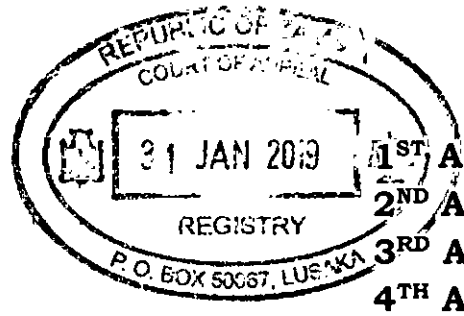
IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO.122/2017**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:



LONDON NGOMA	**1ST APPELLANT**
JOSEPH BIYELA	**2ND APPELLANT**
RICHARD NG'OMBE	**3RD APPELLANT**
FRIDAY SIMWANZA	**4TH APPELLANT**

AND

LCM COMPANY LIMITED **RESPONDENT**

Coram: Chisanga JP, Makungu, Kondolo JJA
On 23rd May, 2018 and 31st day of Jan, 2019

For the Appellant: Mr. T. S. Ngulube – Messrs Tutwa S. Ngulube & Co.
For the Respondent: Mr. S. Chisenga – Corpus Legal Practitioners

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JUDGMENT

MAKUNGU, JA delivered the Judgment of the court.

Cases referred to:

1. *The Rating Valuation Consortium and D.W. Zyambo & Associates (Suing as a firm) v. The Lusaka City Council and Zambia National Tender Board (2004) Z.R 109 (S.C)*
2. *Mobil Oil (Zambia) Limited v. Loto Petroleum Distributors Limited (1977) ZR 336 (H.C)*
3. *Mwenya and Randee v. Kapinga (1998) S.J. 12 (S.C)*
4. *Jean Mwamba Mpashi v. Avondale Housing Project Limited (1988 - 1989) Z.R 140*

5. *Clementina Banda Emmanuel Njanje v. Boniface Mudimba (2011) ZR (HC)*
6. *Edgar Hamuwele (Joint Liquidator of Lima Bank Limited (in Liquidation)) Christopher Mulenga (Joint Liquidator of Lima Bank Limited (in Liquidation)) v. Ngenda Sipalo Brenda Sipalo S.C.Z Judgment No. 4 of 2010*
7. *Amanda Muzyamba Chaala (Administrator of the estate of the late Florence Mwiya Siyunyi Chaala) v. Attorney General and Mukelabai Muyakwa SCZ Judgment No. 6 of 2012*
8. *London Ngoma and others v. LCM Company Limited and United Bus Company of Zambia Limited (Liquidator) SCZ Judgment No. 22 of 1999*
9. *Attorney General v. Achiume (1983) ZR 1*
10. *Anderson Kambela Mazoka and Others v. Levy Patrick Mwanawasa and others (2005) ZR 138 (SC)*
11. *Galaunia Farms Limited v. National Milling Company Limited (2004) ZR 1*
12. *Attorney General v. Mutuna and Others (Appeal No. 088/2012)*
13. *Anti-corruption Commission Limited v. Barnnet Development Corporation Limited*
14. *G.F Construction Limited (1976) v. Rudnap (Zambia) Limited and Unitechan Limited (1999) ZR 134.*

Legislation referred to:

1. *Judgements Act, Chapter 81 of the Laws of Zambia*
2. *Rent Act, Chapter 206 of the Laws of Zambia*

Other authorities referred to:

1. *Chitty on contracts volume 1 – General principles, thirtieth Edition, 2008, Sweet and Maxwell, General H.G. Beale paragraphs 2 – 003, 2009*
2. *Halsbury's laws of England (4th edition) Volume 27, also 5th Edition Vol 62 paragraph 279*
3. *Blacks Law Dictionary Seventh Edition Bryan A. Garner – Editor in Chief Group West, 1999*

The United Bus Company of Zambia Limited (UBZ) was placed under liquidation on 12th January, 1995. It owned a number of properties including subdivisions 4 and 5 of farm No. 110 Villa Elizabeth, Lusaka with two houses on each, which are subjects of this appeal. At the time of liquidation, the appellants were sitting tenants of the said properties. By letters dated 26th January, 1996 the appellants were given the first option to purchase the houses by UBZ. On diverse dates in the month of February, 1996 and in response to the letter from the liquidator, the appellants made different proposals on their intentions to purchase the properties they were each occupying. In the month of October, 1996, the appellants, through S.P. Mulenga and Associates, paid 10% towards the purchase prices of the subject properties. On 22nd May, 1996 a contract of sale was entered into between the respondent and UBZ (In liquidation) for the purchase of the same properties all together valued at K144 million. The Certificate of Title was handed over to the respondent upon execution of the said contract and ownership has since changed to the respondent. The appellants are still in possession of the properties even after demands by the respondent that they should vacate the premises.

