Supreme Court Judgment No. 34 of 2018

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IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 061/2015

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

KALUMBA KASHIWA MWANSA — **1ST APPELLANT**

MWENYA KALINDO MWANSA — **2ND APPELLANT**
(Suing as Joint Administrators of the Estate of the Late Stephen MWANSA)

AND

KENNETH MPOFU — **1st RESPONDENT**
(Suing as Administrator of the Estate of the Late Tom MPOFU)

THE ATTORNEY-GENERAL — **INTERESTED PARTY**

CORAM: **MAMBILIMA, CJ, WOOD AND KAOMA, JJS**
On 10th July 2018 and 22 August 2018

For the Appellants: **Mr. P. Songolo, Philsong and Partners**
For the 1st Respondent: **Mr. L.E. Eya of KBF and Partners**
For the 2nd Respondent: **Mr. F. Imasiku, Principal State Advocate Appearing with Ms K.N. Mundia, Senior State Advocate and Ms D. Mwewa, Assistant Senior State Advocate**

JUDGMENT

MAMBILIMA, CJ, delivered the Judgment of the Court.

CASES REFERRED TO-

1. **KITCHEN V. ROYAL AIR FORCES ASSOCIATION (1958) 2 ALL ER 214;**
2. **ANTI-CORRUPTION COMMISSION V. BARNET DEVELOPMENT CORPORATION LIMITED (2008) ZR 69 VOL. 1;**
3. **KHALID MOHAMMED V. THE ATTORNEY GENERAL (1982) Z.R 49;**
4. **CHRISTINE MALOSA BANDA V. COPPERBELT ENERGY CORPORATION AND TWO OTHERS S.C APPEAL NO. 187/2013;**
5. **BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY V. BOARDERS (1941) 2 ALL ER 205;**
6. **SABLEHAND ZAMBIA LIMITED V. ZAMBIA REVENUE AUTHORITY (2005) ZR 109;**
7. **NKONGOLO FARM LIMITED V. ZAMBIA NATIONAL COMMERCIAL BANK AND OTHERS (2005) Z.R 78;**
8. **NKHATA AND OTHERS V. ATTORNEY GENERAL (1966) Z.R. 124; AND**
9. **BAXTER V. BAXTER (1950) ALL ER 458.**

LEGISLATION REFERRED TO-

a. **STATE PROCEEDINGS ACT, CHAPTER 71 OF THE LAWS OF ZAMBIA;**
b. **LANDS AND DEEDS REGISTRY ACT, CHAPTER 185 OF THE LAWS OF ZAMBIA;**
c. **LIMITATION ACT, 1939;**
d. **HALSBURY LAWS OF ENGLAND, 4TH EDITION VOLUME 36; AND**
e. **CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA.**

On 7th November, 2017, the Attorney-General, who was a party to the action in the Court below, was joined to this appeal as an Interested Party, on an application by the Appellants, on the ground that he may be affected by the outcome of the judgment of this Court in this case.

This appeal is from the Judgment of the High Court delivered on 16th February, 2015. The decision of the Court followed an

action instituted by the Respondent by way of a Writ of Summons and Statement of Claim filed on 3rd December, 2009, and amended with leave of the Court on 1st February, 2010. In the said originating process, the Respondent claimed for the following reliefs:

(i) a declaration that the Plaintiff and his family are the legal tenants of property known as the remaining extent of subdivision E of Farm No. 669a, Lusaka West, the same forming part of the Estate of the late Tom Mpofu;
(ii) an order to compel the Commissioner of Lands to issue Title Deeds to the Plaintiff and his family for the remaining extent of Subdivision E of Farm No. 669a, Lusaka West;
(iii) an interim injunction to prevent the 1st and 2nd Defendants, by themselves, their agents, or servants or whomsoever from evicting the Plaintiff and his family from the property known as the remaining extent of Subdivision E of Farm No. 669a, Lusaka West and from interfering with their possession of the said property until the determination of this matter;
(iv) any other relief that the Court may deem fit;
(v) interest; and
(vi) costs.

The Respondent instituted this action in his capacity as the Administrator for the estate of the late Mr. Tom Mpofu. The Appellants were sued in their capacities as joint Administrators of the estate of the late Mr. Stephen Mwansa. The Attorney-General was part of the proceedings in the lower Court as 3rd Defendant and was sued pursuant to the **STATE PROCEEDINGS ACT**[a].

The case for the Respondent, as can be gathered from his pleadings, was that the Mr. Mpofu was the registered owner of Farm No. 50a, Makeni, Lusaka, which was compulsorily acquired by the State on 20th July, 1984. The Respondent stated that the Ministry of Lands gave Mr. Mpofu Subdivision D of Farm No. 669a, Lusaka West in place of Farm No. 50a. That on 12th December, 2002, the offer for Subdivision D of Farm No. 669 was withdrawn by the Ministry of Lands and Mr. Mpofu was offered Subdivision E of Farm No. 669, Lusaka West.

The Respondent averred that in spite of several requests by Mr. Mpofu, Title Deeds for Subdivision E of Farm No. 669 were not issued to him. According to the Respondent, the Commissioner of Lands recognized Mr. Mpofu as the legal tenant of Subdivision E of Farm No. 669 and confirmed that Title Deeds would be issued to him but this was not done. Mr. Mpofu died on 20th July, 2007.

The Respondent asserted that on 1st November, 2009, the 1st and 2nd Appellants wrote to him and his family demanding that, by

30th November, 2009, they should vacate the part of Farm No. 669/E which they were occupying.

