

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

**2014/HP/0289**

**BETWEEN:**

**MWAMPOLE BRIGHTON KASHAWINDO**

**PLAINTIFF**

**AND**

**MULENGA KASONDE GRACE**



**1<sup>ST</sup> DEFENDANT**

**TONKA REAL ESTATE DEVELOPMENT  
LIMITED**

**2<sup>ND</sup> DEFENDANT**

**(By Original Action)**

**AND BETWEEN:**

**TONKA REAL ESTATE DEVELOPMENT  
LIMITED**

**1<sup>ST</sup> PLAINTIFF**

**CRAWFORD MWINGA (MALE)**

**2<sup>ND</sup> PLAINTIFF**

**AND**

**MWAMPOLE BRIGHTON KASHAWINDO  
(MALE)**

**1<sup>ST</sup> DEFENDANT**

**KABAJAN MUSAH (MALE)**

**2<sup>ND</sup> DEFENDANT**

**(By Counterclaim)**

**Before the Hon. Mrs. Justice A. M. Sitali on the 7<sup>th</sup> day of September,  
2017**

***For the Plaintiff and  
1<sup>st</sup> and 2<sup>nd</sup> Defendants  
(by counterclaim)***

**: *Mr. S. Mambwe of  
Mambwe, Siwila and Lisimba  
Advocates***

*For the 1<sup>st</sup> and 2<sup>nd</sup>  
Defendants and 1<sup>st</sup>  
and 2<sup>nd</sup> Plaintiffs  
(by counterclaim)*

: *Mr. W. Mubanga of  
Chilupe and Permanent Chambers*

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## J U D G M E N T

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Cases referred to:

1. Thorne v. Head (1894) 1 Ch 599
2. Re Howett (1949) Ch 767
3. Dominic Mulaisho v. The Attorney-General (2012) ZR 551
4. Magic Carpet Travel and Tours v. Zambia National Commercial Bank Limited (1999) ZR 61
5. Raphael Ackim Namung'andu v. Lusaka City Council (1978) ZR 358
6. Katongo v. Attorney-General (1978) ZR 148
7. Communications Authority v. Vodacom Zambia Limited (2009) ZR 196
8. Modern Jacks Suppliers Limited v. Strong Engineering Limited and George Sokota (Suing as Liquidation Manager) of African Commercial Bank Zambia Limited SCZ Appeal No. 50 of 2001

Legislation referred to:

1. The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia, section 34
2. The Rules of the Supreme Court, 1999 edition, Order 15 rule 3 and Order 33 rule 3.
3. The Limitation Act 1939, sections 4 and 26

Other works cited:

1. Leigh, R. Coote's Treatise on the Law of Mortgages, 9<sup>th</sup> edition, Volume 1, (London: Stevens and Sons Ltd, 1977)
2. Halsburys Laws of England, 3<sup>rd</sup> edition, volume 27, paragraph 263



The Plaintiff, Mwampole Brighton Kashawindo, commenced this action against the 1<sup>st</sup> and 2<sup>nd</sup> defendants on 24<sup>th</sup> February, 2014 by writ of summons accompanied by a statement of claim. He claims the following reliefs:

- 1) an order that ownership in the property known as L/4770/M Lusaka reverts to him and that the title deeds in the name of the 2<sup>nd</sup> defendant be cancelled for fraud;
- 2) Injunction;
- 3) further or other relief; and
- 4) costs.

According to the statement of claim, the plaintiff was the registered owner of the property known as L/4770/M Lusaka from 1989 to January, 2014, when the 1<sup>st</sup> defendant purported to have been assigned the property by the plaintiff at a purported consideration of K6,000,000.00 (unrebased). The plaintiff asserted that he did not know the 1<sup>st</sup> defendant, Mulenga Kasonde Grace, and that he had never met her or assigned the property known as L/4770/M Lusaka to her. He further averred that he did not ever receive K6,000,000.00 from the 1<sup>st</sup> defendant as consideration for the said property.

The Plaintiff averred in the circumstances, that, the assignment of Lot number 4770/M, Lusaka to the 1<sup>st</sup> defendant could only have been perpetrated by fraud. He further averred that he was unaware of the fraudulent assignment of his property until January, 2014 when he conducted a search on the property. He asserted that the 1<sup>st</sup> defendant had commenced works on the property and had indiscriminately cut down trees in preparation for a project. The plaintiff averred that he had



suffered loss and damage as a result of the defendants' actions. He thus claims the reliefs set out in the statement of claim.

The defendants filed a memorandum of appearance and defence on 26<sup>th</sup> March, 2014.

On 9<sup>th</sup> July, 2014, Crawford Mwinga and Kabajan Musa who were not parties to the original action were joined to the action by way of counterclaim at the instance of the 1<sup>st</sup> and 2<sup>nd</sup> defendants to the original action. The joinder of the two parties was made pursuant to Order 15 rule 3 of the Rules of the Supreme Court, 1999 edition by consent order dated 9<sup>th</sup> July, 2014. By another consent order dated 18<sup>th</sup> March, 2015, the title of the action was amended to read as shown on the face of this judgment pursuant to Order 15/3/2 of the Rules of the Supreme Court. In the counterclaim action, Tonka Real Estate Development Limited and Crawford Mwinga are 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs, respectively, by counterclaim while the plaintiff, Mwampole Brighton Kashawindo and Kabajan Musah are the 1<sup>st</sup> and 2<sup>nd</sup> defendants, respectively, by counterclaim.

For ease of reference, I shall refer to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs by counterclaim as the 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs, respectively, while I shall refer to the 1<sup>st</sup> and 2<sup>nd</sup> defendants by counterclaim as the 1<sup>st</sup> and 2<sup>nd</sup> added defendants, respectively.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants in the original action and the 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs filed an amended defence and counter-claim. They asserted in their defence that the 1<sup>st</sup> defendant, Mulenga Kasonde Grace acquired Lot No. 4770/M Lusaka on or about 25<sup>th</sup> January 2000



pursuant to a court order for foreclosure dated 11<sup>th</sup> May, 1998 and had been paying yearly ground rent, as absolute owner, since then.

It was asserted that by an agreement in writing made and entered into between Mulenga Kasonde Grace, the 1<sup>st</sup> defendant and Tonka Real Estate Development Limited, the 2<sup>nd</sup> defendant, the 1<sup>st</sup> defendant, as purchaser of the property, assigned Lot No. 4770/M Lusaka to the 2<sup>nd</sup> defendant at a consideration of K6,000,000.00. The 1<sup>st</sup> and 2<sup>nd</sup> defendants denied any allegations of fraud on their part and contended that they acquired the subject property as innocent purchasers for value.

In their counter-claim, the 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs, Tonka Real Estate Development Limited and Crawford Mwiinga, stated that on 29<sup>th</sup> May, 1996, an equitable mortgage was created between Crawford Mwiinga, on one hand, and Mwampole Brighton Kashawindo and Kabajan Musah, on the other hand, by the deposit of the title deeds relating to property known as Lot No. 4770/M, Lusaka and Lot No. 7299/M, Lusaka by Kabajan Musah with Crawford Mwiinga as security for the repayment of a debt of K23,955,718.63 (unrebased) owed by Kabajan Musah to Crawford Mwiinga with compound interest at the ruling rate, at that time, per annum.

The 2<sup>nd</sup> added plaintiff stated that at the time the title deeds for the properties were deposited with him by the plaintiff and the 2<sup>nd</sup> added defendant, the properties were on 14 year leases, respectively, granted in respect thereof by the State. The 2<sup>nd</sup> added plaintiff averred that following the default by the plaintiff and the 2<sup>nd</sup> added defendant to discharge the mortgage, an order for foreclosure was granted by the Court on 11<sup>th</sup> May, 1998 in favour of the 2<sup>nd</sup> added plaintiff after which



the 2<sup>nd</sup> added plaintiff sold the property to the 1<sup>st</sup> defendant on 25<sup>th</sup> January, 2000, in order to recover the outstanding amount due and payable to him under the mortgage at that time.

The 2<sup>nd</sup> added plaintiff further averred that the sale of Lot 4770/M Lusaka pursuant to the Court order was done with the full knowledge of both the plaintiff and the 2<sup>nd</sup> added defendant and that a 99 year lease was granted in the 1<sup>st</sup> defendant's favour as absolute owner of the property. The 2<sup>nd</sup> added plaintiff averred that the 2<sup>nd</sup> defendant would state that its acquisition of Lot No. 4770/M, Lusaka from the 1<sup>st</sup> defendant on 18<sup>th</sup> September, 2013 was transparent and lawful and that it is entitled to ownership of the property.

The 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs repeated the contents of the 1<sup>st</sup> and 2<sup>nd</sup> defendants' defence and counter-claimed for:

- (i) A declaration that the 1<sup>st</sup> Added plaintiff acquired the said property properly and lawfully and is entitled to ownership of the same.
- (ii) An order that the sale by the 2<sup>nd</sup> added plaintiff to the 1<sup>st</sup> defendant of the said property was lawful and the 1<sup>st</sup> defendant was entitled to sale the same to the 2<sup>nd</sup> defendant.
- (iii) An order of injunction against the plaintiff (and 1<sup>st</sup> added defendant) and the 2<sup>nd</sup> added defendant restraining them whether by themselves, their agents, employees or servants from interfering with the 2<sup>nd</sup> defendant's (and 1<sup>st</sup> added



plaintiff's) quiet enjoyment of the property known as Lot No. 4277/M, Lusaka.

The plaintiff Mwampole Brighton Kashawindo and the 2<sup>nd</sup> added defendant, Kabajan Musah filed an amended defence and counter-claim to the 1<sup>st</sup> and 2<sup>nd</sup> defendant's defence and the 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs counter-claim on 25<sup>th</sup> March, 2015. The plaintiff averred that he did not at any time give his consent to the 2<sup>nd</sup> added defendant to use his certificate of title relating to Lot No. 4770/M, Lusaka as security for any loan and further that he had never been party to any foreclosure proceedings. The plaintiff further asserted that he had never at any time assigned the property to any person and that any change of title from his name to the name of anybody else was null and void for fraud. The plaintiff and 2<sup>nd</sup> added defendant averred that the 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs are not entitled to the reliefs they seek in their counter claim and urged that their claims be dismissed with costs.

The 2<sup>nd</sup> added defendant denied that he deposited the title deeds to Lot No. 4770/M, Lusaka and Lot No. 7299/M, Lusaka as security for any loan or at all.

In their counter-claim, the plaintiff and the 2<sup>nd</sup> added defendant alleged that the 2<sup>nd</sup> added plaintiff, Crawford Mwiinga sued the 2<sup>nd</sup> added defendant Kabajan Musah under cause No. 1995/HP/2598 for the sum of K7,074,250.00 being alleged consideration which had failed and proceeded to execute on Kabajan Musah's goods. In apparent dissatisfaction with the execution, Crawford Mwiinga commenced a repossession claim under cause No. 1997/HP/1419 which led to the repossession of the property known as Lot No. 7299/M, Lusaka.



