IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 50/2014**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

CHARLES KAJIMANGA (HON. JUDGE) **APPELLANT**
AND
MARMETUS CHILEMYA **RESPONDENT**

CORAM: MAMBILIMA, CJ, KABUKA AND CHINYAMA, JJS;
On 12th July, 2016 and 2nd August, 2016.

For the Appellant: **Mr. E. Silwamba, SC, of Messrs. Erick Silwamba, Jalasi and Linyama Legal Practitioners;**
For the Respondent: **Dr. O. M. M. Banda, of Messrs. OMM Banda and Company.**

JUDGMENT

MAMBILIMA, CJ, delivered the Judgment of the Court.

CASES REFERRED TO-

1. **BEATRICE MUIMUI V. SYLVIA CHUNDA, APPEAL NO. 50 OF 2000;**
2. **HONORIUS CHILUFYA V. CHRISPIN KANGUNDA (1999) ZR 166;**
3. **R. V. HOLY TRINITY, HULL (1827) 7 B&C 611;**
4. **MASAUSO ZULU V. AVONDALE HOUSING PROJECT LIMITED (1982) ZR 172;**
5. **TRADE KINGS LIMITED V. UNILEVER PLC, CHEESEBROUGH PONDS (Z) LTD AND LEVER BROTHERS (Z) LTD (2000) ZR 16;**
6. **G. F CONSTRUCTION (1976) LIMITED V. RUDNAP (ZAMBIA) LIMITED AND UNITECHNA LIMITED (1999) ZR 134;**
7. **WILSON MASAUSO ZULU V. AVANDALE HOUSING PROJECT LIMITED (1982) ZR 172;**
8. **KITWE CITY COUNCIL V. WILLIAM NG'UNI (2005) ZR 57;**
9. **JUDITH CHILUFYA V ATTORNEY GENERAL AND MINISTRY OF WORKS AND SUPPLY, APPEAL NO. 76/2006;**
10. **PETER MILITIS V. WILSON KAFULO CHIWALA (2009) ZR 34;**
11. **VALENTINE WEBSTER CHANSA KAYOPE V. ATTORNEY-GENERAL, SCZ JUDGMENT NO. 18 OF 2011;**

12. FINANCE BANK LIMITED V. AFRICA ANGLE LIMITED, IBRAHIM YUSUF SILDKY AND YVONNE PHOEBE JEDBURGH YUSUF (1998) ZR 237;
13. JUDITH MPOROKOSO V. KERRIES MUMBI SCZ JUDGMENT NO. 19 OF 2014;
14. OTK LIMITED V. AMANITA ZAMBIA LIMITED, DIEGO GAN-MARIA CASILLI, AMANITA PREMIUM OILS LIMITED, AND AMANITA MILLING LIMITED (2011) 1 ZR 170;
15. ANDERSON KAMBELA MAZOKA, LT GENERAL CHRISTON SIFAPI TEMBO, GODFREY KENNETH MIYANDA V. LEVY PATRICK MWANAWASA, ELECTORAL COMMISSION OF ZAMBIA AND THE ATTORNEY-GENERAL (2005) ZR 138;
16. SABLEHAND ZAMBIA LIMITED V. ZAMBIA REVENUE AUTHORITY (2005) ZR 109; AND
17. NKHATA AND FOUR OTHERS V. ATTORNEY GENERAL (1966), ZR 124.

STATUTES REFERRED TO-

i. SUPREME COURT RULES, CHAPTER 25 OF THE LAWS OF ZAMBIA;
ii. RULES OF THE SUPREME COURT, 1999 EDITION (WHITEBOOK); AND
iii. LANDS AND DEEDS REGISTRY ACT, CHAPTER 185 OF THE LAWS OF ZAMBIA.

OTHER AUTHORITIES REFERRED TO-

a. SIME STUART, "A PRACTICAL APPROACH TO CIVIL PROCEDURE", 10TH EDITION, OXFORD UNIVERSITY PRESS: OXFORD;
b. SIMON GOULDING, "ODGERS ON CIVIL COURT ACTIONS"(1996), 24TH EDITION, SWEET & MAXWELL: LONDON;
c. HALSBURY'S LAWS OF ENGLAND, VOLUME 27(1), PARAGRAPH 258; AND
d. HALSBURY'S LAWS OF ENGLAND, VOLUME 27(1), PARAGRAPH 15.

This appeal is from a Judgment of the High Court, delivered on 16th October, 2013. The Judgment followed an action by the Respondent commenced by way of a specially endorsed writ with a supporting statement of claim.