In support of his case, the Respondent gave oral evidence. He echoed what was contained in his Statement of Claim and added that Mr. Mpofu was not compensated for Farm No. 50a although he had stayed on that Farm for more than 20 years. That when the Ministry of Lands took Mr. Mpofu to Farm No. 669/E, he found an unfinished building without a roof or windows, a disused borehole and a dip tank for animals. That Mr. Mpofu moved to the new Farm and worked on the unfinished structure, the damaged borehole, put up other buildings and cleared the land for farming. The Respondent stated that Mr. Mpofu did all these renovations using his personal resources. That in 1986, Ministry of Lands officials went to the farm and told Mr. Mpofu that they had made a mistake when they took him to Subdivision E of Farm No. 669. That the correct farm was Farm No. 669/D. According to the Respondent, Mr. Mpofu told the officials that he was never compensated for Farm No. 50a and that he had no money to start developing Farm

No. 669/D. That he, therefore, maintained that he would not shift from Subdivision E of Farm No. 669 without compensation.

The Respondent further testified that sometime in 2002, Ministry of Lands officials found him at the farm and told him that they were going to withdraw the offer for Farm No. 669/D and give them an offer for Farm No. 669/E which they were occupying. That in 2003, the Respondent wrote a letter to the Commissioner of Lands requesting for the issuance of Title Deeds. That the Commissioner of Lands replied that they had been given Farm No. 669/E. According to the Respondent, notwithstanding the said assurance, a Certificate of Title for that piece of land was issued to another person between 2009 and 2010.

The Appellants filed a Defence to the Respondent's action. They stated that the late Stephen Mwansa was the rightful owner of Farm No. 669/E which he held on Certificate of Title No. L1345. That Mr. Mpofu settled on Farm No. 669/E by mistake and when it was brought to his attention that he was on the wrong farm he pleaded for time to relocate and settle elsewhere. They, therefore,

denied the contention by the Respondent that he is the legal tenant of Farm No. 669/E. They asserted that, being joint administrators of the estate of the late Mr. Stephen Mwansa, they are the rightful people to deal with Farm No. 669/E.

In support of the Appellants' case, the 1st Appellant testified as DW1. He told the lower Court that Farm No. 669/E belonged to his late father, Mr. Stephen Mwansa. That Mr. Mwansa showed him a letter which was written to Mr. Mpofu by the Commissioner of Lands on 20th August, 1986, where the Commissioner of Lands told Mr. Mpofu that he was on a wrong piece of land. That in his reply, Mr. Mpofu asked for more time before he could move from Farm 669/E.

The Attorney General, who was the 3rd Defendant in the Court below, also filed a Defence where it stated that after Mr. Mpofu was offered Farm No. 669/D, he was taken to see the land. That the Lands Officers, however, showed him a wrong property. That according to the Lands Register, Farm No. 669/E belongs to Mr. Mwansa. That despite being informed that he had been shown a

wrong property, Mr. Mpofu insisted on staying on Subdivision E. According to the 3rd Defendant, at some point, Mr. Mpofu agreed to move from Subdivision E if he was compensated for the farm that was compulsorily acquired from him. The 3rd Defendant stated that in May, 1987, the Commissioner of Lands wrote to Mr. Mpofu informing him that his cheque for compensation was ready to be collected but he did not collect the cheque.

The 3rd Defendant asserted that Mr. Mpofu was never promised Title Deeds for Farm No. 669/E because that property belonged to someone else. That the position of the Commissioner of Lands has always been that the Respondent and his late father were occupying a wrong property.

Mr. Paul Kachimba testified on behalf of the 3rd Defendant as DW2. He told the lower Court that in 2003 the Commissioner of Lands attempted to repossess Farm No. 669/E by issuing a notice of intention to re-enter and registering a certificate of reentry.

DW2 went on to testify that with regard to Mr. Mpofu, his Farm No. 50a was compulsorily acquired by the State in 1984. That

at the time, it was agreed that he would be compensated both in monetary terms and also by giving him another piece of land. That in this regard, Farm No. 669/D was offered to Mr. Mpofu as compensation for the loss of Farm No. 50a. That unfortunately, when the Ministry of Lands Inspector went on site to show Mr. Mpofu the property, they showed him a wrong property. That when this came to the attention of the Commissioner of Lands, he immediately notified Mr. Mpofu. That the Mr. Mpofu, through his lawyers, eventually conceded that he was willing to relocate but asked for extension of time within which he could move. DW2 stated that the monetary compensation was only going to be given to Mr. Mpofu if he vacated Farm No. 669/E and moved to his rightful property, Farm No. 669/D.

DW2 went on to tell the lower Court that the Commissioner of Lands, in total disregard of the existence of the dispute, proceeded to re-plan and subdivide Farm No. 669/D into smaller portions in order to accommodate more applicants. That when it came to the attention of the Commissioner of Lands that the said property was a

subject of a pending dispute, the Commissioner of Lands proposed that the Respondent be given Farm 669/E in order to settle the matter. That this decision was made without taking into consideration the fact that Farm 669/E was already on title in the names of Stephen Mwansa. It was DW2's testimony that following that decision, an attempt was made in 2003 to legally repossess Farm No. 669/E from Mr. Mwansa. That Mr. Mwansa appealed to the Commissioner of Lands and the certificate of re-entry was cancelled. DW2, therefore, maintained that Farm No. 669/E belongs to the estate of the late Mr. Stephen Mwansa.

After considering the pleadings, testimonies and submissions, the learned trial Judge stated that Farm No. 669/E was only alienated to Mr. Mwansa in 1988 by way of a direct lease. She found that Mr. Mwansa never had physical possession of Farm No. 669/E. That it followed that Mr. Mwansa did not put up the structures which Mr. Mpofu found on that property.