Upon the repossession of Lot No. 7299/M, Lusaka, the said Crawford Mwiinga purported to assign the property to his wife, Mulenga Kasonde Grace, the 1<sup>st</sup> defendant, as purported mortgagee in possession. The 2<sup>nd</sup> added defendant averred that Crawford Mwiinga, did not and has never rendered any account of the money raised through the said executions. He contended that Crawford Mwiinga had long recovered his debt and had engaged in excessive execution. The 2<sup>nd</sup> added defendant averred that as a result of the actions of Crawford Mwiinga, he had suffered loss and damage. The 2<sup>nd</sup> added defendant therefore counter-claimed for:

- 1) An order to account;
- 2) An order for refund of all monies or values found due with interest;
- 3) Further or other relief;
- 4) and costs.

In response to the plaintiff's amended defence to counter-claim and the added 2<sup>nd</sup> defendant's counter-claim, the 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs stated that Kabajan Musah (the 2<sup>nd</sup> added defendant) delivered the certificate of title for Lot No. 7299/M, Lusaka and Lot No. 4770/M, Lusaka to the firm of Chilupe and Company as security for the repayment of the debt in case of default by him. The 2<sup>nd</sup> added defendant delivered the two certificates of title and signed the agreement dated 29<sup>th</sup> May, 1998, for the payment of the sum of K23,955,718.65 in the presence of Alfred Lungu of the said firm and Crawford Mwiinga, the 2<sup>nd</sup> added plaintiff.

The 2<sup>nd</sup> added plaintiff further alleged that while at Chilupe and Company, Musah Kabajan informed him and Alfred Lungu that Lot No. 4770/M, Lusaka was also his property and that the plaintiff was only



holding the property on his behalf. He alleged that Musah Kabajan's wife stated at that time that Lot No. 4770/M, Lusaka was intended as an inheritance for Kabajan Musah's children.

In his defence to the 2<sup>nd</sup> added defendant's counter-claim, the 2<sup>nd</sup> added plaintiff denied that he received any money from the bailiffs' execution under cause number 1995/HP/2598 and stated that the writ of execution was suspended due to the agreement dated 29<sup>th</sup> May, 1998 and made between the 2<sup>nd</sup> added plaintiff and the 2<sup>nd</sup> added defendant. The 2<sup>nd</sup> added plaintiff further averred that in the circumstances, he had no account to render on the alleged proceeds that may have arisen from the execution.

He contended that the reason he kept pursuing the 2<sup>nd</sup> added defendant was that he had failed to settle the debt to him. The 2<sup>nd</sup> added plaintiff denied that he executed any writ of possession under cause No. 1997/HP/1419. The 2<sup>nd</sup> added plaintiff further stated that he entered into the consent order referred in paragraph 1 because the Court actions did not result in the recovery of the said debt. He contended that he had suffered damage and inconvenience at the hands of the plaintiff and the 2<sup>nd</sup> added defendant due to being denied the use of his money and access to the property in question.

That marked the close of pleadings.

On 7<sup>th</sup> October, 2015, after trial in the matter had commenced, the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs filed a notice to raise preliminary issues. The issues which the defendants and the added plaintiffs seek the Court to determine are as follows:



1. That the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> added defendants are estopped from proceeding with the action herein on account that the said action was commenced after the expiration of 16 years from the date on which the right of action accrued to him contrary to section 4 (3) of the Limitation Act 1939.
2. That the action herein is improperly before this Honourable Court as it is statute barred and is therefore an abuse of court process.

Skeleton arguments in support and in opposition to the preliminary issues raised were filed by the respective parties. Since, at that stage, the plaintiff had already testified and closed his case and the defendants has called one witness, I ordered that I would rule on the preliminary application in my judgment. In making this decision I relied on Order 33 rule 3 of the Rules of the Supreme Court, 1999 edition (the White Book) which gives this Court the discretion to decide at what stage of the proceedings to address a preliminary issue. The Order reads as follows:

*“The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directives as to the manner in which the question or issue shall be stated.”*

At the trial of the action, the plaintiff Mwampole Brighton Kashawindo testified that he was the registered owner of the property known as Lot No. 4770/M, Lusaka in respect of which he was granted a 14 year lease in 1989. He built a small house at the corner of the plot while the rest of the property remained undeveloped. In 2014, he was informed that



someone was building on his property. He denied that he assigned the property to Mulenga Kasonde Grace the 1<sup>st</sup> defendant on 25<sup>th</sup> January, 2000 as stated at entry No. 3 of the print out of the Lands register exhibited on page 9 of the defendants' bundle of documents. He stated that he does not know the 1<sup>st</sup> defendant, Mulenga Grace Kasonde, and that he had never been sued by any person concerning Lot No. 4770/M, Lusaka.

In cross-examination, the plaintiff stated that he left Lusaka to live in Kazungula in 1992 and that he left the certificate of title for Lot No. 4770/M, Lusaka with Musah Katombola, the 2<sup>nd</sup> added defendant, who is his uncle, for safe keeping. He said he had not got the certificate of title back from him since then. The plaintiff further stated that the lease he was issued for the property was for a period of 14 years and was effective from 12<sup>th</sup> May 1989. It was due to expire in 2003. He said that he asked the 2<sup>nd</sup> added defendant to apply to the Ministry of Lands for an extension of the lease when it expired. He further testified that he did not pay ground rent after 1992 and that his uncle used to pay the ground rent. He conceded that he did not have receipts for the ground rent he paid before 1992. He stated, when referred to page 21 of the defendant's bundle of documents, that it was not he who paid the ground rent which was paid from 1<sup>st</sup> January 2001 onwards.

When referred to the printout of the Lands register on page 10 of the defendant's bundle of documents, the plaintiff confirmed that according to entry No. 7 of the Lands register, a certificate of title was issued to Mwiinga Mulenga Grace Kasonde for property No. L/4770/M Lusaka on 7<sup>th</sup> July, 2006. He said he did not know about this development and



came to learn of it in 2014. He reiterated that he built a structure on the property and planted mango trees along its boundary.

The plaintiff stated that he did not conduct a search on the property at the Ministry of Lands between 1992 and 2014. He said he was not aware that the 2<sup>nd</sup> added defendant Kabajan Musah deposited his title deeds for Lot No. 4770/M, Lusaka, with the 2<sup>nd</sup> added plaintiff's lawyers as security for a loan. He said he did not authorize him to do so. The plaintiff denied that although the certificate of title to Lot No. 4770/M Lusaka was in his name, the beneficial owner of the property was Kabajan Musah and that he was only holding the property in trust for him.

That was the plaintiff's case.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants and the 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs called three witnesses. DW1 was Crawford Mwiinga, the 2<sup>nd</sup> added plaintiff. He testified that he was a director in Tonka Real Estate Development Limited, the 2<sup>nd</sup> defendant and 1<sup>st</sup> added plaintiff, and that on 24<sup>th</sup> February 1994, the 2<sup>nd</sup> added defendant, Kabajan Musah and he entered into an agreement for him (DW1) to purchase Lot 7298/M, Lusaka, which is along Kafue Road, from Kabajan Musah, at the agreed purchase price of K16 million (unrebased). DW1 identified the agreement to that effect on page 8 of the plaintiff's bundle of documents.

He went on to state that the parties agreed that after he had paid a specified portion of the purchase price, Kabajan Musa would give him the certificate of title to the said property and he would then pay the balance of the purchase price. DW1 stated that Kabajan Musa failed to give him



the certificate of title and he later discovered that he had sold the property to someone else. DW1 said he wrote a letter to him demanding a refund of the money he had paid for the property.

On 29<sup>th</sup> May, 1996, he summoned Kabajan Musah to a meeting held at Chilupe and Company, the firm of lawyers who were representing him at that time. DW1 stated that Kabajan Musah brought with him to the meeting, two certificates of title for two properties, namely, Lot 4770/M, Lusaka and Lot 7299/M, Lusaka which he deposited with him as security for the money he owed him. He stated that Kabajan Musah gave him the certificates of title so that he could foreclose on the property if he failed to pay. The certificate of title for Lot No. 4770/M, Lusaka was in the name of Brighton Kashawindo Mwampole and the other one was in Kabajan Musah's name.

Kabajan Musah explained to him that Mwampole Brighton Kashawindo was holding the property in trust for him as beneficial owner because, at that time, the leadership code did not allow one person to hold title to two properties. DW1 stated that Kabajan Musah's late wife confirmed that information.

DW1 stated that on 29<sup>th</sup> May, 1996 Kabajan Musah and he signed an agreement for the repayment of the sum of K23,955,718.65 which he owed him. He identified the agreement on page 13 of the defendants' bundle of documents. DW1 went on to state that Kabajan Musa failed to honour the agreement and defaulted in repaying the debt. He therefore commenced Court proceedings to foreclosure on the two properties and a court order was issued on 11<sup>th</sup> May, 1998. To support his assertion,



DW1 referred to the Court order on page 14 of the defendant's bundle of documents.

DW1 went on to testify that he later discovered that it was not possible to change title to Lot No. 4770/M, Lusaka from Kabajan Musah's name to his name (DW1's name) because Kabajan Musah refused to sign the documents to assign the property to him. DW1 said he went back to court and in 2000, the court ordered that the property be assigned in his name. DW1 testified that Lot No. 4770/M, Lusaka was subsequently assigned to Mulenga Kasonde Grace as evidenced by entry No. 3 of the Lands Register set out on page 9 of the defendants' bundle of documents. A certificate of title to the property was issued in her name on 25<sup>th</sup> January, 2000 as per certificate of title set out on page 2 of the defendants' bundle of documents.

DW1 testified that he began to develop Lot No. 4770/M, Lusaka at the end of 2013 to early 2014 and that he built a two room structure with a bathroom and two bedrooms, a VIP toilet, a warehouse, a grand entrance and a boundary wall which were both three quarters complete. He also laid water pipes for Council water lines. DW1 contended that the plaintiff was not the beneficial owner of Lot 4770/M, Lusaka, because, according to him, the plaintiff had not paid any ground rent for it from 1994 to 2001. DW1 stated that the 1<sup>st</sup> defendant and he paid the ground rent arrears relating to the subject property.

He further stated that he did not know the plaintiff Mwampole Brighton Kashawindo and that he only met him during the trial of this action. He expressed surprise that the plaintiff had commenced this action so many years after a certificate of title to the property was issued in the name of



the 1<sup>st</sup> defendant, Mulenga Kasonde Grace. He contended that if the plaintiff were the beneficial owner of the property, he would have commenced the action much earlier.

In cross-examination, DW1 stated that the 1<sup>st</sup> defendant, Mulenga Kasonde Grace, and he were directors in Tonka Real Estate Development, the 2<sup>nd</sup> defendant (1<sup>st</sup> added plaintiff). He reiterated that both the 1<sup>st</sup> defendant and he had not met the plaintiff before the commencement of trial in this action. DW1 conceded that the plaintiff was not a party to the action under cause No. 1997/HP/1419 in which the order stating that the mortgage be enforced by an order of foreclosure subject to the defendant's right of redemption within 60 days from the date the order was issued. He conceded that the certificate of title for Lot 4770/M, Lusaka, was in the plaintiff's name at the time it was handed over to him as security for the repayment of the sum of K23,955,718.65 by Mr. Kabajan Musah.

