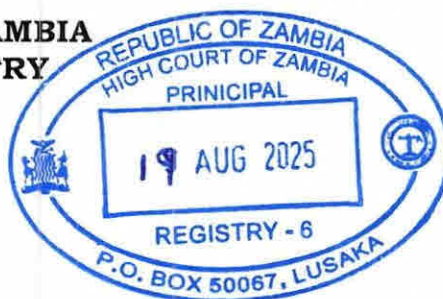


**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)



2021/HP/1114

BETWEEN:

**CATHERINE CHANDA
MULUME WANSHIMBA INVESTMENT (Z) LIMITED**

**1st PLAINTIFF
2nd PLAINTIFF**

AND

**BENHILDAH ZULU
SITEBISO PHIRI
YABBEY SHITIMA**

**1st DEFENDANT
2nd DEFENDANT
3rd DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 19th DAY OF AUGUST,
2025**

For the Plaintiffs : Mr. H. Mulenga, Messrs. Philsong and Partners
For the 1st Defendant : Mrs N.N. E Zulu- Gondwe, National Legal Aid Clinic for Women
For the 2nd Defendant : Mr. J.K. Matende, Legal Aid Counsel
For the 3rd Defendant : Mr. Z.M. Mubiana, Messrs Nsapato and Company Advocates

J U D G M E N T

CASES REFERRED TO:

1. *Printing and Numerical Company v Sampson* 1875 LR19 Eq 462
2. *Oliver v Hinton* 1899 2 Ch 264
3. *Steadman v Steadman* 1974 3 WLR
4. *Khalid Mohammed v The Attorney General* 1982 ZR 49
5. *Wilson Masauso Zulu v Avondale Housing Project Limited* 1982 ZR 172
6. *Mijoni v Zambia Publishing Company Limited* Appeal No. 10 of 1986
7. *Nawakwi v Lusaka City Council*, SCZ Appeal No. 26 of 2001
8. *National Drug Company Limited and Zambia Privatization Agency v. Mary Katongo* SCZ Appeal No 79 of 2001
9. *Sablehand Zambia Limited v Zambia Revenue Authority* 2005 ZR 109
10. *Enesi Banda v Abigail Mwanza* 2006/HP/A002
11. *Banda and another v Mudimba* (HP/A 39 of 2010)

12. Clementina Banda Emmanuel Njanje v Boniface Mudimba 2011 Vol 3 ZR 162

13. Lubungu v Kapango and ors Appeal No. 216 of 2016

LEGISLATION REFERRED TO:

- 1. The Rules of the Supreme Court of England, 1965, 1999 Edition**
- 2. The Statute of Frauds 1677**

OTHER WORKS REFERRED TO:

- 1. Black's Law Dictionary, 9th Edition by Bryan A. Garner, Thomson Reuters 2009**
- 2. Chitty on Contracts: General Principles, 13th Edition**
- 3. Contract Law in Zambia, by Sangwani Patrick Ng'ambi and Chanda Chungu, Second Edition, Juta and Company (Pty) Limited, 2021**
- 4. Halsbury's Laws of England, 16th Edition, Fourth Edition Re-Issue**
- 5. Land Law in Zambia, by Frederick Mudenda , 2007 UNZA Press**

1. INTRODUCTION

1.1 The Plaintiffs, Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, commenced this matter on 17th September 2021, by way of Writ of Summons which was accompanied by a statement of claim and the other documents, seeking the following reliefs:

- i. An Order for specific performance to formalize the creation of the access road in favour of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited and which was agreed upon in the contract of sale dated the 30th August 2018 and made between Benhildah Zulu, Catherine Chanda and Mulume Wanshimba Investments (Z) Limited and which road has since been constructed;*

- ii. *An Order and declaration that the survey diagrams in the Certificate of Title No. 68177 for Lot No. 2614/M/E Lusaka be replaced to reflect the agreement that was made between Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, Benhildah Zulu and Sitembiso Phiri;*
- iii. *An Order and declaration that the selling of Lot 2614/M/E Lusaka by Sitembiso Phiri to Yabbey Shitima before effecting the agreement referred to in (ii) above was done fraudulently and by misrepresentation of the facts and that the said certificate of title No. 68177 be cancelled until after Benhildah Zulu, Sitembiso Phiri and Yabbey Shitima have formalized the creation of the access road in favour of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited;*
- iv. *In the alternative, an Order for the grant of an alternative access road and immediate compensation of the sum ZMMW150,000.00 being the sum of money that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited spent on the construction and development of the access road which was created pursuant to the contract of sale dated 30th August 2018 and made between Benhildah Zulu and Catherine Chanda and Mulume Wanshimba Investments (Z) Limited;*
- v. *Damages for breach of contract and inconvenience;*

- vi. Interest on all sums granted from the date of the cause of action to the date of full and final payment at the current commercial bank lending rate;*
- vii. Costs; and*
- viii. Any other relief that the Court may deem fit.*

2. STATEMENT OF CLAIM

- 2.1 In the statement of claim, Catherine Chanda and Mulume Wanshimba Investments (Z) Limited alleged that Catherine Chanda was a party to a contract of sale for a proposed subdivision which was made on 30th August 2018, between herself, Benhildah Zulu and Mulume Wanshimba Investments (Z) Limited.
- 2.2 They averred that Mulume Wanshimba Investments (Z) Limited was a party to a contract of sale for a proposed subdivision to be created out of Stand No. 2614/M which was made on 30th August 2018, between Benhildah Zulu, Catherine Chanda and Mulume Wanshimba Investments (Z) Limited.
- 2.3 It was stated that Benhildah Zulu was the seller of a proposed subdivision measuring approximately 76.72 meters x 25 meters to be created out of Lot 2614/M situate in Lusaka in the Lusaka Province of the Republic of Zambia.
- 2.4 Catherine Chanda and Mulume Wanshimba Investments (Z) Limited further averred that Sitembiso Phiri is Benhildah Zulu's daughter, and the title holder of Lot 2614/M/E Lusaka, who in conjunction with Benhildah Zulu agreed verbally that the access road be created between Lot

2614/M/E and Lot 2614/M/D, and allowed the beacons to be moved awaiting the formalization of the movement of the beacons at Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's cost.

- 2.5 The contention was that however, unknown to Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, Sitembiso Phiri, fraudulently and through misrepresentation sold the said Lot 2614/M/E before the formalization of the shifting of the beacons was completed as agreed.
- 2.6 Further averment was made, that Yabbey Shitima was the purchaser of Lot 2614/M/E Lusaka from Sitembiso Phiri through fraudulent misrepresentation before the formalization of the beacon replacement of the said property, and who long before purchasing the said property found that the access road had already been constructed.
- 2.7 It was also contended that on 30th August 2018, Benhildah Zulu entered into an agreement with Catherine Chanda and Mulume Wanshimba Investments (Z) Limited for the sale to the said Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, of a proposed subdivision measuring approximately 76.72 meters x 25 meters at the sum of ZMW250,000.00 together with the access road to enable Catherine Chanda and Mulume Wanshimba Investments (Z) Limited to access their property.
- 2.8 Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's assertion was that the proposed subdivision was created out of Lot 2614/M, and that in order to facilitate a

right of way for the said land, the beacons for subdivision No. L/2614/M/E were moved to create an road access for Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, at the direction of Benhildah Zulu and Sitembiso Phiri.

- 2.9 It was also their averment, that the access road was created in the presence of all the parties to the agreement, including Sitembiso Phiri, and it was agreed that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited would formalize the movement of the beacons at their cost, by bringing a surveyor who would prepare the survey diagram to reflect the creation of the access road. It was stated that to date, the beacons reflected the agreement establishing the access road.
- 2.10 Still in averring, Catherine Chanda and Mulume Wanshimba Investments (Z) Limited stated that subsequent to the creation of the access road, they proceeded to erect three flats, which were valued at approximately USD550,000.00 and they developed the road access, by putting pavers, cables, stones, game wire and palm trees, all valued at approximately ZMW100,000.00.
- 2.11 Catherine Chanda and Mulume Wanshimba Investments (Z) Limited contended that sometime in 2021, they came to learn that a subdivision near their land namely, Lot 2614/M/E, was sold to Yabbey Shitima, fraudulently and through misrepresentations.

2.12 The particulars of fraud and misrepresentation were stated as:

PARTICULARS OF FRAUD AND MISREPRESENTATION

- i. *Sitembiso Phiri selling Lot 2614/M/E Lusaka to Yabbey Shitima before the placement of a new survey diagram to reflect where the real extent of Lot 2614/M/E ended given the creation of the access roads.*
- ii. *Allowing Yabbey Shitima to effect change of ownership of the property known as Lot 2614/M/E without first allowing Catherine Chanda and Mulume Wanshimba Investments (Z) Limited to effect their interest, namely the access road by replacing the survey diagrams for the property.*
- iii. *Failing to inform Yabbey Shitima of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's interest in the land, namely an access road which had already been constructed.*
- iv. *Yabbey Shitima proceeding to effect change of ownership of Lot 2614/M/E into her names when the survey in the certificate of title required to be placed on the ground which showed the extent of the land.*

2.13 Catherine Chanda and Mulume Wanshimba Investments (Z) Limited alleged that Yabbey Shitima had since been issuing verbal warnings against them, to the effect that the access

road was on her land, and that it should be demolished, when in essence, she found the said road which rightly belonged to Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, as agreed with Behildah Zulu.

- 2.14 They stated that they had constructed three (3) flats which were now occupied by three (3) tenants, who used the access road, and the rentals were a major source of income for Catherine Chanda and Mulume Wanshimba Investments (Z) Limited.
- 2.15 It was contended that Behildah Zulu had been parking her vehicle and using the access road, which enhanced the agreement between the parties, and further that the said access road was constructed in the presence of Behildah Zulu and Sitembiso Phiri, and they should not be allowed to turn away from what they had approved and witnessed.
- 2.16 Catherine Chanda and Mulume Wanshimba Investments (Z) Limited pleaded in the alternative, that should Behildah Zulu, Sitembiso Phiri and Yabbey Shitima refuse and bar Catherine Chanda and Mulume Wanshimba Investments (Z) Limited from using the already constructed access road, Behildah Zulu should be ordered to provide Catherine Chanda and Mulume Wanshimba Investments (Z) Limited an access road as agreed, and that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited should be refunded the sum of approximately ZMW150,000.00 which Catherine Chanda and Mulume Wanshimba Investments (Z) Limited used to construct the access road with interest.

2.17 Catherine Chanda and Mulume Wanshimba Investments (Z) Limited also averred that they had suffered grave inconvenience at the hands of Benhildah Zulu, Sitembiso Phiri and Yabbey Shitima, who had decided to play a deaf ear to their plea, despite having received letters of demand from Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, demanding a right of access to which they were duly entitled and they had suffered damages and special damages.

3. BENHILDAH ZULU'S DEFENCE

- 3.1 In defence, Benhildah Zulu agreed to the descriptions that were given by Catherine Chanda, Mulume Wanshimba Investments (Z) Limited with regard to themselves and herself.
- 3.2 She further admitted that Sitembiso Phiri was at all material times the title holder for Lot 2614/M/E Lusaka. Benhildah Zulu added that Sitembiso Phiri is her step daughter.
- 3.3 It was however her averment, that she was not privy to any agreement that was made, that involved Sitembiso Phiri or that the entire agreement between Catherine Chanda and Mulume Wanshimba Investments (Z) Limited and herself was reduced into writing, in a contract of sale.
- 3.4 The defence was further that Benhildah Zulu was neither privy to nor party to any fraud as alleged.
- 3.5 She contended that she entered into an agreement with Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, for the sale to Catherine Chanda and Mulume

Wanshimba Investments (Z) Limited, a proposed piece of land, which measured approximately 76.72 X 25m. She stated that there was no agreement for the provision of an access road through property which was not owned by her.

- 3.6 Benhildah Zulu still in defence, stated that the proposed subdivision was land, which was next to Lot No. 2614/M/F Lusaka and was earlier sold by herself to Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, and which had an access road.
- 3.7 She stated that the proposed subdivision was created out of Lot No. 2614/M, and Benhildah Zulu denied that there was any movement of the beacons to create an access road.
- 3.8 Further in defence, Benhildah Zulu's averment was that she was neither aware of, nor was she present at the movement of the beacons and creation of any access road.
- 3.9 No comment was made, admitting or denying the alleged threats that were alleged to have been made by Yabbey Shitima to Catherine Chanda and Mulume Wanshimba Investments (Z) Limited as alleged.
- 3.10 Benhildah Zulu's position was that she was never a party to any agreement with Catherine Chanda and Mulume Wanshimba Investments (Z) Limited over the claimed access road.
- 3.11 She further contended that there was no enhancement to the agreement that she made with Catherine Chanda and Mulume Wanshimba Investments (Z) Limited.

- 3.12 With regard to the assertion in the alternative, that should Benhildah Zulu, Sitembiso Phiri and Yabbey Shitima refuse and bar Catherine Chanda and Mulume Wanshimba Investments (Z) Limited from using the already constructed access road, then Benhildah Zulu should be ordered to provide them an access road as agreed, and that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited should be refunded the sum of approximately of ZMW150,000.00 which they used to construct the access road with interest, the defence was that this fell outside the agreement, that was entered into with Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, which agreement was reduced to writing, and was executed by the parties.
- 3.13 Benhildah Zulu made no comment on the assertions that had been made by Catherine Chanda and Mulume Wanshimba Investments (Z) Limited that they had suffered inconvenience.
- 3.14 Her defence was that she honoured her contractual obligations as contained in the agreement, which was reduced to writing. As such, she was not privy to any inconvenience outside the agreement that was duly entered to.
- 3.15 Benhildah Zulu stated that there was an access road to Lot 2614/M/F Lusaka, which Catherine Chanda and Mulume Wanshimba Investments (Z) Limited owned, and that the said Lot 2614/M/F is next to the land on which Catherine

Chanda and Mulume Wanshimba Investments (Z) Limited sought to create an access road.

- 3.16 The defence was that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited had elected not to use the access road, which was duly available to them, but had instead elected to inconvenience third parties to the sale agreement.

4. SITEMBISO PHIRI'S DEFENCE AND COUNTERCLAIM

- 4.1 In her defence, Sitembiso Phiri stated that Benhildah Zulu is her stepmother. Sitembiso Phiri also averred that she was the titleholder to Lot 2614/M/E, situate in the Lusaka Province of the Republic of Zambia.
- 4.2 She denied having ever been a party to, or being aware of a contract to transfer any portion of or grant any access rights on Lot 2614/M/E to Catherine Chanda and Mulume Wanshimba Investments (Z) Limited or Benhildah Zulu.
- 4.3 Sitembiso Phiri's contention was that Yabbey Shitima is and was at all material times, the purchaser of Lot 2614/M/E Lusaka. She disputed that there was fraud in the sale of Lot 2614/M/E to Yabbey Shitima.
- 4.4 Her defence was that she was neither a party to, nor was she made aware of the agreement dated 30th August 2018. As such, Sitembiso Phiri made no comment as to the truthfulness or lack thereof of the contents of the said agreement.
- 4.5 Sitembiso Phiri's defence was that she was the sole legal owner of Lot 2614/M/E Lusaka, and she stated that she was

not a party to, nor was she notified of the moving of beacons as alleged.