The lower Court found as a fact that the current status of subdivision E was that out of the 322.3 hectares, only 50 hectares

comprised the remaining extent on which the Respondent and his family resided. That the rest of 272 hectares were re-planned into small holdings and offered to other people. That the said 50 hectares was what was in contention between the parties in this case.

The Court went on to find that the Respondent, or the late Mpofu, was not a squatter on Farm 669/E and that he entered on that land in 1985 with the express permission of the Commissioner of Lands, on behalf of the President, who was the predecessor in title for the said land. That the late Mwansa only obtained title to that land in 1988 when the Respondent was already in occupation and had acquired rights to the said land. The Court concluded that having found that the Respondent was not a squatter, he could not be evicted or made to move from Farm 669/E by the Appellants and the 3rd Defendant.

The Court agreed with the Appellants that the Respondent did not specifically plead fraud. She, however, pointed out that the evidence adduced during trial touched on fraud. That the said

evidence was not objected to by any of the parties and that it, therefore, stood to be considered as if pleaded since the parties had an opportunity to respond to the said evidence. The learned trial Judge summarised the evidence that touched on fraud as being that-

> **"... whilst the late MPOFU was complaining on the issue of lack of fair play and before the Ministry of Lands which had settled him on the property in issue could resolve all the matters in contention as evidenced by the correspondence of 1986 and 1987, it went ahead to issue a Certificate of Title to the late MWANSA."**

The Court concluded that the title issued to Mr. Mwansa was issued contrary to Sections 37, 38 and 46 of the **LANDS AND DEEDS REGISTRY ACT**[b]. It pointed out that the said Sections provide to the effect that when there is an application for title and it appears to the Registrar that some interested persons are not party to such application, the Registrar will direct that such application be served on them and the parties be given time to lodge objections, if any. That once the objections are received, the Registrar is required to refer them to the Court which should determine the interests of the parties and whether the title should be issued to the applicant.

According to the learned trial Judge, the person in possession should have ordinarily been given priority. She stated that her holding was further supported by the fact that at the time that the Respondent was settled on Farm No. 669/E, the land did not belong to the Appellants but was vested in the Commissioner of Lands. That the Respondent was, therefore, first in time and had priority over the late Mwansa. In the Court's view, this showed fraud and unfairness in the manner the Ministry of Lands handled this matter especially in light of the inconvenience suffered by the Respondent after his Farm 50a Makeni was compulsorily acquired and he was moved without compensation and the attempt to further relocate him. The Court stated that when the circumstances of this case are holistically considered, it is clear that there was fraudulent conduct in the issuance of the title deeds to Mr. MWANSA. For this holding the Court cited the case of **KITCHEN V. ROYAL AIR FORCES ASSOCIATION**[1], where it was stated that fraud under the **LIMITATION ACT, 1939**[c], is not confined to deceit and dishonesty. That equitable fraud covers conduct which, having regard to the

special relationship between the parties concerned, was an unconscionable thing for one to do towards the other.

Applying the decision of the Court in the **KITCHEN**[1] case, the learned trial Judge held that, in the circumstances of this case, it was unconscionable for the Registrar or the Ministry of Lands to go ahead and issue a Certificate of Title to the late Mwansa without resolving the outstanding issues with the late Mpofu. Accordingly, the learned trial Judge held that the Respondent had effectively proved fraud. She referred to the maxim that **"equity will not allow a statute to be used as a cloak for fraud".**

The Court further found that the evidence proved the exceptions to Sections 33(c) and 34(1)(d). That the portion where the Respondent was settled was affected by the issue of misdescription. Sections 33(c) and 34(1)(d), respectively, provide as follows:

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

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encumbrances, liens, estates or interests as may be shown by such Certificate of Title and any encumbrances, liens, estates or interests created after the issue of such Certificate as may be notified on the folium of the Register relating to such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever:
(c) Except so far as regards any portion of land that may be erroneously included in the Certificate of Title, evidencing the title of such Registered Proprietor by wrong description of parcels or of boundaries.

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:
(d) the case of a person deprived of or claiming any land included in any Certificate of Title of other land by misdescription of such other land, or of its boundaries, as against the Registered Proprietor of such other land, not being a transferee, or deriving from or through a transferee, thereof bona fide for value;"

The lower Court expressed the opinion that the portion of land which the Respondent was occupying was his rightful portion and was wrongly placed under Subdivision E without resolving the dispute or issues raised by the late Mpofu. It found that the late Mwansa's Certificate of Title was wrongly issued to include the property occupied by the Respondent. It stated that it would be grossly unjust to allow the Appellants to remove the Respondent from the land in issue.

Accordingly, the learned trial Judge held that the Respondent had proved his case. She granted the Respondent a declaration that the remaining extent of Farm 669 of Subdivision E, Lusaka West forms part of the estate of the late Tom Mpofu. She ordered that the Certificate of Title for Farm No. 669/E in the names of the late Stephen Mwansa should be cancelled on the ground of fraud and irregularity and further that the Commissioner of Lands must find and give alternative land to the Appellants as a replacement of the remaining extent. The Court went on to order that the Respondent should be issued with a Certificate of Title for the remaining extent of Farm No. 669/E, Lusaka West covering 50 hectares.