The dispute related to the ownership of stand No. 27269, Lusaka, also known as house number 1 of Plot 145/110a, Musonda Ngosa Road, Villa Elizabetha, Lusaka (hereinafter referred to as "the house").

The brief facts of this case, as can be gathered from the record of appeal, are that the Respondent was employed by the National Marketing Board (hereinafter referred to as "NAMBOARD"). When NAMBOARD was dissolved, the Government transferred him to Zambia Cooperative Federation (hereinafter referred to as "ZCF"). ZCF later surrendered him back to the Government, which terminated his services by a letter dated 28th April, 1997, written by a Mr. S. C. Mwamba, Director of the Directorate of State Enterprises.

On 1st October, 1997, Mr. Mwamba wrote another letter to the Respondent, offering him to purchase the house at K46 million, as part payment for his terminal benefits. The Respondent paid for the purchase price through a deduction from his terminal benefits. At that time, the house was occupied by the Appellant as a former employee of ZCF. On 2nd June, 1998, Mr. Mwamba, wrote a letter to the Appellant informing him that the house had been offered for

sale to the Respondent as part payment of his terminal benefits. The Appellant was accordingly advised to accord the Respondent all the cooperation that he would require to take possession of the house.

On 20th January, 1999, Mr. Mwamba wrote another letter to the Appellant, informing him that the final sale arrangements had been made and that the Respondent was now expected to take possession of the house. The Appellant was given 30 days' notice from the date of the letter, to vacate the house and allow the Respondent to take possession.

According to the Respondent, after he purchased the house, he went on to obtain Certificate of Title number 10651. He alleged that from 1st October, 1997, to the date that he commenced this action, the Appellant had been occupying the house without paying rentals. That despite several demands, the Appellant had refused to vacate the house claiming that he was the sitting tenant and, therefore, entitled to purchase the house. That this prompted the Respondent to institute this action claiming the following reliefs:

(a) an order that he is the rightful and legal owner of stand No. 27269, Lusaka, known as House No. 1 of Plot No. 145/110a, Musonda Ngosa Road, Villa Elizabetha, Lusaka;
(b) an order for immediate vacant possession of the said house;

(c) an order to compel the Defendant to paint and repair all damages caused to the said house;
(d) an order to compel the defendant to settle any outstanding bills (if any);
(e) an order that since the Defendant was aware that the property belonged to the Plaintiff, any development by the Defendant was at his own risk;
(f) mesne profits in the sum of K4, 250, 000.00 per month from 1st October, 1997, to date of surrender of the property in dispute by the Defendant to the Plaintiff;
(g) damages for trauma and inconvenience;
(h) interest thereon at the current bank rate from the date of the writ until full settlement;
(i) costs; and
(j) further or other relief.

The Appellant filed a defence in which he disputed the Respondent's claim that the Government decided to sell all former NAMBOARD houses to Ex-NAMBOARD employees. He averred that any purported offer or sale of the house to the Respondent was procured, and consequently vitiated, by fraud on the part of the Respondent and other former NAMBOARD employees.

The Appellant alleged that the Respondent was purportedly offered the house in question by the Government on the basis of false representations by the Respondent to the Government that he was the sitting tenant of the house. He stated that in fact the Respondent had all along been occupying another property, also belonging to NAMBOARD, known as flat No. 2 of plot No. 6459, Saise Road, Longacres, Lusaka, at the time that the Appellant was

in occupation of the house in dispute. He claimed that he had occupied the house since 1989 as an incident of his previous employment as Board Secretary/Legal Counsel of ZCF.

The Appellant further stated that as a Judge of the High Court, who had been employed by the Government since 6th August, 2002, he had a legitimate expectation that the house would be sold to him pursuant to Cabinet Office Circular No. 12 of 1996.

The Appellant's only other witness, Mr. Grieve Zachariah SIBANDE, the former Managing Director of ZCF, confirmed that the house in dispute was allocated to the Appellant by the Housing Committee of ZCF when he was in the employment of ZCF as Board Secretary. He argued that because of his position, the Respondent could not have been eligible to be allocated that house.

The Appellant filed a counterclaim against the Attorney-General, who had been joined to the action as an Intervener. He counter-claimed that as a sitting tenant, he was entitled to purchase the property in accordance with Cabinet Office Circular No. 12 of 1996. He specifically claimed for the following reliefs-

(a) a declaration that the purported offer and sale of the house in dispute to the Plaintiff by GRZ is null and void ab initio;
(b) an order for the cancellation of Certificate of Title number 10651issued to the Plaintiff;

(c) a declaration that the Defendant has been and continues to be in lawful occupation of the house in dispute as a sitting tenant;
(d) an order that the Defendant is entitled to purchase the house in dispute at the price of K46 Million;
(e) any further or other relief (including directions) as the Court may deem just and equitable; and
(f) costs.

