

**IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT NDOLA**

**APPEAL NO. 146/2013**

*(Civil Jurisdiction)*

**BETWEEN:**

**HANIF MOHAMMED BHURA** (Suing pursuant  
to a Power of Attorney granted in his favour by  
**MEHRUNISHA BHURA**)

**APPELLANT**

**AND**

**YUSUF IBRAHIM ISSA ISMAIL**

**RESPONDENT**

**Coram: Phiri, Muyovwe and Wood, JJS**

**On the 1<sup>st</sup> December, 2015 and 15<sup>th</sup> January, 2016**

For the Appellant: Mr. R. Mainza, Messrs Mainza & Company

For the Respondent: Mr. D. K. Kasote, Agent for Messrs George  
Kunda & Company

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## **JUDGMENT**

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**MUYOVWE, JS, delivered the Judgment of the Court**

**Cases referred to:**

1. **Sablehand Zambia Limited vs. Zambia Revenue Authority SCZ Judgment No. 20 of 2003**
2. **Banda vs. Chief Immigration Officer and The Attorney General (1993/1994) Z.R. 80**
3. **Attorney General vs. Marcus Kampumba Achiume (1983) Z.R. 1**
4. **R R Sambo and Others vs. Paikani Mwanza (2000) Z.R. 79**

5. **Rosemary Phiri Madaza vs. Awadh Karen Coleen (2008) Z.R. Vol. 1, 12**
6. **Honorius Maurice Chilufya vs. Chrispin Haluwa Kangunda (1999) Z.R. 166**
7. **Bwalya Kalambo vs. Rock Tools (Z) Limited and Meanwood Holdings Limited Appeal No. 140/2013**
8. **Nkongolo Farms Limited vs. Zambia National Commercial Bank Limited, Kent Choice Limited (In Receivership) and Charles Huruperi (2007) Z.R. 149**
9. **Shawaz Fawaz and Prosper Chelelwa vs. The People (1995-97) Z.R. 3**
10. **Sithole vs. The State Lotteries Board (1975) Z.R. 106**
11. **Galaunia Farms Ltd vs. National Milling Company Limited and Another (2004) Z.R. 1**

**Works referred to:**

1. **Order 18/12/18 of the White Book, 1999 Edition**
2. **Halsbury Laws of England 4<sup>th</sup> Edition Volume 36 paragraph 36**

This is an appeal by the appellant against a judgment of the Lusaka High Court which found that there was fraud in the issuance of Certificate of Title No. L4491 for Stand 6867 Lusaka and ordered its cancellation.

The brief facts are that through a Power of Attorney, the appellant commenced this action in the court below on behalf of his sister, Mehrunisha Bhura, the wife of the respondent. The claim was for, inter alia, a declaration that she was the lawful and registered owner of Stand No. 6867 Lusaka.

It was common cause that the respondent was initially the legal owner of the property in issue. However, by a Deed of Gift produced in the court below, the property was transferred to the respondent's wife in 1996. It was established that the respondent was not in Zambia at the time of execution of the Deed of Gift as he had suffered deportation. According to the appellant, the execution of the Deed of Gift was witnessed by a Ms. J.C. Malunga. The respondent's story was that on his return to Zambia, he discovered that title was now vested into the appellant. The respondent disputed the signature on the Deed of Gift and the National Registration Card as prior to his deportation from Zambia he was not a holder of a National Registration Card. According to the forensic handwriting expert the signature on the Deed of Gift and the National Registration Card did not belong to the respondent. In his evidence, the forensic handwriting expert alluded to the fact that the respondent's signature could change sometimes.

Caught up in the middle of all this was a woman by the name of Mary Mumba who had two children with the respondent and who lived within the disputed property. Mary Mumba placed a caveat on

the plot in issue in 1987 which she did not remove. Although there was no court order filed to remove the caveat, the deed of gift purportedly executed by the respondent was registered and the property changed into Mehrunisha's name.