DW1 further conceded that although he was aware that the property was in the plaintiff's name, he did not make him a party to the proceedings. DW1 also conceded that his wife Mulenga Kasonde Grace was not a party to the Court proceedings under cause No. 1997/HP/1419 in which the order on page 14 of the defendants' bundle of documents was issued.

He further testified that he transferred title in Lot No. 4770/M, Lusaka from the plaintiff's name into his wife's name through his lawyers, Chilupe and Company and that he did not transfer the property into his name in accordance with the court order. DW1 conceded that according to the Lands Register set out on page 9 of the defendants' bundle of documents, he had never been the owner of Lot 4770/M, Lusaka. DW1



further conceded that Mulenga Kasonde Grace did not pay the sum of K6 million to the plaintiff as consideration for Lot 4770/M, Lusaka as stated at entry No. 3 of the Lands Register. DW1 stated that his lawyer of Chilupe and Company had suggested that the deed of assignment should state that he had assigned the property to his wife, Mulenga Kasonde Grace, at a consideration of K6 million as he could not assign the property to his wife without any consideration. DW1 said the sum of K6 million was mythical and was not real.

When asked what the court order dated 11<sup>th</sup> May, 1998 issued under cause number 1997/HP/1419 which is at page 14 of the defendants' bundle of documents meant, DW1 said he did not understand the order as he was not a lawyer. He, however, said his lawyers interpreted it to mean that the Court had ordered that title to Lot No. 4770/M, Lusaka be transferred into his name.

In further cross-examination, DW1 explained that the property which he should have purchased from Kabajan Musah at K16 million was Lot 7298/M, Lusaka, situate on Kafue Road as per agreement on page 12 of the defendants' bundle of documents. He stated that after the sale failed, he demanded for a refund of the sum of K7,024,000.00 which he had paid towards the purchase price. He said he subsequently commenced an action against the 2<sup>nd</sup> added defendant, Kabajan Musah claiming for the sum of K7,074,250.00 with interest in respect of the purchase of Lot No. 7298/M, Lusaka for consideration which had wholly failed, as per specially endorsed writ issued under Cause No. 1995/HP/2598 and set out on pages 9 and 10 of the plaintiff's bundle of documents. He conceded that judgment in default of appearance was entered against the 2<sup>nd</sup> added defendant, Kabajan Musah, on 29<sup>th</sup> June,



1995 for the sum of K7,074,250.00 with interest as per document on page 11 of the plaintiff's bundle of documents.

DW1 said his lawyers issued a writ of fieri facias in execution of the default judgment and bailiffs seized goods worth K9 million from Kabajan Musah's house as evidenced by the sheriff's form on page 19 of the plaintiff's bundle of documents. He stated that it was after the seizure of Kabajan Musah's goods that Kabajan Musah and he signed the agreement on page 13 of the defendants' bundle of documents for the sum of K23,955,718.65 which comprised the principal sum of K7,074,250.00 with compound interest which he calculated from 28<sup>th</sup> February, 1994 when he paid the first installment of the money for the purchase of Lot No. 7298/M, Lusaka to 29<sup>th</sup> May, 1996 when the agreement was signed. DW1 conceded that the default judgment on page 11 of the plaintiff's bundle of documents which was issued on 29<sup>th</sup> June, 1995 under cause No. 1995/HP/2598 awarded interest on the principal sum of K7,074,250.00 but not compound interest.

DW1 further stated that the interest he calculated on the principal sum of K7,074,250.00 from 28<sup>th</sup> February, 1994 to 29<sup>th</sup> May, 1996 was over K14 million to get a total of K23 million. DW1 said he decided to charge Kabajan Musah compound interest on the principal sum of K7,074,250.00 just as he decided not to charge him costs, or else the sum would have been higher. DW1 further stated that after the writ of fieri facias was executed, and after Kabajan Musah went to see him, he abandoned the action under Cause No. 1995/HP/2598 and commenced another action under Cause No. 1997/HP/ 1419 for foreclosure.



He stated that the action under Cause No. 1995/HP/2598 in which the default judgment was issued and in respect of which the writ of fieri facias was executed was stayed as a result of the agreement executed by the parties, as evidenced by the letters on pages 1 to 5 of the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the 1<sup>st</sup> and 2<sup>nd</sup> Added plaintiffs' further bundle of documents dated 8<sup>th</sup> July, 2015. DW1 stated that he did not know if the action under Cause No. 1995/HP/2598 was discontinued before commencing the action under Cause No. 1995/HP/1419.

When referred to the debit and advice note on page 6 of the same bundle of documents, DW1 conceded that this was a report by the sheriff dated 21<sup>st</sup> October, 1997 relating to an execution carried out pursuant to a fresh writ of fieri facias issued under Cause No. 1995/HP/2598.

When referred to the printout of the Lands Register on pages 1 to 3 of the plaintiff's bundle of documents and asked to explain the entries relating to Lot No. 7299/M Lusaka, DW1 stated that Lot No. 7299/M, Lusaka previously belonged to Musa Katombola (2<sup>nd</sup> added defendant) but that he, as mortgagee in possession, conveyed it from his own name into the name of Mulenga Kasonde Grace on 25<sup>th</sup> January, 2000 because of a debt which Kabajan Musah owed him. He said Lot No. 7299/M, Lusaka whose certificate of title is now in the 1<sup>st</sup> defendant's name was not the same property, that is, Lot No. 7298/M, Lusaka which he intended to buy from the 2<sup>nd</sup> Added defendant at K16 million in 1994. He said the two properties, namely, Lot 7298/M, Lusaka and Lot 7299/M, Lusaka are next to each other and are the same size.

Asked if it was fair for him to get both Lot No. 4770/M, Lusaka and Lot No. 7299/M, Lusaka which he assigned to his wife for the sum of



K7,074,250.00 which Kabajan Musah owed him from the failed sale of Lot No. 7298/M, Lusaka, DW1 stated that he considered it fair to get both properties for the said sum because Kabajan Musah had held on to his money since 1994. He contended that he charged compound interest on the principal sum of K7,074,250.00 because he was a businessman and would have earned good interest if the money he had paid to Kabajan Musah for the purchase of Lot No. 7298/M, Lusaka had been in a bank account.

In re-examination, DW1 stated that the sum of K23,995,718.65 was calculated on the principal sum of K7,074,250.00 with interest as shown in the documents on pages 4 to 5 of the plaintiff's bundle of documents. He stated that he calculated interest on the principal sum based on the prevailing interest rate for Indo-Zambia Bank where he had an account at that time. He stated that he did not get a refund of the money he paid to Kabajan Musah for Lot No. 7298/M, Lusaka except for the K500,000.00 which Kabajan Musah paid to him on 29<sup>th</sup> May, 1996 leaving a balance of K23,955,718.65.

DW1 stated that Kabajan Musah agreed to pay this amount as per agreement on page 6 of the plaintiff's bundle of documents. He said he paid Kabajan Musah the sum of K7 million in installments as set out on page 17 of the plaintiff's bundle of documents.

DW2 was Godwin Opara who testified that his property Lot 4771/M, Lusaka is adjacent to Lot 4770/M, Lusaka and that he had approached Mr. Musah to sell him the said property. However, Mr. Musah refused to sell him the property. DW2 said in 2014, the 1<sup>st</sup> added plaintiff,



Crawford Mwinga began to build a boundary wall around Lot 4770/M which he said was his property.

In cross-examination, DW2 said he did not see the certificate of title for Lot No. 4770/M, Lusaka at the time he approached Mr. Musah to sell him the property. He further said he did not know that Lot No. 4770/M, Lusaka was not registered in Mr. Musah's name.

DW3 was Alfred Jack Lungu a lawyer of Chilupe and Permanent Chambers. He testified that he had worked for Chilupe and Company for twenty-three years before the merger to form Chilupe and Permanent Chambers. He stated that he knew Mr. Crawford Mwiinga, the 1<sup>st</sup> added plaintiff, as a client of the firm and that in 1995 Mr. Mwiinga issued instructions to Mr. George Chilupe of the same firm regarding the collection of an unpaid debt of K23,955,718.65 owed to him by Mr. Kabajan Musah. DW3 stated that Mr. Chilupe and he drafted the agreement for the recovery of the debt, a copy of which agreement is on page 6 of the plaintiff's bundle of documents. When the debt remained unpaid by Kabajan Musah, his lawyers Chilupe and Company issued process against the defendant (Mr. Musah) and judgment was entered against him. Execution of the judgment on the defendant, Kabajan Musa, was attempted but it was subsequently stayed after the bailiffs had effected execution, as the parties had made alternative arrangements to settle the debt at the instance of the plaintiff, Mr. Mwiinga.

DW3 stated that Mr. Crawford Mwiinga instructed the firm to write to the Sheriff of Zambia to suspend the proposed execution against Mr. Musah, which they did as evidenced by the letter on page 2 of the 1<sup>st</sup> and 2<sup>nd</sup> defendants and 1<sup>st</sup> and 2<sup>nd</sup> added plaintiff's bundle of documents filed on



8<sup>th</sup> July, 2015. DW3 further said that Mr. Mwiinga subsequently instructed the firm to prepare a deed of assignment in respect of the two properties, Lot 4770/M, Lusaka and Lot 7299/M, Lusaka which the defendant had offered as security for the settlement of the sum of K23,955,718.65.

DW3 stated that Crawford Mwiinga and Kabajan Musah had earlier executed a written agreement dated 29<sup>th</sup> May, 1996 pursuant to which the original title deeds for the two properties were deposited with Mr. Mwiinga, by Kabajan Musah. Mr. Mwiinga subsequently released the certificates of title to Chilupe and Company. DW3 said he prepared the deed of assignment between Mr. Mwiinga and Mr. Musah, and gave it to Mr. Mwiinga for the parties to execute. Mr. Mwiinga did not return the deed of assignment to him.

DW3 further testified that Mr. Kalokoni, a lawyer of Chilupe and Company then advised Mr. Crawford Mwiinga to commence a new action for foreclosure proceedings in Court. DW3 stated that he was aware that an order was made by the Court giving possession of the two properties to Mr. Mwiinga. To support his assertion, DW3 referred to the order on page 14 of the defendant's bundle of documents. DW3 stated that the order showed that Mr. Mwiinga's foreclosure action had succeeded and also ordered the enforcement of the mortgage. He said that on the basis of that order, Mr. Mwiinga arranged for the sale of the properties as mortgagee in possession. Title relating to the two properties was transferred by Mr. Mwiinga in favour of Mulenga, whose full names he could not remember. He stated that the certificate of title to Lot 4770/M, Lusaka was used as security for a third party mortgage.