After considering the evidence and submissions before her, the learned trial Judge found that the Respondent was the rightful owner of the house. She dismissed the counter-claim by the Appellant. She based her decision on, among other authorities, this Court's judgment in the case of **BEATRICE MUIMUI V. SYLVIA CHUNDA**[1], where we said that-

> **"We do not subscribe to the argument that being a sitting tenant is the sole criterion in purchasing of a Government/quasi-Government house in the current policy of empowering employees of Government."**

With regard to the claim by the Appellant that the Court should cancel the Certificate of Title issued to the Respondent, the Court stated that it could only order the cancellation of the Certificate of Title if there was proof that it had been obtained fraudulently. For this, she cited the case of **HONORIUS CHILUFYA V. CHRISPIN KANGUNDA**[2], where we said that-

> **"Section 54 of the Lands and Deeds Registry Act, does not authorise fraud and this was a clear case of fraud. The law thus contemplates that fraud will vitiate a Certificate of Title."**

The lower Court accordingly made a declaration that the Appellant was unlawfully occupying the house. That he was not entitled to purchase the house because it had already been sold to the Respondent. She ordered the Appellant to vacate the house within 30 days. She further ordered the Appellant to settle any outstanding bills, to have the house painted inside and outside, and, to carry out any necessary repair works to the house.

With regard to the Respondent's claim for *mesne* profits, the Court declined to award the Respondent's claim of K4,250,000.00 per month. According to the learned trial Judge, there was no documentary proof of the rentals realized from 1st October, 1997, to the date of surrender. She referred the matter to the Deputy Registrar for assessment of the amount payable as rentals for the period in dispute.

The Appellant has now appealed to this Court, against the Judgment of the lower Court, advancing the following grounds of appeal:

1. **that the trial Court erred when it failed to find or decide that the Respondent had failed to prove, on a balance of probabilities, the case as pleaded by him via his pleadings *vis a vis* the case which the Respondent had deployed before the Court below;**
2. **that the trial Court grossly erred and misdirected itself when it failed to consider or evaluate or assess or to fully or sufficiently or**

seriously consider or evaluate or assess the evidence which was adduced in the Court by the Respondent in relation to or in the context of the case which had been pleaded by the Respondent and the Appellant's primary submissions which were filed into Court on 18th April, 2011;

3. **that the learned trial Judge erred when she proceeded to base or found her judgment on documents which were neither produced in Court nor their contents proved in evidence to the requisite standard of proof. Alternatively, the judgment of the trial Court was fundamentally flawed in that the same was based on surmise or conjecture;**
4. **that the learned trial Judge erred when she granted declaratory relief in her judgment which was neither sought in the pleadings nor warranted by the evidence which was deployed before her;**
5. **that the trial Court erred in having granted reliefs in favour of the Respondent, including the relief of mesne profits, which could only have been warranted if the Appellant had been in a Tenant and Landlord relationship with the Respondent;**
6. **that the trial Court erred and misdirected itself when it failed to adjudicate upon all or the issues which were actually presented before the Court by the Appellant; and**
7. **such other further grounds as may be filed by Counsel for the Appellant upon perusal of the Record of Appeal.**

In support of the above grounds of appeal, the learned Counsel for the Appellant, Mr. Silwamba, SC, filed written heads of argument and an additional list of authorities on which he relied entirely.

Mr. Silwamba, SC, combined arguments in support of the first, second and third grounds of appeal. He submitted that the Respondent did not only fail to refer to or produce the documents contained in his bundle of documents, but he also did not tell the Court that he was generally going to rely upon the said documents.

Counsel contended that in spite of the above position, in her Judgment, the learned trial Judge proceeded on the erroneous and misconceived assumption that the Respondent had actually produced documentary evidence during trial. He stated that litigation, be it civil or criminal, is conducted in accordance with prescribed Rules including appropriate Rules of evidence. According to him, the rules of evidence in both criminal and civil law recognize the elementary difference between filing documents to be used during the hearing or trial to support a litigant's case, and, actually producing or adducing such documents in evidence during the trial. He contended that in this matter, although various documents were filed into Court on behalf of the Respondent, none of the said documents was produced during the hearing of the matter. To support the above arguments, Counsel referred us to the case of **R. V. HOLY TRINITY, HULL**[3], where it was stated that-

> **"... the contents of a written document cannot be proved without producing it...."**

Counsel submitted that the parties in this matter did not file any agreed bundle of documents. He referred us to a book by Sime

STUART entitled **"A PRACTICAL APPROACH TO CIVIL PROCEDURE"**[a], where the author has said that-

> **"... where parties agree the bundles of documents to be used at any hearing ... all the documents in the agreed bundles are admissible as evidence of their contents unless the Court otherwise orders...."**

Mr. Silwamba, SC, went on to attack the learned trial Judge's findings of fact. He contended that the findings of fact by the learned trial Judge were not specifically deployed before the lower Court.