Consequently, an action was commenced by the respondent in the High Court against UBZ (In liquidation) in June, 2002. The appellants applied to be joined to the proceedings as intervenors in November, 1996. The High Court refused their application and they appealed to the Supreme Court against the refusal and won the appeal in 1999. The Respondent's claims were as follows: -

a. ***A declaration that the plaintiff (respondent herein) is the registered and beneficial owner of the properties otherwise known as S/D 4 and S/D 5 of Farm No. 110a Villa Elizabetha situate in the Lusaka Province of the Republic of Zambia.***
b. ***An order of possession of the subject properties.***
c. ***An order for payment of standard rentals by the intervenors (appellants herein) from the date title passed to the plaintiff from the 1st defendant (UBZ Limited (In liquidation).***
d. ***Interest at the lending commercial rate on (c) above.***
e. ***Costs.***

In its judgment dated 14th March, 2017, the lower court made the following findings of fact:

The intervenors (appellants herein) had no interest in the subject property because their purported letters of acceptance were invalid as they constituted counter offers. S. P. Mulenga and Associates

whom the intervenors were dealing with were not authorized by the Liquidator to sell the properties on behalf of the defendant (UBZ). That the plaintiff was a bonafide purchaser for value without notice. The learned judge accordingly, ordered that the plaintiff was entitled to mesne profits with interest at the bank lending rate on the standard rent to be assessed by the Deputy Registrar from the date of the writ to the date of payment.

The appeal is based on five grounds structured as follows:

1. ***The learned trial judge erred both in law and fact when she held that the appellants have no interest in the subject property.***

2. ***The learned trial judge erred both in law and fact when she held that S.P. Mulenga International whom the intervenors were dealing with was not authorized by the Liquidator.***

3. ***The learned trial judge erred in law and fact when she held that the balance of K54, 000, 000 (unrebased) was paid because there were letters directing the plaintiff to pay the advocates, namely, Messrs M. Musonda and Company and yet there was no proof that Messrs. M. Musonda and company remitted the K54, 000, 000 (unrebased) to the Liquidator.***

4. ***That the learned trial judge erred in law and fact when she ordered that the intervenors should pay mesne profits to the plaintiff when in fact the plaintiff did not plead for mesne profits.***

5. ***The learned trial judge erred in law and fact when she ordered that the interest will be determined from the date of the writ of summons when in fact the intervenors became a party to the action in the middle of 1999 and whereas the matter was commenced in 1996, thus cause No. 1996/HP/4554.***

The respective advocates for the parties filed herein written heads of argument in support of their positions. At the hearing of the appeal, counsel for the appellant, Mr. Ngulube relied on the heads of argument and amended record of appeal.

With respect to ground one, Mr. Ngulube submitted that the learned trial judge misapprehended the facts and the evidence before her when she held that the appellants had no interest in the property. According to the appellant, the evidence on record reveals that the appellants accepted the offers and paid 10% towards the purchase of the said houses. This was not taken into account by the lower court. That the payment of 10% created a

relationship between the parties and if at all there was a counter offer, the appellants offer would have been formally withdrawn and the 10% refunded. In addition, the appellants were sitting tenants who ought to have been given the right of first refusal as was the policy. Therefore, the appellants had an interest in the property.

In regard to ground two, learned counsel for the appellant contended that the lower court did not take into consideration the letter written to S.P. Mulenga and Associated exhibited in the intervenors bundle of documents which did not withdraw the authority of S.P. Mulenga to play a part in the transactions. The letter from S.P. Mulenga to the intervenors dated the 21st September, 1996 shows that the Liquidator accepted the proposed purchase prices of each property of Seventeen Million Eight Hundred and fifty subject to approval by the inspection committee. That the trial Judge did not take into account that the Inspection Committee had ratified S.P. Mulenga's conduct of the conveyancing for those that paid 10% deposits. According to Counsel Ngulube, the 10% deposit paid by the intervenors on 1st October, 1996 within 14 days from the date of the offer from S.P. Mulenga constituted a valid offer, acceptance and consideration

constituting a binding contract. That this evidence was not considered by the learned trial judge.

It was also Mr. Ngulube's argument that the letter dated 4th December, 1996 written by the interim joint Liquidator C. Luipa who was also DW1, ignored both the letter to S.P. Mulenga and his own testimony to the effect that the respondents did not remit the K54, 000, 000. 00 balance to the Liquidators. In addition, the said letter dated 4th December, 1996 on page 209 of the record of appeal stated that the Committee of Inspection approved the proposals that were outlined in the said letter as follows:

1. *That in the matter of the former employees wishing to purchase the houses that they occupy, you will immediately cease to act on their behalf as agents.*
2. *That you will act as OUR agent for the purpose of the letters of offer that you sent to each former employee and that each letter of offer already sent to such former employee will constitute a valid offer ratified by the Committee of Inspection.*
3. *That the houses being offered for sale will be paid for over a period of 9 months, 10% having been paid already and the balance to be paid every three months in 3 equal instalments commencing from the date of your letter of offer to them. Please note that the valuations to be used for the houses are the former valuations as given by Mr. Sombe except for those houses that the 10% deposits have been paid for.*