On these facts, the learned judge arrived at the conclusion that there were irregularities in the issuance of Title No. L4491 to the appellant's sister. She found that the caveat placed by Mary Mumba on Stand No. 6867 Lusaka was fraudulently and corruptly removed. Also, that the fraudulent removal of the caveat was subject of a complaint by the respondent to the Law Association of Zambia against Germano Kaulung'ombe who had acted for the appellant. And the learned judge ordered that the caveat be restored. She found that the Deed of Gift and the Certificate of Title No. L4491 were both dated the same date of 19<sup>th</sup> August, 1996. The learned judge concluded that the Certificate of Title No. L4491 for Stand No. 6867 Lusaka was fraudulently obtained. The learned judge found that the appellant had not proved his case to the required standard and declined to declare the appellant legal owner of Stand No. 6867 Lusaka. The learned judge ordered that it be

cancelled in accordance with Section 54 of the Lands and Deeds Registry Act. She also ordered that the property reverts back to the respondent.

On behalf of the appellant, learned Counsel advanced four grounds of appeal couched in the following terms:

- 1. The learned trial Judge misdirected herself in law and in fact when she held that the allegations of fraud had been proved by the defendant despite fraud not having been clearly and distinctively pleaded by the defendant in the defence.**
- 2. The learned trial Judge misdirected herself in law when she admitted the Photographic Album compiled by DW3 on 12<sup>th</sup> June, 2012 in evidence in the face of an objection by the Advocate for the Plaintiff that production of the said Album long after the Plaintiff had closed his case was likely to prejudice the Plaintiff's case and that the same was done in violation of the law on production of documents. (abandoned)**
- 3. The learned trial Judge misdirected herself in law and in fact when she ordered the cancellation of the Certificate of Title issued to one Mehrunisha Bhura and the deletion of entries in the Lands Register in the absence of a counterclaim.**
- 4. The learned trial Judge misdirected herself in law and in fact when she held that the Plaintiff had failed to prove his case in the face of an admission by the Defendant that sometimes he changes his signature and further admission by the Forensic Expert, DW3 that it was possible that the Defendant could have different signatures and that the**

**disputed signature matches with the signature on the National Registration Card.**

Mr. Mainza learned Counsel for the appellant relied entirely on the appellant's heads of argument. In support of ground one, it was submitted that it is trite law that any allegation of fraud must be expressly pleaded together with the facts, matters and circumstances relied on to support the allegation. Counsel cited **Order 18/12/18 of the White Book, 1999 Edition** which provides that:

**“(15) Fraud-Fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts....”**

Counsel also relied on the case of **Sablehand Zambia Limited vs. Zambia Revenue Authority**<sup>1</sup> where it was held that:

**1. 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....**

Counsel pointed out that in his defence, the respondent did not expressly plead fraud as required by the law. That, therefore, the learned judge seriously misdirected herself in law when she held that the allegations of fraud were proved.

Counsel indicated that he was abandoning ground two.

Turning to ground three, Counsel began by citing the case of **Banda vs. Chief Immigration Officer and The Attorney General**<sup>2</sup> where it was held that:

**The appeal court will not interfere with the findings of fact of the lower court unless it is apparent that the trial court fell into error.**

Counsel referred us to the Orders made by the learned trial judge in her judgment where she said:

**“...This means that the Certificate of Title No. L4491 issued to Mehrunisha Bhura is also vitiated and I order that it be cancelled in line with the authority of Dduyeni and Others v. Atlantic Investments Ltd SCZ Appeal No. 130 of 2000 unreported.”**

Counsel also referred us to page 19 of the record of appeal where the learned trial judge said:

**“For avoidance of doubt, I order that entries 9, 10, 11 (dated 7<sup>th</sup> January, 1997) 12 and 13 relating to Stand No. 6867 Lusaka as shown on pages 24, 25 and 26 of the Plaintiff’s Bundle of Documents be deleted forthwith. Stand No. 6867 accordingly reverts to the Defendant as the beneficial owner**