Counsel reproduced part of the Appellant's written submissions before the lower Court. The gist of what he reproduced is that the Respondent failed to demonstrate, with the help of appropriate documentary evidence, how the alleged offer of the house to him had arisen, who offered the house to him and how he made the alleged part payment for the house. To augment his submissions, Counsel cited, among other authorities, the case of **MASAUSO ZULU V. AVONDALE HOUSING PROJECT LIMITED**[4], where we said that-

> **"... where a plaintiff... makes any allegations, it is generally for him to prove the allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case."**

Mr. Silwamba, SC, submitted that although they made very solid and legally unassailable arguments in their submissions before the learned trial Judge, there was nothing in her judgment to show that she had given any consideration to the said arguments. To reinforce this submission, Counsel relied on a number of authorities including the case of **TRADE KINGS LIMITED V. UNILEVER PLC, CHEESEBROUGH PONDS (Z) LTD AND LEVER BROTHERS (Z) LTD**[5], where this Court said-

> **"One point which immediately stands out and which emerged and which appeared to be common cause was that the learned trial Judge did not in fact adjudicate upon the action and the issues actually presented by the Respondent."**

On the fifth ground of appeal, Counsel submitted that the learned trial Judge erred in having granted the relief of *mesne* profits because, according to Counsel, that relief could have only been warranted if the Appellant had been in a tenant and landlord relationship with the Respondent. For this argument, Counsel relied on our decision in the case of **G. F CONSTRUCTION (1976) LIMITED V. RUDNAP (ZAMBIA) LIMITED AND UNITECHNA LIMITED**[6], where we said that-

> **"On mesne profits, these are damages awarded to a landlord for holding over a tenancy by a tenant."**

In response, the learned Counsel for the Respondent, Dr. Banda, filed written heads of argument and an additional authority on which he relied entirely. He argued the Appellant's grounds of appeal seriatim.

On the first ground of appeal, Dr. Banda submitted that the question for determination before the lower Court as well as before this Court is- **"Who is entitled to purchase the property in dispute between the Parties herein?."** Counsel contended that the evidence on record shows that the Respondent proved before the trial Court that he was the rightful person to purchase the property in dispute. He argued that the learned trial Judge based her judgment on facts which were not challenged before the lower Court and which have not been challenged before this Court. He contended that this Court cannot interfere with the learned trial Judge's findings of fact because the Appellant has not shown any good reason to warrant the interference. For these arguments, he also referred us to, among other authorities, a portion of our judgment in the case of **WILSON MASAUSO ZULU V. AVANDALE HOUSING PROJECT LIMITED**[7], where we stated:-

> **"The appellate Court will only reverse findings of fact made by a trial Court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts."**

With regard to the second ground of appeal, Dr. Banda submitted that the Judgment in contention clearly shows that the lower Court considered, evaluated and assessed all the evidence the parties adduced before it.

On the argument by Counsel for the Appellant that the lower Court did not take into account Counsel's submissions before it, Dr. Banda contended that the Court is not bound to consider submissions by Counsel. In support of this contention, he referred us to our decision in the case of **KITWE CITY COUNCIL V. WILLIAM NG'UNI**[8], where we said that-

> **"The Court is not bound to consider Counsel's submissions because submissions are only meant to assist the Court in arriving at a judgment."**

Coming to the third ground of appeal, Dr. Banda submitted that during trial of the matter, the Appellant never raised the issue of non-production of the documents contained in the Respondent's bundle of documents. That the issue only arose in the Appellant's submissions. That, in any case, in his oral evidence, the Respondent adduced his evidence in line with the documents in his

bundle of documents. That the Appellant could not, therefore, have expected the lower Court to have considered the issue through his submissions. For these arguments, Counsel again cited the **KITWE CITY COUNCIL**[8] case.

Counsel adopted his submissions before the lower Court, the gist of which was that the bundles of documents in issue were duly served on the Appellant. That the Respondent never abandoned the filed bundles of documents and they were not struck off the record by the lower Court. According to him, the fact that the documents were not referred to did not mean that they had not been produced in Court.