It is against the above Judgment of the lower Court that the Appellants have now appealed to this Court advancing the following grounds of appeal:

1. **that the honourable Court below fell into grave error at law when it ordered cancellation of a validly issued Certificate of Title for the Appellants allegedly on account of fraud when fraud was not pleaded by the Respondent at all and neither was any evidence of fraud led or adduced at trial by any of the parties to warrant such a serious finding of fact;**
2. **that the learned Judge in the Court below totally misdirected herself in law and in fact when she held that a finding of fraud shall be sound at law if a party wishing to rely on fraud merely adduces**

3. **evidence touching on fraud during trial as long as such evidence is not objected to by the other party and that such evidence of fraud led at trial without pleading it shall be deemed as specifically pleaded for purposes of such a finding;**
4. **that the lower Court seriously misdirected itself in law and in fact when it held that the Appellant only acquired Farm 669/E Lusaka West in 1988 by way of a direct lease when there was overwhelming evidence on record that the land in question was actually bought and held on title by the Appellants as far back as 1982 long before the Respondent came on the scene and further in the face of evidence that the 1988 title deeds were only issued after a subdivision was forced on the Appellants' land by the Commissioner of Lands to create Subdivision D of Farm No. 669 for the Respondent following his loss of Farm 50a Makeni in Lusaka to the State; and**
5. **that the Court below erred in law and in fact in that the following findings of fact namely; that the Appellant did not build the structures on Subdivision E of Farm 669; that the Appellant did not object to evidence of fraud when none was led; that at the time the Respondent was settled on Subdivision E of Farm 669, the farm was under the ownership or vested in the Commissioner of Lands; and that the Appellants' title deed given out in 1988 was issued contrary to the provisions of Section 37, 38 and 46 of the Lands and Deeds Registry Act Cap 185 of the Laws of Zambia in the face of overwhelming evidence that the Respondent was actually duly heard by the Ministry of Lands and its officials; are all perverse as they were made in the absence of any relevant evidence properly before the Court to that effect and were clearly made upon a misapprehension of the facts before the Court.**

In support of the above grounds of appeal, the learned Counsel for the Appellants filed written heads of argument.

On the first and second grounds of appeal, Counsel submitted that the lower Court fell into grave error when it ordered the cancellation of the Appellants' validity issued Certificate of Title. That this was because fraud was not pleaded by the Respondent

and there was no evidence of fraud adduced at trial by any of the parties.

Counsel argued that it is clear from the evidence on record, that the late Mr. Stephen Mwansa purchased the farm in question in 1982 and not in 1992. That the farm was not allocated to him by the Commissioner of Lands as found by the Court below and there was no point when the farm was held by the Commissioner of Lands during the period in question. He stated that even the Respondent himself, in his letter to the Minister of Lands and Natural Resources dated 27th August, 1986, confirmed that the Appellant had a certificate of title for the property in question. That this evidence was confirmed in the minutes of the meeting that was held in the office of the Minister of Lands and Natural Resources on 9th September, 1986. According to Counsel, the Attorney General did not challenge the validity of the said Minutes from the Ministry of Lands and Mr. Paul Kachimba, who testified on behalf of the Commissioner of Lands, validated the Minutes through his evidence.

Counsel went on to submit that there was no evidence before the lower Court to show that the property in issue was repossessed from Mr. Mwansa or that Mr. Mwansa's Certificate of Title issued in 1988 was cancelled. That what the Respondent proved were intentions by the Commissioner of Lands to offer the Respondent the Appellant's Farm without regard to the fact that the farm was already on title in Mr. Mwansa's name.

Counsel contended that it is trite law that a certificate of title is conclusive evidence of ownership of land unless fraud in its acquisition can be proven. For this contention, he referred us to Section 33 of the **LANDS AND DEEDS REGISTRY ACT**[b]. We have reproduced this section above.

Counsel submitted that there is no evidence on the record of appeal pointing to the existence of a pleading for fraud or to some fraudulent activities relating to the acquisition of the Certificate of Title in dispute. That the record of appeal only contains complaints in form of letters written by the Respondent, raising issues about the manner in which the Ministry of Lands Officials treated him

after the loss of his farm number 50a Makeni through compulsory acquisition to the State. That the Respondent also complained about being shown a wrong piece of land by the Ministry of Lands Surveyors as a replacement for his farm number 50a Makeni. That the other correspondence on the record of appeal, are letters written by the Respondent pleading for fair play and for more time before relocating from the Appellants' farm. Counsel stated that the other letters on the record of appeal were those written by the then Acting Commissioner of Lands who informed the Respondent that he was shown a wrong piece of land and that he needed to move out of the remaining extent of Subdivision E of farm No. 669a, Lusaka West.

Counsel contended that in view of the foregoing, the Appellants did not understand where the learned trial Judge found evidence of fraud to warrant the cancellation of a validly issued Certificate of Title and order that the Respondent should be offered the land in dispute. Counsel, therefore, submitted that, in the absence of fraud or mistake, the late Stephen Mwansa was the legal and beneficial owner of sub E of farm No. 669a Lusaka West.

Counsel went on to submit that the only evidence that was adduced by the Respondent, in support of his claim to the land, was a letter of intention to issue a Certificate of Title in the name of the Respondent for the land in dispute. That the said letter was written by the Commissioner of Lands. According to Counsel, the said letter, which was dated 20th January, 2003, was addressed to the whole world. Counsel argued that the Commissioner of Lands did not have power to issue a Certificate of Title as under the **LANDS AND DEEDS REGISTRY ACT**[b] that power rests with the Registrar of Lands and Deeds Registry. In Counsel's view, the role of the Commissioner of Lands ends at land alienation for and on behalf of the Republican President and issuing offer letters to successful applicants.

For the above submissions, Counsel referred us to the case of **ANTI-CORRUPTION COMMISSION V. BARNET DEVELOPMENT CORPORATION LIMITED**[2], where we stated that-

> **"Under Section 33 of the Lands and Deeds Registry Act, a Certificate of Title is conclusive evidence of ownership of land by a holder of a Certificate of Title. However, under Section 34 of the same Act, a Certificate of Title can be challenged and cancelled for fraud or reasons of impropriety in its acquisition."**

Counsel went on to argue that in the instant case the Respondent did not allege fraud and did not adduce any evidence at trial that touched on fraud or indeed mistake. That, therefore, the Certificate of Title for the late Stephen Mwansa, is at law, unassailable. That the said certificate of title is conclusive evidence of ownership of the land in dispute and cannot be cancelled.