- 4.6 She disputed that she was present, and that she consented to any encroachment on Lot 2614/M/E Lusaka.
 - 4.7 Further in her defence, Sitembiso Phiri stated that she was neither party to, nor was she made aware of any such arrangements or that subsequent to the creation of access road, Catherine Chanda and Mulume Wanshimba Investments (Z) Limited proceeded to erect three flats, which were valued at approximately USD550,000.00.
 - 4.8 The same went for the contention that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited developed the road access by putting pavers, cables stones, game wires and palm trees all valued at approximately ZMW100,000.00. Therefore, Sitembiso Phiri made no comment on the truthfulness or lack thereof, of the statement.
 - 4.9 She disputed having made any misrepresentations and being a party to any agreement for Catherine Chanda and Mulume Wanshimba Investments (Z) Limited to acquire any interest in Lot 2614/M/E Lusaka.
 - 4.10 Sitembiso Phiri's defence was that the sale of Lot 2614/M/E Lusaka was done without any fraud, and that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited were not entitled to any notice, as they were not parties to the sale agreement.
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- 4.11 Sitembiso Phiri denied that the access road was constructed in her presence and that she approved any encroachment on to Lot 2614/M/E Lusaka.
- 4.12 It was also her defence that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited did not acquire any rights to Lot 2614/M/E Lusaka, and that no harm accrued to them at her instance.
- 4.13 Sitembiso Phiri counterclaimed the following:
- i. A declaration that the sale of Lot 2614/M/E Lusaka to Yabbey Shitima by Sitembiso Phiri was lawful; and*
 - ii. Costs*
 - iii. Any other relief that the Court may deem fit.*

5. YABBEY SHITIMA'S DEFENCE

- 5.1 Yabbey Shitima in her defence contended that she was a bona fide purchaser for value, without notice of Lot 2614/M/E Lusaka from Sitembiso Phiri.
- 5.2 She denied that she was informed of the provisions of the contract which was now in dispute, repeating that she was a bona fide purchaser for value without notice. Therefore, the allegations of fraud and misrepresentation in her purchasing of Lot 2614/M/E Lusaka from Sitembiso Phiri, was not applicable to them.
- 5.3 Yabbey Shitima stated that it was a fact that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited did not have an easement, to demand a right of passage through her land. She contended that she now owned the

property, and therefore, she decided what developments should be done to it.

5.4 Yabbey Shitima denied that she was liable to pay the amount stated to have been spent on creation of an alternative road, as she was not part of the agreement that was formed.

5.5 Her further contention in defence, was that she was not in breach of any provision in the contract, but she was simply enjoying the quiet possession of her property, as a true owner.

5.6 Yabbey Shitima denied being liable to Catherine Chanda and Mulume Wanshimba Investments (Z) Limited.

6. REPLY TO BENHILDAH ZULU'S DEFENCE

6.1 Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, stated that subsequent to the creation of a contract of sale on 30th August, 2018, they, Benhildah Zulu and Sitembiso Phiri agreed to create the access road in order to facilitate a right of way for the said land, and not as alleged by Benhildah Zulu.

6.2 The reply was further that Benhildah Zulu was a party to the contract of sale dated 30th August, 201,8 as well as to the agreement for the creation of the access road, which was now in dispute.

6.3 It was repeated that Benhildah Zulu and Sitembiso Phiri agreed to create an road access in order to facilitate a right of way to the land.

6.4 It was stated that subsequent to the moving of the beacons, Catherine Chanda and Mulume Wanshimba Investments (Z)

- Limited proceeded to erect three flats, which were valued at approximately USD350,000.00, and they developed the road access by putting pavers, stones, game wires and palm trees.
- 6.5 The addition was that Benhildah Zulu witnessed these developments without any objection whatsoever.
- 6.6 Catherine Chanda and Mulume Wanshimba Investments (Z) Limited averred that Lot 2614/M/F Lusaka did not belong to them as alleged. Their reply was that the contract of sale provided that the secondary access route to the site was to be provided by Benhildah Zulu.
- 6.7 In still replying, Catherine Chanda and Mulume Wanshimba Investments (Z) Limited repeated that they had developed the road access by putting pavers, stones, game wires and palm trees, which were visible to all bystanders, including Benhildah Zulu, whose property was immediately after that for Catherine Chanda and Mulume Wanshimba Investments (Z) Limited.
- 6.8 Catherine Chanda and Mulume Wanshimba Investments (Z) Limited stated that Benhildah Zulu and Sitembiso Phiri had an obligation to inform them of their plan to sell the access road that belonged to them which was developed or at least to settle matters with them before selling it.
- 6.9 The reply was also that Benhildah Zulu was aware of the current status of the land which she sold to Catherine Chanda and Mulume Wanshimba Investments (Z) Limited.
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- 6.10 It was further stated that the contract of sale clearly provided that the secondary access route to the site was to be provided by Benhildah Zulu.
- 6.11 Catherine Chanda and Mulume Wanshimba Investments (Z) Limited averred that they were entitled to an alternative access road, and all the sums that they spent on the development of the already constructed access road, should Benhildah Zulu, Sitembiso Phiri and Yabbey Shitima bar them from using the same.
- 6.12 Catherine Chanda and Mulume Wanshimba Investments (Z) Limited in concluding the reply, stated that Benhildah Zulu had failed to provide a secondary access road to them as provided for in the contract of sale, and that she could not therefore run away from that obligation.

7. REPLY TO SITEMBISO PHIRI'S DEFENCE AND DEFENCE TO HER COUNTERCLAIM

- 7.1 In response, Catherine Chanda and Mulume Wanshimba Investments (Z) Limited stated that Sitembiso Phiri was aware of the contract of sale that was made between Catherine Chanda and Mulume Wanshimba Investments (Z) Limited on the one hand and Benhildah Zulu on the other. The averment was that Sitembiso Phiri physically showed Catherine Chanda and Mulume Wanshimba Investments (Z) Limited where the access road should pass through Lot 2614/M/E Lusaka.
- 7.2 They also stated that Sitembiso Phiri and Yabbey Shitima knew and saw the access road alone, before Sitembiso Phiri

entered into a contract of sale with Yabbey Shitima. Thus, it was fraudulent on the part of both Yabbey Shitima and Sitembiso Phiri to proceed with the sale the property, before settling the matter with Catherine Chanda and Mulume Wanshimba Investments (Z) Limited.

- 7.3 Further averment was made, that Sitembiso Phiri was aware and she personally consented, and gave Catherine Chanda and Mulume Wanshimba Investments (Z) Limited where to construct the access road, and that it was constructed before her eyes, and she even started using the same road.
 - 7.4 Catherine Chanda and Mulume Wanshimba Investments (Z) Limited therefore repeated that it was a misrepresentation for Sitembiso Phiri to proceed to sell the piece of land in question, when there was physical development, namely an access road, which road she had been using to park her car.
 - 7.5 The reply was further that Sitembiso Phiri was in attendance when the construction of the access road was being done, and that if she did not allow the construction of the road, she ought to have stopped the construction of the access road, and not to wait to take the land together with Catherine Chanda and Mulume Wanshimba Investments (Z) Limited developments.
 - 7.6 It was also stated that Sitembiso Phiri could have reported Catherine Chanda and Mulume Wanshimba Investments (Z) Limited for criminal trespass.
 - 7.7 Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's reply was further that Sitembiso Phiri, in the
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presence of Benhildah Zulu, showed Catherine Chanda and Mulume Wanshimba Investments (Z) Limited where the access road should be constructed, and that once the road was constructed, it remained so.

- 7.8 Thus, any costs that were incurred, were at the instance of Sitembiso Phiri and Benhildah Zulu, and Sitembiso Phiri had an obligation to inform Catherine Chanda and Mulume Wanshimba Investments (Z) Limited of her plan to sell her property before the beacons were moved. Thus, it was fraudulent to sell the land together with Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's development.
- 7.9 Catherine Chanda and Mulume Wanshimba Investments (Z) Limited stated that they were entitled to the reliefs sought, and that Sitembiso Phiri had stated how things were discussed, and she even agreed that Benhildah Zulu is her step mother.
- 7.10 In their defence to the counterclaim, Catherine Chanda and Mulume Wanshimba Investments (Z) Limited reiterated their reply, and repeated that the sale of Lot 2614/M/E Lusaka was fraudulently done, in that the sale was done without due regard to the interest that they had, and that they had acquired the rights earlier.
- 7.11 It was again reiterated that they had made sufficient investment on the property, based on the position that was given by Sitembiso Phiri, and the contractual obligation with Benhildah Zulu, being daughter and mother respectively.

- 7.12 Catherine Chanda and Mulume Wanshimba Investments (Z) Limited stated that it was fraudulent on the part of Benhildah Zulu and Sitembiso Phiri to allow Catherine Chanda and Mulume Wanshimba Investments (Z) Limited to develop the access road, and before evicting them if at all, if they never allowed Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, and then proceeded to sell the property in a manner of misrepresentation.
- 7.13 It was stated that Sitembiso Phiri was firstly not a rightful person to be granted Legal Aid, as she had the capacity to retain an independent lawyer, and not at the cost of the tax payers' money, and further that she was not entitled to any costs. The addition was that if there would be any costs, the same should be borne by Benhildah Zulu, her mother.

8. REPLY TO YABBAY SHITIMA'S DEFENCE

- 8.1 In reply to Yabbay Shitima's defence, Catherine Chanda and Mulume Wanshimba Investments (Z) Limited stated that Yabbay Shitima was not an innocent purchaser for value without notice, as she had constructive notice of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's interest, as there was a fully constructed access road long before she purchased the property.
- 8.2 They also contended that Yabbay Shitima had constructive notice of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's interest, as the access road had already been constructed. The averment was that Yabbay Shitima's failure to find out Catherine Chanda and Mulume

Wanshimba Investments (Z) Limited's interest, defeated her defence that she was a purchaser for value without notice.

- 8.3 The assertion was that the further steps that Yabbey Shitima took were fraudulent and a total misrepresentation of the facts on the ground.
- 8.4 Catherine Chanda and Mulume Wanshimba Investments (Z) Limited stated that Benhildah Zulu and Sitembiso Phiri as agreed in the written contract, showed Catherine Chanda and Mulume Wanshimba Investments (Z) Limited the access road, long before Yabbey Shitima purchased the property. Their contention was that selling of the property together with the access road, which would make it impossible for Catherine Chanda and Mulume Wanshimba Investments (Z) Limited to go to their property, was done fraudulently.
- 8.5 It was Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's position, that the said sale should be reversed and Yabbey Shitima's title canceled.
- 8.6 Also averred, was that Yabbey Shitima was unreliable in that she failed to make inquiry on the interest that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited had, when she found that there was an access road which had already been developed. It was stated that Yabbey Shitima contributed to making the steps that were taken.
- 8.7 The reply was also that initially Yabbey Shitima purchased one plot, and at that time, she saw the access road in question. Then later, she purchased the second property from Sitembiso Phiri, and throughout the purchase, she was

aware of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's interest, namely the access road.

9. REPLY TO CATHERINE CHANDA AND MULUME WANSHIMBA INVESTMENT (Z) LIMITED'S DEFENCE TO SITEMBISO PHIRI'S COUNTERCLAIM

9.1 In reply, Sitembiso Phiri maintained her averments as made in the counterclaim against the Catherine Chanda and Mulume Wanshimba Investments (Z) Limited. She joined issue with Catherine Chanda and Mulume Wanshimba Investments (Z) Limited on their defence.

10. EVIDENCE AT TRIAL

10.1 At trial, Catherine Chanda testified, and Catherine Chanda and Mulume Wanshimba Investments (Z) Limited called two (2) other witness. Benhildah Zulu, Sitembiso Phiri and Yabbey Shitima testified in their defence, and they did not call any witnesses.

PW1 - CATHERINE CHANDA

10.2 In her testimony, Catherine Chanda, identified her witness statement, and it was admitted as her testimony.

10.3 Catherine Chanda's testimony as contained in the witness statement, was that she was a Director in the employment of Mulume Wanshimba Investments (Z) Limited. Her evidence was that they were looking for a piece of land to purchase, and they heard that Benhildah Zulu was selling a piece of land.

10.4 Catherine Chanda testified that on 30th August 2018, Mulume Wanshimba Investments (Z) Limited and herself,

entered into a contract of sale with Benhildah Zulu for the sale of a proposed subdivision, measuring approximately 76.72 meters X 25 meters, at the sum of ZMW250,000.00 together with the access road, to enable her and Mulume Wanshimba Investments (Z) Limited access to their property. She stated that the purchase price was paid in full.

- 10.5 Her further testimony was that after signing the contract of sale, she noticed that the contract of sale had not provided for an access road. Thus, she immediately returned to Benhildah Zulu, and they executed a second copy of the contract of sale, because without the access road, they could not buy such a property, because of where it was situated.
- 10.6 In that regard, she referred to the contract of sale and the agreement of sale which were at pages 8 to 12 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents.
- 10.7 In still testifying, Catherine Chanda stated that the proposed subdivision was to be created out of Lot No. 2614/M Lusaka, and in order to facilitate a right of way for the said land, Sitembiso Phiri was engaged by Benhildah Zulu.
- 10.8 Her evidence was that she only came to know about it when Benhildah Zulu took Sitembiso Phiri to show her where the access road was to be constructed. Catherine Chanda added that the discussion was had in the presence of Saidi Chishimba and eventually the bricklayer, who was instrumental in the access road construction.

- 10.9 Further in her testimony, Catherine Chanda's evidence was that when Sitembiso Phiri agreed that the access road could be constructed, it was also agreed that the beacons for subdivision No. L/2614/M/E would be moved to create an road access for them, at the direction of Benhildah Zulu and Sitembiso Phiri.
- 10.10 Thus, Catherine Chanda and Mulume Wanshimba Investments (Z) Limited hired a surveyor who moved the beacons, and produced the sketch-plan, which was merely waiting to be registered. Catherine Chanda added that to date, the beacons were as moved by the surveyor, Charles Simutani. She referred to the survey diagram which was at page 21 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents as evidencing the same.
- 10.11 It was also Catherine Chanda's testimony, that the movement of the beacons did not disadvantage Sitembiso Phiri, as she remained with the same extent of land, as the area where the access road passed, was compensated with, by land which was near the access road to subdivision F of Lot 2614/M, Lusaka.
- 10.12 The evidence that was further given, was that the access road was created in the presence of all the parties to the agreement, including Sitembiso Phiri and Rodrick Chuma, the bricklayer who was spearheading the construction of the access road. She added that it was agreed that they formalize the movement of the beacons at their cost, by bringing a
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surveyor who would prepare the survey diagram to reflect the creation of the access road, and that the beacons would reflect the agreement that was made, establishing the access road.