DW3 testified that after that, the file at Chilupe and Company remained closed from 1998 until he was informed that Mr. Musah had commenced an action relating to the two properties against Mr. Mwiinga.

In cross-examination, DW3 stated that he was not aware that the plaintiff in this action was Mwampole Brighton Kashawindo. He said that he did not come across Mr. Kashawindo during the period when he handled Mr. Mwiinga's case. He said Mr. Mwiinga's instructions to the law firm were to collect the sum of K7,074,250.00 and that it was for that amount that judgment in default was obtained under cause No. 1995/HP/2598 as evidenced by the document on page 11 of the plaintiff's bundle of documents. He conceded that this was the sum for which a writ of *fifa* was issued and execution subsequently suspended.

DW3 stated that the agreement between Crawford Mwiinga and Kabajan Musa which he drafted, a copy of which he referred to on page 6 of the plaintiff's bundle of documents, related to the transfer of Lot 4770/M, Lusaka and Lot 7299/M, Lusaka and not to the debt of K7,074,250.00. DW3 conceded that a formal search was conducted at the Lands and Deeds Registry, which search revealed that the certificate of title to Lot 4770/M, Lusaka was in the name of Mwampole Brighton Kashawindo. DW3 stated that the agreement between Mr. Mwiinga and Mr. Musah stated that the debt should be paid within two months with interest. He further said the law firm did not require Mr. Mwampole Brighton Kashawindo to sign any document regarding the debt of K23,955,718.65 because Mr. Mwiinga's lawyers believed that he had authorised the use of his title deeds to secure the debt.



DW3 contended that the agreement between Crawford Mwiinga and Kabajan Musah was a third party mortgage and that it is not always the case that a third party mortgage must be signed by the owner of the property. He further contended that the mere deposit of the certificate of title to the subject property, with the lender, gives the lender equitable interest in the property until the debt is paid. He conceded that in this case, however, Mr. Mwampole Brighton Kashawindo the owner of Lot 4770/M, Lusaka did not deposit the title deeds with the lender. He further said that based on the advice of Mr. Kalokoni, Mr. Mwiinga commenced another action for possession of the properties which secured the debt.

DW3 stated that Mr. Mwampole, the plaintiff in this matter, was not made a party to the second action under cause no. 1997/HP/1419 in line with Mr. Mwiinga's lawyers' belief that he had no role to play in the matter. DW3 further conceded that the order at page 14 of the defendant's bundles of documents did not contain the details of the mortgaged properties. He also conceded that based on that order which the lawyers enforced against Mr. Mwampole Brighton Kashawindo, who was not a party to the action, Mr. Mwiinga's lawyers proceeded to change title to Lot 4770/M, Lusaka from Mwampole Brighton Kashawindo's name into the name of Mulenga Kasonde Grace.

DW3 stated that according to entry No. 3 of the Lands Register relating to Lot 4770/M, Lusaka, and exhibited on page 9 of the defendant's bundle of documents, Mwampole Brighton Kashawindo assigned the property to Mulenga Kasonde Grace upon payment of K6 million by the said Mulenga Kasonde Grace to Mwampole Brighton Kashawindo. DW3 conceded that the lawyers did not witness the payment of the sum of K6



million to Mwampole Brighton Kashawindo, as indicated at entry No. 3 of the Lands register relating to Lot No. 4770/M, Lusaka. He said the deed of assignment was signed by Mr. Mwiinga as mortgagee in possession. He further said until the late 1990s, there was no legal requirement for the mortgagee in possession to advertise the sale of the property to the public. That it was only when cases of this nature became prevalent that the rules changed and parties were required to seek an order of the Court to sale the property.

DW3 conceded that the assignment registered at entry at No. 3 of the Lands Register was made in 2000 and that the order for possession pursuant to which Mr. Mwiinga transferred the property to Mulenga Kasonde Grace was not registered against Lot 4770/M, Lusaka. He stated that the Lands register, therefore, did not reflect Mr. Mwiinga's interest in Lot 4770/M, Lusaka as mortgage in possession. DW3 conceded that Mr. Mwampole was excluded from the transaction but contended that the transfer of title to Lot No. 4770/M, Lusaka from his name to the name of Mulenga Kasonde Grace was based on a court order obtained in an action to which he was not a party. He further stated that he was not aware that Mulenga Kasonde Grace was Mr. Mwiinga's wife as he had never met her.

DW3 stated that the judgment in default under Cause No. 1995/HP/2598 awarded the plaintiff the sum of K7,074,250.00 with interest but that the rate of interest was not specified as evidenced by the order on page 11 of the plaintiff's bundle of documents.

When referred to the tabulations on pages 4 to 5 of the plaintiff's bundle of documents and asked to explain the computation of interest from 28<sup>th</sup>



February, 1994 to 25<sup>th</sup> May, 1996 on the principal sum paid by Mr. Mwiinga to Kabajan Musah towards the purchase of Lot No. 7298/M, Lusaka, DW3 stated that he was not involved in the tabulation and was unable to confirm whether compound interest was charged on the principal sum.

DW3 testified that the judgment in default was obtained under cause No. 1995/HP/2598 which was a different action from the action under cause No. 1997/HP/1419 in which Crawford Mwiinga obtained an order for possession. He conceded that he had not seen any document indicating that the earlier action was discontinued before the second action was commenced.

He stated that he was involved in the transfer of Lot No. 7299/M, Lusaka from Kabajan Musah to Mulenga Kasonde Grace in relation to the same mortgage. He further stated that the Court order relating to the mortgage was registered against Lot No. 7299/M, Lusaka as per entry No. 4 of the printout of the Lands Register on page 1 of the plaintiff's bundle of documents.

In re-examination, DW3 reiterated that the agreement between Mr. Mwiinga and Mr. Kabajan Musa was for the debt of K23,955,718.65 owed by Mr. Musah to Crawford Mwiinga. He stated that Mr. Mwiinga's lawyers used the certificate of title to Lot No. 4770/M, Lusaka to secure the loan owed by Mr. Musah, although it was in Mr. Mwampole Brighton Kashawindo's name, because Mr. Musah deposited the original certificate of title to secure the debt. DW3 stated that it was reasonable for Mr. Mwiinga's lawyers to assume that there was no fraud involved in the transaction relating to Lot No. 4770/M, Lusaka.



DW3 said that after the Court order was issued, title to Lot No. 4770/M, Lusaka was transferred to Mr. Mwiinga who acquired the right to sell it if he wished to do so, to recover the money. He stated that although the court order referred to both Lot No. 4770/M, Lusaka and Lot No. 7299/M, Lusaka, it was only registered against Lot No. 7299/M, Lusaka, which was in Mr. Musah's name. He further stated that he prepared the documentation for the transfer of Lot No. 4770/M, Lusaka from Crawford Mwiinga to Grace Kasonde Mulenga.

That was the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs' case.

The 2<sup>nd</sup> added defendant, Kabajan Katombola Musah, testified in his own defence but did not call any witnesses. I shall refer to him as DW4. DW4 testified that in 1994 he entered into an agreement with Mr. Mwiinga, the 2<sup>nd</sup> added plaintiff, for the sale of Lot No. 7298/M at the price of K16 million, as evidenced by the agreement on page 8 of the plaintiff's bundle of documents. Mr. Mwiinga paid the total sum of K7,074,250.00 towards the purchase price in installments from 28<sup>th</sup> February, 1994 until 8<sup>th</sup> April, 1994 as shown on the document at page 8 of the plaintiff's bundle of documents. The 7<sup>th</sup> installment of K70,000.00 (unrebated) was not recorded.

DW4 went on to state that at some point Mr. Mwiinga requested for the certificate of title to Lot No. 7298/M, Lusaka so that his wife, who was a medical doctor, could use it to borrow money to pay him, but he refused to give him the certificate of title. Mr. Mwiinga subsequently sued him for the sum of K7,074,250.00, which he had paid for the purchase of Lot No. 7298/M, Lusaka as evidenced by the specially endorsed writ on page



8 of the plaintiff's bundle of documents. He said he did not respond to the specially endorsed writ and so a writ of fieri facias was issued against him. DW4 said he engaged Veritas Chambers to represent him and a stay of execution of the judgment was obtained on his behalf as per order on page 12 of the plaintiff's bundle of documents.

After obtaining the stay of execution, he paid the Sheriff's fees as per receipt issued by the Sheriff's office on page 18 of the plaintiff's bundle of documents and collected his property. DW4 said he paid Mr. Mwiinga K500,000.00 as shown on page 5 of the plaintiff's bundle of documents and informed him that he would pay the balance of the judgment sum in due course.

DW4 went on to state that as he tried to raise the remaining sum of K6,500,000.00, Mr. Mwiinga issued another writ of fifa against him and his goods were seized. He requested Mr. Mwiinga to write to the bailiffs to allow him to retrieve the goods they had seized from him. Mr. Mwiinga summoned him to Chilupe and Company and demanded that he put his request in writing, which he did. Mr. Mwiinga then demanded for security for the debt. DW4 stated that he gave him the certificate of title for Lot No. 7299/M, Lusaka. However, Mr. Mwiinga later informed him that there was a caveat entered against that property and demanded for another certificate of title without releasing the first one. DW4 said he gave him the certificate of title for Lot No. 4770/M, Lusaka which was in the name of his nephew Mwampole Brighton Kashawindo and which his nephew had left in his custody when he left Lusaka.

DW4 stated that when he went back to Chilupe and Company the next day, he found that Mr. Mwiinga had prepared an agreement which stated



that he was to pay him the sum of K23 million being the principal sum of K7,074,250.00, with interest, less K500,000.00 which he had paid him. The agreement stipulated that he should pay the said sum of K23 million within two months and that no interest would accrue on that sum during that period. However, if he failed to pay the said sum, in full, within that period, interest would begin to accrue. DW4 identified the agreement to that effect on page 13 of the defendant's bundle of documents. He further testified that the agreement stated that he had mortgaged Lot No. 4770/M, Lusaka and Lot No. 7299/M, Lusaka to secure the debt. He further said that he surrendered the two certificates of title to Chilupe and Company in order to secure the release of his property which was seized by the bailiffs.

DW4 stated that he did not inform Mr. Mwampole that he had used his certificate of title to secure his debt or that he had surrendered it to Chilupe and Company. He stated that after he signed the agreement, Mr. Mwiinga's lawyers wrote a letter to the Sheriff instructing the bailiffs to release his seized goods. He stated that the goods were released to him after he paid the Sheriff's fees.

DW4 went on to testify that in 2000 he took the sum of K6,000,000.00 to Mr. Mwiinga as the principal sum of K7,074,250.00 less K500,000.00 and asked him to return the certificates of title to him. However, after counting the money, Mr. Mwiinga returned it to him and said that he was still interested in the land. He did not return the certificates of title to him. He also did not pay the balance of the K16 million purchase price for Lot 7298/M, Lusaka as per agreement of 28<sup>th</sup> February, 1994 which is on page 8 of the plaintiff's bundle of documents.