Counsel further submitted that it is also trite law that he who alleges must prove. For this, he referred us to, among other authorities, the case of **KHALID MOHAMMED V. THE ATTORNEY GENERAL**[3], where we said that-

> **"A Plaintiff must prove his case and if he fails to do so, the mere failure of his opponents defence does not entitle him to Judgment."**

Counsel submitted that the Respondent did not adduce any evidence to warrant a declaration that the Respondent and his family are the legal tenants of the property in contention.

With regard to the second ground of appeal, Counsel submitted that the learned trial Judge misdirected herself in law and fact when she held that a finding of fraud could be sound at law if a party wishing to rely on fraud merely adduces evidence touching on fraud during trial as long as such evidence is not

objected to by the other party. Counsel reiterated that there was no evidence on record to establish fraud. He referred us to the definition of fraud in **BLACK'S LAW DICTIONARY 8TH EDITION,** where the word has been defined at page 685 as follows:

> **"A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."**

Counsel submitted that the finding by the lower Court that a party need not plead fraud as long as sufficient evidence of fraud is led and not challenged was against well settled principles of law. To reinforce his argument, he referred us to, among other authorities, Volume 36 of **HALSBURY LAWS OF ENGLAND, 4TH EDITION**[d], where the authors have stated the following in paragraph 36:

> **"Where a party relies on any misrepresentation, fraud, breach of trust, willful default or undue influence by another party, he must supply the necessary particulars of his allegations in his pleading."**

Counsel also cited the case of **CHRISTINE MALOSA BANDA V. COPPERBELT ENERGY CORPORATION AND TWO OTHERS**[4] for the principle that fraud must be distinctly alleged and proved. He submitted that the Respondent did not distinctly allege or indeed prove fraud. To support his arguments, Counsel referred us

to the case of **BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY V. BOARDERS**[5], where Lord Wright said the following:

> **"I venture to think that the error into which, with all respect, the Court has fallen is due to their failure to recognize the importance of the established rule that fraud must be precisely alleged and strictly proved."**

Counsel further cited the case of **SABLEHAND ZAMBIA LIMITED V. ZAMBIA REVENUE AUTHORITY**[6]**,** where we stated as follows:

> **"We entirely agree with the Appellants' Counsel that where fraud is to be a ground in the proceedings, then a Defendant or Respondent wishing to rely on it must ensure that it is clearly and distinctly alleged. Further, at the trial of the cause, the party alleging fraud must equally lead evidence so that the allegation is clearly and distinctly proved. We have examined the evidence in detail and nowhere is the issue of fraud advanced and proved. Since the issue of fraud was not pleaded and no evidence led to prove it, it was erroneous for the learned trial Judge to make a finding in the manner she did."**

Relying on the above authorities, Counsel prayed that the Judgment of the lower Court, ordering cancellation of the Appellants' title deeds should be reversed. Further, that the holding of the Court below, suggesting that a party may rely on fraud even if

it is not pleaded as long as evidence of fraud is led and not objected to, should be reversed.

Coming to the third and fourth grounds of appeal, Counsel submitted that the lower Court misdirected itself in law and fact when it held that the Appellant acquired farm 669a Lusaka West in 1988 by way of a direct lease. According to Counsel, there was overwhelming evidence on record, to the effect that the land in question was actually bought and held on title by the Appellant from as far back as 1982. Counsel further argued that there was evidence that the 1988 Title Deeds were only issued after a subdivision was forced on the Appellants' land by the Commissioner of Lands to create Subdivision D of Farm No. 699a for the Respondent following the compulsory acquisition of his Farm No. 50a Makeni.

Counsel submitted that the Respondent himself, in his letter to the Minster of Lands and Natural Resources dated 27th August, 1986, confirmed that by that time, the Appellant had already

acquired a certificate of title to the disputed property. That this position was also confirmed in the Minutes of the Meeting that was held in the Minister of Lands and Natural Resources' Office on 9th September, 1986.

Counsel went on to submit that the Appellants did not object to the evidence of fraud because that was not pleaded by the Respondent. That there was no evidence to support the finding of fact by the lower Court that the Appellants' certificate of title was issued contrary to the provisions of Sections 37, 38 and 46 of the **LANDS AND DEEDS REGISTRY ACT**[2]. That to the contrary, there was overwhelming evidence showing that the Ministry of Lands gave the Respondent a lot of time to relocate from the disputed land.

Counsel went on to contend that the findings of the lower Court, contested by the Appellants in the third and fourth grounds of appeal, are perverse as they were made in the absence of evidence.

In response, the learned Counsel for the Respondent filed written heads of argument. On the first and second grounds of

appeal, Counsel submitted that the Respondent supports the learned trial Judge's finding that the evidence before her revealed unfairness and fraudulent conduct by the Appellant and the Commissioner of Lands in the issuance of certificate of title No. L1345 which was issued on the 6th May, 1988 to Appellant. Counsel, therefore, supported the learned trial Judge's order of cancellation of that certificate of title. Further, Counsel argued that the lower Court properly directed itself when it made findings of misrepresentation, impropriety, unfairness and fraud against the Appellants even though they were not stated in the Respondent's pleadings. That the learned trial Judge's decision was in line with, among other authorities, the case of **NKONGOLO FARM LIMITED V. ZAMBIA NATIONAL COMMERCIAL BANK AND OTHERS**[7], where the Appellant did not plead fraud and misrepresentation but adduced evidence which brought out details of fraud and misrepresentation. In the **NKONGOLO FARM LIMITED**[7] case, this Court held that although the Appellant did not expressly plead fraud, there were five paragraphs of the statement of claim which

brought out sufficient details of fraud and misrepresentation. This Court went on to hold that even if it had to agree with the learned trial Judge that the pleadings were defective, there was evidence adduced before the High Court by the Appellant on misrepresentation which evidence was not objected to by the Respondent.

