

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

2013/HP/1642



BETWEEN:

ALEX SINYANGWE**PLAINTIFF**

AND

LETICIA CHUMBWE CHISHA**1st DEFENDANT****MAXWELL MUSUSA****2nd DEFENDANT****ATTORNEY GENERAL****3rd DEFENDANT****AARON PHIRI****4th DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 16th DAY OF MARCH,
2018**

For the Plaintiff : Mrs V. Mulenga, Chilupe and Permanent
Chambers

For the 1st, 2nd and 4th Defendants : Mr T.K. Ndhlovu, Batoka Chambers

For the 3rd Defendant : Mr I. Lifunana, Attorney General's
Chambers

J U D G M E N T

CASES REFERRED TO:

1. *Stickney V Keeble* 1915 AC 386
2. *Mijoni V Zambia Publishing Company Limited* 1986 Appeal No 10 of 1986
3. *Nawakwi V Lusaka City Council and another* Appeal No 26 of 2001
(unreported)
4. *Wesley Mulungushi V Catherine Bwale Mizi Chomba* 2004 ZR 96
5. *Sablehand Zambia Limited V Zambia Revenue Authority* 2005 ZR 109

LEGISLATION REFERRED TO:

1. *Statute of Frauds 1677*
2. *The Lands Act, Chapter 184 of the Laws of Zambia*
3. *The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia*
4. *The Land Conversion of Titles Act*

OTHER WORKS REFERRED TO:

1. *Cheshire and Fifoot, Law of Contract, 10th Edition, 1981*
2. *Phipson on Evidence, 17th edition, Thomson Reuters Legal Limited 2010*
3. *Snells Equity*
4. *Land Law in Zambia*
5. *Halsbury's Laws of England, 4th Edition, Volume 16*
6. *Cheshire's Modern Law of Real Property*
7. *Howarth, Land Law, Sweet and Maxwell, 1994*
8. *Chitty on Contracts Volume II Specific Contracts 13th Edition, 2008, Sweet and Maxwell*

The Plaintiff initially commenced this action by way of Originating Summons pursuant to Order 113 of the Rules of the Supreme Court, 1999 edition on 28th May 2012, which process was deemed to have been commenced by writ of summons and statement of claim on 17th May, 2014. The Plaintiff on 21st May, 2014 filed a writ of summons and statement of claim in which he claims;

- i. *A declaration and order that the Plaintiff is the legal and rightful owner of subdivisions 'B' and 'H' of Stand No 18455, Libala South, Lusaka.*
- ii. *An order for possession of the said property.*
- iii. *Damages for trespass and erection of illegal structures on subdivisions 'B' and 'H' of Stand No 18455, Libala South, Lusaka by the 1st and 2nd Defendants*
- iv. *Interest on the damages*
- v. *Any other relief which the court may deem fit*
- vi. *Costs*

The statement of claim states that the Plaintiff is the registered owner of Stand No 18455 Libala South, Lusaka, while the 1st and 2nd Defendants are squatters

on the said property. The 3rd Defendant has been sued pursuant to Section 12 of the State Proceedings Act, Chapter 71 of the Laws of Zambia, as being the custodian of property number 18455, Libala South, Lusaka.

It is also stated in the statement of claim that in or about 2001, the Plaintiff applied for land to the Commissioner of Lands, and he was offered Stand No 18455, Libala South in Lusaka for commercial use, and was issued a certificate of title number 35569 for the said property. That after the certificate of title was issued, the Plaintiff applied to the Lusaka City Council for change of use of the said property from commercial to residential, and for subdivision of the same into housing units. He paid K3, 935.25 for change of use of the property and K1, 000.00 for subdivision of the property.

The statement of claim also states that the application was approved, and site plans were prepared, which were submitted to the Ministry of Lands, and were approved and numbered in or about April, 2007, and payment of K600.00 made for the same. Then in or about August, 2008 when the Plaintiff was ready to move onto the property and start carrying out some development works, he discovered that the 1st and 2nd Defendants who were unknown to him had wrongfully entered upon his land without his consent or approval, and had taken up possession of two units out of the ten that had been subdivided on the property, and numbered LUS/18455/B and LUS/18455/H respectively, hereinafter referred to as subdivisions 'B' and 'H' of Stand No 18455.

It is stated that the 1st and 2nd Defendants upon entering the said properties have wrongfully erected structures thereon without the Plaintiff's consent, and are gaining huge profits by subletting and collecting rentals from their tenants, which acts amount to trespass on the Plaintiff's property. That the 1st and 2nd Defendants have refused to yield possession of the said properties, despite demand being made for them to do so, and purport that the said properties were sold to them, when this was not the case. Further that the Commissioner of Lands wrongfully caused to be issued consent to assign subdivisions 'B' and 'H' of Stand No 18455, Libala South, Lusaka to the 1st and 2nd Defendants

without the Plaintiff's knowledge and approval, thereby depriving him use and enjoyment of the said land.

The 1st and 2nd Defendants on 13th June, 2015 filed their defence and counterclaim in which they aver that Stand No 18455, Libala South, Lusaka was subdivided into ten parts and sold to different people. That subdivisions LUS/18455/B and LUS/18455/H were sold to the 1st and 2nd Defendants respectively. The 1st and 2nd Defendants agree that the Plaintiff was initially allocated Stand No 18455 as a commercial property, and that he later applied to change its' use to a residential property.

They however deny being trespassers on the properties, stating that they are bona fide purchasers of the said two subdivisions through the Plaintiff's agent called Aaron Phiri, whom the Plaintiff mandated to obtain site plans from the Lusaka City Council to convert to the land from commercial to residential, and thereafter offer the subdivisions for sale to different purchasers among them, the 1st and 2nd Defendants. The 1st and 2nd Defendants deny that they constructed on the properties illegally, or that the Commissioner of Lands wrongfully caused the consent to assign the properties to them, as they were bona fide purchasers of the land for value. That therefore, the Plaintiff is not entitled to the reliefs sought. They counterclaim;

- i. *Completion by the Plaintiff of the sale or their respective properties subdivisions LUS/18455/B and LUS/18455/H.*
- ii. *Damages for breach of contract.*
- iii. *Further or other relief.*
- iv. *Costs.*

The 3rd Defendant filed its defence on 2nd September, 2014 in which it agrees that the Plaintiff was issued with a certificate of title for Stand No 18455, Libala South, Lusaka, and that the Lusaka City Council approved the subdivision of the said land. The 3rd Defendant states that the consent to

assign was issued on the basis of the application by the Plaintiff to the 1st Defendant, and that there was no consent to assign the property to the 2nd Defendant, as the application that it received was for consent to assign to Esther Nkonde Mususa. That the 3rd Defendant is not responsible for any loss that the Plaintiff may have suffered.

The 3rd Defendant also filed another defence on 3rd December, 2014 in which it states that the Plaintiff on 25th July, 2007 wrote to the Chief Registrar of Lands requesting removal of the caveat placed by the Plaintiff in respect of subdivisions B and H respectively. That the Plaintiff on 6th September, 2007 applied for consent to assign the subdivision B to the 1st Defendant, which was granted on 11th September, 2007, and that he also applied for consent to assign subdivision H to Esther Nkonde Mususa, which was granted on 1st October, 2007. The 3rd Defendant contends that the Plaintiff is not entitled to any relief, as the all the necessary documents that it received were signed by him.

The Plaintiff filed a reply and defence to the 1st and 2nd Defendant's counterclaim, in which he denies the counterclaim.

At the trial the Plaintiff testified and called no witnesses, while the 1st, 2nd and 4th Defendants all testified and called two witness, and the 3rd Defendant called one witness.

In his testimony, the Plaintiff told the court that he is the registered owner of Stand No 18455, Libala South, Lusaka after he was offered the same, and was issued with a certificate of title on 2nd February, 2005. He identified the document at page 4 of the Plaintiff's bundle of documents as the certificate of title for the property. That the said property was meant for commercial use, and the Plaintiff applied to change it to residential use to the Lusaka City Council in 2006. He told the court that the application was granted, and the land was subdivided into ten units.

The document at page 10 of the Plaintiff's bundle of documents was identified as the receipt for the K3, 935.25 that the Plaintiff paid for change of use of the land. That at page 9 of the said bundle of documents was the receipt that was issued for the subdivision. The Plaintiff still in his testimony testified that after the subdivision was approved, he took the site plan to the Ministry of Lands for numbering, and he was charged K600.00 for the same. That thereafter he moved on site to start developing the property, and he discovered that the 1st and 2nd Defendants whom he did not know, had wrongfully taken possession of two of the subdivisions, being subdivisions B and H without his knowledge and consent.