DW4 further stated that after that, Mr. Mwiinga and his wife took over the two properties and started developing them. Mr. Mwiinga purportedly sold Lot No. 7299/M, Lusaka to Mrs. Mwiinga when initially they were both intending purchasers of Lot No. 7298/M, Lusaka from him, as evidenced by the agreement to that effect on page 8 of the plaintiff's bundle of documents. Mr. Mwiinga also allegedly sold Lot No. 4770/M, Lusaka to Mrs. Mwiinga.

DW4 stated that he had counter-claimed that Mr. Mwiinga should account for Lot No. 7299/M, Lusaka because it was a high value property compared to Lot No. 7298/M, Lusaka which he and his wife should have purchased from him, and for which they had paid less than half of the agreed purchase price of K16 million. He stated that he sold Lot No. 7298/M to someone else in 1995 after Mr. Mwiinga suggested that he gives them the certificate of title to the property so that they could use it to borrow money to pay him because he realised that he had no money to complete the transaction.

In cross-examination, DW4 stated that according to the agreement which he signed with Mr. Mwiinga on 29<sup>th</sup> May, 1996, the debt which he allegedly owed Mr. Mwiinga was K23,955,718.65. He said he freely signed the agreement and was not forced to sign it by anyone. He stated that he mortgaged the two properties, namely, Lot No. 7299/M, Lusaka and Lot No. 4770/M, Lusaka for the debt and conceded that he failed to pay the debt by 30<sup>th</sup> July, 1996 as per agreement.

DW4 said that he was not aware of the order on page 14 of the defendant's bundle of documents by which the Court ordered that the mortgage be enforced by an order of foreclosure subject to the



defendant's right of redemption within 60 days from the date of the order, because it was not served on him. He denied the assertion that he was represented by Veritas Chambers in that action and should therefore have known that the two properties had been repossessed under the foreclosure order of 11<sup>th</sup> May, 1998. He stated that he learned of the Court order in 2014 from his Counsel.

DW4 stated that the goods seized by the bailiffs were released to him and were not sold after he paid the bailiff's fees. He reiterated that Mr. Mwiinga returned the K6 million which he had paid to him because he said he was still interested in the land. DW4 conceded that he knew that the certificate of title to Lot No. 4770/M, Lusaka was not in his name when he took it to Chilupe and Company. He further said the plaintiff entrusted him with the certificate of title to Lot No. 4770/M, Lusaka as his uncle and not as his agent.

He denied that he informed Mr. Mwiinga that Lot No. 4770/M, Lusaka was his property although it was in the plaintiff's name because of the leadership code. He explained that the leadership code did not apply to him as he was not a civil servant. He stated that the certificate of title for Lot No. 4770/M, Lusaka was issued in the plaintiff's name in 1989 for a 14 year lease and that it was due to expire in 2003.

DW4 explained that he sold Lot No. 7298/M, Lusaka to someone else after Mr. Mwiinga had paid K7,074,250.00 of the purchase price because he informed him that he needed the certificate of title to obtain a loan in order to complete the transaction. He further said that after he sold the property to someone else, he did not refund Mr. Mwiinga the sum of K7,074,250.00. He stated that it was then that he was sued by Mr.



Mwiinga. DW4 said that the sum of K23 million which he was required to pay Mr. Mwiinga, according to the agreement on page 13 of the defendant's bundle of documents, included interest on the principal sum of K7,074,250.00 which was calculated by Mr. Mwiinga. DW4 said he did not agree with the interest component of the said sum and that he did not intend to pay it without commencing a court action.

DW4 further stated that the plaintiff did not know what was happening on Lot No. 4770/M, Lusaka until he informed him that someone was constructing on his property. He further stated that he did not renew the 14 year lease for Lot No. 4770/M, Lusaka when it expired in 2003 because the land was already surveyed. He said he would have paid the outstanding ground rent on the property when he applied for a 99 year lease for the said property.

In re-examination, DW4 stated that he reluctantly signed the agreement on page 6 of the plaintiff's bundle of documents because he was unhappy with the interest component of the K23 million which Crawford Mwiinga calculated. He reiterated that he was not a leader and was not working for the Government so that he should fear the leadership code, with regard to the ownership of Lot No. 4770/M, Lusaka. He reiterated that the failure of the sale of Lot 7298/M, Lusaka was caused by DW1 who failed to complete the transaction.

That was the 2<sup>nd</sup> added defendant's case.

Counsel for the respective parties filed written submissions in support of their cases. I am grateful to Counsel for the submissions.



I have considered the pleadings and the evidence adduced by the parties, as well as the submissions and authorities cited therein.

In determining this matter, I shall first deal with the preliminary application raised by the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs. The first issue is that the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> added defendants are estopped from proceeding with this action as the said action was commenced after the expiration of 16 years from the date on which the right of action accrued to the plaintiff contrary to section 4 (3) of the Limitation Act, 1939. And further, that the action herein is improperly before this court as it is statute barred and is, therefore, an abuse of court process.

In skeleton arguments in support of the preliminary issue, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs essentially argued that whereas the plaintiff alleges in his statement of claim that the assignment of Lot No. 4770/M, Lusaka to the 1<sup>st</sup> and 2<sup>nd</sup> defendants could only have been perpetrated by fraud, the particulars of the fraud have not been pleaded or particularised in a concise and precise manner by the plaintiff as required by the rules. Further, that the alleged fraud has not been attributed to the defendants or the added plaintiffs or their agents or anyone acting on their instructions and on their behalf.

It was contended that for the alleged fraud to be tenable as against the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs, it must be solely attributed to them. Counsel submitted that this position is confirmed by section 4 and 26 of the Statute of Limitation 1939.



He further submitted that section 4 is subject to section 26 and that where fraud is alleged, the cause of action accrues when the fraud in question is discovered. He contended that where the fraud is not attributable to the defendant, an action to recover land cannot be commenced after 12 years from the time the right of action accrued.

Counsel submitted that in the present case, the right of action accrued well over 16 years ago and therefore this action cannot be entertained by this Court as the plaintiff slept on his rights. It was submitted that section 26 of the Limitation Act does not apply as the alleged fraud is not attributable to the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs.

Counsel argued that since the certificate of title to Lot No. 4770/M, Lusaka was freely deposited with the lawyers acting for the 2<sup>nd</sup> added plaintiff by the 2<sup>nd</sup> added defendant thereby creating an equitable mortgage, the 1<sup>st</sup> added plaintiff and the 1<sup>st</sup> defendant were not privy to what happened between the plaintiff and the 2<sup>nd</sup> added defendant concerning the release of the title deeds and the pledging of the title deeds as security for the mortgage.

That since the plaintiff pleaded that he did not know the 1<sup>st</sup> defendant and had never met her, any alleged fraud, cannot be attributed to the 1<sup>st</sup> added plaintiff or to the 1<sup>st</sup> defendant. That if there was any fraud, not conceding that there was fraud, then, it should have happened between the plaintiff and the 2<sup>nd</sup> added defendant. That the proviso to section 26 is called in aid of the added plaintiffs and the 1<sup>st</sup> defendant as the added 1<sup>st</sup> plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants are bona fide purchasers.



Counsel cited the case of Thorne v. Head (1) and the case of Re Howett (2) and submitted that since in the present case, the right of action accrued well over 16 years ago, the plaintiff is statute barred from commencing this action. Counsel submitted in conclusion on this issue that the exceptions stated in section 26 of the Statute of Limitations and the proviso to that section, clearly bar this action.

With regard to the alleged fraud being discovered in January, 2014 and the matter being commenced a month later, counsel submitted that the lease held by the plaintiff was a 14 year lease and expired in 2003. That since the title deeds were pledged as security for the mortgage, the plaintiff did not at any point pay rates for the said property. That the rates were paid by the 1<sup>st</sup> and 2<sup>nd</sup> defendants back dated to the date of foreclosure when the order was granted by the court.

Counsel cited the observations of the learned authors of Halsbury's Laws of England, 3<sup>rd</sup> edition, volume 24 who state in paragraph 403 at page 220 as follows:

*“An action in deceit is an action in tort for which the period of limitation is six years, and in relation to equitable remedies, equity acted in obedience to the statute and applied a like limitation; but the running of time for any action based on fraud, or where the right of action is concealed by fraud, does not begin until the fraud has been discovered or could not with reasonable diligence be discovered.”*

He proceeded to submit that while not conceding that there was fraud by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the plaintiff knew that he had a 14 year lease which expired in 2003 and that the non-renewal of the lease and the



non-payment of rates for the property negated his title to the property which would still have expired in 2003 unless it was renewed. That the non-renewal of the lease reverted the land to the President.

It was counsel's contention that had the plaintiff conducted a search in 2003 when his title was due to expire, he would have known that there was an order for foreclosure against the piece of land. That the change of title from his name could have been discovered by reasonable diligence.

Counsel submitted that the plaintiff has no title to talk about in this matter as his 14 year lease expired in 2003 and was not renewed. That a 99 year lease was issued in favour of the 2<sup>nd</sup> defendant soon after the expiration of the 14 year lease on the strength of the order of foreclosure made in respect of the subject piece of land.

Counsel contended that it was an afterthought for the plaintiff to claim ownership of the subject piece of land 10 years after the expiry of his lease and non-payment of rates for the property which is one of the conditions to be satisfied by a property owner. Counsel prayed that this is an appropriate case for this Court to dismiss as it is statute barred.

In opposing the preliminary application to dismiss the action for being statute barred, counsel for the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> added defendants submitted that although he had no argument with the authorities cited in support of the application as they state the correct position at law in ordinary cases, this law does not apply to the present case. Counsel went on to submit that since the plaintiff has alleged fraud in his pleadings, the right to sue only accrued upon the discovery of the alleged fraud.



Counsel submitted that indeed this makes sense in that most frauds are masked and intended not to be discovered and that the aggrieved party can therefore only take action upon discovery of the fraud. Counsel submitted that in his statement of claim, in paragraph 4, the plaintiff averred that he became aware of the fraud on his property only in January, 2014 when he conducted a search at the Lands and Deeds Registry and that he commenced this action a month later. Counsel went on to submit with regard to the 2<sup>nd</sup> added defendant, that he did not commence this action but was sued by the defendants who have raised the preliminary issue. That his counter-claim was necessitated by the defendants.

Counsel contended that if, therefore, the 2<sup>nd</sup> added defendant, Kabajan Musah's counter-claim was statute barred, then it followed that the applicant's own case was statute barred as the counter-claim arose from the same facts as those sued upon by the applicants. Counsel argued that *ipso facto*, the applicants' own case must also fail for being statute barred if this Court makes that finding with respect to Kabajan Musah.

Counsel submitted in conclusion, that the preliminary issue cannot succeed with respect to the plaintiff on the basis that the statute of limitation only starts running in fraud cases after the fraud has been discovered. With regard to Kabajan Musah, Counsel reiterated that his counter-claim can only fail if the applicants' own case is statute barred as the counter-claim arises from the same facts as those on which the applicants founded their case against him. Counsel therefore prayed that the preliminary issue be dismissed with costs.