10.13 Further in her testimony, Catherine Chanda testified that following the creation of the access road, they proceeded to construct three (3) flats, which were valued at USD550,000.00, and they developed the road access by putting pavers, cables, stones, game wires and palm trees, which were all valued at approximately ZMW100,000.00.

10.14 Her evidence was that sometime in 2022, she came to learn that a subdivision near their land, Lot 2614/M/E, was sold to Yabbey Shitima fraudulently and through misrepresentation for the following reasons:

- i. *Sitembiso Phiri selling Lot 2614/M/E Lusaka to Yabbey Shitima before the placement of a new survey diagram to reflect where the real extent of Lot 2614/M/E ended, given the creation of the access road on the ground, which road Sitembiso Phiri was even using;*
- ii. *Allowing Yabbey Shitima to effect change of ownership of the property known as Lot 2614/M/E without first allowing Catherine Chanda and Mulume Wanshimba Investments (Z) Limited to effect their interest, namely the access road;*

- iii. *Failing to inform Yabbey Shitima of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's interest in the land, namely an access road which had already been constructed.*
- iv. *Yabbey Shitima proceeding to effect change of ownership of Lot 2614/M/E into her names, when the survey in the certificate of title required to be placed on the ground.*
- v. *Yabbey Shitima proceeding to buy the said property when she had notice of the beautifully constructed road and without even inquiring from Catherine Chanda, how they had created the road on the piece of land.*

10.15 Catherine Chanda's testimony was that Yabbey Shitima failed to do what a prudent purchaser should do when land that is being bought has some development on it, which was to inquire who had constructed the access road, which, according to her, was to be part of her land.

10.16 It was further her evidence, that instead, Yabbey Shitima started issuing verbal warnings against her through her workers, after she had already changed ownership of the property, stating that the access road was on her land and that it should be demolished, when in essence, she found the said road, which rightly belonged to Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, as agreed with Benhildah Zulu.

- 10.17 In still testifying, Catherine Chanda stated that herself and Mulume Wanshimba Investments (Z) Limited had since constructed three (3) flats, which were occupied by three (3) tenants, who used the access road. The testimony that she further gave, was that the rentals amounting to ZMW19,500.00 per month, were their major source of income. Therefore, the threats to demolish and block the access road was likely to cause them to suffer loss.
- 10.18 Catherine Chanda testified that Benhildah Zulu had been parking her vehicle on her property, and she had been using the access road. Therefore, if it were not agreed, Benhildah Zulu would have stopped the construction of the road particularly the access road, which was constructed in the sight of Benhildah Zulu and Sitembiso Phiri.
- 10.19 It was her evidence that as a result, they should not be allowed to turn away from what they had approved and witnessed.
- 10.20 Catherine Chanda's evidence was that Benhildah Zulu was obligated to provide an access road, and if she resisted the access road that she gave them, then Benhildah Zulu must be ordered to provide them with an access road, as agreed. As pleaded, Catherine Chanda stated that Benhildah Zulu and Sitembiso Phiri should refund them, the sum of approximately over ZMW100,000.00, which they used to construct the access road with interest.
- 10.21 Further testimony was given, that Benhildah Zulu, Sitembiso Phiri and Yabbey Shitima were all aware of the

access road, even those that claimed that they did not sign the contract of sale, and they had been able to see the access road, particularly Yabbey Shitima.

- 10.22 It was Catherine Chanda's evidence that they had suffered grave inconvenience at the hands of Benhildah Zulu, Sitembiso Phiri and Yabbey Shitima, who had decided to play a deaf ear on a matter that the parties would have been able to resolve by a sit down and discussion.
- 10.23 She testified that it was the first contract of sale that Mulume Wanshimba Investments (Z) Limited and herself had executed with Benhildah Zulu, and given where the property is situated, having an access road was a must. Catherine Chanda also stated that she was not the owner of Lot 2614/M/F, as can be seen from the certificate of title, which was at page 30 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents.
- 10.24 Thus, Catherine Chanda's testimony was that it would be fair and just to allow her complete the formalization of the creation of the access road, as agreed to in the contract of sale, which was dated 30th August 2018, and was made between Benhildah Zulu on one hand and Mulume Wanshimba Investments (Z) Limited and Catherine Chanda on the other, and which access road was given to them.
- 10.25 She added that the said access road had already been constructed, and the beacons had been moved.

- 10.26 Catherine Chanda further testified that Yabbey Shitima would still remain with the correct extent of land that she purchased.
- 10.27 The evidence given, was also that it was Catherine Chanda's understanding that the surveyor would only replace the survey diagram in Yabbey Shitima's certificate of title, with what was reflected on the ground. She testified that Yabbey Shitima would not be affected, as she had purchased a property whilst knowing and seeing the developments that were on the property, and she did not qualify to be an innocent purchaser for value.
- 10.28 Catherine Chanda's prayer was that the reliefs sought by Benhildah Zulu, Sitembiso Phiri and Yabbey Shitima's had no basis, and that they should be dismissed. She also prayed that Mulume Wanshimba Investments (Z) Limited and herself, be granted the reliefs sought against Benhildah Zulu, Sitembiso Phiri and Yabbey Shitima in accordance with the claims as issued.
- 10.29 Finally, Catherine Chanda testified that the principal cause of all the disputes, was Benhildah Zulu, who should be bear all the costs and damages, which may be occasioned in this matter.

**CROSS EXAMINATION OF CATHERINE CHANDA BY
COUNSEL FOR BENHILDAH ZULU**

- 10.30 In cross examination, Catherine Chanda testified that she signed the contract of sale, and that her husband was her

witness. Her testimony was that her husband was also present when they negotiated the sale of the land.

10.31 Catherine Chanda further stated that Benhildah Zulu negotiated with her, even though her husband was present.

10.32 She added that the contract of sale was in her name.

**CROSS EXAMINATION OF CATHERINE CHANDA BY
COUNSEL FOR SITEMBISO PHIRI**

10.33 Catherine Chanda's evidence was that Sitembiso Phiri was not party to the contract of sale, but that she was present when the drive way was being allocated to Catherine Chanda.

10.34 Her testimony was that there was an agreement in which Benhildah Zulu and Sitembiso Phiri agreed on the location of the access road. Catherine Chanda further stated that Benhildah Zulu and Sitembiso Phiri were present when she was allocated the access road.

10.35 She agreed that she did not buy the land from Sitembiso Phiri.

**CROSS EXAMINATION OF CATHERINE CHANDA BY
COUNSEL FOR YABBAY SHITIMA**

10.36 Catherine Chanda, with reference to the agreement of sale, which was at page 11 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents, testified that it was the contract of sale, and that no other agreement had been presented before the Court. She agreed that Sitembiso Phiri was not a party to the contract of sale.

- 10.37 In further cross examination, Catherine Chanda testified that when she entered into the contract of sale, she did not lodge a caveat on the property, because it was not important.
- 10.38 She also stated that she did not have an agreement that reflected the creation of an access road to the land. Her position was that Benhildah Zulu told her that they could have an access road before she bought the land, and that it was included in the contract of sale.
- 10.39 Catherine Chanda could not confirm that one plot belonged to her, and that the others belonged to her husband. She testified that there were certificates of title for the neighbouring land. Catherine Chanda added that a trust owned the other property, and her children were some of the people in the trust.
- 10.40 The testimony that was also given, was that her husband managed the trust, and that he was her witness to the contract of sale with Benhildah Zulu.
- 10.41 Catherine Chanda further stated that she could not remember the details of the contract of sale for the trust, but her evidence was that she had an interest in the adjoining land through her children. Her testimony was that the said land, had no access road other than the one that had brought them to Court.
- 10.42 Catherine Chanda denied being the owner of the other land. Her evidence was that she did not have a certificate of title

for the land that she bought, but that she had a contract of sale.

- 10.43 When referred to paragraph 4 of her witness statement, Catherine Chanda's testimony was that it was not correct that in the contract of sale, there was no access road. When cross examined further, she stated that it had no access road.
- 10.44 Catherine Chanda on being referred to the photographs at pages 1 to 3 of the Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents, told the Court that the paved pathway was not there when they entered into the contract of sale, and that there were survey diagrams, when they entered into the contract of sale.
- 10.45 Her evidence was that page 21 of her bundle of documents was the survey diagram that was agreed upon, and that the contract of sale had no attached diagrams.
- 10.46 It was Catherine Chanda's testimony, when she was referred the agreement of sale which was at pages 11 and 12 of the same bundle of documents, that Clause 4 stated that the seller would not be responsible for any service, including water, electricals, sewerage and secondary access routes. She testified that the purchase price in both contracts of sale was the same.

RE-EXAMINATION OF CATHERINE CHANDA

- 10.47 In re-examination, Catherine Chanda stated that the negotiations resulted in an agreed purchase price of ZMW235,000.00, which she paid.
- 10.48 It was her evidence, that Benhildah Zulu and Sitembiso Phiri were present when the access road was created, together with the bricklayer. Catherine Chanda clarified that Sitembiso Phiri did not lose any land as a result of the creation of the access road.
- 10.49 It was also her testimony, that she agreed with Benhildah Zulu and Sitembiso Phiri, that the access road would be as seen on the survey diagram, which was at page 21 of herself and Mulume Wanshimba Investments (Z) Limited's bundle of documents. It was reiterated that with the creation of the access road, Sitembiso Phiri would not lose any land, as her land would move slightly, so that the access road would remain where it was.
- 10.50 With reference to the certificate of title which was in the names of Fatima Saidi Nshimba Chishimba, Chando Chishimba, Metternichi Saidi Nshimba Chishimba Jr, Francis Saidi Chishimba, Nshimba Saidi Chishimba and Metternichi Saidi Nshimba Chishimba the 3rd, which was at pages 29 to 30 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents, Catherine Chanda testified that she did not appear as the owner of the property 2614/M/F.

10.51 Her evidence was that both contracts of sale were before Court.

PW2 – SAIDI METTERNICH CHISHIMBA

10.52 Saidi Metternich Chishimba produced his witness statement as his testimony. In that witness statement, he stated that he was a businessman, and that he witnessed Catherine Chanda and Mulume Wanshimba Investments (Z) Limited buy land from Benhildah Zulu.

10.53 Saidi Metternich Chishimba's witness statement mirrored Catherine Chanda's witness statement, as he testified that he was a witness who was present during the transactions between Catherine Chanda and Mulume Wanshimba Investments (Z) Limited on the one hand, and Benhildah Zulu and Sitembiso Phiri on the other.

10.54 He added that he escorted Catherine Chanda to Benhildah Zulu, and he witnessed the execution of the second copy of the contract of sale, which gave the access road, and particularly, as where the property was situated, it required an access road.

10.55 Reference was made to the contracts of sale which were at pages 8 to 12 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents.

10.56 On other testimony that Saidi Metternich Chishimba gave, he testified that he personally talked to Benhildah Zulu and she agreed to have the access road. He also stated that he was in attendance when Benhildah Zulu took Sitembiso Phiri to show Catherine Chanda and Mulume Wanshimba

Investments (Z) Limited, where the access road was to be constructed, and eventually the bricklayer who was instrumental in the construction of the access road.

- 10.57 Referring to the survey diagram which was at page 21 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents, Saidi Metternich Chishimba's testimony was that it was agreed that the beacons on Subdivision No. L/2614/M/E would be moved to create the access road for Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, at the direction of Benhildah Zulu and Sitembiso Phiri.
- 10.58 His evidence was that thereafter, Catherine Chanda and Mulume Wanshimba Investments (Z) Limited hired a surveyor who moved the beacons, and produced a sketch-plan, which was merely awaiting registration. Like Catherine Chanda, Saidi Metternich Chishimba's evidence was that to date, the beacons were as moved by the surveyor.
- 10.59 He stated that he was informed that Lot 2614/M/E had been sold to Yabbey Shitima, and he was shocked because she could not buy land that had developments on it. It was further his testimony, that any prudent purchaser would inquire about the same to ascertain the interest of the developer.

**CROSS EXAMINATION OF SAIDI METTERNICH
CHISIMBA BY BENHILDAH ZULU**

10.60 When cross examined by Benhildah Zulu, Saidi Metternich Chishimba testified that he did not buy the land from her, stating that Benhildah Zulu dealt with the buyer. He added that God was his witness.

**CROSS EXAMINATION OF SAIDI METTERNICH
CHISIMBA BY COUNSEL FOR SITEMBISO PHIRI**

10.61 Saidi Metternich Chishimba testified that he was a witness to the contract of sale.

10.62 His evidence was that Sitembiso Phiri was not a party to the contract of sale that was executed between Catherine Chanda and Mulume Wanshimba Investments (Z) Limited and Benhildah Zulu, and that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited did not buy any land from Sitembiso Phiri.

**CROSS EXAMINATION OF SAIDI METTERNICH
CHISIMBA BY COUNSEL FOR YABBAY SHITIMA**

10.63 It was Saidi Metternich Chishimba's evidence, that he was not a party to the contract of sale that he witnessed, which contract of sale was for a proposed subdivision.

10.64 He stated that the mother title had a diagram, but there was no diagram for the proposed subdivision, as it was yet to be established as a newly created plot.

10.65 Saidi Metternich Chishimba when referred to the agreement of sale, which was at page 9 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of

documents, testified that the dimensions were indicated as 76.72 meters x 25 meters of bare land, and that the same was also indicated on the other agreement for sale which was at page 11. However, the agreement for sale did not mention any diagrams.

- 10.66 It was Saidi Metternich Chishimba's testimony, when he was referred to the survey diagram, which was at page 21 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents, that he had mentioned that it was dated 4th January 2021 in paragraph 11 (viii), and that it was his witness statement.
- 10.67 Saidi Metternich Chishimba's evidence was that Yabbey Shitima was not informed about the access road which was readily constructed. He told the Court that the land that needed an access road did not have a certificate of title.
- 10.68 He identified page 29 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents as the mother title, stating that all the other plots were created from 2614/M/F/4.
- 10.69 Saidi Metternich Chishimba testified that Fatima Saidi Nshimba Chishimba is his daughter. His evidence was that a Trust of the Chishimbas owned the property, and that they are his children. However, he did not buy the land.
- 10.70 Further in cross examination, Saidi Metternich Chishimba stated that the said property had an access road, and that it was not subject of this action. Rather, the property in dispute was next to the property on title.

10.71 His evidence was that he knew Yabbey Shitima, and that she had a certificate of title as a separate person. His position was that Yabbey Shitima went to the land after Catherine Chanda had bought the property. Thus, she was not aware of the agreement regarding the access road.