He also testified that the 1st and 2nd Defendants had refused to vacate the said properties, stating that they bought the same from Aaron Phiri. The Plaintiff's evidence was that he did not give any mandate to anyone to sell his land, adding that he did not sign the contracts of sale, and the deeds of assignment that were executed to sell the properties to the 1st and 2nd Defendants. He also testified that the Legal Aid lawyers and Nkwazi Chambers were engaged to act on his behalf when he did not give such consent to the said lawyers to act on his behalf. The Plaintiff further testified that the signatures on the contract of sale, which was at page 1 of the 1st and 2nd Defendants bundle of documents was not his. That the document shows that he sold subdivision H to Esther Nkonde Mususa at K10, 000.00.

Further that at pages 2-5 of the said 1st and 2nd Defendant's bundle of documents was a deed of assignment purportedly between him and Esther Nkonde Mususa for subdivision H with a purchase price of K20, 000.00. He stated that the assignment was not signed. Then at page 8 of the 1st and 2nd Defendants bundle of documents was the contract of sale between himself and Leticia Chasha, which was prepared by the Directorate of Legal Aid. The Plaintiff told the court that it was prepared without his instructions on 29th August, 2007, for the sale of subdivision B of Stand No 18455, with the purchase price being K20, 000.00. He testified that it had his purported

signature. The document at page 13 of the 1st and 2nd Defendant's bundle of documents was identified as the assignment allegedly executed between the Plaintiff and Leticia Chasha, and it was prepared by Nkwazi Chambers, on 29th August, 2007, with a purchase price of K20, 000.00.

Further in his testimony, the Plaintiff stated that the 1st and 2nd Defendants obtained consent to assign the properties, when he did not apply for such consent. He explained that there was a caveat placed on the property at the time when the 1st and 2nd Defendants obtained the consent to assign. He referred the court to the document at pages 13-14 of the Plaintiff's bundle of documents, being a print out from the Lands Register for Stand No 18455, stating that entry number 3 at page 14 shows that on 7th June, 2007, Geoffrey Sichelwe placed a caveat on the property, and that the same was only removed on 7th December, 2007, as seen at entry number 4.

The documents at pages 18 and 19 of the 1st and 2nd Defendants bundle of documents were identified as the consent to assign to Leticia Chasha on 11th September, 2007, and to Esther Nkonde Mususa dated 10th October, 2007. He went on to state that at pages 1-3 of the Plaintiffs bundle of documents was a contract of sale between the Plaintiff and Geoffrey Sichelwe for subdivision 18455/E, which he signed and the contract price was K5, 000.00. He denied having sold the land to the 1st and 2nd Defendants, and stated that page 8 of the 3rd Defendant's bundle of documents which was the purported application to assign the property to Esther Nkonde Mususa is dated 25th July, 2007, which was dated before the execution of the contract of sale. He denied that the signature on the document was his. That page 9 of the 3rd Defendant's bundle of documents was an application to assign the property to Leticia Chasha dated 25th July, 2007 at a consideration of K20, 000.00.

In cross examination by Counsel for the 1st, 2nd and 4th Defendants, the Plaintiff testified that the signatures on pages 8, 9 and 10 of the 3rd Defendant's documents were not his. He stated that among the businesses that he does is running bars, bureau de changes and that he is a property

developer. The Plaintiff agreed that he lived at his own property in Lilayi, and that he knew the 4th Defendant who resides in Lima, where the Plaintiff owned a property. He denied that he lives on the same property with the 4th Defendant, or that the 4th Defendant was his agent.

He however agreed that he had applied for change of use of the property at the Council, but denied that he used an agent to do so. It was stated that the Plaintiff reported the 1st and 2nd Defendants to the police, and that the 4th Defendant was found guilty, and given a suspended sentence. That Sichalwe had placed the caveat with the Plaintiff's knowledge, and he later withdrew it. When referred to the document at page 10 of the 3rd Defendant's bundle of documents, being a letter to the Chief Registrar at the Lands Department, authored by himself, the Plaintiff denied any knowledge of it.

He did however agree that the national registration card number indicated on the document was his, but denied that the signature on the document was his. The Plaintiff agreed that identification documents are presented at the Ministry of Lands for placement on files, but added that the same could be obtained from there without the owner's consent. He could not say if the person who drafted the letter at page 10 of the 3rd Defendant's bundle of documents obtained the Plaintiff's national registration card from his file at the Ministry of Lands.

When cross examined by Counsel for the 3rd Defendant, the Plaintiff testified that the document at page 8 of the 3rd Defendant's bundle of documents was an application for consent to assign the property to Esther Nkonde Mususa by himself, and that at page 9 of the said bundle of documents was the consent to assign the property to Leticia Chasha, and they were both dated 25th July, 2007. Whilst agreeing that the document at page 10 of the 3rd Defendant's bundle of documents was a letter to the Chief Registrar of Lands by the Plaintiff, asking that the caveat be removed, which was at the time that the applications for consent to assign at pages 8 and 9 were made, the Plaintiff denied that this was the position.

It was his evidence that the caveat was not removed as a result of the letter at page 10 of the 3rd Defendant's bundle of documents, adding that the caveat was only removed on 7th December, 2007, after an application to remove it was made, which was at page 13 of the Plaintiff's bundle of documents. He agreed that he lives in the same neighbourhood with the 4th Defendant, but denied that he had any part to play in what the 4th Defendant did in the transaction.

The 4th Defendant was first defence witness. He told the court in his evidence that he knew the Plaintiff as they lived in the same neighbourhood, and they were friends. That on a date he did not recall in 2006, the Plaintiff went to his house with a title deed, and told him that he needed help as he had no money, and he wanted his commercial plot subdivided. That DW1 told the Plaintiff that they could go and see Zebron Zulu, a surveyor at the Lusaka City Council, and there the Plaintiff gave Zebron Zulu the title deed and his national registration card, and entrusted DW1 and Zebron Zulu to demarcate the land.

He stated that Zebron Zulu asked him to pay K1, 000.00 as the subdivision fee and that there was also a charge for change of use of the land at K3, 935.25, and DW1 paid the same. When he did so, he showed the Plaintiff the receipts for the payments made. DW1 still in his testimony testified that he would thereafter check on the progress, and after nine months the documents were signed, and the Plaintiff said he would get five plots, and the other five would be shared between Zebron Zulu and DW1 as consideration. It was stated that DW1 thereafter went to the Ministry of Lands where the diagrams were processed, and he cleared all the arrears on the properties and paid K600.00 for the diagrams.

Further, that the Plaintiff directed that DW1 gives all the people on the property the diagram, as the Plaintiff had already sold the subdivisions to two people before the said subdivision was legalized. That Mr Zulu had changed the land use from commercial to residential, and they shared the plots, but the Plaintiff reported him to the police, stating that DW1 had stolen his documents. It was his evidence that the issue was sorted out, and he handed over the

original title deed and his national registration card, and he remained with copies. He continued testifying that thereafter they both sold the plots and the buyers started building in the Plaintiff's presence, and the Plaintiff did not take any of the developers to the police for encroaching on his land.

DW1 stated that he paid for the diagrams and collected them from the Ministry of Lands and not the Plaintiff. He also stated that the Plaintiff reported him to the police for selling his property, and he appeared before the Subordinate Court where he was acquitted. On how he sold his plots, DW1 testified that he did so through the Plaintiff, and that even Mr Zulu sold the plots that he was given. That despite the Plaintiff having asked DW1 to give all the buyers of the plots the survey diagram, he sued the 1st and 2nd Defendants.

On whether he was the Plaintiffs agent, DW1 stated that the Plaintiff had entrusted him with his documents, and DW1 had used his resources to pay for the subdivision of the land, and he was his agent. He stated that he obtained the document at page 9 of the Plaintiff's bundle of documents, being the receipt for the payment of K1, 000.00, and the one at page 10 of the said bundle of documents, stating that he had the title deed for the property. That at page 11 was the receipt for the payment of K600.00 as survey fees, which he made, adding that the Plaintiff lied when he said he made the payments.

On who DW1 sold his two plots to, he told the court that they were Esther Nkonde Mususa, the 2nd Defendant's wife, and Harry Kalanga, and he gave them the survey diagrams, as instructed by the Plaintiff.