4. *That the 10% deposits already paid by each former employee will be passed on to UBZ immediately. Those former employees that have not paid the 10% deposit will have to surrender and vacate the houses they occupy within 30 days.*
5. *That you will confine yourself to valuation and marketing.*

Mr. Ngulube added that there is no indication in the letter that S.P. Mulenga had no authority to deal with the houses in issue. There was no need for extrinsic evidence as the letter indicated that S.P. Mulenga were was ratified by the Committee of Inspection. Therefore, the plaintiff's transactions with UBZ should have been nullified. The learned trial court's findings that S.P. Mulenga was not authorized was perverse and should be reversed by this Court.

It was Mr. Ngulube's further contention that there was a misdirection on the part of the trial judge in holding that the respondent was an innocent purchaser for value because the appellants were in occupation of the houses and this was sufficient notice to the respondent. That the respondent did not bother to inquire as to what interest the appellants had in the properties and this conduct was tantamount to negligence. Before the respondent paid the purchase price, its servants or agents inspected the

premises that were occupied by the appellants. This was confirmed by PW1 who informed the respondent that the houses were offered to the appellants. Counsel's position was that the appellant's interests superseded that of the respondent.

In support of this submission, learned counsel, Mr. Ngulube cited and relied on the case of ***The Rating Valuation Consortium and D. W. Zyambo and Associates (Suing as a firm) v. Lusaka City Council and Zambia National Tender Board*** [1] wherein the Supreme Court held as follows:

> ***"What should guide the court in analyzing business relationships should be whether or not the parties conduct and communication between them amounted to an offer and acceptance. What is regarded as an important criterion is for the court to discern a clear intention of the parties to create a legally binding agreement between themselves. This can be discerned by looking at the correspondence and the conduct of the parties as a whole."***

In arguing ground three, Mr. Ngulube submitted that the trial judge did not take into account the evidence of the Liquidator, (DW1) who stated that the sum of K54, 000, 000 was not remitted and there is nothing to show that the said sum was received or

acknowledged by UBZ. The receipt that the trial Judge relied upon was challenged for not being authentic.

There was a discrepancy in the findings made by the trial court because a perusal of the plaintiff's (respondent) further bundle of documents at page 7 shows that the purported receipt for 54 million was undated and not from M. Musonda and Company who were handling the transaction but from C.M. Musonda and Company who were not participating in the transaction. As a result, he faulted the trial judge for holding that the K54, 000, 000 was paid. There was need to adduce more evidence to determine the authenticity of the receipt from C.M. Musonda as there is evidence on record that the said firm did not even know which properties were being referred to. Counsel in this regard cited and relied on the High Court case of ***Mobil Oil (Zambia) Limited v. Loto Petroleum Distributers Limited*** [2] wherein it was held as follows:

> ***"The Court must investigate the circumstances to see whether the document came into being as a perfect agreement, and, if the court on the evidence finds that it did, then the court is not prevented from so holding by any impediment of law."***

Counsel Ngulube also asserted that the trial judge did not take into consideration that the respondent had notice of the appellant's occupation of the houses and their interests in purchasing the houses. He relied on the cases of ***Mwenya and Randee v. Kapinga*** [3] and ***Jean Mwamba Mpashi v. Avondale Housing Project Limited.*** [4] *In* ***Mwenya and Randee*** [3] it was held as follows:

> ***"The occupation of land by a tenant affects a purchaser of land with constructive notice."***

In ***Jean Mwamba Mpashi*** [4] it was held thus:

> ***"It is in each case a question of construction whether or not the parties intended to undertake immediate obligations or whether they were suspending all liabilities until the conclusion of formalities. Have they, in other words made the operation of their contract conditional upon the execution of a further document in which case these obligations will be suspended or have they made an immediately binding agreement though one which is later to be merged into a more formal contract. The task of the court is to extract the intention of the parties both from the terms of their correspondence and from the circumstances surrounding and following it and the question of interpretation may thus be stated....."***

Mr. Ngulube further argued that the Liquidator, Mr. Sombe did not formally indicate to the appellants that he had rejected their offers and that the houses were offered to another purchaser. The Liquidator's conduct was illegal, more so that there was a policy to offer the sitting tenants the right of first refusal. Reference was made to ***paragraph 1322*** of the ***Halsburys of England*** which reads:

> ***"Notice may be actual or constructive and where the said notice is imputed on the subsequent purchaser then the plea of purchaser without notice is defeated."***

In addition, Mr. Ngulube was of the understanding that the learned trial judge did not take into account that the Supreme Court of Zambia has already ruled in this particular matter that the appellant's interest in the said properties accrued the moment the houses were offered to them.