**and the caveat by DW2 Rose Mumba stands until properly withdrawn or removed.”**

It was submitted that the learned trial judge fell into error when she made the above Orders as the respondent did not plead for the same by way of counter-claim. It was pointed out that in his defence, the respondent's prayer was for the dismissal of the plaintiff's claims with costs. Counsel contended that as the Orders in question were not prayed for in the defence or counter-claim, the learned trial judge exceeded her jurisdiction when she purported to grant the respondent and DW2 Rose Mumba the Orders in question which the duo never asked for in the defence. Counsel urged us to quash the Orders in question as the same were granted in contravention of the law on pleadings.

In support of ground four, Counsel buttressed his argument by referring us to the cases of the **Attorney General vs. Marcus Kampumba Achiume**.<sup>3</sup> Counsel also referred us to the learned judge's findings of facts at page 14 of the record of appeal where she said:

**“Based on what has been discussed above, I find that the Deed of Gift was not executed by the Defendant as the**

**purported Donor. The Plaintiff has thus failed to prove his case on the authenticity or validity of the Deed of Gift relied upon. On the other hand, the Defendant has proved that the purported signature on the Deed of Gift did not belong to him in line with the expert evidence of PW3.”**

It was submitted that in assessing and evaluating the evidence, the learned trial judge failed to take into account the respondent's evidence under cross-examination where he conceded that he sometimes changes his signature. And, according to the handwriting expert's evidence, it was possible that the respondent could have different signatures. It was contended that by the respondent's own admission that he changes signatures, the appellant proved on a balance of probability that the Deed of Gift was executed by the respondent.

Counsel urged us to quash the lower court's judgment in its entirety with costs to the appellant.

On behalf of the respondent, Mr. Kasote relied on the respondent's heads of argument. In response to ground one, it was submitted that the respondent strongly denied having executed the Deed of Gift to the donee. It was submitted that in his defence, the

respondent alleged that the donee obtained the property by corrupt means. Counsel submitted that the property in issue was caveated on 16<sup>th</sup> January, 1987 and the caveator testified that she never removed the caveat on the property. In response to the allegation by the appellant that fraud was not pleaded and was not proved, the case of **R R Sambo and Others vs. Paikani Mwanza**<sup>4</sup> was relied upon where it was held that:

**(i) The first appellant was granted Title to the Stand under circumstances which were not only bordering on fraud but that were fraudulent. Like in this case, the Deed of Gift was Registered on a caveated property which is contrary to Section 79 of the Lands and Deeds Registry Act, Cap 185 AND WHICH Section reads as follows:- “So long as a Caveat in Form 8 remains in force, the Registrar shall not make any entry on the Register having the effect of charging or transferring or otherwise affecting the estate or interest protected by such caveat.”**

In this case, a judgment which was delivered on 19<sup>th</sup> October, 1990 was registered on 21<sup>st</sup> February, 2005 in the Lands and Deeds Registry in order to remove the caveat after a period of 15 years after the delivery of the judgment. It was submitted that this action was contrary to Section 5(2) of Cap. 185 of the Laws of Zambia which provides that:- “All other documents except probate of a Will required to be Registered as foresaid shall be Registered” –

**(a) In the case of a document executed at the place where it is registered, within thirty (30) days from its date.”**

That in this case, there was no order in the judgment specifically ordering the removal of the caveat placed on the disputed property on 16<sup>th</sup> January, 1987. Counsel contended that the appellant used the judgment to remove the 1987 caveat in order to make her claims to the property appear legitimate. In the case of **Rosemary Phiri Madaza vs. Awadh Karen Coleen**,<sup>5</sup> it was held that:

**In terms of the Lands and Deeds Registry Act, the removal of the Caveat in those circumstances without the consent of the Caveator was unlawful and a breach of the Law.**

That the learned trial judge was on firm ground when she concluded that there was fraud in the way the Deed of Gift was executed and the certificate of title was obtained. It was pointed out that the person who is alleged to have witnessed the execution of the Deed of Gift did not testify and the respondent also expressed ignorance as to the existence of the said Deed of Gift.