He was not cross examined by Counsel for the 3rd Defendant. In cross examination by Counsel for the Plaintiff, DW1 stated that the Plaintiff asked him to subdivide the land. He however stated that he had no document in writing authorizing him to do so, but agreed that as an agent he needed something in writing to be able to dispose of that person's property. That he had proceeded in the absence of such a document as he trusted the Plaintiff.

Hi evidence was that he made the payments at pages 9, 10 and 11 of the Plaintiff's bundle of documents, and that the said receipts were in the Plaintiff's names. He denied having sold the property to Leticia Chasha, or that she had said that he had sold her the piece of land. He further stated that the Plaintiff did not give him any document to show that he had given him five portions of the land, and that there was no caveat when he sold the land to Esther Nkonde Mususa.

DW1 maintained that he sold the land to Esther Nkonde Mususa through the Plaintiff, and that the Plaintiff gave DW1 the proceeds of sale. He could not recall who drafted the assignment for sale of the land to Esther Nkonde Mususa, or the contract price, stating that the Plaintiff paid him almost K8, 000.00. He denied having engaged counsel to represent him in the sale, and stated that he only became aware of the caveat some two years later.

In re-examination, DW1 testified that he did not reduce the agreement that he had with the Plaintiff into writing, as the two were childhood friends and DW1 trusted the Plaintiff. On the documents at pages 9, 10 and 11 of the Plaintiff's bundle of documents, he stated that he had the title deed for the Plaintiff as well as his national registration card and, that is why the receipts were in the Plaintiff's name. He also stated that the Plaintiff did not transfer the properties that he gave him into his names, stating that the Plaintiff would sell the plots to his clients, and DW1 would be paid some money, and the Plaintiff would get the rest, adding that they would be together during the sales.

DW2 was the 2nd Defendant. This witness told the court that he met the 4th Defendant when he was with his late wife and they were looking for a plot to buy. That the 4th Defendant had showed them the plots in Libala South, as well as the title deed in the Plaintiff's name. DW2 stated the 4th Defendant told them that he was selling the land in the Plaintiff's name, and he did not know the Plaintiff at the time. On the purchase price, DW2 stated that it was K16, 000.00, and he was told that the same would be indicated as K20, 000.00, as

the Zambia Revenue Authority (ZRA) needed to get 3% of that money, and they needed to round off the figure.

The evidence as regards which plot DW2 bought was that it was 18455/H, and he paid for the title deed, and started building. He only came to know the Plaintiff when he was sued in 2012. DW2 denied having encroached on anyone's land.

When cross examined by Counsel for the 3rd Defendant, DW2 testified that he gave the 4th Defendant the consent to transfer the property into his own name, which was at page 8 of the 3rd Defendants bundle of documents. He agreed that the document at page 1 of the 3rd Defendant's bundle of documents was the national registration card for his late wife, adding that he availed it so that the land could be transferred into her name. He further testified that the copy of the national registration card at page 2 of the 3rd Defendant's bundle of documents accompanied the consent to assign the property, and that the consent to assign the said property was at page 18 of the 1st and 2nd Defendant's bundle of documents, and that it was granted after a letter of sale was signed.

However the same was stopped as Geoffrey Sichalwe placed a caveat on the whole property when he had only bought Stand No 18455/E. He told the court that his late wife and others had signed the letter at page 10 of the 3rd Defendant's property which was a petition for the removal of the caveat on the whole property on 27th July, 2007.

DW2 in cross examination by Counsel for the Plaintiff testified that he had dealt exclusively with the 4th Defendant in the transaction, and that he paid the 4th Defendant the purchase price of K16, 000.00. He agreed that he had heard the 4th Defendant testify that the money was paid to the Plaintiff, but his evidence was that he did not know the Plaintiff at the time. On the contract of sale at page 1 of the Plaintiff's bundle of documents, DW2 told the court that it was executed between the Plaintiff and his late wife Esther Nkonde Mususa, on

2nd May, 2007, and that the purchase price was indicated as K10, 000.00. Further that the date 19th February, 2007 was indicated at the top of the document, and that the 4th Defendant processed all the documents.

Whilst agreeing that in his evidence in chief he had testified that he did not execute the contract of sale, DW2 stated he signed the document at page 1 of the 1st and 2nd Defendant's bundle of documents as a witness, while his late wife signed as the purchaser. He stated that the Plaintiff did not sign the document in his presence, and he agreed that the assignment at page 2 of the 1st and 2nd Defendant's bundle of documents indicated the purchase price as K20, 000.00, which was different from the amount on the contract of sale. However the two documents related to the same properties.

Whilst agreeing that they signed the document at page 6 of the 1st and 2nd Defendant's bundle of documents, which was the same document at page 10 of the 3rd Defendant's bundle of documents, DW2 stated that he did not know who authored it. That his late wife wrote the application for consent to assign the property which was at page 8 of the 3rd Defendant's bundle of documents. He agreed that when the consent to assign the property which was at page 19 of the 1st and 2nd Defendant's bundle of documents was granted, there was a caveat on the property, but that he was not aware of it at the time.

DW2 stated that the 4th Defendant did not show him any authority from the Plaintiff to deal with the said land, but that he was aware that agents in the sale of land require documentation to that effect. That he bought the land from the 4th Defendant in the absence of the 4th Defendant having such authority, as he had the certificate of title for the property. That when he bought the land from the 4th Defendant he was aware that the 4th Defendant did not own the land, as he had shown them the title deed which was in the Plaintiff's name.

DW3 was Leticia Chumbwe Chasha. In her evidence she stated that when got her late husband's benefits in 2007, she approached the seller of a house in Libala South Mr Henkie Kalanga to buy it. That Mr Kalanga told her that he

bought the plot from the 4th Defendant after the Plaintiff gave him the same. DW3 also testified that when she bought the house, she went to live with her sister in Chilenje as she was still in mourning, and left Mr Kalanga living in the house. She went on to state that in the same year 2007 Mr Kalanga called her asking for her national registration card, and she met the Plaintiff at the property as Mr Kalanga had bought two plots at the premises, and he was constructing on the other plot.

DW3 explained that Mr Kalanga had introduced the Plaintiff as the owner of the ten plots, and after DW3 gave him the documents she left. She further stated that Mr Kalanga had explained that the property was in the Plaintiff's name, and that he would deal with him directly, and thereafter she fell sick, and Mr Kalanga proceeded to deal with the paperwork for property, and DW3 would send her young brother to him for any documents that were needed.

It was stated that DW3 moved into the house in December, 2009 when she recovered, and only became aware that there was an issue between the Plaintiff and the 4th Defendant after it was over. She explained that she had lost the diagram for the property, and she went to the Ministry of Lands where a Mr Mulenga there referred her to see Zebron Zulu, and that in that process she met the Plaintiff who told her that he had heard that she had been going to the Ministry of Lands and when she told him why she had been going there, he told her that he had the letter that she was looking for to say that no money was owing. She agreed to meet the Plaintiff in town but he said he was in Libala South, and they could not meet. That the meeting was rescheduled to Duly Motors and when they met, the Plaintiff took her to his lawyers at Chilupe and Permanent Chambers and told her that she should be dealing with them.

Further, that the Plaintiff asked her to pay K80, 000.00 for the property, but she told him that she did not have that kind of money. DW3 then explained to Mr Kalanga what had happened, and then the 4th Defendant went to her house the next day. It was stated that the 4th Defendant had called the Plaintiff and put the phone on loud speaker but the Plaintiff told the 4th Defendant that

DW3 was lying. The next thing she saw was a summons being served on her. DW3 identified the document at page 8 of the 1st and 2nd Defendant's bundle of documents as the contract of sale that she had signed with Mr Kalanga, after Mr Kalanga prepared it, and that she was sick at the time. She also agreed to having signed the assignment at page 13 of the 1st and 2nd Defendants bundle of documents, stating that her neighbor Raymond Phiri signed as the Plaintiff's witness, and that Mr Kalanga signed as her witness.

DW3 when cross examined by Counsel for the 3rd Defendant stated that she gave Mr Kalanga her national registration card to complete the sale agreement. That he had later reported that there was a caveat placed on the property.

In cross examination by Counsel for Plaintiff, DW3 testified that Legal Aid Board prepared the contract of sale that was at page 8 of the 1st and 2nd Defendant's bundle of documents. She denied having engaged Legal Aid Board to prepare the contract on her behalf, but stated that it was dated 29th August, 2007 with a purchase price of K20, 000.00. DW3 also told the court that she knew that the 4th Defendant was dealing with the sale of the land but she admitted that he did not show her any documentation authorizing him to do so. It was her evidence that she did not know that he was required to have such documents. On the document at page 9 of the 3rd Defendant's bundle of documents, DW3 stated that it was an application for consent to assign which Mr Kalanga completed, and she signed as she was sick, and she knew nothing about the document at page 10 of the 3rd Defendant's bundle of documents for removal of the caveat.