Counsel cited the High Court case of ***Clementina Banda Emmanuel Njanje v. Boniface Mudimba*** [5] where it was held thus:

"The following requirements need to be fulfilled when relying on the doctrine of bona fide purchaser for value without notice; a purchaser must; act in good faith; be a person who acquires an interest in property by grant rather than operation of law; must have given value for the property; must generally have obtained the legal interest in the property; and must have had no notice of equitable interest at the time he gave his consideration for the conveyance.

A purchaser is affected by notice of an equity where: the equity is within his own knowledge; actual notice, equity would have come to his own knowledge if proper inquiries had been made; constructive notice and where his agent as such in the course of transactions has actual or constructive notice of the equity; imputed notice."

With respect to ground four, Mr. Ngulube, stated that the order by the lower court for Mesne profits was a misdirection because mesne profits were not pleaded. According to counsel, the appellants were not trespassers but sitting tenants with an interest in the said properties. The appellants were occupying those premises on the basis of a Supreme Court Judgment which found that they had an interest in the houses. That the deposit made by the appellants created legal relations and therefore mesne profits

were unjustifiable. He relied on the supreme court case of ***Edgar Hamuwele (Joint Liquidator of Lima Bank Limited (in liquidation) Christopher Mulenga (Joint Liquidator of Lima Bank Limited (in liquidation) v. Ngenda Sipalo, Brenda Sipalo*** [6] where the supreme court found that as they had not paid anything towards the properties and the offers having been withdrawn, they were not entitled to possession. He also relied on the case of ***Amanda Muzyamba Chaala (Administrator of the estate of the late Florence Mwiya Siyunyi Chaala) v. Attorney General, Mukelabai Muyakwa*** [7] where it was held thus:

> ***"From the foregoing, this appeal is allowed. The decision of the committee refusing to sell house No. 43, Independence Avenue to the late Florence Mwiiya Siyunyi Chaala is hereby quashed. The effect of our judgement is that the status quo of the deceased having been a bona fide legal tenant of house no. 43 A Independence Avenue, Mongu as at the date of her application to buy the house in question is restored. Any subsequent action by the Committee to offer the said house to the 2nd respondent is void and of no effect as the said offer could not override the accrued rights of the deceased."***

Learned counsel urged us to consider the principles laid down in the two cases mentioned above. He further submitted that the appellants should be allowed to purchase the houses and enjoy the fruits of the presidential housing initiative. The houses should not have been given to a third party without giving the appellants an opportunity to purchase them first.

Further submissions made on behalf of the appellants were that the trial court should not have awarded mesne profits and payment of standard rent from the date of the writ without taking into account the fact that the respondents had occupied the said premises for a period of three years during the period in question. Mr. Ngulube therefore urged us to set aside the awards on mesne profits.

In arguing ground five, Mr. Ngulube stated that the trial Judge erred in law and fact when it awarded interest from the date of the writ because the appellants were not parties when this matter commenced in 1996. The appellants only joined the proceedings in 1999. Further that, the claim for interest was not from the date of the writ but from the dates of the Certificates of Title. According

to Mr. Ngulube, the Order by the trial court for interest was punitive because the appellants were treated like trespassers. He was of the view that the lower court should have considered the case of ***London Ngoma and others v. LCM Company Limited and United Bus Company of Zambia Ltd (Liquidator)*** [8] wherein the Supreme Court held among other things as follows:

> ***"That the appellants had interest in the matter and they should therefore have been notified of any action taking place concerning the properties on which they had paid deposits and which were subject of the contract."***

He finally urged us to set aside the award of interest as it was arrived at in error.

In countering the arguments put forward by the appellants Counsel, learned counsel for the respondent i.e. Mr. Chisenga, relied on the respondent's heads of argument filed herein on 18th May, 2018. He argued grounds one and two together. His stance was that the appellant is merely asking us to reverse the findings of fact that were made by the lower court. That he who alleges must prove and that findings of fact can only be reversed where there are compelling reasons based on laid down principles. In

support of this, he referred us to the cases of ***Attorney General v. Achiume, Zulu v. Avondale Housing project*** [9] and ***Anderson Kambela Mazoka Others v. Levy Patrick Mwanawasa.*** [10]

In ***Attorney General v. Achiume,*** [9] it was held as follows:

> ***"The appeal court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence, based upon a misapprehension of facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make."***

In the ***Anderson Kambela Mazoka*** [10] case the Supreme Court held among other things that he who alleges must prove.

Mr. Chisenga, submitted that the trial court was on firm ground when it held that the appellants did not have an interest in the subject properties. He was of the view that DW1's testimony under cross-examination clearly showed that the appellants varied the terms of the initial offer and there was no acceptance of the offers.