As for the fifth ground of appeal, Dr. Banda urged us to take judicial notice of court decisions over NAMBOARD houses. According to Counsel, the said decisions show that the Respondent acquired the house through the decisions of this Court, the High Court and the Industrial Relations Court. He referred us to, among other cases, this Court's decisions in the case of **JUDITH CHILUFYA V ATTORNEY GENERAL AND MINISTRY OF WORKS AND SUPPLY**[9], where, in reference to former NAMBOARD houses, this Court stated that-

> **"In short the Supreme Court was saying that the houses were awarded to the Ex-Namboard workers in the Industrial Relations Court. The matter relating to these houses is, therefore, res judicata."**

Dr. Banda supported the lower Court's decision that the Appellant should pay the Respondent *mesne* profits for the period he remained in the house. For this, Counsel cited, among other authorities, the cases of **PETER MILITIS V. WILSON KAFULO CHIWALA**[10] and **VALENTINE WEBSTER CHANSA KAYOPE V. ATTORNEY-GENERAL**[11]**.** In the **PETER MILITIS**[10] case, we said that-

> **"A landlord may recover in an action for mesne profits damages which he has suffered through being out of possession of the land. Mesne profits being damages for trespass, can only be claimed from the date when a defendant ceased to hold the premises as a tenant and became a trespasser."**

In the **VALENTINE WEBSTER CHANSA KAYOPE**[11] case, we said the following:

> **"We accept the foregoing as the correct law on *mesne* profits. And on the evidence on record, we uphold the learned trial Judge's finding of fact that the period 1st January, 2002 to 30th November, 2004, the appellant had no legal right to occupy the respondent's house. We would add that he kept the respondent out of the house, without lawful justification. In the premises, the law governing mesne profits states that he must pay the mesne profits to the respondent for his continued occupation of the house, after the expiry of his legal right to occupy it. The fact that he was granted a stay of execution against eviction, while he was pursuing his vain**

claim to purchase the house, did not confer on him a legal right to occupy it, free of charge."

Dr. Banda submitted that the Appellant had kept the Respondent out of the house and the Respondent had suffered loss as a result of the Appellant's continued occupation of his property. Counsel added that, before the lower Court, the Appellant failed to prove the allegations contained in his amended defence/counter-claim against the Attorney-General.

Lastly, on the sixth ground of appeal, Dr. Banda contended that the Appellant has not highlighted the issues which he alleges the trial Court failed to properly adjudicate upon. In his view, the learned trial Judge properly adjudicated upon all the issues that were before her.

Counsel also argued that the first, second, third and seventh grounds of appeal are not grounds of appeal because they contravene the requirement that a ground of appeal should only contain points of law and fact which are alleged to have been wrongly decided. In support of this argument, Counsel relied on the case of **FINANCE BANK LIMITED V. AFRICA ANGLE LIMITED,**

IBRAHIM YUSUF SILDKY AND YVONNE PHOEBE JEDBURGH YUSUF[12], where we said that-

> **"According to rule 58(2) of the Supreme Court, a Memorandum of Appeal should not contain arguments but only points of law and fact which are alleged to have been wrongly decided."**

The gist of the argument by Dr. Banda, in his filed additional authority, is that although the Appellant is an ex-employee of ZCF and is now an employee of the Judiciary, the house in dispute did not belong to the Judiciary but to NAMBOARD, the employer of the Respondent. That, therefore, the Appellant was not eligible to be offered the house. To reinforce these arguments, Counsel referred us to the case of **JUDITH MPOROKOSO V. KERRIES MUMBI**[13]. He stated that in that case, the Appellant was a teacher under the Ministry of Education who occupied a ZCCM house. According to him, the Appellant claimed to be eligible to be offered the house she occupied and she advanced the same arguments as those advanced by the Appellant before the lower Court. He reproduced a portion of our decision in that case, from pages J14 to J25 of that Judgment. Of relevance to this case, we said the following in the **JUDITH MPOROKOSO**[13] case:

> **"It is very clear to us that the respondent purchased the house in issue in 1998, long before it was offered to the appellant in 2002,**

and that at the time of purchase; he was eligible to buy the house. The contract of sale between ZCCM and the respondent having been concluded in 1998, ZCCM could not offer the same house to the appellant for purchase because the house was no longer available for sale. ...

The Appellant has spiritedly argued that she is entitled to benefit from the sale of the house because she was the legal sitting tenant and a government employee. While we acknowledge that the appellant was and still is a government employee in the Ministry of Education, she was not an employee of ZCCM, the institution that was selling the houses or of a subsidiary of ZCCM ....

Applying the decisions in the above two cases to the facts of the present case, it is clear that the appellant did not qualify to purchase the house in issue. Being a sitting tenant and an employee of the Government in the Ministry of Education at the time of the implementation of the home ownership empowerment scheme did not make the appellant eligible to purchase a ZCCM house. The appellant needed to be an employee of ZCCM or a subsidiary of ZCCM in addition to being a sitting tenant. ...