I have considered the skeleton arguments in support of and in opposition to the application. The defendants and added plaintiffs seek to have the action herein dismissed on the ground that it was commenced after the limitation period allowed for an action to recover land had expired. The defendants and added plaintiffs contend that the limitation period for an action to recover land is twelve years from the date when the cause of action accrues and that in this case, the plaintiff commenced the action more than 16 years after the date of the cause of action.

In opposing the application, the plaintiff asserted that this action is not statute barred because he only discovered that the land in issue was in the 2<sup>nd</sup> defendant's name in 2014 after the 2<sup>nd</sup> added defendant alerted him that someone was building on his property. He stated that it was in the same year when he commenced this action. In his statement of claim, the plaintiff asserts that he was the owner of the land in issue namely Lot No. 4770/M, Lusaka which he held under a certificate of title issued to him in 1989, which title he held until 2014 when the 1<sup>st</sup> defendant, whom he has never met and does not know, purported that he had assigned the said property to her at K6 million. The plaintiff further asserts that any assignment of the property to the 1<sup>st</sup> defendant, in the circumstances could only have been perpetrated by fraud, as he never assigned it to her or to anybody else. He further contended that he has never been sued with regard to the said property.

It is trite law that an action for the recovery of an interest in land should be brought within 12 years of the accrual of the cause of action in accordance with section 4 (3) of the Limitation Act, 1939. The Limitation Act applies to Zambia by virtue of section 2 of the British Acts (Extent of Application) Act, Chapter 11 of the Laws of Zambia. This position of the



law was reaffirmed in Dominic Mulaisho v. The Attorney-General (3). Section 4 (3) of the said Act provides that:

*“No action shall be brought by any other person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”*

Further section 26 of the Limitation Act provides as follows:

*“Where, in the case of any action for which a period of limitation is prescribed by this Act, either –*

*(a) The action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent, or*

*(b) The right of action is concealed by the fraud of any such person as aforesaid, or*

*(c) The action is for relief from the consequences of a mistake;*

*the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.”*

The plaintiff's assertion that the 1<sup>st</sup> defendant could only have had Lot No. 4770/M, Lusaka assigned to her by means of fraud brings the action herein within the provisions of section 26 of the Limitation Act 1939. Section 26 of the Act clearly provides, inter alia, that where, in the case of any action for which a limitation period is prescribed by the Act, the action is based upon the fraud of the defendant or his agent or any



person through whom he claims or his agent, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

In this case, the action is based upon the alleged fraudulent assignment of Lot No. 4770/M, Lusaka to the 1<sup>st</sup> defendant, which alleged fraud the plaintiff only discovered early in 2014 after he was alerted of the developments on his property. He commenced the action on 24<sup>th</sup> February, 2014. That being the case, I find that the limitation period begun to run at the time the alleged fraud was discovered by the plaintiff. The action which was commenced on 24<sup>th</sup> February, 2014 is therefore not statute barred. The preliminary issues raised to the effect that the plaintiff is estopped from proceeding with this action due to the expiration of the limitation period for commencement of such actions and further that the action being statute barred is therefore an abuse of court process therefore fail and are dismissed.

Turning back to the main matter, from the evidence on record, it is not disputed that the plaintiff, Mwampole Brighton Kashawindo, was initially the registered owner of Lot No. 4770/M, Lusaka which is the main subject of this action, as per certificate of title No. L1777 dated 12<sup>th</sup> May, 1989, which was issued in his name. The property was subsequently allegedly assigned to the 1<sup>st</sup> defendant, Mulenga Kasonde Grace, by the plaintiff for an alleged consideration of K6 million. On 25<sup>th</sup> January, 2000, certificate of title No. L1022 was issued in the name of Mulenga Kasonde Grace as evidenced by the print out of the Lands register relating to Lot No. 4770/M, Lusaka which is set out on pages 9 to 11 of the defendants' bundle of documents. On 18<sup>th</sup> September, 2013,



Mwiinga Mulenga Kasonde Grace assigned Lot No. 4770/M, Lusaka to the 2<sup>nd</sup> defendant, Tonka Real Estate Development Limited, for a consideration of K50,000.00. A certificate of title No. 247889 was issued in the name of the 2<sup>nd</sup> defendant Company on the same date.

The plaintiff denies that he assigned his property Lot No. 4770/M, Lusaka to Mulenga Kasonde Grace, the 1<sup>st</sup> defendant, as indicated at entry No. 3 of the Lands register set out at page 9 of the defendants bundle of documents. He contends that he does not know Mulenga Grace Kasonde as he has never met her and that he did not receive the sum of K6 million from the said Mulenga Kasonde Grace as shown at entry No. 3 of the Lands register. He alleges, for that reason, that any purported assignment by him of the subject property to the 1<sup>st</sup> defendant could only have been perpetrated by fraud.

On the other hand, Mulenga Kasonde Grace, the 1<sup>st</sup> defendant, pleaded in her defence that she acquired Lot No. 4770/M, Lusaka on 25<sup>th</sup> January, 2000 pursuant to a Court order for foreclosure dated 11<sup>th</sup> May, 1998. She pleaded further that she, in turn, assigned the property to the 2<sup>nd</sup> defendant, Tonka Real Estate Development, on 18<sup>th</sup> September, 2013 for a consideration of K6,000.00. The 1<sup>st</sup> and 2<sup>nd</sup> defendants allege that they acquired the subject property as innocent purchasers for value and deny that they acquired the property fraudulently as alleged by the plaintiff. Hence this action.

The plaintiff seeks an order that ownership in the property known as Lot 4770/M, Lusaka reverts to him and that the title deeds in the name of the 2<sup>nd</sup> defendant be cancelled for fraud. The issue I have to determine with regard to this claim is whether title to Lot No. 4770/M, Lusaka



properly passed from the plaintiff to the 1<sup>st</sup> defendant by virtue of the foreclosure order dated 11<sup>th</sup> May, 1998 issued under cause No 1997/HP/1419. In determining this issue, I have examined the evidence on record regarding the circumstances in which the said foreclosure order was issued and in which Lot No. 4770/M, Lusaka was subsequently assigned to Mulenga Kasonde Grace as evidenced by entry No. 3 of the Lands Register at page 9 of the defendants' bundle of documents.

According to the evidence adduced on behalf of the defendants by Crawford Mwiinga (DW1), who is the 1<sup>st</sup> defendant, Mulenga Kasonde Grace's husband, the original certificate of title to Lot No. 4770/M, Lusaka, which was in the name of the plaintiff, Mwampole Brighton Kashawindo, was deposited with him by Kabajan Musah (DW4) in the presence of his (DW1's) lawyer, Alfred Lungu (DW3) of Chilupe and Company on 29<sup>th</sup> May, 1996. The certificate of title was deposited as security for the repayment of the sum of K23,955,718.65, which Kabajan Musa allegedly owed him (DW1). Crawford Mwiinga and Kabajan Musa subsequently executed an agreement for the repayment of the said sum of K23,955,718.65.

The plaintiff was not present at the time his certificate of title to Lot No. 4770/M, Lusaka was deposited with DW1 by DW4 as security for Kabajan Musa's debt and he was not made a party to the agreement executed by DW1 and DW4 in respect of the said sum of K23,955,718.65. DW1 explained that the plaintiff was not made a party to the agreement because Kabajan Musah informed him that Lot No. 4770/M, Lusaka belonged to him and that the plaintiff only held the property in trust for him due to the restrictions placed on land ownership



by a leadership code which was in effect at that time. DW1 claimed that Kabajan Musah's wife confirmed that Lot No. 4770/M, Lusaka belonged to Kabajan Musah.

By the said agreement, Kabajan Musah undertook to pay the sum of K23 million within two months of the execution of the agreement, that is, by 31<sup>st</sup> July, 1996. When Kabajan Musah defaulted in repaying the debt, Crawford Mwiinga commenced foreclosure proceedings against him which culminated in the issuance of the court order dated 11<sup>th</sup> May, 1998, which order is on page 14 of the defendant's bundle of documents. Crawford Mwiinga, purportedly, as mortgagee in possession of Lot No. 4770/M, Lusaka pursuant to the said Court order assigned Lot No. 4770/M, Lusaka to Mulenga Kasonde Grace. This is evidenced by the deed of assignment relating to Lot No. 4770/M, Lusaka dated 25<sup>th</sup> January, 2000 which is exhibited at pages 2 to 5 of the 1<sup>st</sup> and 2<sup>nd</sup> defendants and 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs' supplementary bundle of documents filed into Court on 25<sup>th</sup> August, 2015. A certificate of title to Lot No. 4770/M, Lusaka was then issued in the name of Mulenga Kasonde Grace on the same day.

Alfred Lungu (DW3) the lawyer who drafted the agreement relating to the K23 million which was executed by Crawford Mwiinga and Kabajan Musa stated that the deposit by Kabajan Musa of the plaintiff's title deeds as security for the repayment of Kabajan Musa's debt to Crawford Mwiinga created an equitable mortgage over Lot No. 4770/M, Lusaka, although the plaintiff, as the holder of title to the said property, was not a party to the agreement. DW3 contended that the plaintiff was excluded from the agreement because, according to him, it is not always necessary for the owner of title deeds which are deposited by a person who is not the



registered owner of the property pledged as security for the repayment of a debt, to be made a party to the agreement between the lender and the borrower.

It is trite that where a borrower of money deposits his title deeds with a lender as security for the repayment of a loan, an equitable mortgage is created between the parties to that transaction provided it can be shown that the land was meant to be treated as security for a loan. The learned author of Coote's Treatise on the Law of Mortgages, 9<sup>th</sup> edition, vol. 1 at page 86 states as follows:

*A deposit of title deeds by the owner of freeholds or leaseholds with his creditor for the purpose of securing either a debt antecedently due, or a sum of money advanced at the time of the deposit operates as an equitable mortgage or charge, by virtue of which the deposittee acquires, not merely the right of holding the deeds until the debt is paid, but also an equitable interest in the land itself.”* (Emphasis added).

Further, the learned authors of Halsbury's Laws of England, 3<sup>rd</sup> edition, vol. 27, at paragraph 263, observe as follows:

*“A mere deposit of title deeds upon an advance, with intent to create a security thereon but without a word passing gives an equitable lien so that as between a debtor and creditor, the fact of possession of the title deeds raises the presumption that they were deposited by way of security.”*

In Magic Carpet Travel and Tours v. Zambia National Commercial Bank Limited (4), Silomba J, as he then was, stated that:



*“At common law, the position is that once a borrower has surrendered his title deeds to the lender as security for the repayment of a loan, an equitable mortgage is thus created, the borrower, in such a relationship, cannot deal with the land without the knowledge and approval of the lender whose interest in the land takes precedence.” (Emphasis added).*

It will be observed from the authorities which I have cited above, that an equitable mortgage is created by the deposit of title deeds by the owner of the title deeds with the person from whom he has borrowed money as security for the repayment of the debt.

