

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

APPEAL NO. 8/2019
SCZ/08/18/2019

(Civil Jurisdiction)



B E T W E E N:

MUSESHA CHITUNDU JOSEPH KUNKUTA

APPELLANT

AND

GARY DAVIS CHIBANGULA

1ST RESPONDENT

CHISAMBA MABLE MWANSA

2ND RESPONDENT

Coram: WOOD, KAOMA and MUTUNA JJS
on 11th August, 2020 and 18th September, 2020

For the Appellant: Dr. J. Mulwila SC - Messrs Ituna Partners

For the 1st Respondent: Mr. M. Chitundu - Messrs Barnaby, Chitundu & Khunga Advocates and Mr. J Choonga- GDC Chambers

For the 2nd Respondent: No Appearance

JUDGMENT

WOOD, JS, delivered the judgment of the Court.

Cases referred to:

1. *Simwanza Namposhya v Zambia State Insurance Corporation Limited (2010) 2 ZR 339.*
2. *Zulu v Avondale Housing Project Limited (1982) Z.R. 172.*
3. *Re Vandervell's Trusts (No. 2) [1972] Ch. 269.*
4. *Zambia Railways Limited v Pauline S. Mundia and another (2008) 1 Z.R. 287.*
5. *Dyer v Dyer (1788) 2 Cox Eq cas 92.*
6. *Sundi v Ravalia 5 LRNR (1949-54) 345.*

J2

7. *Krige and another v Christian Council of Zambia* (1975) Z.R. 152.
8. *Khalid Mohamed v The Attorney General* (1982) Z.R. 49.
9. *Frallen Investments Limited v Zambia Railways Limited, National College for Management Development* (2008) ZR 99 Vol 1.
10. *Clementina Banda, Emmanuel Njanje v Boniface Mudimba* (2011) Z.R. 116 Vol 3.
11. *Carreras Rothmans Limited v Freeman Mathews Treasure Limited* (1985) Ch. 207.
12. *The Venture* (1908) CA 218
13. *Tribe v Tribe* [1995]4 ALL ER 236.
14. *Zambia Consolidated Copper Mines Limited v Eddie Katayi and Max Chilongo* (SCZ Judgment No. 2 of 2001)

Legislation referred to:

1. Order 5, Rules 15 and 16 of The High Court Act, Cap 27 of the Laws of Zambia.
2. Sections 4 and 33 of the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia
3. Sections 4 and 7 of the Statute of Frauds Act of 1677
4. Section 2 (c) English Law (extent of Application) Act Cap 11

Other works referred to:

1. *Hayton & Marshall, Commentary and Cases on the Law of Trusts and Equitable Remedies* Sweet & Maxwell London (1996), 10 edition.
2. *Lewin on Trusts* 13th edition, Walter Banks 1928 Sweet & Maxwell at page 178.
3. *Paragraph 524 Halsbury's Laws of England, Volume 48, 4th Edition.*

Introduction

- [1] This is an appeal against a decision of the Court of Appeal setting aside a judgment of the High Court which held that the 2nd respondent held Stand No. 22974 Lusaka (hereinafter called the property) in trust for the appellant and as such, was not a beneficial owner of the property who could assign it to

J3

the 1st respondent claiming that he was bona fide purchaser for value without notice.

Background

[2] According to the statement of claim, the appellant was the beneficial owner of the property and the 2nd respondent held the certificate of title relating to the said property in trust for him. The 1st Respondent was an intending purchaser of the said property through a contract of sale, entered into with the 2nd respondent without the consent or authority of the appellant. The statement of claim goes on to give a background leading to how the 2nd respondent acquired title to the property. It alleged that sometime in 2000 the appellant requested the 2nd respondent who was then an employee of National Housing Authority, to purchase a house at the Presidential Housing Initiative (PHI) on his behalf. The appellant provided the full purchase price of K80,000,000.00 (unrebased). The appellant added a cottage to the main house and rented the property to Zambia Air Force and Mr. Yoram Sinyangwe who had been paying through Kay Marketing, an

J4

entity owned by the appellant. Unbeknown to the appellant, the 2nd respondent entered into a contract of sale for the property to the 1st respondent and wrote to the appellant's tenant to vacate the property. The appellant stated in his statement of claim that the 2nd respondent had acted in a dishonest manner and had no right to sell the property. He accordingly sought a declaration that the 2nd respondent was not a beneficial owner; a declaration that the purported contract of sale was null and void and of no effect; an interim injunction restraining the 2nd respondent from disposing of the property; an order for the removal of a caveat placed by the 1st respondent on the property and an order to halt the conveyance between the 2nd respondent and the 1st respondent.