In re-examination, DW3 explained that she was told that the Plaintiff was the owner of the property.

DW4 was Hankie Kalanga. He testified that was informed that plots were being sold in Libala South and upon making enquiries, he was led to the 4th Defendant. That the 4th Defendant showed him a title deed in the name of the Plaintiff and survey diagrams for the property. DW4 further testified that he

had gone to the Ministry of Lands where he had confirmed that the Plaintiff owned the land, and he met the Plaintiff as the 4th Defendant was just the Plaintiff's agent. DW4 explained that the Plaintiff had told him that he had authorized the 4th Defendant to sell the land, and that he therefore his agent, and DW4 could deal with him.

He went on to state that he transacted with the 4th Defendant and bought two plots at the same place, and he even started building. That the Plaintiff would even go there and find him building and when he completed the house, the Plaintiff congratulated him and he moved in with his family, and that even at that stage, his relationship with the Plaintiff was cordial. Then he started building at the next plot and he decided to sell the house that was complete, that he was living in, and when the 1st Defendant bought it, he informed the Plaintiff.

DW4 further testified that he had even asked the Plaintiff to complete the transaction with DW3 as he had just bought the plot, and after a contract of sale was drafted between the Plaintiff and the 1st Defendant, DW4 took the same to the Plaintiff to sign, and the Plaintiff signed a signature that was different from the one on the title deed. That Geoffrey Sichalwe placed a caveat on the property after he bought a plot from the Plaintiff, and the Plaintiff wanted to crook him. That DW4 then wrote a letter to the Ministry of Lands and asked all the people with plots at the property to sign it for removal of the caveat. That the Plaintiff agreed not to tamper with Geoffrey Sichalwe's property, and that is how Geoffrey Sichalwe removed the caveat. DW4 expressed surprise that the Plaintiff had sued the 1st Defendant who was an innocent person.

DW4 was not cross examined by Counsel for the 3rd Defendant. In cross examination by Counsel for the Plaintiff, DW4 stated that he had bought the land from the 4th Defendant who was an agent for the Plaintiff. That he bought the two properties at K20, 000.00 each, and the said amounts were paid to the 4th Defendant. DW4 also testified that the 4th Defendant did not show him any

document authorizing him to sell the land, although he was aware that the 4th Defendant needed to have a letter authorizing him to sell the same. That he went ahead to buy based on trust. He further told the court that he instructed the Legal Aid Board to prepare the contract of sale which was at page 8 of the 1st and 2nd Defendant's bundle of documents, and that he did so after he agreed with the Plaintiff to find a lawyer to draft the same.

His further evidence in cross examination was that after the 1st Defendant had signed the said contract of sale, he took it to the Plaintiff, and that he signed as witness for the 1st Defendant, and he saw the Plaintiff and 4th Defendant sign as the Plaintiff's witness.

On the document at page 13 of the 1st and 2nd Defendant's bundle of documents, DW4 testified that Nkwazi Chambers prepared it on 29th August, 2007. That the document was signed by Raymond Phiri, and the Plaintiff as well as the 1st Defendant and DW3, but that the Plaintiff did not sign it in Raymond Phiri's presence. He agreed to having prepared the letter at page 6 of the 1st and 2nd Defendant's bundle of documents which was the same document at page 10 of the 3rd Defendant's bundle of documents.

DW4 also agreed that when the consent to assign that was on page 18 of the 1st and 2nd Defendant's bundle of documents was granted, there was a caveat on the property, and he did not know when the caveat was removed. He explained that he had executed a contract of sale with the 4th Defendant and that he took out the consent to assign on behalf of the 1st Defendant, when he sold her the land. That he had told her that the title holder for the property was the Plaintiff.

The fifth defence witness was Zebron Zulu. He testified that he knew the 4th Defendant towards the end of 2006 when the 4th Defendant and the Plaintiff approached him at his office at the Lusaka City Council when he was working as Senior Land Surveyor. That the Plaintiff had told him that he had a plot in Libala South that he wanted to subdivide, but he did not have enough money

to do the same. DW5 further testified that the Plaintiff had told him that he would entrust the 4th Defendant to work with him to do the sub division, and the cost would be paid in the form of plots.

It was his evidence that as the plot was commercial, he had advised the Plaintiff that he needed to apply for change of use, and that after that was done, ten plots were created on the property. When DW3 visited the site he found that three plots had structures on them, and that the 4th Defendant made the payments for change of use of the land and numbering, and that the receipts for the same were issued in the Plaintiff's name, as could be seen on the documents at pages 9 to 11 of the Plaintiff's bundle of documents, as he was the title holder of the property. That the 4th Defendant had custody of the original receipts, and that when DW5 completed the survey, he was paid in the form of one plot which he sold through the 4th Defendant.

Still in evidence, DW5 told the court that the 4th Defendant was given three plots as payment for the services rendered to the Plaintiff. He explained that when the survey was approved he delivered the survey diagrams to the 4th Defendant, with a view that the same would be used to obtain title deeds for the ten plots. That he could not recall who bought the plot that he was given by the Plaintiff, as the 4th Defendant as agent sold it, and he did not sign any contract of sale. That the Plaintiff lied when he said that he did not engage the 4th Defendant as his agent.

When cross examined by the 3rd Defendant's Counsel, DW5 told the court that it was not true that the Plaintiff did not know the 4th Defendant as the two went to his office where the Plaintiff gave his title deed to the 4th Defendant in DW5's presence. That he was not with the 4th Defendant when the 4th Defendant made the payments, but he showed him the receipts.

DW5 in cross examination by the Plaintiff's Counsel stated that he was engaged as a private surveyor in this matter, and was paid in the form of a plot. That he later sold the plot through the 4th Defendant. He denied that he

was paid K1, 000.00 for the services that he rendered, maintaining that he was paid in the form of a plot. It was also his evidence that the 4th Defendant was the Plaintiff's agent, and that there was no written but oral agreement to that effect. He did however agree that an agent in the sale of land needs to have authority to that effect. DW5 told the court that he was not there when the payments at pages 9 to 11 of the Plaintiff's bundle of documents were made, and he would therefore not know who made them.

It was his evidence that the said documents reflect that the Plaintiff paid the amounts on them. He further told the court that the 4th Defendant received three plots, and that he was not there when the survey diagrams were handed over to the various buyers, after he had collected it from the Ministry of Lands. He could not say if the 4th Defendant lied when he said that he was the person who had collected the said diagrams.

DW6 was the 3rd Defendant's witness. He testified that he had worked at the Ministry of Lands for seventeen years, and that anyone who wished to transfer or sell land had to obtain permission from the Ministry of Lands in order to do so, in line with Section 45 of the Lands Act. That in that regard the Commissioner of Lands was empowered to grant consent to assign land. In terms of the procedure applicable to do transfer or sell land, DW6 testified that the person who wanted to transfer or sell the land, had to fill in the application for consent upon payment of the prescribed fee.

With reference to page 8 of the 3rd Defendant's bundle of documents, DW6 stated that it was an application to transfer or assign taken out by Alex Sinyangwe, the Plaintiff in this matter, and the intended assignee was Esther Nkonde Mususa. That page 9 of the said 3rd Defendant's bundle of documents was also an application to transfer or assign, taken out by the Plaintiff and the intended assignee was Leticia Chasha. DW6 further in his testimony told the court that attached to the application for consent to assign are the national registration cards of both the vendor and purchaser, as well as the contract of sale.

He identified the document at page 2 of the 3rd Defendant's bundle of documents as a photocopy of the national registration card for Esther Nkonde Mususa, and the one at page 2 of the said documents as being the national registration card for the Plaintiff. That at page 3 was a photocopy of the 1st Defendant's national registration card. Still in his testimony, DW6 stated that an applicant lodges the application for consent, and if satisfied, the Commissioner of Lands grants the consent to assign or transfer.

That in this case the consent was granted, as evidenced at page 19 of the 3rd Defendant's bundle of documents, and page 19 of the 1st and 2nd Defendant's bundle of documents, being the consents to assign to the 1st Defendant and Esther Nkonde Mususa respectively. DW6 identified the document at page 14 of the 3rd Defendant's bundle of documents as the contract of sale executed between the Plaintiff and the 1st Defendant, and the one at page 2 of the 1st and 2nd Defendant's bundle of documents as the contract executed between the Plaintiff and Esther Nkonde Mususa.