10.72 It was also testified that the contracts of sale showed that Yabbey Shitima bought the land after Catherine Chanda and Saidi Metternich Chishimba's evidence, was that he had stated so in paragraph 10 of his witness statement. He added that Catherine Chanda informed him so.

10.73 His evidence was that Catherine Chanda and the Trust bought the land from Benhildah Zulu, and that only the land that was owned by the Trust had an access road.

RE-EXAMINATION OF SAIDI METTERNICH CHISHIMBA

10.74 In re-examination, Saidi Metternich Chishimba clarified that Sitembiso Phiri is a daughter to Benhildah Zulu, and that she witnessed the showing of the access road.

10.75 He also stated that she told him when she was selling the plot that Yabbey Shitima bought.

PW3 -RODRICK CHUMA

10.76 Rodrick Chuma produced his witness statement as his testimony. In his witness statement, he testified that he was a bricklayer who was engaged by Catherine Chanda and Mulume Wanshimba Investments (Z) Limited to construct the road access.

10.77 It was his testimony, that he was in attendance when Sitembiso Phiri and Benhildah Zulu were showing

Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, where the road access should pass. Then thereafter, he started constructing it, and that it was as shown at pages 1 to 7 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents.

10.78 Rodrick Chuma added that various materials, such as pavers, cement, quarry dust, plastic and game wire were used in the construction of the access road.

10.79 He testified that he saw the beacons for Lot 2614/M/E Lusaka being moved to pave way for the development of access road.

10.80 In still testifying, Rodrick Chuma stated that the access road was created in the presence of all the parties to the agreement, including Sitembiso Phiri and Benhildah Zulu.

CROSS EXAMINATION OF RODRICK CHUMA BY BENHILDAH ZULU

10.81 In cross examination, he stated that he had seen Benhildah Zulu in Chalala at Mrs. Saidi's plot. It was his evidence that he could say that it was in New Kasama area, but that he had never spoken with her. Rodrick Phiri testified that he had told the truth.

CROSS EXAMINATION OF RODRICK CHUMA BY COUNSEL FOR SITEMBISO PHIRI

10.82 Rodrick Chuma when referred to paragraph 5 of his witness statement, stated that it was correct. He told the Court that he was engaged to construct the access road.

- 10.83 His evidence was also that he did not see the agreement, but that he was there on the ground. Rodrick Chuma stated that he did not know who signed the document, as he was not there, but he was present with all the parties when the access road was being shown to them, and he was shown where to create it.
- 10.84 It was his testimony that no document was signed in his presence, and he did not know who was living on the land.
- 10.85 On being referred to paragraph 4 of his witness statement, his evidence was that he was shown where the beacons would be, and they were removed. He also stated that he did not know the plot number, but the owner knew it.
- 10.86 It was Rodrick Chuma's testimony that his witness statement was true. He testified that they put beacons for the first time, and they moved the beacons so that they could create the access road.
- 10.87 When cross examined further, Rodrick Chuma changed, testifying that the beacons were there.
- 10.88 His evidence was also that the owner of Lot 2614/M/E was Chishimba Saidi, whom he stated was with Catherine Chanda. He identified Benhildah Zulu in Court, and he stated that Sitembiso Phiri was present when the access road was being shown.
- 10.89 Rodrick Chuma in further cross examination, testified that he was not told that Sitembiso Phiri had refused to be present when the access road was being shown. He was not aware that she did not sign the agreement.

10.90 Rodrick Chuma agreed that his witness statement did not state when the access road was created.

**CROSS EXAMINATION OF RODRICK CHUMA BY
COUNSEL FOR YABBAY SHITIMA**

10.91 Rodrick Chuma, testified, when he was referred to paragraph 5 of his witness statement, that he knew the parties to the agreement, stating that they were Mr. Saidi, Mrs. Saidi and Sitembiso.

10.92 His testimony was that he did not know Yabbay Shitima, and that she was not present at the time the access road was created.

10.93 That marked the close of the case for Catherine Chanda and Mulume Wanshimba Investment (Z) Limited.

DW1-BENHILDAH ZULU

10.94 Benhildah Zulu produced her witness statement as her evidence in Court. In accordance with her witness statement, on 30th August 2018, she entered into an agreement with Catherine Chanda and Mulume Wanshimba Investments (Z) Limited for the sale of 2500 square meters piece of land, being subdivision 2614/M in New Kasama, Lusaka.

10.95 She stated that the sale agreement was reduced into writing.

10.96 Benhildah Zulu testified that at the time the agreement for sale was entered into, Catherine Chanda owned subdivision F of Stand 2614/M in New Kasama, Lusaka, and that an access road was provided to her.

10.97 Her further testimony was that the sale agreement only involved herself and Catherine Chanda, and at no time were Sitembiso Phiri and Yabbey Shitima involved in the agreement process.

10.98 She also stated that the construction of the driveway in dispute was not done with her consent or knowledge, and that she did not own the land on which the driveway was built by Catherine Chanda and Mulume Wanshimba Investments (Z) Limited.

**CROSS EXAMINATION OF BENHILDAH ZULU BY
COUNSEL FOR SITEMBISO PHIRI**

10.99 In cross examination, she was referred to the contract of sale, which was at pages 3 and 4 of her bundle of documents, and she testified that Sitembiso Phiri was not a party to the agreement. Benhildah Zulu's evidence was further that Sitembiso Phiri did not sign the agreement, and she was not listed among the witnesses who were present.

10.100 Benhildah Zulu confirmed that there was no document that showed that Sitembiso Phiri agreed to give any of her land to Catherine Chanda and Mulume Wanshimba Investments (Z) Limited. She recalled the testimony that Catherine Chanda gave.

10.101 Further in cross examination, Benhildah Zulu testified that she did not engage Sitembiso Phiri over the access road, and that it was not there. Her position was that she did not agree that Sitembiso Phiri was present when the access road was being created.

**CROSS EXAMINATION OF BENHILDAH ZULU BY
COUNSEL FOR YABBEY SHITIMA**

- 10.102 Benhildah Zulu testified that the agreement was firstly between herself and Mr. Chishimba, and she signed it.
- 10.103 When she was referred to the contract of sale, which was at pages 1 to 5 of her bundle of documents, her testimony was that at pages 1 and 2, the parties were herself and Catherine Chanda and Mulume Wanshimba Investments (Z) Limited.
- 10.104 It was Benhildah Zulu's evidence, that on the first page of the agreement, it did not relate to Lot 1426/M/E, but that it did so on the second page. She also stated that she had rights to subdivision E, before she sold it. Benhildah Zulu further stated that she has no agreements with Sitembiso Phiri and Yabbey Shitima.
- 10.105 She told the Court that she had no agreement with Sitembiso Phiri over an access road.
- 10.106 On being referred to the agreement of sale which was at page 5 of her bundle of documents in paragraph 4, Benhildah Zulu's testimony was that she verbally specified which land would be used as an access road, because there was one buyer, and not that another road would be created.

**CROSS EXAMINATION OF BENHILDAH ZULU BY
COUNSEL FOR CATHERINE CHANDA AND MULUME
WANSHIMBA INVESTMENTS (Z) LIMITED**

- 10.107 When cross examined by Counsel for Catherine Chanda and Mulume Wanshimba Investments (Z) Limited,

Benhildah Zulu stated that the contract with Catherine Chanda and Mulume Wanshimba Investments (Z) Limited also had verbal terms, which she would also like the Court to consider.

10.108 Her evidence was that she resided close to the property in issue, about 20 meters away, and she could see the developments on it, such as the wall fence and the roof of the flats at a later stage.

10.109 Benhildah Zulu agreed that she was invited to park her motor vehicle in the yard, stating it that had a wall fence, because she had moved into another flat, and her motor vehicle was not safe. She added that she entered the premises through a gate.

10.110 Benhildah Zulu told the Court that Sitembiso Phiri is her daughter, and that she would visit her even at the time in question. It was also her evidence, that to her knowledge Sitembiso Phiri did not park her motor vehicle on the same premises when she went to visit her.

10.111 Her testimony was that Catherine Chanda did not buy the property before Yabbey Shitima. She also stated that Sitembiso Phiri was given the property by her father before Yabbey Shitima bought it from her, and that was before Benhildah Zulu sold property to Catherine Chanda.

10.112 She, however, stated that she would not know when Sitembiso Phiri sold the property to Yabbey Shitima.

10.113 Benhildah Zulu further in cross examination, testified that she was not aware that Sitembiso Phiri had pleaded that

she saw tyre marks on the property, before she sold it to Yabbey Shitima. It was her testimony that the road that she would use to go and park her motor vehicle into the property was the same road in question.

10.114 Benhildah Zulu on being referred to paragraph 7 of her witness statement, testified that she did not have proof that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited owned subdivision F, but that the evidence was the sale.

10.115 When referred to the certificate of title for the Trust, which was at pages 29 and 30 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited bundle of documents, Behildah Zulu's testimony was that it was for subdivision F of Lot No. 1426/M. She added that looking at page 30, it did not have Catherine Chanda's name.

10.116 She also stated that it did not have Saidi Chishimba's name, but that there was a Chishimba.

10.117 Benhildah Zulu testified that paragraph 7 of her witness statement was not correct.

10.118 It was further her evidence, when she was referred to the agreement of sale which was at page 4 of her bundle of documents, in paragraph 4, that it did not state that she would provide an access road for Catherine Chanda, but that she would provide a secondary access to the site as seller.

10.119 When further referred to the photograph which was at page 1 of Catherine Chanda and Mulume Wanshimba

Investments (Z) Limited's bundle of documents, Benhildah Zulu testified that it was the access road to the property in question, but that it was not well built with pavers as she left it. Her evidence was further that she had not been there, but she used to use it, when she was going to park her motor vehicle, before it was paved.

10.120 Benhildah Zulu stated that when she would use the access road to go and park her vehicle, she would speak with the man who was responsible for opening the gate, and that she was also on talking terms with Catherine Chanda.

10.121 Her continued testimony was that she was in Court when Catherine Chanda and Rodrick Chuma testified. Her position was that she was confused when Rodrick Chuma testified about the verbal agreement, because there was no such agreement.

10.122 It was Benhildah Zulu's evidence that she did not report them to the police, and that to her knowledge, nor did Sitembiso Phiri, for trespassing, when they used the access road.

10.123 Benhildah Zulu stated that Yabbey Shitima bought property that was a combination of properties from her two children, Sitembiso Phiri and Pauline Lungu Phiri, but she did not know if Pauline Lungu Phiri had sold her property earlier.

10.124 When referred to the survey diagram which was at page 21 of the Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents, Benhildah

Zulu's testimony was that she resided on the remainder of Lot 2614/M, and that adjacent to it, was the property in issue, and that the access road was labeled as a road reserve.

10.125 She further stated that she had seen the proposed subdivision B, which belonged to Pauline Lungu Phiri, and it was on the other side. Benhildah Zulu, however, testified that she did not see the extent of the land that Sitembiso Phiri sold to Yabbey Shitima.

10.126 She told the Court that Pauline Lungu Phiri and Sitembiso Phiri's land was back-to-back, and without an access road.

10.127 It was testified that there was no verbal agreement in addition to the written contract.

RE-EXAMINATION OF BENHILDAH ZULU

10.128 In re-examination, Benhildah Zulu clarified that the verbal agreement was that Sitembiso Phiri would be using the initial access road. She described the distance between her house and the main road, as from the courtroom to the High Court roundabout.

10.129 Benhildah Zulu with reference to the certificate of title for the Trust, which was at page 30 of the Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents, testified that Catherine Chanda did not appear on that certificate of title.

10.130 That marked the close of the case for Benhildah Zulu.

DW2 – SITEMBISO PHIRI

- 10.131 Sitembiso Phiri identified and produced her witness statement as her evidence in chief. In her witness statement, she testified that in 2003 her father, Grave McAdam Phiri, gave her land which measured 2500 square meters in New Kasama.
- 10.132 She testified that she proceeded to follow the due process for having the land marked off as Subdivision E of Lot 2614/M, on diagram number 24337/2015, which was dated 3rd December 2015, and she acquired a title deed number 23095 in her name.
- 10.133 Sitembiso Phiri further testified that she held the title deed for the land, and she did not sell it or give any rights to the land until sometime in November 2019, when she decided to sell the land to Yabbey Shitima.
- 10.134 Her evidence was that on showing the land to Yabbey Shitima, she noticed car tyre tracks on the bare land constituting her land, Subdivision E of Lot 2614/M, stating that the tyre tracks led to the piece of land, which was next to her land.
- 10.135 Sitembiso Phiri further stated that she noticed that one of the beacons on her land had been removed. Her evidence was that she confronted Catherine Chanda, demanding that she does not temper with her land, and she also informed Catherine Chanda that she was selling the land to Yabbey Shitima.

10.136 Further in her testimony, Sitembiso Phiri testified that she did not allow Catherine Chanda and Mulume Wanshimba Investments (Z) Limited to use her land in any way, and she proceeded to sell the land to Yabbey Shitima, sometime towards the end of November 2019.

10.137 Her evidence was that she was surprised to later learn from Yabbey Shitima, that Catherine Chanda had proceeded without consent to pave a portion of the land, being Subdivision E of Lot 2614/M as a driveway, and to see Court proceedings being instituted against her.

10.138 Sitembiso Phiri's testimony was that she duly acquired the land, constituting Subdivision E of Lot 2614/M, and that she duly sold it to Yabbey Shitima without any encumbrances.

**CROSS EXAMINATION - OF SITEMBISO PHIRI BY
COUNSEL FOR BENHILDAH ZULU**

10.139 On being cross examined, Sitembiso Phiri's evidence was that she owned subdivision E of Stand No. 1426/M, but she sold it. She stated that she obtained a certificate of title for the property, save for Yabbey Shitima whom she sold it to.

10.140 Her testimony was that she was not there when Catherine Chanda and Mulume Wanshimba Investments (Z) Limited and Benhildah Zulu entered into the contract of sale.

10.141 It was also Sitembiso Phiri's testimony, that she was not privy to the agreements that were made between them for

the creation of any access road, and that she did not get surveyors to survey the land that had been built on.

**CROSS EXAMINATION OF SITEMBISO PHIRI BY
COUNSEL FOR YABBEY SHITIMA-MUBIANA**

10.142 Sitembiso Phiri, when referred to the contract of sale which was at pages 8 to 12 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundles of document, stated that she was not a party to those agreements, and that she was not consulted on an access road being built for Catherine Chanda and Mulume Wanshimba Investments (Z) Limited on her property.

10.143 Her evidence was that she had sole ownership of Subdivision E of Lot 2614/M, before she sold it to the Yabbey Shitima.

10.144 She further stated that prior to selling that land to Yabbey Shitima, she did not give anyone a right of way or easement.