Further submissions were that it is trite law that where acceptance qualifies or varies the offer, it then constitutes a counter offer and is ineffective. In support of this he referred to the case of ***Galaunia Farms Limited v. National Milling***.[11]

Mr. Chisenga stated that the trial judge was therefore on firm ground when she found at J18 that there was no valid acceptance by the appellants and that the liquidator was not impeded from offering to sell the properties to the plaintiff.

Further that, there was no claim that the respondent's title was obtained by fraud or mistake.

Mr. Chisenga submitted further that the onus to prove that S.P Mulenga and Associates International had the authority from the Liquidator to act on his behalf was on the appellants. There was no evidence on record to show such authorization. Our attention was drawn to pages 150 and 151 of the record of appeal where the former liquidator categorically stated to the effect that S.P. Mulenga was an agent for the former UBZ employees having been approached by them to help them secure the purchase of the UBZ

houses that they occupied. That this position was supported by the status report issued by the joint liquidators dated 19th October, 2001 appearing on pages 117 – 120 of the record of appeal wherein it is clear that the valuation of the properties was done by S.P. Mulenga Associates who were acting as estate agents of the sitting tenants. In addition, there was no letter appointing the said firm as agent on behalf of the appellants as seen on page 303 of the record of appeal lines 6 -9.

Mr. Chisenga submitted that the third ground of appeal is based on a misapprehension of facts. He stated that according to the record of proceedings, the defendant's witness in examination in chief stated that there was no proper handover from the first liquidator and it took time for the joint liquidators who were subsequently appointed to understand what stage the liquidation had reached. That under cross- examination DW1 Christy Chitalu Luipa one of the joint liquidators appointed after Sombe, conceded that when the joint liquidators made inquiries from M. Musonda and Company over the balance of K54, 000. 000 they were informed that it was remitted to the Liquidator.

Mr. Chisenga, went on to state that the respondent met its obligations with respect to the purchase price and reference was made to the letter from the interim Joint Liquidator Mr. Clement Mabutwe dated 21st March, 1997 addressed to Messrs M. Musonda and Company appearing on page 134 of the record of appeal confirming that the properties were legally sold to the respondent and that the liquidators had no further interest or claim. The receipts appear on page 173 of the record of appeal. That the full amount was paid and this was confirmed in the Assignments as well as the letter dated 2nd August, 1996 appearing on pages 157 and 155 of the record of appeal respectively. That the letter dated 12th June, 2006 appearing on page 167 of the record of appeal acknowledges that the money had been paid over to the liquidators.

Counsel also stressed that the issue being raised in ground three was never raised in the lower court by the appellants as evidenced by the pleadings. He in this regard relied on the ***Attorney General v. Mutuna and Others*** [12] wherein the Supreme Court held among other things that:

"It is a settled principle of law that issues not pleaded or brought upon evidence before the High Court cannot be raised in an appellant court."

It was counsel's submission that ground three must therefore be dismissed.

In reaction to ground four, Mr. Chisenga submitted that, like ground three, this ground must be dismissed because there is a misapprehension of the pleadings that were made in the lower court. The learned trial judge was on firm ground when she held that the appellants should pay the standard rent to the respondent for the period they had been in possession of the properties. Counsel was of the view that the lower court clearly analysed the law and facts of the matter on pages J19 to J20 of her Judgment.

According to Mr. Chisenga, it is an undisputed fact that the respondent has been wrongfully deprived of its enjoyment of the subject property for many years after obtaining good title to it. Therefore, the respondent is entitled to mesne profits. He referred us to **Halsbury's Laws of England, paragraph 255** which the

lower court had referred to on page 19 of the Judgment. It reads as follows:

> *"Mesne Profits – the Landlord may recover in an action for mesne profits, the damages which he has suffered through being out of possession of the land or if he can prove no actual damage caused by him by the defendant's trespass, the landlord may recover as mesne profits, the amount of the open market value of the premises for the period of the defendant's wrongful occupation. In most cases, the rent paid under any expired tenancy will be strong evidence as to the open market value. Mesne profits being a type of damages for trespass can only be recovered in respect of the defendant's continued occupation after the expiry of his legal right to occupy the premises. The landlord is not limited to a claim for the profits which the defendant has received from the land or those which he himself has lost."*

On this basis, counsel urged us to dismiss ground four.

On ground five, Mr. Chisenga submitted that the lower court was on firm ground when it awarded interest on the standard bank lending rate to the respondent from the date of the writ to the date of payment as pleaded in the statement of claim. He referred us to Section 2 of the **Judgments Act** on interest which provides:

"Every judgment, order, or decree of the High Court or of a subordinate court whereby any sum of money, or any costs, charges or expenses, is or are to be payable to any person shall carry interest as may be determined by the court which rate shall not exceed the current lending rate as determined by the Bank of Zambia from the time of entering up such judgment, order, or decree until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment, order, or decree."

