A Certificate of Title is conclusive evidence of ownership of land by a holder of a Certificate of Title. However, under Section 34 of the same Act, a Certificate of Title can be challenged and cancelled for fraud or reasons of impropriety in its acquisition.” (Court’s emphasis)

6.40 From the authorities cited above, it is clear that a Certificate of Title can be cancelled when a Party challenging its acquisition proves fraud or impropriety in its acquisition.

6.41 The Defendants by the their Counter-claim sought to establish that the Deceased fraudulently sold the Subject Property to the 1st Plaintiff as a portion of the Subject Property had already been sold to the 2nd Defendant by the Deceased. In the case of ***Sithole v State Lotteries Board***¹¹, the Supreme Court stated as follows: -

“If a party alleges fraud, the extent of the onus on the party alleging is greater than a simple balance of probabilities.”

- 6.42 On the strength of the foregoing authority, I find that as the Defendants herein have failed to establish that the 2nd Defendant purchased a portion of the Subject Property before the 1st Plaintiff purchased the Subject Property from the Deceased, they have failed to prove the allegations of fraud as set out in their Counter-claim.
- 6.43 It follows therefore that the 1st Plaintiff herein is the legal owner of the Subject Property and I so declare. Accordingly, I find that the 1st Plaintiff is entitled to an Order evicting the Defendants from the Subject Property. In the circumstances, I Order the Defendants to yield vacant possession and to demolish their illegal structures within 60 days hereof and at their own cost. Should the Defendants neglect to do so, I Order that the 1st Plaintiff shall be at liberty to demolish the illegal structures at the Defendants' cost.
- 6.44 As regards the claim for damages, it is contained in paragraph (v) of the Statement of Claim filed by the Plaintiffs and it states merely that the Plaintiff therefore claims for damages. The Plaintiffs did not endeavour to particularise the damages but it can be discerned from paragraphs 21, 22, 23 and 24 of the Statement of Claim that the claim relates to the period that the 1st Plaintiff became legal owner of the Subject Property and requested the Defendants, who were in occupation of the Subject

Property without his consent, to vacate the Subject Property.

6.45 In the said paragraphs, the 1st Plaintiff averred that being the legal owner of the Subject Property with interest in making use of the Subject Property, he did proceed to request all persons who were on the Subject Property to vacate so that he could proceed with his plans for developing the Subject Property. He further averred that several persons vacated the Subject Property save for the Defendants and a few other members of the 2nd Defendant church who remained adamant that they were *bona fide* purchasers of the Subject Property. It was also averred that despite several requests, the Defendants have refused and/or neglected to vacate the Subject Property alleging that they bought it from the Deceased. Further, in his evidence in chief, the 1st Plaintiff reiterated in his testimony the above and added that when he purchased the Subject Property and went to the Subject Property to erect a wall fence in order to secure the Subject Property from encroachment, both Plaintiffs requested the Defendants to vacate the Subject Property. He testified that all the squatters moved out except for the Defendants. Efforts were made to talk to the Defendants to move out, but proved futile. When he asked them why they were refusing to move out, they presented him with documents shown at pages 22 and 23 of the Plaintiffs' Bundle of

Documents, which had no details relating to the Subject Property.

6.46 This evidence was not contested and the Defendants have indeed admitted that they are in occupation of the Subject Property. In fact, at paragraph 6 of the Defence and Counter-claim, the Defendants confirm that the 2nd Defendant is in occupation of the Subject Property where it has erected the church building and other structures. The Defendants justify their being in possession on the basis that the Deceased sold them the Subject Property in 2004. This justification is based on their belief that documents shown at pages 22 and 23 of the Plaintiffs' Bundle of Documents are proof that the Deceased received funds from them for the sale of the Subject Property.

6.47 I have already found above that the documents at pages 22 and 23 of the Plaintiffs' Bundle of Documents did not amount to the sale of the Subject Property and that there was no agreement between the Deceased and the Defendants, which assigned the Subject Property to the Defendants. It was on this premise that I found that the 1st Plaintiff is the legal owner of the Subject Property and entitled to an Order of eviction of the Defendants. Accordingly, having found that the 1st Plaintiff is entitled to possession of the Subject Property, I also find that he is

entitled to an award of damages as he was kept out of use of the Subject Property and I accordingly so Order.

6.48 I am however at pains to determine how much the 1st Plaintiff is entitled to as damages because as I have stated earlier, the claim for damages has not been particularised. In the case of **Mhango v Ngulube**¹², the Court addressed this issue as follows: -

“It is, of course, for any party claiming a special loss to prove that loss and to do so with evidence which makes it possible for the court to determine the value of that loss with a fair amount of certainty... The result is that the evidence presented to the court was unsatisfactory, and, in our opinion, the learned trial judge would have been entitled either to refuse to make any award or to award a much smaller sum, if not a token amount in order to remind litigants that it is not part of the judge’s duty to establish for them what their loss is.”

6.49 The Court went on to hold that for purposes of doing justice, where the evidence is inadequate, the Court can make an intelligent guess as to what loss has been suffered.

6.50 In view of what I have stated in the preceding paragraphs and in the absence of any evidence to aid me, I can only order that the amount of damages due from the Defendants to the 1st Plaintiff be assessed by the Deputy

Registrar and I so Order. The amount determined as due shall attract interest at the short term bank deposit rate from date of Writ to date of the Judgment and thereafter, at the current bank lending rate as determined by Bank of Zambia till date of payment.

7 CONCLUSION

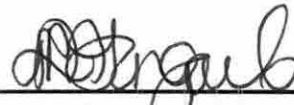
- 7.1 In conclusion, as the Defendants have failed to establish the 2nd Defendant's equitable interest in a portion of the Subject Property, the 2nd Defendant has no legal or equitable claim to a portion of the Subject Property. Consequently, as all the Defendants' claims were based on the establishment of the 2nd Defendant's equitable interest in a portion of the Subject Property, all the Defendants' claims against the Plaintiffs have no legal basis and are accordingly dismissed.
- 7.2 It follows therefore, that the 1st Plaintiff herein is the legal owner of the Subject Property and I so declare. Accordingly, I find that the 1st Plaintiff is entitled to an Order evicting the Defendants from the Remaining Extent of Plot No. 137, Matero, Lusaka. In the circumstances, I Order the Defendants to yield vacant possession and to demolish their illegal structures within 60 days hereof and at their own cost. Should the Defendants neglect to do so, I Order that the 1st Plaintiff shall be at liberty to demolish the illegal structures at the Defendants' cost.

7.3 I also Order that the 1st Plaintiff's claim for damages succeeds. The amount of damages due from the Defendants to the 1st Plaintiff shall be assessed by the Deputy Registrar. The amount determined as due shall attract interest at the short term bank deposit rate from date of Writ to date of the Judgment and thereafter, at the current bank lending rate as determined by Bank of Zambia till date of payment.

7.4 Costs are for the 1st Plaintiff as against the Defendants, to be taxed in default of agreement.

7.5 Leave to appeal is granted.

**SIGNED, SEALED AND DELIVERED AT LUSAKA THIS 4TH DAY
OF DECEMBER, 2023.**



**P. K. YANGAILO
HIGH COURT JUDGE**