**CROSS EXAMINATION OF SITEMBISO PHIRI BY
COUNSEL FOR YABBEY SHITIMA- MWANZA**

10.145 It was Sitembiso Phiri's testimony, when she was referred to paragraph 8 of her witness statement, that the tyre marks were on bare land, and that when she sold the land, no one was constructing a road on it.

10.146 Her evidence was further that someone tampered with the beacons on her land.

10.147 Sitembiso Phiri testified that she even confronted Catherine Chanda and Mulume Wanshimba Investments

(Z) Limited in 2021, as they did not have permission to be on her land.

10.148 It was her testimony, that she did not report them to the police, as there was no development on the land.

10.149 Sitebiso Phiri explained that when she got her certificate of title between 2015 to 2016, there was a survey diagram and that she did not alter the survey diagram at any point, even when it was done.

10.150 Her evidence on being referred to the survey diagram which was at page 21 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents, was that she was aware of the proposal because the land was given to them by their father, and as the older child, she had stated that they should contribute money, and they had the land surveyed, and they obtained title.

10.151 Her evidence was that she did not suggest that an access road be placed on her land, because it was hers, and that she did not discuss the issue of the access road on her land with anyone.

10.152 Sitebiso Phiri testified, when she was referred to paragraph 12 of her witness statement, that she discovered the driveway that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited had constructed, when she was sued in Court, and after she had sold the land.

**CROSS EXAMINATION OF SITEMBISO PHIRI BY
COUNSEL FOR THE CATHERINE CHANDA AND
MULUME WANSHIMBA INVESTMENTS (Z) LIMITED**

- 10.153 In further cross examination, Sitembiso Phiri stated that she did not know Catherine Chanda, but she had known Saidi Chishimba for about 10 years through a mutual friend. Her evidence was that she did not offer him to buy a property. When cross examined further, Sitembiso Phiri however, testified that she had offered him to buy the land casually, but it was not a serious conversation, and at an amount that she could not recall.
- 10.154 It was her testimony, when she was referred to paragraph 8 of her witness statement, that she saw tyre marks on bare land, and that a beacon had been moved on her land. Sitembiso Phiri testified that she was not present when the beacon was removed, but the cement was fresh and she was confused, because she did not pass through there frequently.
- 10.155 Her evidence was that the fresh cement was for the beacon that was removed, and that a new beacon had been mounted which had fresh cement.
- 10.156 Sitembiso Phiri's testimony was that she had never confronted Catherine Chanda, and that she only saw her at Court, but she had never spoken with her.
- 10.157 Her evidence when she was referred to paragraph 9 of her witness statement, was that she had confronted Mr. Chishimba and Catherine Chanda, as stated in her

witness statement. Sitembiso Phiri stated that Mr. Chishimba was Catherine Chanda's husband, and she had asked him what was going on.

10.158 It was also Sitembiso Phiri's evidence that she did not leave her property under his care, and it was the caretaker Emmanuel who told her about Mr. Chishimba.

10.159 Her evidence was that Emmanuel was Benhildah Zulu's caretaker for the main farm, and he had told her that Saidi Chisimba had removed the beacon, but not for the purpose of putting an access road. Sitembiso Phiri's evidence was also that Mr. Chishimba had informed her that he had taken the surveyors to the property.

10.160 On being referred to the survey diagram which was at page 21 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents, Sitembiso Phiri stated that it was a proposed survey diagram.

10.161 She also testified that she told Mr. Chisimba that she wanted to sell the property, and when she sold the property to Yabbey Shitima, she knew that the beacons on her property had been tampered with.

10.162 It was stated that Sitembiso Phiri did not know that her mother had sold a piece of land to Catherine Chanda.

10.163 Sitembiso Phiri further in cross examination, testified that she had never parked her car at the property in question, but at her property, when she was cultivating. Her evidence was that she never used to go to Catherine

Chanda's property, because she had no relationship with her, and she had her own space at her property.

10.164 The testimony that she gave, when she was referred to pages 4 to 5 of Benhildah Zulu's bundle of documents, was that it was a contract of sale between Benhildah Zulu, Catherine Chanda and another person.

10.165 As to the date on the document, Sitembiso Phiri's evidence was that it was 30th August 2018, at page 5.

10.166 When referred to page 11 of her witness statement, it was Sitembiso Phiri's testimony that it stated that she sold the land to Yabbey Shitima towards the end of November 2019. She testified that the sale of the land to Catherine Chanda, was over a year before, she sold her land to Yabbey Shitima.

10.167 That marked the close of the case for Sitembiso Phiri.

DW3 – YABBEY SHITIMA

10.168 Yabbey Shitima identified and produced her witness statement as her testimony. She stated therein, that she was the owner of Sub E of Lot 2614/M, which she legally purchased from Sitembiso Phiri. Her evidence was that a copy of the title was at pages 1 to 3 of her bundle of documents.

10.169 In further testifying, Yabbey Shitima stated that she was not aware of the access road at the time of the purchase, and more so a tarred road, stating that there was no such road, but a mere bush at the time that she bought the piece of land.

- 10.170 She further testified that there was no caveat that was registered on the property to indicate any interest in the property.
- 10.171 Yabbey Shitima, also testified that she was not a party to the agreement that was made between Catherine Chanda and Mulume Wanshimba Investments (Z) Limited and Benhildah Zulu. As such, she was not bound by its terms.
- 10.172 Her evidence was that she did not know about the existence of the access road condition, as Sitembiso Phiri did not include such a condition in the contract of sale. Therefore, she did not purchase the property through fraudulent means as alleged or at all.
- 10.173 Yabbey Shitima stated that effecting the change of Lot 2614/M/E into her name was not a fraudulent act as purported, due to the fact that there was no notice given to her in that regard by Sitembiso Phiri.
- 10.174 She went on to state that the request being made was that there should be no inconvenience caused, and in order for the other tenants to enjoy their properties, an alternative solution must be considered.
- 10.175 However, her testimony was that she was not obligated to refund Catherine Chanda and Mulume Wanshimba Investments (Z) Limited for the alternative that would be provided, owing to the reasons alluded to earlier, and that any inconvenience that was experienced by Catherine Chanda and Mulume Wanshimba Investments (Z) Limited should not be borne by her.

10.176 It was further Yabbey Shitima's evidence that the issue in the present case, was purely one between Catherine Chanda and Mulume Wanshimba Investments (Z) Limited and Behildah Zulu, and it did not concern her. Her testimony was also that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited had no recourse against her or the land.

**CROSS EXAMINATION OF YABBEY SHITIMA BY
COUNSEL FOR BEHILDAH ZULU**

10.177 There was no cross examination.

**CROSS EXAMINATION OF YABBEY SHITIMA BY
COUNSEL FOR SITEMBISO PHIRI**

10.178 In cross examination, Yabbey Shitima, on being referred to the survey diagram which was page 21 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents, testified that she was not sure that she had seen that document before. She stated that she had not seen an approved survey diagram that had an access road on the land that she purchased.

10.179 Her evidence when further referred to the photograph which was at page 1 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents, which showed the access road, was that when she bought Sub E of Lot 2614, the developments which were at page 1, were not on the land.

10.180 She testified, when she was referred to pages 1 to 3 of her bundle of documents, that it was a certificate of title for

her land, and that no one apart from Catherine Chanda had stated that she had obtained the certificate of title fraudulently.

10.181 Yabbey Shitima testified that she took all the steps to obtain a certificate of title.

**CROSS EXAMINATION OF YABBEY SHITIMA BY
COUNSEL FOR CATHERINE CHANDA AND MULUME
WANSHIMBA INVESTMENTS (Z) LIMITED**

10.182 It was her testimony that she bought Sub E in 2019, in a month that she could not recall. Yabbey Shitima testified that she had extensive discussion with Sitembiso Phiri before she bought the land.

10.183 She agreed that she also bought land from Pauline in 2019, in a month that she could not recall.

10.184 Yabbey Shitima further agreed that she had heard Sitembiso Phiri's testimony. However, she could not confirm that Sitembiso Phiri had testified that the beacons had been tempered with, when she bought the land. Her evidence was that she heard, but could not verify.

10.185 Still in cross examination, Yabbey Shitima stated that she did not recall seeing tyre marks leading to Catherine Chanda's property.

10.186 Her testimony was further that she did not assign any employee to tell Catherine Chanda to remove the access road, stating that she only saw her in Court.

10.187 It was her evidence that it was inaccurate to state that she saw the access road being constructed on her property.

Yabbey Shitima testified that the access road was not there when she bought the property.

10.188 She told the Court, when she was referred to the photograph which was at page 1 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents and, which depicted the access road, that the road was not there when she bought the property. Her testimony was that it was constructed after she had bought the land, but that it was not constructed in her presence.

10.189 Further in cross examination, Yabbey Shitima testified that she did not live there, so she would not go there regularly. She explained that she only went there and found that the access road had been constructed. Her evidence was that she did not report to the police, and she denied that this was so, because she found the road there.

10.190 Yabbey Shitima stated that she was not refusing the access road because she wanted her land to be back-to-back, testifying that she bought the land as a whole, and not in two pieces, and that it totaled 100 x 100.

10.191 She agreed that she had not brought the plan and the certificate of title.

10.192 That marked the close of Yabbey Shitima's case.

11. DECISION OF THIS COURT

11.1 I have considered the evidence and submissions that were filed by the parties.

FACTS NOT IN ISSUE

- 11.2 The facts that are common cause are that Benhildah Zulu is the step mother to Sitembiso Phiri. It is also not in contention that Benhildah Zulu had an interest in the property known as Lot No 2614/M, while Sitembiso Phiri had an interest in the property known as Lot No 2614/M/E.
- 11.3 It is not in dispute that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited have an interest in the property known as Lot 2614/M, having executed two agreements for the sale of the land with Benhildah Zulu on 28th August 2018 and 30th August, 2018.
- 11.4 It is common cause that Sitembiso Phiri sold the property Lot 2614/M/E to Yabbey Shitima who acquired a certificate of title for the said property. The facts that are also not in contention, are that Yabbey Shitima is now the legal owner of the property known as Lot 2614/M/E.

ISSUES IN DISPUTE

- 11.5 The issues in dispute are whether it was agreed that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited would be given an access road to the property that they bought from Benhildah Zulu, through Sitembiso Phiri's property before it was sold to Yabbey Shitima.
- 11.6 It is also in issue, is whether Sitembiso Phiri fraudulently sold her property to Yabbey Shitima.
- 11.7 The facts which are further in dispute are whether Yabbey Shitima is a bona fide purchaser for value without notice of

Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's interest in her property.

ANALYSIS

WHETHER CATHERINE CHANDA AND MULUME WANSHIMBA INVESTMENTS (Z) LIMITED WERE GRANTED AN ACCESS ROAD

- 11.8 Catherine Chanda testified that she entered into a contract of sale with Benhildah Zulu, for a proposed subdivision of Lot 2614/M on 30th August 2018. She stated that the first contract did not have provision for an access road. However, it was a term of the second contract of sale, that an access road would be provided by Benhildah Zulu.
- 11.9 She further testified that Benhildah Zulu engaged Sitembiso Phiri on the issue of the access road, and when Sitembiso Phiri agreed to the construction of the access road, it was agreed that the beacons on Sitembiso Phiri's property, L/2614/M/E, be moved to create the said access road.
- 11.10 That was how the access road was created in the presence of all the parties, and Catherine Chanda proceeded to erect three flats on her property. She testified, that however she came to learn that a subdivision near their land, being Lot 2614/M/E, had been sold to Yabbey Shitima fraudulently and through misrepresentation.
- 11.11 Saidi Metternich Chishimba reiterated Catherine Chanda's testimony. He stated that he witnessed the signing of the contract of sale between Catherine Chanda and Mulume

Wanshimba Investments (Z) Limited and Benhildah Zulu, which gave them an access road.

- 11.12 His evidence was also that he was in attendance when Benhildah Zulu took Sitembiso Phiri to show Catherine Chanda and Mulume Wanshimba Investments (Z) Limited where the access road was to be constructed, and that the discussion was had in his presence, and eventually the brick layer who was instrumental in the construction of the access road.
- 11.13 Saidi Metternich Chishimba further stated that it was agreed that the beacons would be moved to create the access road and Catherine Chanda and Mulume Wanshimba Investments (Z) Limited hired a surveyor who moved the beacons, and produced a sketch plan that was awaiting registration.
- 11.14 He told the Court that the access road was created in the presence of all the parties, including himself, Sitembiso Phiri and Rodrick Chuma, the bricklayer.
- 11.15 Rodrick Chuma testified that he was engaged by Catherine Chanda and Mulume Wanshimba Investments (Z) Limited to construct the access road. He also stated that he was in attendance when Sitembiso Phiri and Benhildah Zulu were showing Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, where the access road should be constructed.

- 11.16 Rodrick Chuma further stated that he saw the beacons for Lot 2614/M/E Lusaka being moved to pave way for the development of the access road.
- 11.17 In her defence, Benhildah Zulu, admitted that she entered into a contract of sale with Catherine Chanda and Mulume Wanshimba Investments (Z) Limited. Her testimony was that at the time of the agreement, Catherine Chanda owned Subdivision F of Lot 2614/M, and an access road was provided to her. She, however, stated that in relation to the driveway in question, Catherine Chanda and Mulume Wanshimba Investments (Z) Limited constructed it without her consent and knowledge.
- 11.18 She denied that Sitembiso Phiri was engaged over the access road, or that she was present when the access road was being made. When referred to her bundle of documents, Benhildah Zulu testified that the first page of the agreement did not refer to Subdivision E of Lot 2614/M, but that the second page did. Further that she had rights over it before she sold it.
- 11.19 Benhildah Zulu also testified that she verbally specified which road would be used as an access road, because there was one buyer, and not that another road would be created. In relation to the access road in question, she stated that she used it when she was going to park her motor vehicle, but it was not well built with pavers when she left it.
- 11.20 Sitembiso Phiri on the other hand, testified that she had noticed that one of the beacons on her land had been

removed. Thus, she had confronted Catherine Chanda, demanding that she should not temper with her land.

- 11.21 It was further her evidence, that she did not allow Catherine Chanda and Mulume Wanshimba Investments (Z) Limited to use her land in any way.
- 11.22 Sitebiso Phiri also stated that she was surprised to later learn from Yabbey Shitima, that Catherine Chanda had proceeded without consent to pave a portion of the land, Lot 2614/M/E, as a driveway.
- 11.23 Sitebiso Phiri testified that she was not privy to any agreements for the access road, and that prior to selling her property to Yabbey Shitima, she did not give anyone a right of way or easement.
- 11.24 Yabbey Shitima in her defence, testified that she was not aware of the access road at the time she purchased the property, stating that there was a bush and no access road. Her testimony was also that there was no condition about an access road in her contract of sale.
- 11.25 Yabbey Shitima told the Court that she was not sure if she had seen the survey diagram which was at page 21 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents. She further stated that the developments as shown on the photograph which was at page 1 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents were not on the land when she purchased it.