That when the Commissioner of Lands received all these documents, which were in order, he granted to consent to assign the properties. He further testified that Section 45 of the Lands Act does not stop consent from being granted when there is a caveat. That the department that is concerned with caveats is the Lands and Deeds Department, which by virtues of Section 5 of the Lands and Deeds Registry Act, empowers the registration of a transaction even when there is a caveat placed on the property.

DW6 when cross examined by Counsel for the 1st 2nd and 4th Defendant stated that an applicant for consent to assign lodges the same together with contracts for the sale of land. In cross examination by Counsel for the Plaintiff, DW6 testified that the Commissioner of Lands would not grant consent to assign if no contract of sale accompanied the application for consent to assign. That the parties to the contract of sale at page 15 of the 3rd Defendant's bundle of documents were the Plaintiff and the 1st Defendant dated 29th August, 2007,

while the consent to assign was dated 25th July, 2007, which was before the contract of sale.

He also stated that the contract of sale at page 1 of the 1st and 2nd Defendant's bundle of documents was dated 19th February, 2007 with a purchase price of K10, 000.00 while at page 8 the application for consent to assign to the said property to Esther Nkonde Mususa showed the purchase price as K20, 000.00. When referred to page 13 of the Plaintiff's bundle of pleadings, DW6 stated that the 3rd Defendant only received the consent to assign to Esther Nkonde Mususa and not from the 2nd Defendant. That when considering whether to grant consent to assign, the Commissioner of Lands is not concerned with the encumbrances on the property, but will look at the application and the contract of sale.

All the parties filed submissions. The Plaintiff in the submissions referred to the Statute of Frauds 1677 which in Section 4 requires that contracts for the sale or the disposition of an interest in land must be supported by written evidence in order to be enforceable. That ***Cheshire and Fifoot, Law of Contract, 10th Edition, 1981*** at page 185 states that a note or memorandum in writing is sufficient evidence, provided that it contains all the material terms of the contract, and facts such as names, or adequate identification of the parties, the description of the subject matter and the nature of the consideration may be called the minimum requirements.

The case of ***MIJONI V ZAMBIA PUBLISHING COMPANY LIMITED 1986 Appeal No 10 of 1986*** was referred to, which stated that for a note or memorandum to satisfy Section 4 of the Statute of Frauds the agreement need not be in writing, but that a note or memorandum was sufficient provided it contained all the terms of the agreement. Further that the case of ***WESLEY MULUNGUSHI V CATHERINE BWALE MIZI CHOMBA 2004 ZR 96*** also upheld that principle. That in this case there was no note or memorandum in writing as the Plaintiff did not execute any of the documents allegedly selling the land to the 1st and 2nd Defendants, and that he did not have an agency relationship

with the 4th Defendant. Therefore the purported transactions should be declared null and void ab initio, as it is a principle of common law that one cannot sell that which he does not know, framed in latin as ***nemo dat quad no habet.***

The Plaintiff also submitted that the 1st and 2nd Defendants could not rely on the doctrine of part performance as DW2, the 2nd Defendant and DW3, the 1st Defendant testified that the purchase price was not paid to the Plaintiff, and that DW2 stated that he did not meet or know the Plaintiff during the transaction for the sale of LUS/18455/H until the matter was commenced, but that he dealt with the 4th Defendant, contrary to the provisions of the contract of sale and the assignment. That in any event the contract of sale reflects the purchase price as K10, 000.00 for LUS/18455/H, while the deed of assignment reflects the same as K20, 000.00, and that the two documents were not executed by the Plaintiff.

That DW3 testified that she bought the property from DW4 whom she paid the purchase price contrary to the contents of the contract of sale and deed of assignment which state that she bought the land from the Plaintiff and her assertion was that she bought the same through the 4th Defendant, the Plaintiff's agent. That DW4 testified that he engaged the Legal Aid Board to draft the contract of sale, and did not engage Nkwazi Chambers to prepare the assignment. PW1 also denied having engaged Nkwazi Chambers. Further that the contract of sale and deed of assignment were dated 29th August, 2007, and that consent to assign was granted on 11th September, 2007.

That it is trite that property can only be assigned when Presidential consent has been granted, and failure to obtain the consent negated the sale transaction. It was also submitted that the 4th Defendant testified that he was not paid the purchase price of K20, 000.00 by DW2, the 2nd Defendant but that the payment was made to the Plaintiff who then gave the 4th Defendant the money. That even the 1st Defendant stated that she paid the purchase price to DW4. The 1st Defendant on the other hand testified that he paid for the change

of use of the land and the subdivision, and that he collected the survey diagrams from the Ministry of lands contrary to DW5's evidence.

Reference was made to ***Phipson on Evidence, 17th edition, Thomson Reuters Legal Limited 2010*** at paragraph 12-36 at page 365 which states that the credibility of a witness depends on his knowledge of facts, his intelligence, his interestedness, his integrity, his veracity. That among the factors affecting the weight of a witness' testimony are his means of knowledge, opportunities of observation, reasons for recollection or belief, experience, powers of memory and perception, and any special circumstances affecting his competency to speak to the particular case.

That the 4th Defendant, 1st and 2nd Defendants, as well as DW4 and DW5 were inconsistent in their evidence regarding the subdivision of the land, and the subsequent sales of the said land thereby putting their credibility in issue, and their evidence was therefore best described as fabrication.

On the 1st and 2nd Defendants alleging that they were bona fide purchasers, ***Snells Equity*** at paragraph 4-21 at page 65 was referred to. It states that ***"an important qualification to the basic rule of first in time priority of interests is the doctrine of a bona fide purchaser for value without notice, which demonstrates a fundamental distinction between legal and equitable interests in some kind of property."***

Further that at paragraph 4-22 of page 65 – 66 of the said book, it states that ***"a legal estate or interest is generally enforceable against anyone who takes the property, whether or not he had notice of it.....: a bona fide purchaser for valuable consideration who obtained legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law. He took free of the equitable interest. In such a case equity followed the law. The purchaser's conscience was is no way affected by the equitable right. So there was no justification for invoking the jurisdiction of equity against him where***

there was equal equity, the law prevailed. The onus lay on the purchaser to prove that he was a bona fide purchaser for value, and also that he took without notice of the equitable interest.

Further, that the learned authors of ***Land Law in Zambia at pages 245-447*** lay down the requirements that need to be fulfilled in order for a party to rely on the doctrine of being an innocent purchaser for value. These were stated as;

1. *A purchaser acting in good faith.*
2. *A purchaser acquiring interest in property by grant rather than operation of the law, and should have given value for the property.*
3. *A purchaser must generally have obtained a legal interest in the property.*
4. *A purchaser must have had no notice of the equitable interest at the time they gave their consideration for the conveyance. That a purchaser is affected by notice of an equity in three cases, namely;*
 - i. *Actual notice: where equity is within his own knowledge*
 - ii. *Constructive notice: where equity would have come to his own knowledge if proper enquiries had been made; and*
 - iii. *Imputed notice: where his agent as such in the course of the transaction has actual or constructive notice of the equity.*

Further that ***Halsbury's Laws of England, 4th Edition, Volume 16*** at para 1322 at page 887 states that ***"notice may be actual or constructive and where the said notice is imputed on the subsequent purchaser, then the plea of a purchaser without notice is defeated."*** That DW2, the 2nd Defendant in this case knew at the time of the purported purchase of subdivision H of Stand No 18455, Libala South Lusaka that the property belonged to the Plaintiff, and despite DW1 holding himself out as the Plaintiff's agent, he had no document in writing evidencing the authority that he had to sell the said subdivision. That this was despite the fact that DW2 knew that

DW1 had to have the Plaintiff's consent in writing nonetheless he purchased the said land.

Therefore DW2 had actual notice regarding the ownership of the land when he bought the same, and even paid the purchase price to DW1, even though DW1 denied having sold the property to DW2. Consequently DW2 could not claim to be a bona fide purchaser for value.

As regards DW3, the 1st Defendant, the submission was that she bought the house from DW4, and that DW4 in cross examination testified that the 1st Defendant was aware that the property belonged to the Plaintiff, and that the 1st Defendant sold it to DW4, without a note or memorandum in writing evidencing the alleged agency relationship. That DW3 paid the purchase price of K20, 000.00 to DW4, and not the Plaintiff as alleged in the contract of sale and deed of assignment, but she nonetheless bought the property.