According to Mr. Chisenga, it is an undisputed fact that the appellants have been in occupation of the premises from the time the matter was commenced by the respondent in the lower court to date. He contended therefore that, any sum payable by the appellants as mesne profits ought to attract interest in line with the Judgments Act. That the arguments by the appellant on when the appellants were joined to the proceedings has no basis as the interest due relates to the period that the appellants were in possession of the properties.

In conclusion, he submitted that the appellant has not shown any reasons to warrant the disturbance of the findings made by the

lower court in favour of the respondent. Therefore, this appeal is devoid of merit and should be dismissed with costs.

We have thoughtfully considered the record of appeal and the written and oral submissions made on behalf of the parties. We are guided by all the authorities cited in this judgment.

We shall deal with all five grounds of appeal as one because they are interconnected. It is clear from the record of appeal and from the case of ***London Ngoma and Others v. LCM Company & UBZ (in liquidation)*** [8] that the appellants had demonstrated that they had sufficient interest in the matter and therefore the Supreme Court granted them rights to be heard by the High Court.

The first liquidator of the United Bus Company of Zambia (UBZ) (in liquidation) was Mr. Rodgers Muchanga Sombe who was appointed in January, 1995 and he resigned in October, 1996. Thereafter other liquidators were appointed. Rodgers Sombe had purportedly offered each appellant the first option to purchase the houses they were occupying at various prices. The letters in question were similar in substance and format. We shall therefore

only quote from the letter written to L. Ngoma on page 194 of the record of appeal:

"26th January, 1996

Mr. L. Ngoma
Plot 4/110A/%
Musonda Ngosa Road
Villa Elizabetha
LUSAKA

Dear Sir,

FIRST OPTION TO PURCHASE HOUSE NO. 110A/5 ON PLOT/ STAND NO. 4/110A, MUSONDA NGOSA ROAD, VILLA ELIZABETHA.

As liquidator of the United Bus Company of Zambia Limited. I am obliged to dispose of all the company's assets in order to raise funds to meet the claims of the company's creditors.

Accordingly, I intend to sell all the residential properties on the open market but before doing so, I would like to know whether you are willing to buy the house you are presently occupying at the valuation price of K35 million.

Kindly let me have your offer within 21 days from the date hereof together with documentary proof of your ability to purchase the house. Kindly note that as the subject house is situated on land which requires subdividing before an absolute offer can be made to you, the offer herein is being made subject to this further condition.

Should you fail to meet the foregoing or should your offer not to be successful, you will be required to vacate the house upon the expiration of the period of 30 days. During the said 30 days, the house will be

offered to other interested buyers who will have the right to view the house between 08:00 Hours and 18:00 hours every day upon presentation of the written authorization from myself or my duly authorised agent. Please note that you will be at liberty during the 30 days period to tender your offer for the house in competition with other interested buyers.

The house you are currently occupying has been fully inspected by professionally qualified independent valuation surveyors who have certified it to be in good state of repair. Accordingly, you will be held liable for any damage caused to the flat whilst it remains in your occupation.

The action I have taken is necessary in order for me to discharge my duties as by law provided. I trust that I have your understanding and that you will co-operate accordingly.

Yours sincerely,

Rogers Muchange Sombe, FCCA

OFFICIAL LIQUIDATOR"

(Words in bold for court's emphasis only)

Our understanding of the second and third paragraphs of the letter is that the offerees/appellants were being invited to enter into negotiations with the liquidator in order to later create an offer and subsequently a contract. The letters can therefore be interpreted as **invitations to treat** and not **offers**. The lower court therefore misdirected itself by finding that there were **offers** and **counter**

offers. From the foregoing, the question that begs an answer is; what is the difference between an offer and an invitation to treat?

According to **Chitty on Contracts** [1] paragraph 2 – 003

An offer is defined as "an expression of willingness to contract on specified terms made with the intention (actual or apparent) that it is to become binding as soon as it is accepted by the person to whom it is addressed."

In paragraph 2 -008 of **Chitty on Contracts** [1]

> ***"An invitation to treat is defined as a communication by which a party is invited to make an offer. It is distinguishable from an offer primarily on the ground that it is not made with the intention that it is to become binding as soon as the person to whom it is addressed simply communicates his assent to its terms."***

Under paragraph 2 – 009, the authors state that;

> ***"Generally the wording of a statement does not conclusively determine the distinction between an offer and an invitation to treat. Thus, a statement may be an***

invitation to treat although it contains the word "offer" while a statement may be an offer although it is expressed as an "acceptance," or although it requests the person to whom it is addressed to make an "offer."

It is trite law that an **offer** exposes the offeror to a contract **if** it is **accepted** by the offeree; an **invitation to treat** does not. An invitation to treat is a mere declaration of willingness to enter into negotiations. Accepting an invitation to treat does not *per se* form a binding contract.