The house in issue was not a Government pool house. It belonged to ZCCM, a quasi-Government institution although the Government was the majority shareholder. As testified by PW2, ZCCM had preferred to sell the house to the respondent, a former employee who had not been paid his terminal benefits though he was not a sitting tenant. Clearly, the respondent was eligible to purchase the house; and he paid for it through his terminal benefits and he would be right to say that the house was sold to him as part of his benefits."

We have carefully considered the evidence on record, the heads of argument and additional authorities filed by Counsel, and the judgment appealed against. We will deal with the first, second, third and sixth grounds of appeal together because they have raised related issues. We will then deal with the fifth ground of appeal. The Appellant has abandoned the fourth ground of appeal.

The kernel of the arguments by Counsel for the Appellant, Mr. Silwamba, SC, on the first, second, third and sixth grounds of appeal, is that in his evidence before the lower Court, the Respondent did not make any reference to, or produce any of, the documents contained in his bundle of documents. Further, that the Respondent did not tell the lower Court that he was generally going to rely on documents contained in the bundle of documents.

Mr. Silwamba, SC, has also attacked the learned trial Judge's findings of fact on the ground that none of the said findings of fact was directly deployed before the trial Court by the Respondent. Counsel has gone on to accuse the lower Court of having failed to take into account submissions made before the lower Court on behalf of the Appellant. In addition, he has contended that the learned trial Judge did not adequately adjudicate on the issues presented before her.

One of the issues raised by the first, second, third and sixth grounds of appeal is whether the learned trial Judge properly directed herself when she relied on the documentary evidence contained in the Respondent's bundle of documents. A look at the Respondent's evidence before the lower Court indeed establishes

that, in his testimony, he did not make reference to any of the documents contained in his bundle of documents. However, in our view, this cannot be taken to mean that the Respondent abandoned all the documents contained in his bundle of documents.

The procedural rules relating to documentary evidence in civil matters are different from those applicable to criminal matters. This is essentially because the standard of proof in criminal matters is proof beyond reasonable doubt while proof in civil matters is on a balance of probabilities. For this reason, the rules relating to documentary evidence in criminal matters require that each document must be specifically identified and produced by the relevant witness during trial before its contents can be publicized and relied upon to support a party's case. It follows that the criminal case of **R. V. HOLY TRINITY, HULL**[3], which Counsel for the Appellant has relied upon, is not applicable to the facts of this case.

In addition to the above, it is trite law that, there is no discovery and inspection of documents and the filing of bundles of documents in criminal matters, unlike the position in civil matters where civil procedural rules provide for parties to have access to all

documents in the possession of their opponent and raise any objections that they may have to such documents. According to Order 19 of the **SUPREME COURT RULES**[1], the Court or trial Judge should, not later than fourteen days after appearance and defence have been filed, give directions with respect to, among other things, discovery of documents and inspection of documents. Discovery of documents enables a party to see all material documents in the possession of his or her opponent and if need be, to take copies of the documents. The authors of **ODGERS ON CIVIL COURT ACTIONS**[b], have said at page 277-

> **"Such disclosure is obtained by the process – formerly only available in equity, but now freely used in all divisions of the High Court and the county court- called 'Discovery of Documents'. Two stages are involved: the disclosure of what documents exist (coupled with any claim that any of them are privileged from production) and the inspection of such of those documents as the opposite party is entitled to see."**

Order 24, rule 16 of the **RULES OF THE SUPREME COURT, 1999 EDITION**[ii], stipulates the consequences of failure to comply with the requirement for discovery. It states-

> **"24/16 16.—(1) If any party who is required by any of the foregoing rules, or by any order made there under, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose or to supply copies thereof fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1) the Court**

> **may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly."**

The above elaborate procedures of discovery and inspection of documents allow parties to know in advance which documents are with the opponent and to raise objections if necessary. In the case of **OTK LIMITED V. AMANITA ZAMBIA LIMITED, DIEGO GAN-MARIA CASILLI, AMANITA PREMIUM OILS LIMITED, AND AMANITA MILLING LIMITED**[14], Mutuna, J (as he was then), stressed the importance of discovery and inspection of documents when he said the following:

> **"the application before me is an interlocutory application which arises from the defendant's notice to object to documents filed on 4th September, 2009. It comes in the wake of the failure by the parties to convene for inspection of documents, at which stage the defendants would have raised the objections. It has become common practice now for Counsel to ignore or neglect to inspect documents, and proceed straight to filing bundles of documents. This is what happened in this case and the practice is not only wrong, but is frowned upon by the courts. Further, the fact that the parties have deliberately ignored taking certain steps set out in the order for directions, does not take away a party's right to object to certain documents that are included in the bundle of documents."**

From the above, it is clear that in a civil matter, a party is provided with an opportunity to object to any document intended to be brought before the Court by the opposing party. We must add here that an objection to a document must be made timely to allow

the opposing party to respond and, if possible, to make any relevant application. In our opinion, the objection cannot be validly made after the trial of the matter has closed.