- [3] The defence and counterclaim by the 2nd respondent was that she was the registered owner of the property up until the sale to the 1st respondent. She denied that she held the property in trust for the appellant or that she needed any authorization from the appellant to sell the property. She admitted that the

properties were rented out and stated that she was entitled to the rent and counterclaimed for the rent.

- [4] The 1st respondent's defence and counterclaim was to the effect that he had no knowledge of the existence of a trust between the appellant and the 2nd respondent and that he was a bona fide purchaser for value without notice who had conducted a due diligence prior to purchasing the property in issue. He also relied on section 4 of the Statute of Frauds of 1677 and stated that there was no memorandum in writing relating to the property. He then counterclaimed for an order and a declaration that he was the new beneficial owner of the property. In addition, he sought an order for specific performance of the agreement with the 2nd respondent.

Decision of the High Court

- [5] The High Court considered the pleadings and the evidence that was before it and came to the conclusion that the respondents having failed to adduce evidence to the contrary, it was clear that the appellant had provided the full purchase price for the property which was registered in the name of the

2nd respondent, giving rise to a resulting trust. The High Court further held that the 2nd respondent had never been the beneficial owner of the property. It dismissed the defence of laches that was raised by the respondents and found that the appellant maintained an equitable title to the property. The court also held that the 2nd respondent had never been the beneficial owner of the property and therefore had no legal authority to sell the property and declared the contract of sale between the 2nd respondent and the 1st respondent null and void.

[6] On the question of whether or not the 1st respondent was a bona fide purchaser for value without notice, the High Court held that the 1st respondent, who is a lawyer by profession had not acted in good faith and had taken undue advantage of the 2nd respondent by indicating in the contract that she had received the full purchase price for the property when she had not. It also found that the 1st respondent had constructive notice of the existence of the appellant's equitable interest in the property even before he paid the consideration for the property. The reasoning by the court was that the 1st

J7

respondent knew that the appellant was the property manager for the property and was responsible for collecting the rent and also knew that the appellant acted for the 2nd respondent in the purchase of the property from National Housing Authority. As such, the 1st respondent was not a bona fide purchaser for value without notice. Having established that the appellant had maintained an equitable interest in the property and that the 1st respondent was not a bona fide purchaser for value without notice, the High Court dismissed the counterclaims and entered judgment for the appellant.

Appeal to the Court of Appeal

[7] On appeal to the Court of Appeal matters took a different turn. The Court of Appeal upon perusal of the record of appeal and heads of argument came to the conclusion that there was no resulting trust after all for the following reasons:

- (i) *The evidence showed that apart from the adjacent property, the receipts from National Housing Authority were issued in the 2nd respondent's name.*
- (ii) *The property was offered to the 2nd respondent in 2000 and a certificate of title was issued in her name in 2003.*

J8

- (iii) *The onus was on the appellant to provide documentary evidence that he had made a request to the 2nd respondent and that he had financed the purchase of the property.*
- (iv) *There was no evidence for the High Court to make a finding of fact that the K80 million for the purchase of the property was provided by the appellant.*
- (v) *The 2nd respondent being the beneficial owner of the property possessed the authority to sell the property and consequently the contract of sale between the 2nd respondent and the 1st respondent was valid and enforceable.*

Grounds of appeal to this Court

[8] The appellant has now filed six grounds of appeal against the judgment of the Court of Appeal as follows:

[8.1] *That the Court erred in law and in fact to set aside the finding of the trial court that the K80 million (unrebased) purchase price for the property was provided by the appellant and went on to hold (contrary to the overwhelming evidence adduced by the appellant, Mr Mwansa (PW2) and Mrs Bertha Mwansa), that the imposition or presumption of a resulting trust in favour of the appellant to the property collapsed as it had no limb to stand on in the absence of proof that the appellant provided the funds which the 2nd respondent used to purchase the property.*

[8.2] *Having found that the appellant paid the purchase price for land adjacent to the property (which forms part of the property) the Court*

should have declared resulting trust in favour of the appellant as regards that piece of land but instead declared that the 2nd respondent possessed the authority to sell the property which was a misdirection.