- 11.26 In their submissions, Catherine Chanda and Mulume Wanshimba Investments (Z) Limited stated that the contract of sale which was at pages 8 to 10 of their bundle of documents, demonstrated that Benhildah Zulu agreed to provide an access road, which was given to them with the consent of Sitembiso Phiri. They submitted that Benhildah Zulu would even use it, which showed that it was approved.
- 11.27 In support of that submission, they relied on the case of ***Printing and Numerical Company v Sampson*** ⁽¹⁾ where it was decided that:
- “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 their contract when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.”***
- 11.28 The submission was also that Benhildah Zulu had a contractual obligation to provide the access road to Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, whether it was the already provided access road or any other access road.
- 11.29 It was further stated that the piece of land that was purchased, is located at a place that could only be accessed using the current developed access road.
- 11.30 The case of ***National Drug Company Limited and Zambia Privatization Agency v. Mary Katongo*** ⁽⁸⁾ was also relied on where the Supreme Court held that:

“It is trite law that once the 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.”

- 11.31 Still in submission, Catherine Chanda and Mulume Wanshimba Investments (Z) Limited stated that if there was any difference in the contents of the contract of sale, then the difference could only be against the vendor, who was the owner of the document.
- 11.32 It was stated that Benhildah Zulu’s argument that she did not give Catherine Chanda and Mulume Wanshimba Investments (Z) Limited the access road should not be accepted, because Benhildah Zulu was using the said access road, and she could not, now, turn and say that she did not know a well-developed road.
- 11.33 The further submission was that the evidence of the witnesses showed that the parties were aware of the provision of the access road, and that Sitembiso Phiri in her evidence, agreed that she saw the road, and that the beacons on her property were moved to pave way for the access road.
- 11.34 It was also stated that Yabbey Shitima admitted that at the time that she purchased the property from Sitembiso Phiri,

the beacon had already been moved for the purpose of the access road.

- 11.35 Therefore, it was submitted that the sale between Sitembiso Phiri and Yabbey Shitima was done with the full knowledge that there was a third party who had interest within the property in question.
- 11.36 It was also submitted that Sitembiso Phiri admitted that when she saw that the beacon had been moved, she did not report to the police or take up any action as any person would if the beacon was moved by a person that she knew on the property. Thus, that demonstrated that Sitembiso Phiri permitted them to move the beacon at their cost.
- 11.37 On the other hand, Sitembiso Phiri's submission was that she did not transfer any interest in her land to Catherine Chanda and Mulume Wanshimba Investments (Z) Limited. Her submission was that such a transfer was required to be in writing, as provided by **Section 4 of the Statute of Frauds 1677**.
- 11.38 She relied on the case of ***Mijoni v Zambia Publishing Company Limited*** ⁽⁶⁾ in support of that submission, and stated that the totality of the evidence which had been laid before this Honourable Court, showed that there was nothing in writing to that effect.
- 11.39 Therefore, it was not tenable for Catherine Chanda and Mulume Wanshimba Investments (Z) Limited to claim that such an interest was granted to them through oral evidence.

- 11.40 Further submission was made, that the absence of Sitembiso Phiri's signature as a party or witness on the documents, supported her position, that she was not present or privy to the agreement.
- 11.41 She stated that in any case, the agreements did not relate to her land. Sitembiso Phiri also relied on the doctrine of privity of contract, stating that she could not be liable under such a contract.
- 11.42 Yabbey Shitima in her submissions, also placed reliance on the doctrine of privity of contract, quoting from the learned authors of ***Contract Law in Zambia, by Sangwani Patrick Ng'ambi and Chanda Chungu, Second Edition, Juta and Company (Pty) Limited, 2021***, who define it as follows at page 145:
- “The doctrine of privity means that a contract cannot, as a general rule, confer rights or impose obligations arising under it on any person except the parties to it.”***
- 11.43 It was submitted that the contract of sale was between Catherine Chanda and Mulume Wanshimba Investments (Z) Limited and Benhildah Zulu and Yabbey Shitima could not, therefore be sued or compelled to perform obligations which she was not aware of.
- 11.44 It was also stated that Sitembiso Phiri, who lawfully conveyed the land to Yabbey Shitima, was not party to the contract of sale, and the subsequent purported agreement between

Catherine Chanda and Mulume Wanshimba Investments (Z) Limited and Benhildah Zulu.

- 11.45 A perusal of the documents on record, show that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited and Benhildah Zulu entered into two (2) contracts of sale, one dated 23rd August 2018, and the other dated 30th August 2018.
- 11.46 The contract of sale which is at pages 8 to 10 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents, and is dated 30th August, 2018, shows that Benhildah Zulu offered to sell 76.72m x 25m bare land, a Subdivision of Stand 2614/M in New Kasama area, to Catherine Chanda and Mulume Wanshimba Investments (Z) Limited.
- 11.47 The Clause in that contract of sale which is of particular interest in this matter, is Clause 4 which provided as follows:
- “that the seller shall not be responsible to provide any service thus including water, electricity, sewerage but secondary access route to the site will be provided by the seller. The land in mention is sold as is and whereas.”***
- 11.48 The contract of sale which is at pages 11 to 12 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents, and is dated 23rd August, 2018, shows that Benhildah Zulu offered to sell 77m x 25m of bare land, a Subdivision of Stand 2614/M New Kasama to Catherine Chanda and Mulume Wanshimba Investments (Z) Limited.

11.49 In that contract of sale, Clause 4 stated that:

“THAT THE SELLER SHALL NOT BE RESPONSIBLE TO PROVIDE FOR ANY SERVICE THUS INCLUDING WATER, ELECTRICITY, SEWERAGE AND SECONDARY ACCESS ROUTES TO THE SITE. THE LAND IN MENTION IS SOLD AS IS AND WHEREAS”

11.50 The contracts of sale, corroborate the evidence and pleading by Catherine Chanda and Saidi Metternich Chishimba that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited entered into a contract of sale with Benhildah Zulu, but it did not provide for an access road. Therefore, a second contract of sale which is at pages 8 to 10 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited’s bundle of documents, was entered into, which had a provision to provide an access road, as the first contract which is at pages 11-12 of the said bundle of documents did not.

11.51 In her testimony, Benhildah Zulu admitted that she entered into a contract of sale with Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, stating that Catherine Chanda owned Subdivision F of Lot 2614/M, and that an access road was provided to her.

11.52 She, however, stated that in relation to the driveway in question, Catherine Chanda and Mulume Wanshimba Investments (Z) Limited constructed it without her consent and knowledge. Her testimony was that an access road was provided as stated in the contract of sale.

- 11.53 The contract of sale which is at pages 8 to 10 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents, therefore, on the face of it establishes that it was an obligation for Benhildah Zulu to provide a secondary access route to the site, and that the land was sold on an as is and whereas basis.
- 11.54 The wording of contract to the effect that the land was being sold on an as is basis, was that it was sold on the basis of its' physical condition, as at the time of the agreement, which the buyers Catherine Chanda and Mulume Wanshimba Investments (Z) Limited had accepted, but that Benhildah Zulu was obligated to provide a secondary access route.
- 11.55 Catherine Chanda testified that following the creation of the access road, they proceeded to construct three (3) flats and they developed the access road by putting pavers, cable stones, game wires and palm trees.
- 11.56 Benhildah Zulu, in her testimony, stated that an road access was provided to Catherine Chanda, but the driveway in question was constructed without her consent and knowledge.
- 11.57 A perusal of the documents which are on record and, in particular, the photographs which are at pages 1 to 7 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents, show that the access road in question, as well as the flats were constructed by Catherine Chanda and Mulume Wanshimba Investments (Z) Limited.
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- 11.58 Benhildah Zulu alleged that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited were provided with an access road, which by virtue of the second contract of sale, she was obligated to provide.
- 11.59 However, it will be noted that whilst alleging that she did in fact provide the secondary access route, Benhildah Zulu failed to show where that secondary access route was that she provided, and thereby rebut Catherine Chanda and Mulume Wanshimba Investments (Z) Limited that it was the access road which is in contention, and which is on the land that Sitembiso Phiri sold to Yabbey Shitima.
- 11.60 It is trite that a party alleging a disputed fact must provide evidence to prove that fact, and this principle was stated in the cases of ***Wilson Masauso Zulu v Avondale Housing Project Limited*** ⁽⁵⁾ and ***Khalid Mohammed v The Attorney General*** ⁽⁴⁾.
- 11.61 In this matter, Benhildah Zulu did not provide any evidence to support the allegation that an access road or a secondary access route was provided to Catherine Chanda and Mulume Wanshimba Investments (Z) Limited.
- 11.62 In relation to the access road or driveway in question however, Benhildah Zulu testified that it was constructed without her knowledge and consent.
- 11.63 When referred to the contracts of sale which are at pages 8 to 12 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents, Sitembiso

Phiri stated that she was not consulted on the building of an access road on her property.

11.64 She also testified that prior to selling her property to Yabbey Shitima, she did not give anyone a right of way or easement. Sitembiso Phiri, however, told the Court that she had noticed that one of the beacons on her land had been removed, and she had confronted Catherine Chanda, demanding that she did not temper with her property.

11.65 When further cross examined, about confronting Catherine Chanda on the movement of the beacon, Sitembiso Phiri stated that she did not confront her or speak with her. She also testified that she only saw Catherine Chanda at Court. However, when referred to paragraph 9 of her witness statement, Sitembiso Phiri stated that she had confronted Catherine Chanda and Saidi Metternich Chishimba as stated in her witness statement.

11.66 Sitembiso Phiri admitted having known Saidi Metternich Chishimba for about 10 years, and her evidence was that she had casually offered him to buy the property, but it was not a serious conversation.

11.67 When referred to paragraph 8 of her witness statement, Sitembiso Phiri's evidence was that a beacon was removed moved from her land, but that she was not present when it was removed. However, there was fresh cement where the beacon had been removed, and a new beacon with fresh cement had been mounted. Nevertheless, she was confused because she did not frequently use that route.

- 11.68 The evidence on record shows that Sitembiso Phiri was aware that a beacon had been removed from her land, and that another one had been mounted in another position.
- 11.69 What is noteworthy, is that Sitembiso Phiri was inconsistent in her testimony in relation to having confronted Catherine Chanda about the movement of a beacon on her land, as initially she testified that she did not confront Catherine Chanda and that she only saw her in Court.
- 11.70 However, when she was cross examined further, and she was referred to her evidence in her witness statement, she settled on the position that she had confronted both Catherine Chanda and her husband, Saidi Metternich Chishimba, on the movement of the beacon on her land.
- 11.71 Sitembiso Phiri, when referred to the survey diagram which was at page 21 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents which Catherine Chanda stated was agreed upon by the parties, testified that she was aware of the survey diagram, because the land was given to them by their father, and they had to contribute to have the land surveyed and they obtained title.
- 11.72 When further cross examined, she referred to the survey diagram as a proposed survey diagram.
- 11.73 The said survey diagram is dated 4th January 2021, and it is titled '*Proposed Subdivision and Replaning of Sub E of Lot 2614/M Lusaka Province Scale 1:1250.*' It shows the proposed 76.72m x 25m which is referred to in the contract of sale that Benhildah Zulu executed with Catherine Chanda and

Mulume Wanshimba Investments (Z) Limited, is right next to Lot 2614/M/F.

- 11.74 The survey diagram also shows a road reserve that goes to the said proposed subdivision, which is in between subdivisions D and E of Lot 2614/M.
- 11.75 It will be noted that Benhildah Zulu was also referred to the said survey diagram at page 21, and she testified that she resided on the remainder of Lot 2614/M, and that adjacent to it, was the property in issue, and that the access road was labeled as a road reserve.
- 11.76 Sitembiso Phiri's testimony with regard to the survey diagram which is at page 21 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents shows that she was aware of the access road.

FRAUD AND MISREPRESENTATION

- 11.77 Catherine Chanda and Mulume Wanshimba Investments (Z) Limited claim that Subdivision E of Lot 2614/M was fraudulently sold to Yabbey Shitima. They particularized the fraud in their pleadings as follows:
- i. Sitembiso Phiri sold Lot 2614/M/E in Lusaka to Yabbey Shitima before a new survey diagram was placed to reflect the true boundary of Lot 2614/M/E, considering the creation of an access road on the ground, which Sitembiso Phiri was even using;*
 - ii. Allowing Yabbey Shitima to effect a change of ownership of the property known as Lot*

2614/M/E without first enabling Catherine Chanda and Mulume Wanshimba Investments (Z) Limited to assert their interest, namely the access road;

iii. Failing to inform Yabbey Shitima of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's interest in the land, specifically the already constructed access road;

iv. Yabbey Shitima proceeding to effect a change of ownership of Lot 2614/M/E into her name when the survey diagram in the certificate of title required the boundary to be physically marked on the ground; and

v. Yabbey Shitima proceeding to buy the said property when she was aware of the well-constructed road and did not even inquire how the road was created on this piece of land.

11.78 In her defence, Benhildah Zulu stated that she was neither privy to nor a party to any fraud.

11.79 Stembiso Phiri in her defence, disputed that there was any misrepresentation and that she was party to the contract of sale that Benhildah Zulu executed with Catherine Chanda and Mulume Wanshimba Investments (Z) Limited. She stated that the sale of Subdivision E of Lot 2614/M to Yabbey Shitima was done without fraud.

11.80 It has been seen that Yabbey Shitima in her defence, told the Court that the allegations of fraud and

misrepresentation did not apply to her, and that she was a bona fide purchaser for value without notice. In her testimony, she stated that she did not know about the condition of an access road, and it was also not included in the contract of sale that she executed with Sitembiso Phiri.

11.81 Therefore, she did not purchase the property by fraudulent means. Yabbey Shitima stated that effecting the change of ownership of Lot 2614/M/E into her name was not a fraudulent act, as purported, because there was no notice that was given to her in that regard by Sitembiso Phiri.

11.82 In the reply, Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, stated that Sitembiso Phiri and Yabbey Shitima saw the access road alone before they entered into a contract of sale. Therefore, it was fraudulent on their part to proceed with the sale before settling the matter with Catherine Chanda and Mulume Wanshimba Investments (Z) Limited.

11.83 In her submissions, Sitembiso Phiri stated that the standard of proof for fraud is higher than a mere balance of probabilities, and she placed reliance on the case of **Sablehand Zambia Limited v Zambia Revenue Authority** ⁽⁹⁾.

11.84 It was stated that the allegations of fraud were not particularly supported in evidence at trial, and that fell below the standard of proof for proving fraud. The further submission was that there was nothing in the evidence to

show any misrepresentation by Sitembiso Phiri or even any motivation or benefit on the part of Sitembiso Phiri.