The facts of the present case establish that the Appellant did not raise any objection to the documents contained in the Respondent's bundle of documents during discovery and inspection of documents or at any other time before the conclusion of trial. The objection was only raised in the Appellant's written submissions, which were filed after the close of trial. In our view, the Appellant's objection was not timely as there was no opportunity for the Respondent to respond to the objection and, if possible make any necessary application to make amends. In fact, a cursory study of the Appellant's written submissions before the lower Court and his grounds of appeal before us, establishes that the Appellant has not questioned the authenticity of any of the documents contained in the Respondent's bundle of documents.

We, therefore, are of the view that the lower Court was not precluded from taking into account the documents contained in the Respondent's bundle of documents. This holding is supported by our decision in the case of **ANDERSON KAMBELA MAZOKA, LT**

GENERAL CHRISTON SIFAPI TEMBO, GODFREY KENNETH MIYANDA V. LEVY PATRICK MWANAWASA, ELECTORAL COMMISSION OF ZAMBIA AND THE ATTORNEY-GENERAL[15], where we said the following:

> **"Thus, in a case where a defence and or, in our view, any matter not pleaded is let in evidence and not objected to by the other side, the Court is not and should not feel precluded from considering it .... In our considered opinion, the Respondent having not objected to the evidence immediately it was adduced, this Court is not precluded from considering that evidence."**

In any case, even assuming that the documents contained in the Respondent's bundle of documents had not been produced, the Appellant does not dispute the fact that the Respondent was issued with a Certificate of Title in relation to the house. It is trite law that a Certificate of Title is conclusive evidence of ownership of the property to which it relates. It can only be nullified if fraud, in its acquisition, is proved. To this effect, section 33 of the **LANDS AND DEEDS REGISTRY ACT, CHAPTER 185 OF THE LAWS OF ZAMBIA**[3], provides in part that-

> **"33. A Certificate of Title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise, which but for Parts III to VII might be held to be paramount or to have priority; the Registered Proprietor of the land comprised in such Certificate shall, except in case of fraud, hold the same subject only to such**

> **encumbrances, liens, estates or interests as may be shown by such Certificate of Title and any encumbrances, liens, estates or interests created after the issue of such Certificate as may be notified on the folium of the Register relating to such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever...."**

Although, in his defence and counter-claim, the Appellant alleged fraud in the manner the Respondent obtained the Certificate of Title, he did not adduce any evidence to prove the fraud to the required standard. It is settled law that an allegation of fraud must not only be clearly and distinctly alleged but it must also be clearly and distinctly proved by evidence. The standard of proving an allegation of fraud is higher than the civil law standard of proof. In the case of **SABLEHAND ZAMBIA LIMITED V. ZAMBIA REVENUE AUTHORITY**[16],we said the following:

> **"On the authorities cited to us ... we entirely agree with the appellant's Counsel that where fraud is to be a ground in the proceedings, then a defendant or respondent 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. The clear message from the two cited cases is that 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."**

In this case, we hold that the Appellant did not lead any evidence to clearly and distinctly prove the allegation of fraud in the issuance of the Certificate of Title. We, therefore, hold that the Certificate of Title issued to the Respondent in relation to the house,

remains conclusive evidence of the Respondent's ownership of that house.

With regard to Counsel for the Appellant's attack on the learned trial Judge's findings of fact, we are of the opinion that Counsel has not stated specifically the grounds upon which they have faulted the lower Court's findings of fact. We do not, therefore, see any valid legal basis for reversing the said findings. In so holding, we affirm our decision in **NKHATA AND FOUR OTHERS V. ATTORNEY GENERAL**[17],where we said-

> **"a trial Judge sitting alone without a jury can only be reversed on fact when it is positively demonstrated to the appellate court that:**
>
> **(a) by reason of some non-direction or mis-direction or otherwise the Judge erred in accepting the evidence which he did accept;**
>
> **(b) in assessing and evaluating the evidence the Judge had taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account;**
>
> **(c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the Judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or**
>
> **(d) in so far as the Judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted was not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.**

On the contentions by Counsel for the Appellant, that the lower Court failed to take into account the Appellant's submissions and to adequately adjudicate on all the issues, we are of the view that these contentions have not been substantiated by Counsel.