Reference was made to ***Cheshire's Modern Law of Real Property*** stating that it states one of the objects of investigating title as being to ***"discover whether the land is subject to rights vested in persons other than the vendor, and the equitable doctrine of notice that a purchaser is bound by any right which he would have discovered had he made ordinary investigations...if he fails to make enquiries of third persons who happen to be in possession of the land, he is affected with notice of all equitable interests held by them as for example an option to purchase the fee simple that has been granted to a lessee already in possession."***

That even the learned authors ***Howarth, Land Law, Sweet and Maxwell, 1994*** have fortified this position by observing that ***"a purchaser is under obligation to undertake full investigation of title before completing his purchase. He can only plead absence of notice if he made all usual and proper enquiries. If he does not do so, or is careless or negligent, he is deemed to have constructive notice of all matters that he would have discovered"***

It was also submitted that in the case of ***NAWAKWI V LUSAKA CITY COUNCIL AND ANOTHER APPEAL No 26 of 2001 (unreported)*** it was stated that “***the purchasing of realty should not be approached as casually as purchasing household goods.***” That in this case the 1st and 2nd Defendants were not bona fide purchasers for value, as they had notice of who was the legal owner of the property, and contrary to the contracts of sale and deeds of assignment executed, they did not pay the purchase prices to the Plaintiff. That as the 1st Defendant was not the legal owner of the property, he could not pass title to the property to the 1st and 2nd Defendants. On that basis, the claim for specific performance of the contracts of sale should be dismissed as it was misconceived and untenable at law.

Further in the submissions, it was stated that while DW6 testified that the Commissioner of Lands has power to grant consent to assign property in line with Section 5 of the Lands Act, and that under Section 79 of the Lands and Deeds Registry Act, a transaction cannot be registered if there is a caveat lodged on a property. That it was their argument that Section 5 of the Lands Act was inapplicable in this case, as Section 13 of the Land Conversion of Titles Act prohibits the subdivision, sale, transfer, assignment, subletting, mortgaging, charging or in any other manner whatsoever the encumbering of any land without the consent of the President in writing.

That the deed of assignment at pages 2 to 5 of the 1st and 2nd Defendant’s bundle of documents was not signed by either party, and that the contract of sale of subdivision H of Stand No 18455 Libala South, Lusaka indicates the purchase price as K10, 000.00, yet the application for consent to assign the said property has K20, 000.00 indicated as the purchase price, and despite these discrepancies, the consent to assign was granted. That this consent to assign was wrongly granted as it was obtained without the Plaintiff’s knowledge or approval, and thereby depriving him of the use and enjoyment of the said land.

The Plaintiff also submitted that a perusal of the applications for consent to assign show that they have the Plaintiff's purported signature, and DW2 testified that he never met the Plaintiff when the transaction was done, and he only dealt with the 4th Defendant. The 1st Defendant on the other hand had no knowledge of the author of the purported consent to assign, and therefore the documents were a forgery and void ab initio. That in any event the deed of assignment for subdivision B of Stand No 18455, Libala South, Lusaka was executed before the consent to assign was granted contrary to the provisions of Section 13 of the Lands Act, and was therefore void ab initio.

That the consents to assign were granted notwithstanding that there was a caveat on the property and this was done in contravention of Section 79 of the Lands and Deeds Registry Act which prohibits the Registrar from making any entry on the register which will have an effect of charging or transferring or otherwise affecting the estate or interest protected by the caveat. Therefore the Commissioner of Lands wrongfully granted the consents to assign the two properties and the Plaintiff should be declared the legal and rightful owner of subdivisions B and H of Stand No 18455, Libala South, Lusaka, and be granted orders of possession of the same, as well as damages for trespass and erection of illegal structures on the said properties, and any other relief the court may deem fit, and costs.

The 1st, 2nd and 4th Defendants in their submissions stated that the Plaintiff dwelled on two aspects being consent to assign and caveats. That Section 5 of the Lands Act, Chapter 184 of the Laws of Zambia prohibits any person from selling, transferring or assigning land without the consent of the president. Further that Section 76 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia entitles a person claiming to be beneficially interested in any land or estate by virtue of any unregistered agreement or other instrument or transmission of any trust express or implied or transferring any estate or interest in land or any other person to be held in trust or being an intending purchaser or mortgagee of any land may lodge a caveat with the Registrar.

That the case of **WESLEY MULUNGUSHI V CATHERINE BWALE CHOMBA 2004 ZR 96** held that no registration of any transfer of land or mortgage shall be made by the Commissioner of Lands when there is a caveat. That Section 5 of the Lands Act and Section 76 of the Lands and Deeds Registry Act are distinct in that consent to assign can be granted even where a caveat is placed on a property, but that Section 79 of the Lands and Deeds Registry Act, states that no registration shall be entertained where there is a caveat.

Therefore in this case, the Commissioner of Lands was in order to grant the consents to assign, but the registration could not be done in the face of the caveat that was placed on the property. Further reference was made to Section 4 of the Statute of Frauds, 1677 as amended by the English Law Reform (Enforcement of Contracts) Act, 1954, stating that contrary to the assertions by the Plaintiff, this section did not apply as the contracts referred to in that provision are for conveyancing, and that the agreement between the Plaintiff and the 4th Defendant and the one between the Plaintiff and DW5, Mr Zulu were not for conveyancing.

That the court in this case ought to order specific performance so that the conveyance of the properties 18455/B and 18455/H to the 1st and 2nd Defendants be completed, as the court in the case of **WESLEY MULUNGUSHI V CATHERINE BWALI CHOMBA 2004 ZR 96** held that "**The court will decree specific performance only if it will do more perfect and complete justice than the award of damages**". Further that in the case of **STICKNEY V KEEBLE 1915 AC 386** it was stated that "**indeed the dominant principle has always been that equity will grant specific performance if under all the circumstances, it is just and equitable to do so**".

It was submitted that the Defendants had shown that the Plaintiff had lied before the court when he testified that he did not know the Defendants and DW5, Zebron Zulu, as it was proved that the Plaintiff had appointed the 4th Defendant as his agent and DW5 to facilitate the change of use of the land from commercial to residential. Therefore the Plaintiff must be estopped from

reneging on his promises to the 4th Defendant and DW5, and be punished for perjury, as he lied on oath. That the Defendants having proved their counterclaim, the Plaintiff's claim should be dismissed with costs.

The 3rd Defendant in its submissions, stated that it is not the role of the Commissioner of Lands to assume the role of investigator when discharging his duties pertaining to the grant of consent to assigning property. That the provisions of Section 5 (1) of the Lands Act, Chapter 184 of the Laws of Zambia require one who wishes to sell or assign land to obtain consent from the President before doing so. Further that sub section 2 of the said Section 5 of the Lands Act states that where consent is not granted within forty five days of the application being filed, it shall be deemed to have been granted.

That from these provisions of the law, it is clear that the Commissioner of Lands is not required to investigate the authenticity of any signatures on the documents submitted, save to ensure that all ground rates are paid, and that the purchaser qualifies to own land in line with the provisions of the Lands Act.

With regard to the Plaintiff's submissions that the Commissioner of Lands granted the consents to assign when there was a caveat in force, it was submitted that Section 79 of the Lands and Deeds Registry Act provides that so long as a caveat is in force, the Registrar shall not make any entry on the register having the effect of charging or transferring or otherwise affecting the estate or interest protected by the caveat.

That this provision is directed to the Registrar and not the Commissioner of Lands, and therefore once the Commissioner of Lands grants consent to assign, the Registrar of Lands and Deeds has power to decline the registration of a transaction, if there is a caveat on the property. Therefore in this case, the Commissioner of Lands having received the applications for consent to assign, had the authority to issue the said consent on being satisfied that all the requisite requirements had been complied with, in the name of qualification to own land, and payment of all the ground rates.

I have considered the evidence. It is a fact that the Plaintiff is the registered owner of Stand No 18455 Libala South, Lusaka. It is also not in dispute that the said land was a commercial property which was changed into a residential one after the Plaintiff applied for change of use, and had the property subdivided into ten plots. The dispute is on whether the Plaintiff engaged the 4th Defendant as his agent to sell the plots that had been subdivided, and he was authorized to sell the said plots to the 1st Defendant and the 2nd Defendant's late wife Esther Nkonde Mususa.