Counsel submitted that the lower Court explained why it arrived at the holding that fraud had been proved. Further, that the Respondent's statement of claim disclosed some acts of unfairness and fraud. That, therefore, the learned trial Judge was within the provisions of the law when she ordered the cancellation of the certificate of title on the ground that it was issued fraudulently. To buttress this submission, Counsel referred us to the case of **ANTI-CORRUPTION COMMISSION V. BARNET DEVELOPMENT CORPORATION LIMITED**[2], which we have already referred to elsewhere in this Judgment.

Counsel went on to submit that when summing up her findings, the learned trial Judge outlined the acts and

circumstances of imposition and falsehoods that anchored her finding of fraud. That the learned trial Judge showed that Mr. Mwansa had made untrue claims, namely, that before 1988 he was the owner of Farm 699(a) and that he built the structures that Mr. Mpofu renovated and occupied. That using those untrue claims, the Commissioner of Lands started adverse actions against Mr. Mpofu. That Mr. Mpofu tried to challenge these unfair acts but the Commissioner of Land, without due compliance to the law, went ahead and resurveyed and re-planned the subdivisions. Counsel contended that there could be no better term to describe such activities than "fraudulent and unfair".

Counsel went on to submit that apart from the intimidation and threats which Mr. Mpofu suffered, soon after the re-planning of new boundaries, the Respondent was given an ultimatum to move out of subdivision E and warned that if he did not move, the Commissioner of Lands would not pay him his compensation for the farm Number 50(a) Makeni. According to Counsel, that ultimatum was unconstitutional as it was contrary to Article 16 of the

CONSTITUTION OF ZAMBIA[e], which provides for adequate compensation where a person's land is compulsorily acquired by the State.

Counsel expressed the view that the Commissioner of Lands should have first given Mr. Mpofu the Title Deeds for subdivision D before demanding his relocation. He alleged that the only reason the Commissioner of Lands unilaterally imposed painful ultimatums and even withheld the constitutionally guaranteed compensation, was to further the scam already calculated to deprive the Respondent of his rights.

Coming to the third ground of appeal, Counsel submitted that the Appellants never produced evidence during trial to show that Mr. Mwansa's ownership pre-dated Mr. Mpofu's settlement on or allocation of subdivision 'D" of Farm 669(a). That Mr. Mpofu's letter dated 5th September, 1986, showed that Mr. Mwansa was brought into the picture after Mr. Mpofu had been settled on the Farm. That the evidence on the record of appeal shows that the certificate of

title was offered to the Appellants in 1988. That there was no evidence that Mr. Mwansa bought the farm in dispute before 1982. Further, that the Appellant did not produce detailed particulars and the whereabouts of the person from whom Mr. Mwansa allegedly bought the farm. That, therefore, the lower Court was on firm ground to hold that Mr. Mwansa acquired that farm in 1988 through a direct lease evidenced by certificate of title number L1345.

With regard to the fourth ground of appeal, Counsel argued that the appellants' contention, that the structures on subdivision 'E' of Farm 669(a) were built by Mr. Mwansa, had no backing either from the Commissioner of Land's evidence or from the 1st Appellant's testimony.

Counsel urged us not to disturb the findings of fact made by the learned trial Judge. For this, he referred us to the case of **NKHATA AND OTHERS V. ATTORNEY GENERAL**[8], where we pronounced the principle that as a general rule, this Court would rarely interfere with the findings of fact by the lower court unless

such findings are not supported by the evidence on record or the lower court erred in assessing and evaluating the evidence by taking into account matters which ought not have been taken into account or failing to take advantage of having seen and heard the witnesses.

We have carefully considered the evidence on record, the arguments of Counsel and the judgment appealed against. We will also deal with the first and second grounds of appeal together, as they have raised interrelated issues.

In the first and second grounds of appeal, Counsel for the Appellants has essentially submitted that the lower Court misdirected itself when it ordered the cancellation of the Appellants' Certificate of Title on the ground that it was fraudulently issued and, that the Respondent did not distinctly plead fraud nor adduce any evidence to prove it.

The gist of the response by Counsel for the Respondent is that the learned trial Judge was on firm ground when she arrived at the finding of fraud notwithstanding the fact that the Respondent did

not specifically plead fraud. According to Counsel, the Respondent's Statement of Claim disclosed acts of unfairness and fraud. In Counsel's view, the lower Court rightly grounded her findings relating to fraud on the fact that Mr. Mwansa obtained his Certificate of Title on the strength of falsehoods that he peddled to the Commissioner of Lands. Counsel has referred us to a number of cases where, according to him, fraud was not specifically pleaded but the Court considered evidence of fraud adduced by one party and not objected to by the other.