In the present case, however, the undisputed evidence is that the plaintiff, Mwampole Brighton Kashawindo, did not surrender his title deeds to Lot No. 4770/M, Lusaka to Crawford Mwiinga as security for the repayment of a debt, as he did not borrow any money from him. The title deeds of the said property were deposited with DW1 by Kabajan Musah who was not the registered owner of the property. While DW1 and DW3 alleged that Kabajan Musah informed them that he was the absolute owner of Lot No. 4770/M, Lusaka and could therefore deposit the title deeds of that property as security for the debt, they did not adduce any documentary evidence to support the assertion that Kabajan Musah was the absolute owner of the property. In any case, DW3 told this Court that he conducted a search on Lot No. 4770/M, Lusaka at the Lands and Deeds Registry and found that the plaintiff, Mwampole Brighton Kashawindo, was the registered owner of the said property as evidenced by the printout of the Lands Register on page 9 of the defendants' bundle of documents.



Further, Crawford Mwiinga did not allege that when Kabajan Musah deposited the title deeds to Lot No. 4770/M, Lusaka with him, he acted on behalf of the plaintiff, as his agent, nor is there any evidence on record to that effect.

Thus, based on the evidence before me, I find as a fact that no equitable mortgage was created with respect to Lot No. 4770/M, Lusaka by the deposit of the title deeds to that property with Crawford Mwiinga by Kabajan Musa as security for the repayment of a debt owed by Kabajan Musa to Crawford Mwiinga. This is because Kabajan Musah was neither the registered owner of Lot No. 4770/M, Lusaka as evidenced by the printout of the Lands Register at pages 9 to 11 of the defendants' bundle of documents, nor was he acting as the plaintiff's agent at the time he deposited the certificate of title to Lot No. 4770/M, Lusaka with Crawford Mwiinga, as shown by the evidence on record.

Further, there is no evidence on record that Kabajan Musah had the plaintiff's consent for him to pledge his title deeds to Lot No. 4770/M, Lusaka, as security for his debt. In fact, Kabajan Musah testified that he did not inform the plaintiff that he had pledged his title deeds for Lot No. 4770/M, Lusaka, as security for his debt. He also said he did not obtain the plaintiff's consent to do so.

That being the case, I hold that the alleged foreclosure order dated 11<sup>th</sup> May, 1998 which was obtained by DW1 against DW4 under Cause No. 1997/HP/1419 was not binding on the plaintiff nor was it enforceable against the plaintiff's property, Lot No. 4770/M, Lusaka, as the plaintiff was not a party to the foreclosure proceedings under which it was issued nor was he party to the agreement which gave rise to those proceedings.



In other words, Lot No. 4770/M, Lusaka was not subject to foreclosure pursuant to the court order dated 11<sup>th</sup> May, 1998 as alleged by the defendants in their defence and by DW1 and DW3 in their oral evidence.

Section 34 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia clearly provides that no action for possession or for the recovery of land can lie or be sustained against the registered owner of land held under a certificate of title except in the circumstances listed in that section. Section 34 of the Act, as relevant, reads as follows:

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

*(a) the case of a mortgage as against a mortgagor in default;”*

In the present case, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs, in his submissions, seemed to suggest that the plaintiff, Mwampole Brighton Kashawindo, was a mortgagor in default and was therefore liable to be dispossessed of Lot No. 4770/M, Lusaka, pursuant to the alleged foreclosure proceedings. This submission, however, has no merit in the light of the clear evidence on record which shows that the plaintiff was not a party to the agreement between DW1 as lender and DW4 as borrower regarding the sum of K23 million for which the title deeds to Lot No. 4770/M, Lusaka were pledged as security for its repayment. Further, as I already observed, he was not a party to the proceedings under cause No. 1997/HP/1419 under which DW1 obtained the alleged order for foreclosure dated 11<sup>th</sup> May, 1998.



In the circumstances, the 1<sup>st</sup> defendant's assertion in paragraph 1 of the amended defence and counter-claim that she acquired Lot No. 4770/M, Lusaka on 25<sup>th</sup> January, 2000 pursuant to a court order for foreclosure dated 11<sup>th</sup> May, 1998, is untenable and has been successfully rebutted by the plaintiff. Further, the 1<sup>st</sup> and 2<sup>nd</sup> defendants' assertion in their defence, that they acquired the said property as innocent purchasers for value without notice cannot stand in light of the evidence on record to the contrary. This is especially so as DW1, Crawford Mwiinga, admitted that the 1<sup>st</sup> defendant did not pay Mwampole Brighton Kashawindo the sum of K6 million as consideration for the assignment to her of Lot No. 4770/M, Lusaka, as shown at entry No. 3 of the Lands Register.

Regarding the plaintiff's contention that the assignment of Lot No. 4770/M, Lusaka to Mulenga Grace Kasonde was perpetrated by fraud, an examination of the documentation set before me reveals that the contention has merit. I say so because whereas entry No. 3 of the Lands register relating to Lot No. 4770/M, Lusaka, on page 9 of the defendant's bundle of documents shows that it was the plaintiff, Mwampole Brighton Kashawindo, who assigned the said property to the 1<sup>st</sup> defendant, Mulenga Kasonde Grace, for K6 million, there is an assignment relating to Lot No. 4770/M, Lusaka, which is exhibited at pages 2 to 5 of the 1<sup>st</sup> and 2<sup>nd</sup> defendants and 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs' supplementary bundle of documents, which shows that Lot No. 4770/M, Lusaka was, in fact, assigned to Kasonde Grace Mulenga by Crawford Mwiinga as mortgagee in possession for the price of K25 million, contrary to the details at entry No. 3 of the Lands Register.

The discrepancy in the names of the assignor of the property and the price at which the property was allegedly assigned to Mulenga Kasonde



Grace as recorded at entry No. 3 of the Lands register, on one hand, and as indicated in the assignment relating to the property which was registered at the Lands and Deeds Registry as per document on page 3 of the 1<sup>st</sup> and 2<sup>nd</sup> defendants and 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs' supplementary bundle of documents, on the other hand, lends weight to the plaintiff's assertion that the assignment of the property to Mulenga Kasonde Grace was perpetrated by fraud. I say so because, under normal circumstances, the details of the assignor of a property and the price at which the property was conveyed to the assignee as stated in the assignment ought to correspond with the entries relating to the property on the Lands Register. This was not the case in the present case. The falsification of the details of the assignor of the property to the 1<sup>st</sup> defendant in the Lands Register suggests to me that the transaction was not lawfully effected, but was fraudulent.

Further, the plaintiff Mwampole Brighton Kashawindo who purportedly assigned Lot No. 4770/M, Lusaka to the 1<sup>st</sup> defendant on 25<sup>th</sup> January, 2000 at a consideration of K6 million, according to entry No. 3 of the Lands Register denied knowing Mulenga Kasonde Grace or that she paid him the said money for the said property. The plaintiff's assertion that he did not assign his property to the 1<sup>st</sup> defendant and that he did not receive K6 million from the 1<sup>st</sup> defendant as consideration for the assignment of the property, as indicated in the Lands Register, is supported by the evidence of DW1 and DW3, his lawyer, both of whom admitted that Mulenga Kasonde Grace did not pay the sum of K6 million to the plaintiff for the assignment of the said property and further that the money was mythical and was not real, to use the words of DW1, Crawford Mwiinga.



As the plaintiff did not assign Lot No. 4770/M, Lusaka, to Mulenga Kasonde Grace as per entry No. 3 of the Lands Register, and since the said property was not subject to the foreclosure proceedings under cause No. 1997/HP/1419, I hold that Mulenga Kasonde Grace did not acquire good title to Lot No. 4770/M, Lusaka pursuant to the court order dated 11<sup>th</sup> May, 1998. It should be noted that the court order on which DW1 relied when he purported to assign Lot No. 4770/M, Lusaka, to the 1<sup>st</sup> defendant as mortgagee in possession did not specify the mortgaged properties which it referred to. Thus, in addition to the reasons I have already stated, this is yet another reason why the said order could not form the basis for dispossessing the plaintiff of his legal interest in Lot No. 4770/M, Lusaka.

As Mulenga Kasonde Grace did not acquire good title to Lot No. 4770/M, Lusaka, she could not assign good title in the property to the 2<sup>nd</sup> defendant. The assignment of Lot No. 4770/M, Lusaka by Mwiinga Mulenga Grace Kasonde to Tonka Real Estate Development Limited as per entry No. 8 of the Lands register set out at page 10 of the defendants' bundle of documents is therefore null and void.

I, therefore, order that the certificate of title No. 247889, dated 18<sup>th</sup> September, 2013, relating to Lot No. 4770/M, Lusaka, which is in the name of Tonka Real Estate Development Limited be cancelled and the Lands register be rectified accordingly. I further order that the 2<sup>nd</sup> added plaintiff Crawford Mwiinga shall immediately surrender the said certificate of title to the Registrar of Lands for cancellation.

I, accordingly, grant the plaintiff, Mwampole Brighton Kashawindo, an order to revert title to Lot No. 4770/M, Lusaka into his name. As the 14 year lease granted to the plaintiff, Mwampole Brighton Kashawindo,



expired in 2003, the plaintiff should take necessary steps for the renewal of the lease.

As I conclude on the plaintiff's claims, I note from the evidence of the defendants and the 2<sup>nd</sup> added plaintiff that the 1<sup>st</sup> defendant and the 2<sup>nd</sup> added plaintiff had put up some developments on Lot No. 4770/M, Lusaka, after title to the property was issued in the 2<sup>nd</sup> defendant's name. As the defendants and 2<sup>nd</sup> added plaintiff built on the plaintiff's property without his knowledge or consent, they did so at their own peril and they must incur the losses that will go with their vacating the property as held in Raphael Ackim Namung'andu v. Lusaka City Council (5). The 1<sup>st</sup> and 2<sup>nd</sup> defendants and the 2<sup>nd</sup> added plaintiff are ordered to demolish, at their own cost, the structures and boundary wall which they built on the plaintiff's property and to yield possession of the said property to the plaintiff within 14 days of this judgment.

The plaintiff, therefore, succeeds in his action against the 1<sup>st</sup> and 2<sup>nd</sup> defendants and consequently against the 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs.

Turning to the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs' counter-claim, the 1<sup>st</sup> and 2<sup>nd</sup> added defendants seek a declaration that the 2<sup>nd</sup> defendant and 1<sup>st</sup> added plaintiff, Tonka Real Estate Development Limited acquired Lot No. 4770/M, Lusaka properly and lawfully and is entitled to ownership of the same.

A declaration is an equitable remedy and a party is not entitled to it as of right. Whereas the High Court has the power to make binding declarations, a declaratory remedy can only be granted on proper



principles and considerations: see Katongo v. Attorney-General (6) and Communications Authority v. Vodacom Zambia Limited (7).