11.85 In the submissions in reply, Catherine Chanda and Mulume Wanshimba Investments (Z) Limited stated that they had pleaded and detailed the misrepresentation and fraud at page 4 of their pleadings. They further submitted that at trial, Sitembiso Phiri, admitted that she was aware that the beacons on her property were moved by Saidi Metternich Chishimba, who they contended, testified that Benhildah Zulu and Sitembiso Phiri authorised the movement of the beacons towards the south to create the access road.

11.86 However, despite this knowledge, Sitembiso Phiri proceeded to sell the property together with the developments which could be seen at page 1 of their bundle of documents.

11.87 It was also submitted that Yabbey Shitima admitted in cross examination, that at the time she purchased the property, the beacons had been moved. Further, she testified that that she did not inquire who had constructed the beautiful access road, which she was requesting to be given to her without pleading the same.

11.88 Catherine Chanda and Mulume Wanshimba Investments (Z) Limited stated that fraud is defined in ***Black's Law Dictionary, 9th Edition by Bryan A. Garner, Thomson Reuters 2009*** as:

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

- 11.89 The submission was that the evidence as given by Sitembiso Phiri and Yabbey Shitima proved that they had noticed the presence of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited on the land, by the movement of beacons and the access road.
- 11.90 Therefore, it was untruthful and a concealment of facts if they claimed that they did not see the access road.
- 11.91 Still in submission, Catherine Chanda and Mulume Wanshimba Investments (Z) Limited stated that Yabbey Shitima should be held to have had constructive notice of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited interest in that land, according to the survey diagram, which was at page 21.
- 11.92 They stated that this was because Yabbey Shitima purchased the land on which the beacons had already been moved. Thus, had she inquired, the matter would have been resolved differently.
- 11.93 It was also submitted that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited had pleaded fraud and misrepresentation, and they had led evidence during trial to prove that Behildah Zulu, Sitembiso Phiri and Yabbey Shitima were all aware of their presence on the land.
- 11.94 They stated that Behildah Zulu and Sitembiso Phiri even used the same road, while Yabbey Shitima saw and was aware of the said access road. Therefore, the steps that were taken without Catherine Chanda and Mulume Wanshimba

Investments (Z) Limited's knowledge were fraudulent on all angles that one could view them.

11.95 Reliance was further placed on the decision in the case of ***Sablehand Zambia Limited v Zambia Revenue Authority*** ⁽⁹⁾.

11.96 It is trite, that the law requires a party that alleges fraud to particularise that fraud in their pleadings. ***Order 12 Rule (1)(a) of the Rules of the Supreme Court of England 1965 (1999 edition) White Book*** provides that:

"2. - Particulars of pleading

(1) 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,

(2) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; ..."

11.97 It is also a requirement of the law, that a party alleging fraud has to clearly and distinctly lead evidence at trial, to prove the allegations of fraud, as was stated in the case of ***Sablehand Zambia Limited v Zambia Revenue Authority*** ⁽⁹⁾.

11.98 It was held as follows in that matter:

"Where fraud is an issue in the proceedings, then a party 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 allegation is clearly and distinctly proved.

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.”

11.99 The definition of fraud as seen above, is that it is a knowing misrepresentation of the truth or concealment of a material fact, in order to induce another to act to his or her detriment.

11.100 **Black’s Law Dictionary, 9th Edition** at page 1091 defines *misrepresentation* as follows:

“The act of making a false or misleading assertion about something, usu. with the intent to deceive. • The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion. [Cases: Fraud 9.] 2. The assertion so made; an assertion that does not accord with the facts.”

11.101 *Fraudulent misrepresentation* has also been defined in the said **Black’s Law Dictionary** at page 1091 as:

“A false statement that is known to be false or is made recklessly — without knowing or caring whether it is true or false — and that is intended to induce a party to detrimentally rely on it.”

- 11.102 The evidence in this matter, shows that the statement of claim as filed by Catherine Chanda and Mulume Wanshimba Investments (Z) Limited contains the necessary particulars of fraud and misrepresentation as earlier cited.
- 11.103 The requirement is further, as was stated in the case of ***Sablehand Zambia Limited v Zambia Revenue Authority*** ⁽⁹⁾, is that evidence to prove the fraud as pleaded, must be led at trial on a standard that is higher than a balance of probabilities.
- 11.104 In this matter, it will be noted that Catherine Chanda testified that Benhildah Zulu engaged Sitembiso Phiri on the issue of the access road, and when Sitembiso Phiri agreed to the construction of the access road, it was agreed that the beacons on her property Subdivision E of Lot 2614/M, be moved to create an access road.
- 11.105 Catherine Chanda, however, testified that she came to learn later, that the property was fraudulently and through misrepresentation sold to Yabbey Shitima.
- 11.106 Sitembiso Phiri and Yabbey Shitima denied the allegations of fraud and misrepresentation as pleaded. It is, however, worth noting that in her testimony, Sitembiso Phiri admitted having confronted Catherine Chanda and Saidi Matternich Chishimba over the movement of the beacon on her land.
- 11.107 What is also clear from the evidence is that Sitembiso Phiri was aware of the survey diagram which is at page 21 of Catherine Chanda and Mulume Wanshimba Investments (Z)

Limited's bundle of documents. That document has the access road clearly defined on the property Lot 2614/M/E.

- 11.108 Catherine Chanda testified that after they agreed that the access road to the property be created on Lot 2614/M/E at their costs, she engaged a surveyor who moved the beacons and prepared the said survey diagram.
- 11.109 Rodrick Chuma the bricklayer who was engaged to do the road reserve maintained that he saw Benhildah Zulu direct where the road reserve was to be constructed. This evidence was not seriously disputed.
- 11.110 From this, it can be concluded that Sitembiso Phiri was aware, and she agreed that an access road should be given to Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, which would pass through her property.
- 11.111 As rightly contended by Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, if Sitembiso Phiri was against granting an access road to them, she would have disputed its' construction or reported the same to the authorities.
- 11.112 However, as the evidence shows, Sitembiso Phiri was fully aware that the beacon on her land had been tempered with before she proceeded to sell her property to Yabbey Shitima, and yet she took no action to prevent or reverse the movement of her beacons on her land.
- 11.113 It is true that Sitembiso Phiri, was not part of the contract of sale that was executed between Benhildah Zulu and

Catherine Chanda and Mulume Wanshimba Investments (Z) Limited.

- 11.114 A perusal of the Lands Register which is at pages 13 to 20 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents, shows that Lot 2614/M was initially owned by Phiri Grave Macdam, whom Stembiso Phiri referred to as her father in her testimony.
- 11.115 At Entry number 13 of the said Lands Register, the property was transferred to Benhildah Zulu by way of a grant of probate on 1st August 2014.
- 11.116 On 2nd March 2016, at entry number 18, Benhildah Zulu transferred Subdivisions C, D, E and G to Thandiwe Monica Phiri, Pauline Phiri and Sitembiso Phiri.
- 11.117 Then at entry number 20, Benhildah Zulu transferred Subdivision F to Matternich Saidi Chishimba, on 18th August 2016. Further at entry number 24, which is dated 26th August 2021, Catherine Chanda placed a caveat on Lot 2614/M as an interested purchaser.
- 11.118 The contract of sale which was executed between Benhildah Zulu and Catherine Chanda and Mulume Wanshimba Investments (Z) Limited is dated 30th August 2018, which date is after Sitembiso Phiri acquired her certificate of title to Lot 2614/M/E on 2nd March, 2016, as shown, at pages 1 and 2 of her bundle of documents.
- 11.119 As rightly contended by Yabbey Shitima in her submissions, it is trite that a person cannot give that which they do not

have. This submission is supported by the latin maxim '*Nemo dat quod non habet*'.

11.120 In this matter, Benhildah Zulu did not have rights over Sitembiso Phiri's property at the time that she entered into a contract of sale with Catherine Chanda and Mulume Wanshimba Investments (Z) Limited.

11.121 The evidence on record has shown, however, that Sitembiso Phiri was aware of the movement of the beacons on her property. Further, Catherine Chanda, Saidi Metternich Chishimba and Rodrick Chuma all testified that Sitembiso Phiri was present with Benhildah Zulu, when Catherine Chanda and Mulume Wanshimba Investments (Z) Limited were shown where the access road was to be constructed, and it was agreed that the beacon on Sitembiso Phiri's land be moved to create an access road.

11.122 This testimony while it was disputed by Sitembiso Phiri, is believable as I have earlier pointed that Sitembiso Phiri was inconsistent as regards the position that she did not confront Catherine Chanda after she found that the beacon on her property had been moved, and that there was fresh cement after another one was placed on another position.

11.123 Yet, when cross examined further, Sitembiso Phiri testified that she confronted both Catherine Chanda and her husband, Saidi Metternich Chishimba.

11.124 I have also stated that Benhildah Zulu failed to show the Court which access road she provided to Catherine Chanda

and Mulume Wanshimba Investments (Z) Limited according to the contract of sale that they executed.

11.125 In her submissions, Sitembiso Phiri argued that she did not transfer any interest in her land. She stated that such a transfer was required to be in writing, as provided in **Section 4 of the Statute of Frauds 1677.**

11.126 That Section is as follows in provision:

“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.”

11.127 Sitembiso Phiri contended that there was nothing in writing to that effect. Therefore, it is not tenable for Catherine Chanda and Mulume Wanshimba Investments (Z) Limited to claim that such an interest was granted to them through oral evidence.

11.128 It is trite, that it is a requirement of the law that contracts for the sale of land must be in writing. In this matter, Clause 4 of the contract of sale clearly shows that Benhildah Zulu was obligated to provide a secondary access route to Catherine Chanda and Mulume Wanshimba Investments (Z) Limited.

11.129 It has been seen from the evidence, that such route was provided in the form of the disputed access road. The parties

have not disputed the existence of this access road, which Benhildah Zulu agreed to have been using when she was going to park her motor vehicle, even though her defence was that she did not agree for the said access road to be created, and that it was created without her consent.

11.130 The evidence therefore shows that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited were granted a right of way or access road on Sitembiso Phiri's property by Benhildah Zulu, which was not legally registered, before she sold the land to Yabbey Shitima.

11.131 In summarizing the chapter on Easements and Profits, **Fedrick Mudenda**, in his book **Land Law in Zambia, 2007 UNZA Press**, states the following:

“An easement may be described as the right held by one land owner to do something in or on the land of another or to prevent the other land owner from doing something on his own land. A person possesses an easement in respect of his enjoyment of some estate or interest in a particular piece of land, and the easement is said to be appurtenant to that land (Hansford V Jago [1921] 1 Ch 32). Easements may be positive or negative, according as the right is to do something or prevent another from doing something. Easements may be created by statute, or by grant, express or implied, or by prescription, based on long use or presumed grant.”

- 11.132 The essential characteristics of an easement are also discussed in paragraph 7.2 of the book as follows; there must be a dominant and servient tenement, which entails that there must be land benefiting from the exercise of the right, and land that is burdened by it. Secondly, the dominant and servient tenement must not be owned and occupied by the same person, which entails that the two lands must be owned by different persons. Thirdly, the easement must accommodate the dominant tenement, which entails that the right must benefit the land and not merely the persons on the land.
- 11.133 Finally, the easement must be capable of forming the subject matter of the grant, which entails that it must be capable of being conveyed by deed.
- 11.134 A consideration of the evidence in this matter, shows that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's land has benefited from the right of way on Lot 2614/M/E, which land is burdened by it and the subdivisions in question are not owned by the same persons.
- 11.135 It will also be noted that the right of way benefits the occupants of the land, and this has been demonstrated by the developments which were made on Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's property. Finally, the easement is capable of being conveyed by deed which is the process that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited alleged to have embarked on, before Stembiso Phiri sold her property to

Yabbey Shitima, and this is evidenced by the survey diagram which is at page 21 of their bundle of documents.

- 11.136 The easement which was granted to Catherine Chanda and Mulume Wanshimba Investments (Z) Limited was express in terms on the contract of sale which is dated 30th August, 2018.
- 11.137 In the case of ***Steadman v Steadman*** ⁽³⁾ the parties marriage had broken down and the wife applied for a declaration that the matrimonial home was jointly owned and for an order for sale. Following negotiations, it was agreed that the wife would sell her interest in the house to her husband for GBP1500.
- 11.138 The husband paid GBP100 and his solicitors prepared a deed of transfer of the wife's interest in the house to the husband and the wife refused to sign the deed.
- 11.139 The Court in that matter stated that:

“Where therefore, a party to a contract enforceable under the Statute of Frauds stood by while the other party acted to his detriment in performance of his own contractual obligations, the first party would be precluded by the Court of Chancery from claiming exoneration, on the ground that the contract was unenforceable from the performance of his reciprocal obligations, and the Court would, if required, decree specific performance of the contract. Equity would not as put, allow the Statute of Frauds to be used as an engine of

fraud...part performance could be viewed as a way of proving an agreement falling within Section 4 notwithstanding the absence of writing.”

- 11.140 ***Halsbury’s Laws of England, 16th Edition, Fourth Edition Re-Issue in paragraph 1308*** states that equity does not allow a statute to made an instrument of fraud.
- 11.141 Applying the above to this case, it will be seen that while the contract of sale was executed between Benhildah Zulu and Catherine Chanda and Mulume Wanshimba Investments (Z) Limited under which Benhildah Zulu agreed to provide a secondary access to the said Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, that was actualized by the creation of an access road which passed through the land that belonged to Sitembiso Phiri. Sitembiso Phiri was a not a party to that agreement.
- 11.142 However, the evidence which is on record, which I have believed is that Benhildah Zulu went with Sitembiso Phiri to show Catherine Chanda who was with her husband where the access road should be constructed within Sitembiso Phiri’s property.
- 11.143 The facts are common cause that the agreement in relation to the access road passing through Sitembiso Phiri’s property was not reduced into writing. Sitembiso Phiri has argued that because of that, and as she was not a party to the contract of sale, in line with ***Section 4 of the Statute of Frauds*** the agreement should not be enforceable.

- 11.144 From the decision in the case of ***Steadman v Steadman*** ⁽³⁾ which has been seen above, although it involved parties to an oral agreement, the principle to be taken from that case and applied to Sitembiso Phiri who was not a party to the contract of sale for the land, is that by her showing Catherine Chanda where the access road should be, and she did nothing when the beacon on her land was moved, so that the said access road could be created and was in fact created, she cannot now be allowed to set up the Statute of Frauds to defeat the interest that she gave to Catherine Chanda and Mulume Wanshimba Investments (Z) Limited in the form of the access road which passes through her land, as that would be inequitable.
- 11.145 The evidence which has not been disputed is that when Sitembiso Phiri sold the land to Yabbey Shitima, the beacon on the land had been moved to pave way for the creation of the access road. The contention by Catherine Chanda and Mulume Wanshimba Investments (Z) Limited is that both Sitembiso Phiri and Yabbey Shitima were aware of the access road when Yabbey Shitima bought the land from Sitembiso Phiri.
- 11.146 That assertion was not conclusively rebutted, as Sitembiso Phiri merely stated that she did not use the access road or park at Catherine Chanda's property when she went to the property. Yabbey Shitima testified that it would be inaccurate to say that the access road was constructed on

the property while she looked, as it was not there when she bought the property.