We agree with Counsel for the Appellants that it is settled law that fraud must be distinctly alleged and proved. ***Order 18/8/16 of the Rules of the Supreme Court, 1999***, states that **"Any charge of fraud or misrepresentation must be pleaded with the utmost particularity...."** Similarly, ***Order 18/12/18 of the Rules of the Supreme Court, 1999***, provides that **"Fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."** The decision of this Court in the case of **SABLEHAND ZAMBIA**

LIMITED V. ZAMBIA REVENUE AUTHORITY[6] endorses these principles. We stated:-

> **"On the authorities cited to us (i.e. Associated Leisure Limited v Associated Newspaper Limited (2) and Wilde and Another v Gibson (3), we entirely agree with the appellant's Counsel that where fraud is to be a ground in the proceedings, then a defendant or respondent wishing to rely on it must ensure that it is clearly and distinctly alleged. Further, at the trial of the cause, the party alleging fraud must equally lead evidence so that the allegation is clearly and distinctly proved. The clear message from the two cited cases is that allegations of fraud must, once pleaded, be proved on a higher standard of proof than on a mere balance of probabilities because they are criminal in nature. ... We have looked at the affidavit in opposition sworn by the respondent and nowhere does it allege fraud. We have also examined the evidence in detail and nowhere is the issue of fraud advanced and proved. Since the issue of fraud was not pleaded and no evidence led to prove it, it was erroneous for the learned trial Judge to make a finding in the manner she did."**

Some decided cases, however, seem to suggest that a party relying on fraud does not necessarily have to mention the word "fraud" in the pleadings. That it is enough for that party to simply set out sufficient and distinct facts that disclose fraudulent conduct. A case in point in this regard is this Court's decision in the **CHRISTINE MALOSA BANDA**[4] case, where we held as follows:

> **"We have taken a look at the pleadings of both the Respondents and the Appellant. We hold the opinion that although the Respondents did not mention the word 'fraud' in their pleadings, they, nevertheless, gave sufficient and distinctive particulars of Mr. Mwalula's fraudulent conduct. In fact in his reply, the Appellant recognized the fact that the Respondents had alleged fraud when he**

stated that "it is highly regrettable that (an) allegation of fraud can be brought against the late Mwalula (in) this way"."

Other authorities suggest that the Court is entitled to take into account evidence of fraud where fraud is not pleaded but such evidence is adduced and not objected to. An example of such authorities is our decision in the case of **NKONGOLO FARMS LIMITED**[7], where we said the following:

> **"However, looking at the five (5) paragraphs of the statement of claim quoted above, we hold the view that these paragraphs brought out sufficient details of fraud and misrepresentation ... We agree with Mr. Chisanga that although the pleadings were deficient for the purposes of using the pleas of fraud and misrepresentation to claim damages, the details brought out in the five (5) paragraphs quoted above on the statement of claim are sufficient details for applying fraud and/or misrepresentation as a vitiating factor of consent by the appellant Company Directors in the transaction between the 3rd respondent and the appellant Company.**
>
> **In the alternative, even if we had to agree with the learned trial judge that the pleadings were defective, we hold that there was evidence adduced before the High Court by the appellant on the misrepresentation by the 3rd respondent, which evidence was not objected to by the respondents. The Court has an obligation to weigh that evidence."** (Emphasis by underlining is ours)

A study of authorities on the standard of proof for an allegation of fraud establishes that such an allegation must be proved to a standard that is slightly higher than proof on a balance of probabilities although lower than proof beyond reasonable doubt.

This is the conclusion we came to when we decided the case of **SABLEHAND ZAMBIA LIMITED**[6]. In that case, we specifically stated that **'allegations of fraud must, once pleaded, be proved on a higher standard of proof than on a mere balance of probabilities because they are criminal in nature'**. Lord Denning, LJ arrived at a similar conclusion in the case of **BAXTER V. BAXTER**[9], when said the following:

> **"[A civil] case may be proved by a preponderance of probabilities, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."** (Emphasis by underlining is ours)

What can be discerned from the above authorities is that an allegation of fraud must be distinctly pleaded and proved. This does not necessarily mean that the word 'fraud' must be mentioned in the Statement of Claim or other originating process. What the law simply requires is that the originating process must give distinct particulars of the allegation of fraud. If a party has neither pleaded fraud nor outlined facts that disclose fraud but has adduced

evidence of fraud at trial and that evidence has not been objected to, the Court is required to consider that evidence. The Court must, however, bear in mind that an allegation of fraud must be proved to a standard which is slightly higher than proof on a balance of probabilities, but lower than proof beyond reasonable doubt.

On the basis of the above, the first question that inevitably arises is- **"did the Respondent plead fraud in his originating process or outline facts that disclosed fraudulent conduct in the issuance of the Certificate of Title for Farm No. 669/E to Mr. Mwansa?"** A study of the record of appeal establishes that, on this issue, the learned trial Judge held as follows:

> **"As argued by the 1st and 2nd Defendants, the Plaintiff herein has not specifically pleaded the issue of fraud although the evidence adduced touches on the same. This evidence was not objected to by any of the parties and stands to be considered as if pleaded and the parties had opportunity to respond to the same."**

Having carefully studied the Respondent's Writ of Summons and Statement of claim, we agree with the lower Court that the Respondent did not specifically plead fraud. Further, in his Statement of Claim, the Respondent did not outline any facts which

could be said to have disclosed fraud in the issuance of the Certificate of title to the Appellants.

The next question then is- **"did the Respondent adduce any evidence to prove fraud to the required standard?"** As already alluded to, the learned trial Judge found that the Respondent adduced evidence to prove fraud and the Appellants did not raise any objection to the said evidence. According to her, the following was the crux of the evidence establishing fraud:

> **"... whilst the late Mpofu was complaining on the issue of lack of fair play and before the Ministry of Lands which had settled him on the property in issue could resolve all the matters in contention as evidenced by the correspondence of 1986 and 1987, it went ahead to issue a Certificate of Title to the late Mwansa. This title was thus issued contrary to the provisions of Sections 37, 38 and 46 of the Act to the effect that when there is an application for title to be issued and it appears to the Registrar that some interested persons are not party to such application the Registrar will direct that such application be served on them and the parties be given time to lodge objections, if any. Once the objections are received, the Registrar shall refer the same to the Court which shall determine interests of the parties and whether the title should be issued to the applicant or not. The person in possession should have ordinarily been given first priority."**

In the lower Court's opinion, since the Respondent was not invited to make representations, this pointed to the existence of

fraud and unfairness in the issuance of the Certificate of Title by the Ministry of Lands to the Appellants.