Accordingly, we find no merit in the first, second, third and sixth grounds of appeal.

Coming to fifth ground of appeal, the gist of the arguments by Counsel for the Appellant is that the learned trial Judge misdirected herself when she awarded the relief of *mesne* profits to the Respondent. According to Counsel, that relief could have only been warranted if the Appellant had been in a tenant and landlord relationship with the Respondent.

In our view, the question for our decision on the fifth ground of appeal is whether the lower Court properly directed itself when it awarded the Respondent the relief of *mesne* profits. The position of the law on *mesne* profits has been clearly stated by the authors of **HALSBURY'S LAWS OF ENGLAND, VOLUME 27(1), PARAGRAPH 258**[c], who have said that-

> **"The landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land or, if he can prove no actual damage caused to him by the defendant's trespass, the landlord may recover as mesne profits the**

value of the premises to the defendant for the period of the defendant's wrongful occupation. In most cases, the rent paid under any expired tenancy is strong evidence as to the open market value. Mesne profits, being a type of damages for trespass, may be recovered in respect of the defendant's continued occupation only after the expiry of his legal right to occupy the premises. The landlord is not limited to a claim for the profits which the defendant has received from the land, or those which he himself has lost."

It is clear from the above quotation that in an action for *mesne* profits, a landlord may recover the damages which he or she has suffered through being out of possession of the land. The question then, is whether the Respondent can be said to have been the Appellant's landlord in relation to the house in dispute. In our view, the documents on the record of appeal establish that the Respondent was legally the Appellant's landlord from the time the Government sold the house to him.

It is not in dispute that the Appellant was only assigned the house by virtue of his employment as Board Secretary/Legal Counsel for ZCF. He was, therefore, occupying the house as a tenant of the Government. This position is consistent with what the authors of **HALSBURY'S LAWS OF ENGLAND, VOLUME 27(1), PARAGRAPH 15[d]**, have said, namely that-

"Where, however, a person is merely permitted to occupy premises, whether as a privilege or by way of remuneration or part payment for his services, he occupies as tenant and not as employee, unless he does not have exclusive possession of the premises.... The

relationship of employer and employee and landlord and tenant may exist simultaneously between the same persons, even though the employee occupies his employer's premises rent-free as part remuneration for his services."

There is evidence, and the learned trial Judge found as a fact, that by a letter written on 1st October, 1997, the Directorate of State Enterprises offered the house for sale to the Respondent. On 10th October, 1997, the Respondent accepted the offer. On 2nd June, 1998, the Director of the Directorate of State Enterprises wrote to the Appellant informing him that the house had been offered for sale to the Respondent. The Director also advised the Appellant to accord the Respondent all the cooperation needed to enable him take possession of the house. On 20th January, 1999, the Director wrote to the Appellant advising him that the final sale arrangements had been concluded. In that letter, he gave the Appellant 30 days, from the date of the letter, to vacate the house and allow the Respondent to take possession.

Although it is not in dispute that the Appellant was an employee of ZCF and has been an employee of the Judiciary since 6th August,2002, he has never been an employee of NAMBOARD, the institution whose houses were sold to its former employees as settlement of their terminal benefits.

On the authority of the **JUDITH MPOROKOSO**[13] case, the relevant portions of which we have already reproduced elsewhere in this judgment, we hold that the Appellant did not qualify to purchase the house. Being a sitting tenant and an employee of the Government did not make the Appellant eligible to purchase that house. The Appellant needed to be a former employee of NAMBOARD in addition to being a sitting tenant.

Further, and as we have already stated above, the letter of 20th January, 1999, by the Director of the Directorate of State Enterprises, allowed the Appellant to remain in lawful occupation of the house for 30 days from the date of that letter. However, after the expiration of the notice period, the Appellant refused to vacate despite several reminders from the Respondent.

We, therefore, are of the view that the Respondent must recover the *mesne* profits in respect of the period for which the Appellant continued to occupy the house after the expiry of the notice to vacate. In our view, to hold otherwise would be to give the Appellant unjust enrichment.

Ground five, therefore, has no merit.

The Appeal having failed on all the grounds of appeal, we dismiss it with costs for the Respondent. We refer this matter to the Deputy Registrar for assessment of the *mesne* profits for the period the Appellant remained in occupation of the house after the notice to vacate had expired.

I.C. Mambilima
CHIEF JUSTICE

J.K. Kabuka
SUPREME COURT JUDGE

J. Chinyama
SUPREME COURT JUDGE