In the present case, I have found that the 1<sup>st</sup> defendant Mulenga Kasonde Grace did not acquire good title to Lot No. 4770/M, Lusaka in view of the fact that the said property was not subject to the purported foreclosure order issued by the Court on 11<sup>th</sup> May, 1998 under Cause No. 1997/HP/1419. Further, Mwampole Brighton Kashawindo did not assign Lot No. 4770/M, Lusaka to the said Mulenga Kasonde Grace as shown at entry No. 3 of the Lands register set out at page 9 of the defendants' bundle of documents. The evidence on record also shows that the plaintiff was oblivious to the agreement between DW1 and DW4 pursuant to which his title deeds for Lot No. 4770/M, Lusaka were pledged by DW4 as security for the repayment of the sum of K23 million.

The evidence further reveals that the plaintiff was not party to the subsequent proceedings which were instituted by DW1 against DW4 as a result of which the order dated 11<sup>th</sup> May, 1998, was issued authorizing DW1 to enforce the mortgage by foreclosure proceedings. It was on the basis of that order that DW1 purportedly proceeded to assign the property to Mulenga Kasonde Grace, as purported mortgagee in possession. The 1<sup>st</sup> defendant in turn proceeded to assign the property to the 2<sup>nd</sup> defendant without the plaintiff's knowledge. This happened because as Counsel for the plaintiff and 2<sup>nd</sup> added defendant submitted, Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs proceeded on the erroneous assumption that even if the plaintiff as owner of Lot No. 4770/M, Lusaka did not deposit the certificate of title for the said property with Crawford Mwiinga and did not owe him any money, a valid equitable mortgage was created.



However, the submission by counsel for the defendants and added plaintiffs is completely untenable as DW3's own testimony was that Mwampole Brighton Kashawindo was completely excluded from the process that created the alleged equitable mortgage and was, therefore, oblivious to what was happening to his property until he was alerted of the goings-on by Kabajan Musah.

As I already stated, section 34 of the Lands and Deeds Registry Act, Cap. 185 prohibits the repossession of property from a registered owner of land, unless the said owner is, inter alia a mortgagor in default in terms of section 34 (1) (a). As I observed earlier in this judgment, the plaintiff as owner of the property in issue was not party to the purported mortgage and, therefore, was not a mortgagor in default. He, therefore, could not be deprived of his property on the basis of the alleged mortgage.

On the evidence before me, I hold that the 2<sup>nd</sup> defendant (1<sup>st</sup> added plaintiff) did not properly and lawfully acquire Lot No. 4770/M, Lusaka and is not lawfully entitled to ownership of the land. I therefore, decline to grant the declaration as prayed.

The 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs also seek an order that the sale by Crawford Mwiinga of Lot No. 4770/M, Lusaka was lawful and that the 1<sup>st</sup> defendant, Mulenga Kasonde Grace was entitled to sale the property to the 2<sup>nd</sup> defendant, Tonka Real Estate Development Limited. Having established that Lot No. 4770/M, Lusaka was not mortgaged to Crawford Mwiinga by Kabajan Musah's act of depositing the original certificate of title, with him, it follows that the alleged sale of the property to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> added plaintiff, Crawford Mwiinga was legally



untenable. In the absence of equitable interest in Lot No. 4770/M, Lusaka, the 2<sup>nd</sup> added plaintiff, Crawford Mwiinga had no legal interest in the property to pass to his wife, Mulenga Kasonde Grace. This claim, therefore, lacks merit and is dismissed.

The 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs also seek an order of injunction against the plaintiff and the 2<sup>nd</sup> added defendant to restrain them from interfering with the 2<sup>nd</sup> defendant's quiet enjoyment of Lot No. 4770/M, Lusaka. Having established that the 2<sup>nd</sup> defendant, Tonka Real Estate Development Limited, did not acquire good title to the said property, and having ordered that certificate of title No. 247889 issued in the 2<sup>nd</sup> defendant's name be surrendered to the Registrar of Lands for cancellation, this claim has no merit. I, accordingly, dismiss it.

In sum, the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the 1<sup>st</sup> and 2<sup>nd</sup> added plaintiff's counter-claim wholly fails and is dismissed.

The 2<sup>nd</sup> added defendant, Kabajan Musah counter-claims from the 2<sup>nd</sup> added plaintiff Crawford Mwiinga an order to account and an order for a refund of all the money found due with interest.

With regard to this claim, the 2<sup>nd</sup> added defendant, Kabajan Musah alleged that Crawford Mwiinga had sued him for the sum of K7,074,250.00 under Cause No. 1995/HP/2598 for alleged consideration which had failed and had proceeded to execute on his goods. This was after he obtained judgment in default in that action for the sum of K7,074,250.00 with interest. The rate of interest was not specified in the order but under the specially endorsed writ issued under Cause No. 1997/HP/2598, the plaintiff (Crawford Mwiinga) claimed for the sum of



K7,074,250.00 in respect of Lot No. 7298/M in Makeni, Lusaka being consideration which had wholly failed and interest on that sum at current bank rate from 12<sup>th</sup> March, 1995 and costs. These were the claims in respect of which the plaintiff in that action, Crawford Mwiinga, obtained judgment in default.

After two executions at the 2<sup>nd</sup> added plaintiff's instance in which the 2<sup>nd</sup> added plaintiff's goods were seized by bailiffs, the 2<sup>nd</sup> added plaintiff calculated the sum due to him from Mr. Musah as K23,955,718.65. He therefore demanded for security for the said sum and the 2<sup>nd</sup> added plaintiff deposited title deeds to Lot No. 4770/M, Lusaka and Lot No. 7299/M, Lusaka as a security for the debt to be repaid within two months of the date of an agreement executed between him and Crawford Mwiinga on 29<sup>th</sup> May, 1996.

Following Kabajan Musah's default Crawford Mwiinga commenced a fresh action for repossession of the two properties. He subsequently took possession of the two properties allegedly as mortgagee in possession. He then allegedly sold the two properties to his wife, Mulenga Kasonde Grace as evidenced by the deed of assignment relating to the two properties on pages 6 to 10 of the 1<sup>st</sup> and 2<sup>nd</sup> defendants' and 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs' supplementary bundle of documents filed on 25<sup>th</sup> August, 2015.

According to the deed of assignment and entry No. 4 of the Lands Register on pages 1 to 3 of the plaintiff's bundle of documents, the property was assigned by Crawford Mwiinga to Mulenga Grace Kasonde for a consideration of K25 million on 25<sup>th</sup> January, 2000. A certificate of title was issued in her name on the same date.



The 2<sup>nd</sup> added defendant seeks now to have Crawford Mwiinga account for the proceeds of the sale of Lot No. 7299/M, Lusaka. The 1<sup>st</sup> and 2<sup>nd</sup> defendants and the 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs have opposed the claim to account on the basis that it is statute barred. I note in agreement with the submission by counsel for the 2<sup>nd</sup> added defendant that the 2<sup>nd</sup> added defendant was joined to the proceedings by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

Further, the defendants and 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs' claims arose from the same set of facts on which the 2<sup>nd</sup> added defendant based his claims against the 2<sup>nd</sup> added plaintiff, Crawford Mwiinga. As the defendants joined the 2<sup>nd</sup> added defendant to the proceedings, they gave him an opportunity to require the 2<sup>nd</sup> added plaintiff, to account for his dealings with Lot No. 7299/M, Lusaka which he said he sold to the 1<sup>st</sup> defendant as mortgagee in possession pursuant to the Court order dated 11<sup>th</sup> May, 1998.

It is trite that the mortgagee has a duty to account after the sale of a mortgaged property. In Modern Jacks Suppliers Limited v. Strong Engineering Limited and George Sokota (Suing as Liquidation Manager) of African Commercial Bank Zambia Limited (8) on an appeal against the High Court's refusal to set aside an order of sale of the mortgaged property, the Supreme Court, per Chirwa, JS observed as follows:

*"The second ground of appeal was that the Court fell into error by dismissing the appellants' application to set aside the order of sale and to make enquiries and ascertain the amount lawfully due to the respondent. In considering this application, we note from the summons for setting aside the order of sale that there was a prayer*



*for an account to be made in this matter to ascertain the amount due to the mortgagee. This prayer was never considered by the learned trial court and no decision was made. We agree that where a mortgagee exercises his right of sale and that there had been some payments and a sale has in fact taken place, the mortgagee must account to the mortgagor the total sum paid under the mortgage and proceeds from the sale. We would allow this ground of appeal and order that the respondent must account to the appellants on the mortgage i.e. the payments made on the mortgage; the principal outstanding before the respondent went under...” (Emphasis added).*

In the present case, the undisputed evidence is that DW1 Crawford Mwiinga as mortgagee in possession of Lot No. 7299/M, Lusaka assigned the said property to the 1<sup>st</sup> defendant. This is evidenced by the deed of assignment to that effect on pages 6 to 10 of the 1<sup>st</sup> and 2<sup>nd</sup> defendants and 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs’ supplementary bundle of documents. It is also confirmed at entry No. 4 of the Lands Register set out in the printout on page 1 of the plaintiff’s bundle of documents.

That being the case, upon the sale of the mortgaged property to the 1<sup>st</sup> defendant, the 2<sup>nd</sup> added plaintiff, as mortgagee, was required to account to the 2<sup>nd</sup> added defendant, as mortgagor, for the proceeds of the sell. He was expected to deduct the judgment debt, interest and any costs that he may have incurred from the sale price and should have accounted for the balance, if any, and paid it to the 2<sup>nd</sup> added defendant. As the 2<sup>nd</sup> added plaintiff did not account for the sale of Lot No. 7299/M, Lusaka, I hold that the 2<sup>nd</sup> added defendant, Kabajan Musah, is entitled to have an account rendered to him by the 2<sup>nd</sup> added plaintiff.

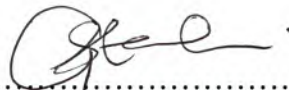


I, accordingly, order that the 2<sup>nd</sup> added plaintiff, Crawford Mwinga, shall within 21 days of the date of this judgment account for the proceeds of the sale of Lot No. 7299/M, Lusaka and for the balance, if any, and pay it to the 2<sup>nd</sup> added defendant. The balance of the sale price to be paid to the 2<sup>nd</sup> added defendant, if any, shall attract simple interest at 10% from 25<sup>th</sup> March, 2015, being the date the 2<sup>nd</sup> added defendant's counter-claim was filed into Court, until payment.

The 2<sup>nd</sup> added defendant also seeks further or other relief. However, I do not consider it necessary to grant the 2<sup>nd</sup> added defendant any other relief as prayed.

The plaintiff having succeeded in his action will have his costs to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the 1<sup>st</sup> and 2<sup>nd</sup> added plaintiffs. Similarly, the 2<sup>nd</sup> added defendant having succeeded in his claim against the 2<sup>nd</sup> added plaintiff will have his costs to be borne by the 2<sup>nd</sup> added plaintiff, Crawford Mwinga. The costs awarded to the plaintiff and to the 2<sup>nd</sup> added defendant, respectively, are to be agreed and taxed in default of agreement. Leave to appeal is granted.

Dated this 7<sup>th</sup> day of September, 2017.



.....  
**A.M. SITALI,**  
**JUDGE**