The Plaintiff's first claim is for a declaration that he is the legal and rightful owner of subdivisions 'B' and 'H' of Stand No 18455 Libala South. In his testimony he told the court that after he had successfully applied for change of use of Stand No 18455, Libala South, Lusaka from commercial to residential, and he moved on site to start developing the property, he found that there were two occupants of subdivision 'B' and 'H', whom he did not know. That the two people purported to have bought the properties from the 4th Defendant, but the Plaintiff did not mandate anyone to sell his land.

The 4th Defendant was DW1 in this matter. He testified that the Plaintiff had approached him with his title deed for Stand No 18455, Libala South, Lusaka and asked to have said land subdivided, and sold, as he did not have any money. That the 4th Defendant and the Plaintiff went to the Lusaka City Council where they met DW5, Zebron Zulu, a surveyor there. DW5 told the court that the Plaintiff gave the 4th Defendant his title deed and national registration card, and assigned DW5 to ensure the change of use of the land in conjunction with the 4th Defendant, and subdivide the property, and this was done. The evidence of the 4th Defendant was that he paid for the change of use of the land and subdivision, but that the receipts which were before the court at pages 9 to 11 of the Plaintiff's bundle of documents were in the Plaintiff's name, as the 4th Defendant had the Plaintiff's title deed in his possession, after the Plaintiff gave it to him.

The Plaintiff when cross examined denied that he had employed the 4th Defendant as his agent, stating that he had made the application for change of use by himself, and not through an agent. When the 4th Defendant testified and was cross examined by Counsel for the Plaintiff, his evidence that the Plaintiff appointed him as his agent was not put to him. What he was asked was whether as an agent in the sale of land he was aware that he needed to have a document in writing evidencing his authority as an agent. DW5 in his evidence testified that the Plaintiff and the 4th Defendant went together to his office when the Plaintiff had engaged him to subdivide the land, and DW5 had advised the Plaintiff that as the property was commercial, he had to apply to change its' use to residential.

When cross examined by Counsel for the Plaintiff, DW5 was asked in what capacity he was engaged by the Plaintiff in the transaction, and he said that it was as a private surveyor. He was further asked in what form he was paid, and he had testified that it was in the form of a plot, and was not paid K1, 000.00 for the services that he rendered.

At no point was PW5's evidence on the Plaintiff having gone to his office with the title deed and national registration card with the 4th Defendant, and that he handed over those documents to the 4th Defendant so that he could ensure the change of use and have the land subdivided challenged. Further, while the 4th Defendant in his testimony testified that after the change of use of the land and subdivision were done, the Plaintiff had given him five plots to sell and even told him to give the diagram to all the purchasers of the subdivision, he was not challenged on this in cross examination. This evidence is thus credible.

Therefore, DW5 corroborated the 4th Defendant's evidence that the Plaintiff engaged him as an agent to change use of the land and to subdivide the said land, and I so find. Having so found that the 4th Defendant was an agent, the next question is whether the 4th Defendant was an agent of the Plaintiff when it came to sale of the subdivisions B and H of the Plaintiff's Stand No 18455, Libala South, Lusaka. The evidence of the 4th Defendant was that after the

change of use of the land and the subdivisions were done, the Plaintiff had paid him in the form of five plots to be shared between him and DW5. He also stated that he decided to sell the plots that he was given, and that he did so through the Plaintiff. It was his testimony that he sold his plots to Esther Nkonde Mususa and Henkie Kalanga, and he also sold DW5's plot on his behalf.

In cross examination, the 4th Defendant testified that the Plaintiff sold the plot to Esther Nkonde Mususa and gave the 4th Defendant money in the amount of almost K8, 000.00. The evidence of DW4, Henkie Kalanga was that he had dealt with the 4th Defendant who had told him that the Plaintiff owned the land, and on that basis he had paid the 4th Defendant, and he even started building on the property and moved into the house once it was completed. He also testified that the Plaintiff would even go there and even congratulated him on completing the house. DW4 had also testified that he had even told the Plaintiff when he was about to sell the house to the 1st Defendant, and it was agreed that the Plaintiff completes the transaction with the 1st defendant as DW4 had only bought the plot.

DW4 told the court that he even had the contract of sale prepared and he took it to the 1st Defendant, who signed it before taking it to the Plaintiff to sign, and that he also had the assignment prepared, and he had both the 1st Defendant and the Plaintiff sign it separately, but in his presence. The 1st Defendant who testified as DW3 told the court that after she bought the house from DW4, DW4 had introduced her to the Plaintiff at the property, as DW4 was constructing on the other plot that he had bought there. That DW4 had asked the 1st Defendant to provide her national registration card so that change of ownership of the property could be done, and that is when DW4 had introduced her to the Plaintiff as the buyer of his house. That later on the Plaintiff had demanded that she pays him K80, 000.00 but she had told him that she had no money.

DW2 was the 2nd Defendant. In his testimony he had explained that he had transacted with the 4th Defendant when he bought the plot in the name of his

late wife Esther Nkonde Mususa. The evidence of DW3, the 1st Defendant and DW4 established that the Plaintiff did in fact meet the 1st Defendant when she bought the property from DW4. The Plaintiff did not challenge the evidence of the 1st Defendant and DW4 relating to him having met them or that it was agreed between him and DW4 that he would sign the contract of sale with the 1st Defendant. What the witnesses, DW3 and DW4 were asked on, were the discrepancies in the purchase price indicated on the contract of sale and the assignment executed, as well as the application for consent, and the dates when they were executed, and who prepared the documents.

The Plaintiff in the submissions alleged that there was no memorandum in writing authorizing the 4th Defendant to sell the properties in issue as an agent of Plaintiff, and reliance was placed on Section 4 of the Statute of Frauds 1677, which requires that all contracts for the sale of land must be in writing in order to be valid. Further that in this case as the 4th Defendant sold the properties to the 1st and 2nd Defendants without the authority of the Plaintiff and received the money, yet the contracts of sale indicate that the Plaintiff sold them when in fact not, and they are therefore null and void.

The 1st, 2nd and 4th Defendants submitted that Section 4 of the Statute of Frauds 1677 applies to contracts for the sale of land, and not to an agent appointed to sell such land, requiring the agency relationship to be evidenced in writing. ***Chitty on Contracts Volume II Specific Contracts 13th Edition, 2008, Sweet and Maxwell***, defines agency as “***the body of general rules under which one person, the agent has the power to change the legal relations of another, the principal.***”

Paragraph 31-012 at page 8 of the said ***Chitty on Contracts Volume II Specific Contracts 13th Edition, 2008, Sweet and Maxwell***, states that an agent employed by the vendor to find a purchaser is an agent in a limited sense only, and that such a person has authority to describe the property and make representations as to its value so as to bind the principal, but has no implied authority to receive a pre-contract deposit on such terms as to make the

prospective vendor liable, and no power without the express authority to conclude a contract for a lease or a sale.

In this case the evidence of DW4 is very crucial as to whether the 4th Defendant was in fact the Plaintiff's agent in the sale of subdivisions B and H of Stand No 18455, Libala South, Lusaka. It has been seen that he testified that when he was buying the property, he had met the Plaintiff who told him that he had authorized the 4th Defendant to sell the property. This evidence was not challenged in any way, and it is therefore credible, and establishes that the Plaintiff in fact authorized the 4th Defendant to sell the property to DW4, and this explains why the 2nd Defendant did not meet the Plaintiff during the time that he bought the property.

The 4th Defendant was given authority to sell the property. The evidence with regard to the contract of sale between the Plaintiff and the 1st Defendant as seen from the evidence on record is that DW4 had it prepared and he took it to the Plaintiff and the 1st Defendant to sign, which they did separately, but in his presence. He also testified that the Plaintiff on that contract of sale appended a signature that was different from that on his title deed. Again this evidence was not challenged in any way. DW4 is on record as having taken the contract which is at page 8 to 12 of the 1st and 2nd Defendant's bundle of documents executed between the Plaintiff and the 1st Defendant to the Plaintiff to sign, and this evidence which was undisputed establishes that the Plaintiff in fact signed the contract of sale for the land to the 1st Defendant.

The Plaintiff instead referred to page 1 of his bundle of documents which is a contract of sale dated 10th September 2004 between himself and Geoffrey Sichelwe wherein he sold 1526 square metres of Stand No 18455, Lusaka to the said Geoffrey Sichelwe. The certificate of title at page 5 of the Plaintiff's bundle of documents shows that Stand No 18455 was 5, 247 square metres in extent, entailing that Geoffrey Sichelwe was sold just a portion of the Plaintiff's land. The Plaintiff testified that the signature at page 2 of his bundle of

documents as vendor is his signature, and not what was at page 9 of the 1st and 2nd Defendant's bundle of documents.