Turning to ground three, it was submitted that this case is on all fours with the case of **Honorius Maurice Chilufya vs. Chrispin Haluwa Kangunda**<sup>6</sup> where in that case we held that the respondent obtained the certificate of title fraudulently and ordered the

cancellation of the certificate of title and also the rectification of the records at the Lands and Deeds Registry. Counsel contended that in this matter this is exactly what the learned trial judge did. Further, that the respondent in his defence clearly stated that the disputed property was his as he did not donate it to anyone.

In response to ground four, again it was reiterated that the respondent strongly denied having executed the Deed of Gift; he denied that he had an NRC; that he did not deal with Ms. Malunga at Messrs J. C. Malunga and Company. The appellant admitted that he did not attend the signing of the Deed of Gift and the donee decided to stay away from the trial for reasons best known to herself. Counsel also referred to the evidence of the forensic handwriting expert who confirmed that the disputed signatures were not the respondent's signatures. It was argued that there was overwhelming evidence that the Deed of Gift was forged and that this could be the reason for the donee's decision to stay away from the trial. It was contended that the learned judge's findings cannot be faulted for the mere fact that there is a possibility that the respondent's signature changes at times.

Counsel urged us to dismiss the appeal with costs.

We have considered the evidence in the court below, the judgment appealed against as well as the submissions by Counsel for the parties.

We propose to deal with grounds one and three together as they are interrelated.

In ground one, the gist of Counsel for the appellant's argument was that the trial court found fraud in the issuance of Title No. L4491 for stand No. 6867 Lusaka when it was not distinctly pleaded. In sum, Counsel for the respondent submitted that the respondent vehemently denied having executed any Deed of Gift in favour of his wife and that she obtained the property corruptly. In ground three, Counsel for the appellant submitted that the trial court ordered cancellation of Title No. L4491 in the names of the appellant's sister and ordered rectification of the records at the Lands and Deeds Registry in the absence of a counter-claim by the respondent. Counsel for the respondent contended that having found fraud, the learned Judge was on firm ground when she

ordered rectification of the records at the Lands and Deeds Registry. We have looked at the arguments by both Counsel in the two grounds.

At this stage, we find it necessary to reproduce paragraphs 1 to 4 of the defence filed by the respondent in the court below which read as follows:

- 1. That the Defendant's possession of the Power of Attorney is within his Personal knowledge which cannot be attributed to the Defendant and further that the Defendant does not know that Stand 6867 Chainama Road, Lusaka, belongs to Mehrunisha Bhura because the Defendant does not remember donating/transferring the said property to Mehrunisha Bhura since the property was bought from E. Mohammed on 1<sup>st</sup> October, 1984 at K40,000.00.**
- 2. That if the said Mehrunisha has a Certificate of Title to Stand No 6867 it must have been obtained by corrupt means. (Emphasis ours)**
- 3. That the Defendant herein strongly denies having signed the alleged Deed of Gift and the said Mehrunisha will personally be called upon to tell the Court how the Deed of Gift was signed and who witnessed the Defendant's signing.**
- 4. That the Defendant will aver that the Certificate of Title in the Plaintiff's possession was corruptly obtained because the Defendant who owns the property was not a party to the execution of the Deed of Gift. (Emphasis ours)**

We note that although fraud was not distinctly and particularly set out in the pleadings, the respondent did plead that the appellant obtained the certificate of title through corruption.