We have painstakingly considered the evidence adduced by the Appellants. We do not agree with the learned trial Judge that the Respondent proved fraud to the required standard. In our view, the evidence referred to by the learned trial Judge simply brought out allegations of unfairness in the manner Mr. Mpofu was treated following the compulsory acquisition of his Farm No. 50a. This is so because there is clear evidence on record that when Mr. Mpofu's Farm No. 50a was compulsorily acquired from him, he was given Farm No. 669/D and not Farm No. 669/E. In a letter written by the Acting Commissioner of Lands to Mr. Mpofu on 20th August, 1986, the Acting Commissioner of Lands told him, among other things, that Farm No. 669/E belonged to Mr. Mwansa. The Acting Commissioner of Lands also pointed out that when it was realized that Mr. Mpofu had been shown the wrong farm, he was invited to go to Ministry of Lands so that a Surveyor could show him the proper boundaries of Farm No. 669/D. That although Mr. Mpofu

promised to go to Ministry of Lands he never did. Further, that on 8th August, 1986, the Acting Commissioner of Lands personally met Mr. Mpofu on Farm No. 669/E and informed him that he was at a wrong farm. That Mr. Mpofu became hostile and hurled insults at the Commissioner of Lands and vowed never to leave the place. On 13th August, 1986, Mr. Mpofu chased the land Surveyor who was sent to the farm to open up boundary lines. The Acting Commissioner of Lands advised Mr. Mpofu to call on his office for him to be shown the extent of Farm No. 669/D. Mr. Mpofu was warned that he was on Farm No. 669/E at his own risk and whatever improvements he was effecting would end up not being his.

In another letter written by the Acting Commissioner of Lands on 7th October, 1986, Mr. Mpofu was given up to 31st October, 1986, to move to Farm No. 669/D. In his letter of response, written on his behalf by his lawyers, Jacques and Partners, on 14th October, 1986, Mr. Mpofu did not contest the fact that Farm No.

669/E did not belong to him. In that letter, his lawyers, inter alia, wrote:-

> **"Our client's instructions are that he does not object moving to the new place, but would like to be given more time to enable him make arrangements for the construction of a house, deep tank and also to enable him plant and harvest the 15 hectares land he has ploughed.**
>
> **It is with the above in mind that our client is asking your good offices in conjunction with Mr. Mwansa to allow him to continue staying in the present house for a period of up to 12 months...."**

It is evident from the above letter by Jacques and Partners that, as early as 1986, Mr. Mpofu knew and accepted that Farm No. 669/E belonged to Mr. Mwansa. It is also clear that, although the Certificate of Title for Farm No. 669/E was only issued to Mr. Mwansa on 6th May, 1988, he owned that piece of land at least as early as 1986 and Mr. Mpofu was aware of this fact. At that time Mr. Mpofu did not claim ownership of Farm 669/E. What he wanted was for him to be given adequate time to prepare some facilities on Farm 669/D before he could move.

Further, a study of the testimony of PW1 reveals that he did not adduce any evidence that can be said to have established fraudulent conduct in the issuance of the Certificate of Title for Farm No. 669/E to Mr. Mwansa. It appears the lower Court heavily

relied on the letter of complaint written by Mr. Mpofu to the Minister of Lands and Natural Resources on 5th September, 1986 entitled "Appeal for Fair Play". In that letter, Mr. Mpofu complained about how he had been unfairly treated, firstly by not having been compensated for Farm No. 50a and secondly by the Commissioner of Lands offering Farm No. 669/E to Mr. Mwansa when Mr. Mpofu had already settled on that farm and effected some developments using his own money. We do not think that what is stated in Mr. Mpofu's letter of complaint can be taken to be evidence by itself, proving fraud to the required standard and capable of forming the basis for canceling the Certificate of Title issued to Mr. Mwansa. An allegation of fraud is a serious allegation. This is why the law requires that such an allegation must be proved to a standard that is slightly higher than proof on a balance of probabilities. The onus was on the Respondent to establish, to the required standard, that there was actual fraud, and not simply unfairness, in the issuance of the Certificate of Title in issue.

The learned trial Judge went on to state that the Commissioner of Lands should have invited the Respondent to make representations before issuing the Certificate of Title to Mr. Mwansa. We are of the view that this was not necessary in the circumstances of this case. As we have already stated elsewhere, Mr. Mpofu was told on numerous occasions that the land in issue belonged to Mr. Mwansa and he undertook to move to his rightful farm.

From the foregoing, we are of the firm view that the Respondent did not adduce evidence of fraud sufficient enough to establish fraudulent conduct in the issuance of the Certificate of Title in issue. We do not, therefore, agree with the decision of the lower Court to cancel the Appellants' Certificate of Title to Farm No. 669/E. We reverse that decision and hold that the said Certificate of Title was validly issued to Mr. Mwansa.

Since the Commissioner of Lands subdivided and allocated the Respondent's Farm No. 669/D to other people, we hold that the Commissioner of Lands must give the Respondent an alternative

piece of land as a replacement for Farm No. 669/D which the Commissioner of Lands erroneously subdivided and allocated to other people.

Our decision on the first and second grounds of appeal effectively also disposes of the third and fourth grounds of appeal.

All in all, this appeal has succeeded. We award costs to the Appellants both in this Court and in the lower Court to be taxed in default of agreement.

I.C. Mambilima
CHIEF JUSTICE

A.M. Wood
SUPREME COURT JUDGE

R.M.C. Kaoma
SUPREME COURT JUDGE