11.147 She nevertheless agreed, that she did not report Catherine Chanda to the police for trespassing on her property.

BONA FIDE PURCHASER FOR VALUE

11.148 Yabbey Shitima alleged that she was a bona fide purchaser for value without notice from Stembiso Phiri.

11.149 In the statement of claim, Catherine Chanda and Mulume Wanshimba Investments (Z) Limited alleged that Yabbey Shitima was the purchaser Subdivision E of Lot 2614/M Lusaka from Sitebiso Phiri through fraudulent misrepresentation.

11.150 In submission, Catherine Chanda and Mulume Wanshimba Investments (Z) Limited stated that the only reason why they were before the Court, was because of Yabbey Shitima's interest, who purchased the property long after Benhildah Zulu and Sitebiso Phiri had permitted Catherine Chanda and Mulume Wanshimba Investments (Z) Limited to construct the access road, and the beacons had already been moved.

11.151 In support of the submission, they relied on the case of ***Enesi Banda v Abigail Mwanza*** ⁽¹⁰⁾.

11.152 They also quoted the definition of Innocent Purchaser for Value in ***Black's Law Dictionary, 9th Edition by Bryan A. Garner, 2009*** which states as follows:

“One who buys something for value without notice of another's claim to the property and without

actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior claims.”

- 11.153 It was submitted that Yabbey Shitima had constructive notice of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's rights in the land, by way of the access road. They requested that the Court orders that Yabbey Shitima's rights are subject to Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's rights.
- 11.154 It was also submitted that Yabbey Shitima would not lose any land or the value of her property, and that her issue was that she may not be comfortable about having two properties being side by side, but that was not a compelling legal right, given that she had notice of the presence of another, whom she did not inquire about.
- 11.155 Also relied on, was the case of ***Nawakwi v Lusaka City Council*** ⁽⁷⁾ and it was stated that Yabbey Shitima ought to have made inquiries on the person who had shifted the beacons, and what arrangements were there for Catherine Chanda and Mulume Wanshimba Investments (Z) Limited to use the road that was on the land that she was about to purchase.
- 11.156 In her submissions, Yabbey Shitima stated that she was a bona fide purchaser for value without notice, because at the time of purchase of the land from Sitembiso Phiri, she

conducted the necessary due diligence, prior to purchasing the property, and she was satisfied that the person conveying the property to her had title, and that there were no impediments that could affect the conveyance. Further, there was no registered encumbrance on the land.

- 11.157 The case of ***Oliver v Hinton*** ⁽²⁾ was relied on, and it was submitted that Yabbey Shitima, being a purchaser, conducted her due diligence by physically inspecting the property, and the existing access road was not present contrary to what had been alleged by Catherine Chanda and Mulume Wanshimba Investments (Z) Limited.
- 11.158 It was submitted that Sitembiso Phiri did not put Yabbey Shitima on notice, that there was a prior agreement that would affect the purchase from Sitembiso Phiri, as she was not a party to the agreement between Catherine Chanda and Mulume Wanshimba Investments (Z) Limited and Benhildah Zulu.
- 11.159 Page 148 of the book ***Land Law in Zambia, by Fedrick Mudenda, 2007 UNZA Press***, was relied on where he discusses the requirements that must be satisfied for the defence of bona fide purchaser for value without notice to succeed.
- 11.160 It was submitted that firstly, Yabbey Shitima, without fraud or sharp practice, purchased the land from Sitembiso Phiri, the true owner. Secondly, Yabbey Shitima paid for the value of the land, free of encumbrances or any right to easement on the land. Therefore, she was entitled to the benefit and

enjoyment of the value of the land that she purchased without any interference from any third party.

11.161 It was also Yabbey Shitima's submission that there was a purchase of land in which the legal estate of Yabbey Shitima now vests, and she was not put on actual, constructive or imputed notice that there was a prior agreement by Catherine Chanda and Mulume Wanshimba Investments (Z) Limited and Benhildah Zulu, to the effect that an access road would be created on the land which she purchased in its' entirety.

11.162 The case of ***Banda and another v Mudima*** ⁽¹¹⁾ was relied on where it was held as follows:

“d. the purchaser must have had no notice of the equitable interest at the time he gave his consideration for the conveyance. A purchaser is affected by notice of an equity in three cases:

- i. actual notice; where the equity is within his own knowledge;***
- ii. constructive notice; where the equity would have come to his own knowledge if proper inquiries had been made; and***
- iii. imputed notice; where his agent as such in the course of the transaction has actual, or constructive notice of the equity.”***

11.163 It was submitted that contrary to the assertions that Yabbey Shitima was aware by virtue of having seen the access road, Yabbey Shitima was not personally informed by either

Sitembiso Phiri as owner of the land, or Catherine Chanda and Mulume Wanshimba Investments (Z) Limited themselves, and the necessary inquiries did not reveal the presence of the access road on Yabbey Shitima's subdivision.

11.164 The submission was that she only came to know of it after the conveyance was completed, when Catherine Chanda and Mulume Wanshimba Investments (Z) Limited demanded that they be given a right of way.

11.165 Yabbey Shitima also submitted that, as the access road was created on her premises without her consent, it now formed part of her property. Consequently, Catherine Chanda and Mulume Wanshimba Investments (Z) Limited could not claim compensation or a right of access.

11.166 In support of the submission, she relied on the case of ***Lubungu v Kapango and ors*** ⁽¹³⁾ where the Supreme Court held as follows:

“It is a settled principle of law that improvements to realty become part of the realty and can never be returned, and to compel the land owner to make recompense would be unjust even if it can be demonstrated that the land owner had intended to effect similar improvements (See G Jones op.cit). The Roman law doctrine of quicquid plantatar, solo solo cedit has long been accepted as a principle of English law – and Zambian law. Its application is well-illustrated in Ramsden v. Dyson where it was held that if a stranger builds on land

which is the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefits of all the expenditure upon it.

...

Taken in the round, this appeal succeeds. The appellant, as the title holder to the property in question, is entitled to quiet possession and enjoyment of the whole property. As developers of land which is not theirs, the first respondents are hereby ordered to vacate the appellant's land forthwith. The development on the land having become part of the land shall, in keeping with the law as we have explained it, now vest in the appellant landowner. We also award damages to the appellant against the first respondents for trespass and for loss of use of the said land to be assessed by the Deputy Registrar."

11.167 It was submitted that the access road in contention, which forms part of Yabbey Shitima's land, should continue to exist and be declared to belong to Yabbey Shitima.

11.168 In the case of ***Clementina Banda Emmanuel Njanje v Boniface Mudimba*** ⁽¹²⁾, the Court discussed the requirements that have to be fulfilled for the doctrine of bona fide purchaser for value to be satisfied, as follows:

"In sum, the following requirements need to be fulfilled when relying on the doctrine:

- (a) a purchaser must act in good faith;**
- (b) purchaser is a person who acquires an interest in property by grant rather than operation of law. The purchaser must also have given value for the property;**
- (c) the purchaser must generally have obtained the legal interest in the property; and**
- (d) the purchaser must have had no notice of the equitable interest at the time he gave his consideration for the conveyance. A purchaser is affected by notice of an equity in three cases:**
- i. actual notice; where the equity is within his own knowledge;**
 - ii. constructive notice; where the equity would have come to his own knowledge if proper inquiries had been made; and**
 - iii. imputed notice; where his agent as such in the course of the transaction has actual, or constructive notice of the equity.”**

11.169 In this matter, Yabbey Shitima purchased the property from Sitembiso Phiri, as seen from the contract of sale which is at page 3 to 5 of Sitembiso Phiri’s bundle of documents. That contract of sale is not dated. However, both Sitembiso Phiri and Yabbey Shitima stated that this was in November 2019.

- 11.170 Yabbey Shitima further went ahead and acquired a certificate of title on 4th December, 2019, as evidenced at pages 1 to 3 of her bundle of documents.
- 11.171 Yabbey Shitima is therefore the legal and beneficial owner of Lot 2614/M/E, which is the property on which the access road was constructed by Catherine Chanda and Mulume Wanshimba Investments (Z) Limited.
- 11.172 As earlier established, Sitembiso Phiri granted Catherine Chanda and Mulume Wanshimba Investments (Z) Limited a right of way on the land prior to her having sold it to Yabbey Shitima.
- 11.173 This is also evidenced by the movement of beacon and the survey diagram which is at page 21 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's bundle of documents.
- 11.174 Yabbey Shitima, however contended that she was not given notice by Sitembiso Phiri of any access road that was on the land. In her submissions, she also stated that she conducted due diligence, and it did not reveal an access road on the property.
- 11.175 As stated in the case ***Clementina Banda Emmanuel Njanje v Boniface Mudimba*** ⁽¹²⁾, a purchaser must not have had notice of any equitable interest at the time they give consideration for the conveyance. Such notice includes constructive notice. Constructive notice is where the equity would have come to their own knowledge, if proper inquiries had been made.

- 11.176 In this matter, Sitembiso Phiri admitted to having been aware that her beacon had been moved on the property. Therefore, it cannot be said that Yabbey Shitima was also not aware of the alteration of the beacons on the property that she was about to purchase from Sitembiso Phiri.
- 11.177 I say so because Yabbey Shitima acquired the land based on the survey diagram which was in the certificate of title that was held by Sitembiso Phiri, and which did not depict the land as on the proposed survey diagram which is at page 21 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited bundles of documents.
- 11.178 She testified that she inspected the land before she purchased it from Sitembiso Phiri. Yabbey Shitima testified that she conducted due diligence and she was satisfied that Sitembiso Phiri owned the land.
- 11.179 From the testimony that Benhildah Zulu gave, she explained that the access road was not as developed as it is now, when she used to use it to go and park her car. This evidence goes to show that most likely, when Yabbey Shitima was purchasing the land from Sitembiso Phiri, the access road was there, but it was not fully developed.
- 11.180 Catherine Chanda stated that after they were shown the access road, they started construction of the three flats. It is on record that Yabbey Shitima confronted Catherine Chanda over use of the access road.
- 11.181 Therefore, Yabbey Shitima had notice that Catherine Chanda was using the access road. She did not make full

inquiries to find out who had shifted the beacon, and for what purpose, and whether the shifting of the said beacon had affected the measurements for the land that she was purchasing from Sitembiso Phiri.

11.182 Yabbey Phiri cannot therefore be stated to have been a bona fide purchaser for value, without notice of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's equitable interest in the land.

STEMBISO PHIRI'S COUNTERCLAIM

11.183 The evidence shows that Sitembiso Phiri did not bring it to Yabbey Shitima's notice that she had agreed with Benhildah Zulu that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited would be given an access road that passed through Lot 2614/M/E, that she had purchased from Sitembiso Phiri.

11.184 The failure to do so was misrepresentation and fraudulent, as the intention was to induce Yabbey Shitima to purchase the land.

11.185 Sitembiso Phiri therefore fraudulently and by misrepresentation sold her property to Yabbey Shitima, for the reasons given above. As Catherine Chanda and Mulume Wanshimba Investments (Z) Limited had acquired equitable interest in the land through the grant of an access road before Sitembiso Phiri sold the land to Yabbey Shitima, Sitembiso Phiri should have disclosed that to Yabbey Shitima.

11.186 The fraud in selling the property to Yabbey Shitima has been proved to the required standard. Thus, I cannot declare that the sale of Lot No 2614/M/E by Sitembiso Phiri to Yabbey Shitima was lawful, as it was marred by fraudulent misrepresentation. It is trite that fraud unravels all. The counterclaim fails.

12. CONCLUSION

12.1 The evidence on record shows that Benhildah Zulu breached the contract of sale that was executed between herself and Catherine Chanda and Mulume Wanshimba Investments (Z) Limited, by not completing the grant of a secondary route on the property, being proposed subdivision of Lot No 2614 through registration of said property as depicted at page 21 of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited bundle's of documents.

12.2 Catherine Chanda and Mulume Wanshimba Investments (Z) Limited claim specific performance of the agreement to formalize the creation of the access road as agreed in the contract of sale which was dated 30th August, 2018.

12.3 ***Chitty on Contracts: General Principles, 13th Edition at page 1718*** with regard to specific performance states that:

“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract....It will not be Ordered if the contract suffers from some defect, such as the failure to comply with formal requirements or mistake or

illegality which makes the contract invalid or unenforceable.”

- 12.4 In this matter I have found that Sitembiso Phiri cannot set up the Statute of Frauds to avoid the agreement that she made with Catherine Chanda and Mulume Wanshimba Investments (Z) Limited that the access road to their property would be created through her property.
- 12.5 Catherine Chanda and Mulume Wanshimba Investments (Z) Limited contended that if specific performance is ordered, Yabbey Shitima will still be able to have the size of the land that she contracted to buy, as the beacons were moved.
- 12.6 Sitembiso Phiri went behind Benhildah Zulu's back to sell the property which was reflected in her certificate of title that she obtained in 2016 prior to the registration of the subdivisions as agreed on the survey diagram which was at page 21 of Catherine Chanda and Benhildah Zulu's bundle of documents, and which document only passed through the Planning Authority on 4th January, 2021.
- 12.7 Based on the above, specific performance being an equitable remedy and on the facts of the case, it is what would be just in this case. I accordingly find that Catherine Chanda and Mulume Wanshimba Investments (Z) Limited are entitled to a decree of specific performance as pleaded.
- 12.8 They succeed on the claim for a declaration that the certificate of title No 68177 for Lot No 2614/M/E Lusaka be replaced to reflect the agreement that was made between Catherine Chanda and Mulume Wanshimba Investments (Z)

Limited and Benhildah Zulu, as the same was done fraudulently and by misrepresentation by Sitembiso Phiri.

- 12.9 Further, the evidence on record shows that Yabbey Shitima was not a bona fide purchaser for value because she had actual and constructive notice of Catherine Chanda and Mulume Wanshimba Investments (Z) Limited's equitable interest on the land by virtue of the access road, which was granted to them before she purchased the property from Sitembiso Phiri.
- 12.10 Benhildah Zulu having been in breach of contract, she liable for damages for breach of contract.
- 12.11 Sitembiso Phiri having been at the core of the dispute by agreeing that the access road be created and she reneged on that position by proceeding to sell the property to Yabbey Shitima, herself and Benhildah Zulu as a party in breach, shall bear the costs of the other parties to this matter. Leave to appeal is granted.

DATED AT LUSAKA THE 19th DAY OF AUGUST, 2025

S. Kaunda
**S. KAUNDA NEWA
HIGH COURT JUDGE**