The Plaintiff alleged that his signature at page 9 of the 1st and 2nd Defendant's bundle of documents was forged, as well as those at pages 8 and 9 of the 3rd Defendant's bundle of documents, being the applications for consent to assign the land to the 1st Defendant and the late Esther Nkonde Mususa. It is trite that allegations of fraud, in this case the forgery must be specifically pleaded and particularized, and evidence led to prove such fraud. The case of **SABLEHAND ZAMBIA LIMITED V ZAMBIA REVENUE AUTHORITY 2005 ZR 109** held that;

"1. Where fraud is an issue in the proceedings, then a party or wishing to rely on it must ensure that it is clearly and distinctly alleged. Further, at the trial of the cause, the party alleging fraud must equally lead evidence, so that the alleging fraud must equally lead evidence, so that the allegations is clearly and distinctly proved.

2. Allegations of fraud must, once pleaded, be proved on a higher standard of proof, than on a mere balance of probabilities, because they are criminal in nature".

A perusal of the writ of summons and statement of claim shows that there is no pleading of fraud or forgery in them. The Plaintiff just claims that he should be declared the legitimate owner of Subdivisions B and H of Stands No 18455, Lusaka, as the 1st and 2nd Defendants illegally took possession of the properties. The pleadings fell short of the requirements of the law when it comes to allegations of fraud, and secondly the evidence of DW4 shows that he testified that the Plaintiff signed the contract at pages 8-12 of the 1st and 2nd Defendant's bundle of documents. This evidence being undisputed goes to show that the Plaintiff signed differently on those documents from when he signed the contract at page 2 of his bundle of documents.

Further the evidence on record shows that he authorized the 4th Defendant to sell the properties, and there is no allegation that the 4th Defendant forged the Plaintiff's signature. Therefore the reliance on Section 4 of the Statute of Frauds 1677 to argue that there was no memorandum in writing authorizing the 4th Defendant to sell the Plaintiff's land was misplaced, as an agency agreement may be in writing or oral, but what is crucial is the power that the agent has. What is required to be in writing is the sale of land itself for it to be valid, and there is evidence to that effect on record as seen from the contracts of sale signed, as well as the assignments.

It follows that the arguments by the Plaintiff that he did not engage the Legal Aid Board to prepare the contract of sale and Nkwazi Chambers to prepare the assignment lack merit, because DW4's evidence is that the Plaintiff authorized him to prepare the same, and this evidence was not discredited.

The evidence given by the 1st Defendant and DW4 confirms the 4th Defendant's evidence that the Plaintiff was aware that the 4th Defendant was selling the subdivisions, even though the 4th Defendant may not have been truthful as to how the plots were being sold. This is because while the 4th Defendant testified that he would sell the plots with the Plaintiff, and the Plaintiff pays him the money, DW2 told the court that he had exclusively dealt with the 4th Defendant, and did not know the Plaintiff, although he was told that the Plaintiff was the owner of the property.

However the 4th Defendant's evidence in cross examination was that he was given K8, 000.00 out of the purchase price paid by the Plaintiff when he sold the plot to the 2nd Defendant's wife, and he was not further cross examined on that issue to discredit that evidence. This shows that the Plaintiff did receive some money when the 4th Defendant sold the plot to the 2nd Defendant's wife.

If indeed the 4th Defendant had no such powers of sale, once the Plaintiff found DW1 on the property developing it before he sold it to the 1st Defendant, he would have reported the 1st Defendant to the police, and would have further

challenged the 4th Defendant in cross examination on the truth regarding the assertion that he got part of the money paid for sale of the property to the 2nd Defendant's wife. DW4 is on record as having constructed the house that he sold to the 1st Defendant under the Plaintiff's watch, and surely if the 4th Defendant had no powers to sell the land, why did the Plaintiff watch all the developments take place on his land, and do nothing about it?

The evidence on the whole shows that the Plaintiff and the 4th Defendant had an agreement authorizing the 4th Defendant to sell the land, and the evidence of DW4 supports this position. The allegations that the Plaintiff's signature was forged have not been proved, and the argument the properties were sold without his authority will equally fail. Even the argument by the Plaintiff that the sales were null and void for want of the Plaintiff's authority will fail, as this flies in the teeth of the evidence given by DW4.

The maxim *nemo dat quad no habet* does not apply, and neither does the doctrine of bona fide purchaser for value apply, as the Plaintiff gave the 4th Defendant express authority to sell the properties in issue, and the 1st and 2nd Defendants were not required to conduct enquiries on the ownership of the properties before they bought them to establish if there were any interests that they should have been brought to their notice, as the 4th Defendant was clear that he was selling the Plaintiff's land on his authority.

As rightly submitted by the 3rd Defendant, when applications for consent to assign are made to the Commissioner of Lands, that office does not investigate the authenticity of any signatures thereon, and is concerned only with whether the assignee qualifies to own land in line with the law, and that ground rates are paid. However prudence demands that issues such as the purchase price on the contract of sale, assignment and consent to assign should tally to give credence to the documents, before the consent to assign is granted. Thus while there were discrepancies in the purchase price indicated on the contract of sale executed in this matter in comparison with the amount indicated on application for consent to assign, and the assignment for the property sold to

the 1st Defendant, the same do not take away the Commissioner of Lands power to grant the consent.

There was also an argument that the Commissioner of Lands erroneously granted the consent to assign when there was a caveat placed on the property. At page 14 of the Plaintiff's bundle of documents is the Lands Register for the Plaintiff's land Stand No 18455, Libala South, Lusaka. It shows that on 7th June, 2007, a caveat was registered on the property. This caveat was withdrawn on 7th December, 2007, as seen at page 15 of the said bundle of documents. DW6 who is a Senior Lands Officer testified that Section 5 of the Lands Act requires any person who wishes to sell, transfer or assign any land to obtain permission of the President before doing so.

That to this effect an application to assign is made, and that the Commissioner of Lands when granting such consent only concerns himself with the assignee's eligibility to own land and the payment of ground rates. Further that while Section 76 of the Lands and Deeds Registry Act allows a person claiming an interest in land to lodge a caveat on the property, Section 79 of the said Act directs the Registrar of Lands and Deeds not to register any transaction if there is a caveat on the property.

Thus in effect, while the Commissioner of Lands has power to grant consent to assign even when there is a caveat on a property, the transaction pursuant to which a caveat has been placed on a property will not be entered on the register so long as the caveat is in force. It follows therefore that there was nothing sinister in this matter when the Commissioner of Lands granted the consent to assign subdivisions B and H of Stand No 18455, Libala South, Lusaka after the applications were made to him on 25th July, 2007, as seen on the documents at pages 7 and 8 of the 3rd Defendant's bundle of documents, when the caveat had been placed on the property on 7th June, 2007, as two different offices deal with the consent to assign and the registration of documents.

Even if the Commissioner of Lands grants consent to assign where there is a caveat on the property, Section 79 of the Lands and Deeds Registry Act, prevents the Registrar of Lands and Deeds from registering the transaction due the caveat being in place, and this acts as a check on the exercise of the Commissioner of Lands powers. The reference to the Land Conversion of Titles Act by the Plaintiff was misplaced as the said Act was repealed by the Lands Act of 1995.

In light of the evidence on record that the 4th Defendant was authorized to sell the Plaintiff's subdivisions B and H of Stand 18455, Libala South, Lusaka to the 1st Defendant and the late Esther Nkonde Mususa respectively, the Plaintiff's claim that he be declared the legitimate and rightful owner of these properties, will fail, and it is dismissed. It consequently follows that the claims for an order of possession, as well as damages for trespass and erection of illegal structures on the said land will equally fail.

The 1st and 2nd Defendants on the other are successful on their counterclaim having shown that they are bona fide purchasers of the land, and I accordingly order that the Plaintiff shall complete the contracts of sale of subdivisions LUS/18455/B and LUS/18455/H to the 1st and 2nd Defendants. This shall be done within thirty days from today, failure to which the 1st and 2nd Defendants shall be at liberty to commence contempt proceedings against him. The damages for breach of contract were however not proved, and they will fail. The Defendants are awarded costs of the proceedings to be taxed in default of agreement. Leave to appeal is granted.

DATED THE 16th DAY OF MARCH, 2018


S. KAUNDA NEWA
HIGH COURT JUDGE