The record reveals that the 1st appellant responded to the invitation to treat through his advocates on 23rd February, 1996 stating that he was willing to purchase the house. He also expressed his view that the valuation of K35 million was on the high side and that he was willing to purchase the house at the price of K30 million according to the valuation carried out by Messrs C.M. Mulenga and Associates.

The 2nd appellant personally replied to the invitation to treat on 12th February, 1996 by averring that he was willing to purchase the house and proposing to pay the given purchase price of K37

million by instalments of 20% at the signing of the sale agreement and 80% at the expiry of 60 days from the date of the offer.

We note that the record does not include an invitation to treat or an offer addressed to the 3rd appellant Richard N'gombe.

The record shows that the 4th appellant personally replied to the invitation to treat on 6th February, 1996 expressing his willingness to purchase the property and requesting for a copy of the Title Deed so that he could obtain a mortgage.

The liquidator was at liberty to accept or reject the offers made by the appellants. However, there is no indication that he replied to the offers. We interpret the silence on the part of the liquidator as a sign that the negotiations were terminated. The offer made to the respondent meant that the appellants' offers were rejected. Therefore, no binding contracts of sale were created.

Our further observations are that in the invitations to treat given to the appellants in this case, the word "offer" was not used in its technical legal sense. It is clear from the communications between

the parties that there was an understanding to negotiate the terms and conditions upon which the houses may be sold.

It is clear from the record that after the properties were advertised for sale, Sombe accepted an offer from the respondent to purchase all the said properties at K144 million on 20th February, 1996 barely a month after giving invitations to treat to the appellants. On 9th April, 1996 the respondent paid K90 million towards the purchase price. On 22nd May, 1996 a contract of sale was signed between Sombe and the respondent.

There was ample evidence before the lower court that the balance of the purchase price i.e. K54 million was paid before the transaction was completed. We therefore reject the appellant's advocates argument that there was no proof of payment of the said amount to the liquidator because the transaction would not have been completed without full payment. The record shows clearly that the respondent obtained title to the properties in October, 1996.

We must address the issue of payment of 10% of the purchase prices by the appellants to S.P. Mulenga and Associates in

October, 1996 and January and April, 1997. The payments were made on the basis of the valuations and offers made by S.P. Mulenga and Associates and not on the prices offered by Mr. Sombe the liquidator. There is no proof that S.P. Mulenga and Associates were ever appointed by the liquidator, Mr. Sombe as his agents. The letter on page 209 of the record of appeal, written by the interim joint liquidator C. Luipa dated 4th December, 1996 to S.P. Mulenga and Associates indicates clearly that S.P. Mulenga were acting as agents for the former employees (including the appellants) wishing to purchase UBZ houses. This letter was written after the properties were sold to the respondent. There is no indication that the monies paid to S.P. Mulenga were ever transmitted to the liquidator Mr. Sombe.

The view we take is that the offers made to the appellants by S.P. Mulenga and Associates were null and void *ab initio* because S.P. Mulenga and Associates had no authority to sale the properties, but the liquidator. According to the letter dated 21st March, 1997 on page 115 of the Record of Appeal from Clement Mabutwe, the other interim joint liquidator, to Messrs M. Musonda and Company, the contracts of sale prepared for the appellants were declared null and void by the writer because the properties were

already sold to LCM Limited by Messrs Sombe and Company. This confirms that S.P. Mulenga and Associates had no authority to sale the properties.

It is clear from the evidence on record that the respondent took possession of the property from December, 1997 until they were evicted by the appellants' advocates in 2000. The appellants then repossessed the houses. The question that begs an answer is whether the lower court was on firm ground when it upheld the sale of the houses to the respondent?

It is not in dispute that the properties were supposed to be offered for sale first to the sitting tenants. The view we take is that the liquidator treated the appellants unfairly by giving them invitations to treat instead of offering the houses to them unreservedly.

In this case, the respondent did not claim to be a bonafide purchaser for value without notice of any other interest in the properties. However, the lower court found that the respondent was a bonafide purchaser for value without notice. We are mindful that the lower court and the parties involved were all at liberty to

raise any question of law at any stage of the proceedings. The appellants have addressed this issue under the third ground of appeal and cited various authorities including ***Mwenya and Randee v. Kapinga*** [3] where it was held among other things that:

> ***"The occupation of land by a tenant affects a purchaser of land with constructive notice." It means if a purchaser has notice that the vendor is not in possession of the property, he must make inquiries of the person in possession and find out from him what his rights are and if he does not choose to do that, then whatever title he acquires as purchaser will be subject to the title or rights of the tenant in possession."***

In the present case, there was ample evidence that the respondent had inspected the houses before paying the first instalment towards the purchase price. They found the houses occupied by the appellants. The liquidator even informed the respondent that the appellants were entitled to be given the first option to purchase the houses which they were given.

In Halsbury's **Laws of England** paragraph 1322 Page 887 vol. 16 4th edition;

"Notice may be actual or constructive and where the said notice is imputed on the subsequent purchaser the plea of purchaser without notice is defeated."