According to Black's Law Dictionary (8<sup>th</sup> Edition) at page 371, the word "corruptly" is defined as "in a corrupt or depraved manner; by means of corruption or bribery. As used in criminal law statutes, *corruptly* usually indicates a wrongful desire for pecuniary gain or other advantage." The synonyms for the word "corrupt" are: immoral, unethical, dishonest, crooked, shady and fraudulent.

We note that indeed, as submitted by Mr. Mainza, fraud was not distinctly pleaded. This is a valid argument and we agree with Mr. Mainza, that the rules of pleadings demand that fraud must be distinctly pleaded. We have emphasised this requirement in a plethora of cases including the case of **Sablehand Zambia Limited**<sup>1</sup> cited by Mr. Mainza. In our recent judgment in the case of **Bwalya Kalambo vs. Rock Tools (Z) Limited and Meanwood Holdings Limited**<sup>7</sup> a similar argument was raised and we said at Page J18 that:

**“We implore counsel, in future, to set out the allegation of fraudulent misrepresentation or fraud in a separate paragraph from the particulars.”**

This is cardinal and we expect Counsel to abide by the rules of pleadings. We will return to this point later in our judgment.

Having noted the above, we take the view that the details brought out in the four paragraphs cited herein that: the respondent did not donate the property to the appellant; he never executed the Deed of Gift and maintained that the property belonged to him. Further, the fact that title changed to the appellant without the knowledge of Mary Mumba, the caveator and without a specific court order, put the learned trial judge on inquiry as to whether the title issued to the appellant was a clean title. These facts were accepted by the trial judge and were not perverse and we cannot disturb them as they attest to the fact that the appellant did not come to court with clean hands.

We have also considered the circumstances under which the title for the disputed property was issued, particularly, the disputed

Deed of Gift and NRC; irregularities on the Lands Register and the fact that the title was issued when the caveat placed by one Mary Mumba was still in existence. We also note that the Judgment allegedly relied upon to remove the caveat did not make any directions or order for its removal. While we are alive to the authorities relied on by Counsel for the appellant, we reiterate the position we took in the case of **Nkongolo Farms Limited vs. Zambia National Commercial Bank Limited, Kent Choice Limited (In Receivership) and Charles Huruperi,**<sup>8</sup> at page 172 that:

**“.... We agree that the appellant did not plead fraud or misrepresentation with sub heads stating particularities of fraud or misrepresentation as provided under Order 18 rule 8 of the Rules of the Supreme Court... However, looking at the five (5) paragraphs quoted above, we hold the view that these paragraphs brought out sufficient details of fraud and misrepresentation...**

**...even if we had to agree with the learned trial judge that the pleadings were defective, we hold that there was evidence adduced before the High Court by the appellant on the misrepresentation by the 3<sup>rd</sup> respondent, which evidence was not objected to by the respondents. The court has an obligation to weigh that evidence. In the case of *Mazoka and Others vs. Mwanawasa and Others*, the election petition of 2001, this court considered this point and held that such evidence had to be considered.”**

And so with all the anomalies and irregularities present in the issuance of the appellant's title, the learned trial judge had no choice but to consider and weigh the evidence before her in favour of the respondent. We take the view that the learned judge faced with the facts before her rightly reached the inescapable conclusion that the appellant was not the lawful owner of the property.

Again, we wish to emphasise that the **Nkongolo case**<sup>8</sup> and the case in *casu* should not be interpreted to mean that fraud should not be specifically pleaded as required by the rules. Our view is that in specific cases, depending on the peculiar facts of the case, a court cannot ignore the glaring face of fraud or corruption simply because fraud has not been specifically pleaded. In the case in *casu*, the justice of the case demanded that the certificate of title be cancelled in terms of Section 33 of the Lands and Deeds Registry Act because not cancelling the title would have meant laundering the appellant's title.

On the issue of the absence of a counterclaim, our view is that this is irrelevant. In his statement of claim in the court below, the appellant claimed, inter alia:

**1. A declaration that she is the lawful and registered owner of Stand No. 6867, Lusaka**

Without doubt, the learned trial judge was being invited to determine the lawful owner of the property in dispute. In our view, the appellant's claim in the court below was rather strange for the registered owner and title holder of the disputed property. In other words, the appellant who was the title holder of the property was asking the court to declare her the lawful and registered owner of Stand No. 6867 Lusaka. It would not be far-fetched to conclude that this was an attempt by the appellant to legalise her title to the property. Otherwise, why should the title holder run to court for such a declaration? Considering that the learned judge found that the appellant was not the lawful owner of the property, despite the absence of a counter-claim, it was proper for the learned judge to order cancellation of the title and order rectification of the register in relation to the property. Grounds one and three fail.

Coming to ground four, the gist of the arguments by Counsel for the appellant were that in arriving at a finding that the appellant failed to prove their case, the learned judge did not consider the evidence of the respondent and the handwriting expert that the

respondent did not always sign the same. The argument by Counsel for the respondent was that the conclusion of the handwriting expert was to the effect that the Deed of Gift was forged and that the findings of the learned judge could not be faulted simply on the basis that the respondent's signature did at times change. That the expert's finding is his opinion and the court is not bound by it. In the case of **Shawaz Fawaz and Prosper Chelelwa vs. The People**<sup>9</sup> at page 13, this court had the following to say:

**“When dealing with the evidence of an expert witness a Court should always bear in mind that the opinion of an expert is his own opinion only, and it is the duty of the Court to come to its own conclusion based on the findings of the expert witness.”**

Further, in the case of **Sithole vs. The State Lotteries Board**<sup>10</sup> we held, inter alia, that:

**(iv) The function of a handwriting expert is to point out similarities or differences in two or more specimens of handwriting and the court is not entitled to accept his opinion that these similarities or differences exist but once it has seen for itself the factors to which the expert draws attention, it may accept his opinion in regard to the significance of these factors.**

We wish to state that while we agree that there was evidence regarding changes in the manner the respondent signed, we are of

the view that the trial court looked at the documents presented to it by the expert and came to its own conclusion. Also, we take the view that the alleged differences in the way the respondent signed was not the sole consideration for the findings made by the learned judge but rather, evidence was considered holistically. To begin with, it was not in dispute that the appellant did not witness the execution of the Deed of Gift in issue. Secondly, a Ms. J.C. Malunga who is alleged to have witnessed the execution of the Deed of Gift was not called as a witness and the donee also did not testify. Thirdly, but not the least, there existed a caveat on the property at the time of registration of the Deed of Gift. Clearly, the appellant's case was very weak and it was weakened further by the serious irregularities noted in the issuance of the title in dispute. Surely, the alleged changes in the manner the respondent signed was not sufficient to warrant the trial court to find in the favour of the appellant. In other words, the appellant got caught in his own web of deceit and crookedness. In the case of **Galaunia Farms Limited vs. National Milling Company Limited and Another**,<sup>11</sup> we held that:

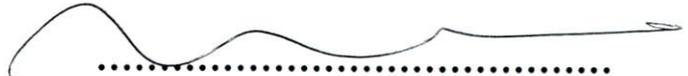
**A Plaintiff must prove his case and if he fails to do so, the mere failure of the opponent's defence does not entitle him to judgment.**

In our considered view, the learned trial judge considered the evidence in totality and rightly came to the conclusion that the appellant failed to prove his case. We, therefore, find no basis to reverse the findings of the learned judge. Ground four also fails.

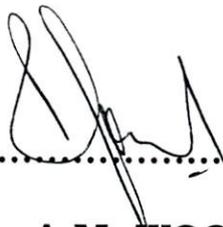
In sum, all the grounds of appeal fail. Costs to the respondent to be taxed in default of agreement.



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**G.S. PHIRI**  
**SUPREME COURT JUDGE**



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**E.N.C. MUYOVWE**  
**SUPREME COURT JUDGE**



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