From the foregoing quotation from Halsbury's Laws of England it appears that the defence of bonafide purchaser for value should be pleaded.

Section 58 of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia makes an exception to the law in the **Kapinga** [3] case and the Halsbury's Laws of England as it provides that a purchaser from a registered proprietor, cannot be affected by the notice thus:

"Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer or mortgage from the Registered proprietor of any estate or interest in land in respect of which a Certificate of Title has been issued shall be required or in any manner concerned to inquire into or ascertain the circumstances in or the consideration for which such Registered Proprietor or any previous Registered proprietor of the estate or interest in question is or was registered, or to see to the application of the purchase money or by any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule

of law or equity to the contrary notwithstanding and the knowledge- that any such trust or unregistered interest is in existence shall not of it self be imputed as fraud."

The foregoing statutory provision is not ambiguous and therefore requires no interpretation. In the **Kapinga** [3] case, Section 58 was not considered. Our application of the said Section to this matter entails that although the respondent had direct/ actual notice of the appellants' unregistered interests, it was not affected by such notice or any rule of law or equity contrary to Section 58. That knowledge of the existence of the unregistered interests cannot *per se* be imputed as fraud.

We note that the appellants did not even plead fraud. We therefore cannot consider whether or not the sale was fraudulent.

In the case of ***Anti-corruption Commission Limited v. Barnnet Development Corporation Limited*** [13] the Supreme Court held among other things 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 the Certificate of Title. However, under Section 34 of the same Act, a Certificate of Title

can be challenged and cancelled for fraud or impropriety in its acquisition."

The impropriety that was brought up by the appellants in evidence was of non-payment of the balance of K54 million of the purchase price and discrepancies in the contract of sale. These discrepancies were in our view unsubstantiated. The discrepancies mentioned cannot even invalidate the contract of sale. For the aforementioned reasons, the lower court was on firm ground when it found that the respondent was the rightful owner of the properties as it purchased the properties from the liquidator of the registered owner and currently holds Certificates of Title to the four properties.

Coming to the issue of mesne profits, in the case of ***G.F Construction Limited v. Rudnap (Zambia) Limited*** *and* ***Unitechan Limited*** [14] the Supreme Court defined mesne profits as:

"Damages awarded to a landlord for holding over a tenancy by a tenant."

In **Blacks law dictionary**, mesne profits are defined as:

"Profits which have accrued while there was a dispute over land ownership. If it is determined the party using the land did not have legal ownership, the true owner can sue for some or all of the ***profits*** *made in interim by illegal tenant which are thus called* ***"mesne profits."***

In the present case, there was no relationship of landlord and tenant between the respondent and the appellants. However, the appellants cannot under the circumstances be described as illegal tenants. Therefore, the lower court misdirected itself when it found at J19 that since the property was legally sold to the respondent, it goes without saying that the plaintiff is entitled to mesne profits. This finding is set aside as it was made on a misapprehension of the facts and the law.

We note that in the court below the respondent did not claim for mesne profits but for standard rentals from the date that title passed to the plaintiff from the defendant with interest. The lower court misdirected itself when it considered an issue which was not pleaded. That leads to the question, what is standard rent?

Under **Section 2 of the Rent Act Cap 206 of the Laws of Zambia**

"Standard rent" means:

a. In relation to unfinished premises-

(i) if on the prescribed date, they were let, the rent at which they were so let.

(ii) if on the prescribed date they were not so let, a rent to be determined by the court at a monthly rate of one and one-quarter per/centum costs of construction plus market value of the land, the landlord paying all outgoings;

Under Section 4 (a) of the same Act the court shall have power to determine the standard rent of any premises, either on the application of any person interested or of its own motion.

Our interpretation of the foregoing provisions of the law is that standard rent relates to premises that have been let by a landlord to a tenant and are subject to rent control legislation. The position we take therefore is that the claim for standard rent was misconceived in this particular case because there was no lease agreement between the parties.

For the foregoing reasons, the award of standard rent cannot stand and it is hereby quashed.

However, equity demands that the respondent be compensated for having been deprived of the use of the properties from the year

2000 to date. It was the evidence of PW1 that the respondent was in possession of the properties from December, 1997 to 2000 when the appellants repossessed them.

We therefore, award the respondent damages for loss of use of the properties from 2000 until the appellants vacate the premises such damages to be assessed by the Deputy Registrar of the High Court. The appellants are given 30 days from the date hereof to vacate the premises. They are free to claim from S.P Mulenga and Associates a refund of the deposits that they paid.

In sum, grounds 1, 2, 3 and 5 have failed while ground 4 succeeds. The appellants shall bear the costs in this court.

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F.M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

.....

C.K. MAKUNGU
COURT OF APPEAL JUDGE

.....

M.M. KONDOLO, SC
COURT OF APPEAL JUDGE