[8.3] The Court below lacked sufficient material on which it declared the 2nd respondent as the beneficial owner of the property and consequently fell into error by so declaring. The appellant had all the time been the beneficial owner.

[8.4] The Court shied away from upholding or reversing the trial court's finding that the 1st respondent was not a bona fide purchaser for value who could not benefit from the contract of sale of the property entered into with the 2nd respondent. If it reversed that finding, it gave no cogent reason for so doing.

[8.5] The observation made by the Court that: 'it is strange that the 2nd respondent was conveniently not available during trial as a witness for the 1st respondent (appellant in this Court), if indeed she had freely and voluntarily recanted her earlier denial that the property belonged to the appellant, was inappropriate since the 2nd respondent as a party to the proceedings could not be expected to be called as a witness to any of the other parties.

[8.6] The burden of proof in civil matters is on a balance of probabilities. It was not an imperative for the appellant to produce documentary evidence to show that he had requested the 2nd respondent to purchase the house for him in her name and that he financed the purchase. The onus the lower Court put on the appellant was a misdirection.

Arguments by the parties

[9] The appellant anchored its first argument on the principle that an appellate court will not upset findings of fact unless it can be shown that the findings are perverse or made in the absence of relevant evidence or based upon misapprehension of facts such that on a proper view of the evidence no trial court acting correctly could have reasonably made. For this proposition the appellant has relied on the case of *Simwanza Namposhya v Zambia State Insurance Corporation Limited*¹. This principle was dealt with in considerable detail in the case of *Zulu v Avondale Housing Project Limited*² and has been affirmed in numerous decisions of this Court. There is no need in our view to repeat ourselves. We will therefore in this judgment dwell on whether the findings of fact by the High Court should have been disturbed by the Court of Appeal as we deal with the appellant's first ground of appeal. The appellant has argued that the evidence before the trial court as given by the appellant, Mr. Samuel Mwansa (PW2) and Mrs. Bertha Mwansa was that the 2nd respondent secured the purchase of the property for the appellant and that it was the

appellant who provided the funds for purchase from his pension benefits.

- [10] PW2 who was 80 years old at the time, testified that he knew the appellant and the 2nd respondent as the two were brought up in his house and that the appellant had informed him that he wanted to buy a house through the 2nd respondent. The record of appeal also shows that Mrs. Bertha Mwansa deposed in her affidavit in support of the ex parte summons for an interim injunction that the appellant had approached her for advice on whether he could buy property from PHI where the 2nd respondent stood a better chance to get the offer. She further deposed that the appellant was the beneficial owner of the property in issue. However, in the judgment appealed against, the Court of Appeal reversed the finding of fact by the trial court that the appellant paid the purchase price of K80million and set aside the judgment of the trial court. The Court of Appeal reasoned that there was no proof that the appellant provided the funds to buy the property and that the onus was on the appellant to provide documentary evidence that he financed the purchase. The Court placed emphasis on

J12

the denial by the 2nd respondent in her affidavit in opposition which sought proof of payment of the K80 million from the appellant. Paragraph 2 of the affidavit in opposition states that:

“That paragraph 4 is denied and the plaintiff (appellant) will be put to strict proof that he paid me the sum of K80 million to purchase the property for him. As intimated above, the PHI scheme was open to the public and I can think of no earthly reason why I should purchase the property for the plaintiff when I need one myself.”

[11] The appellant has argued that the Court of Appeal took paragraph 2 of the 2nd respondent’s affidavit in opposition to be a robust defence not taking into account the fact that the 2nd respondent had failed to put the appellant to strict proof since she skipped court hearings. The evidence of the appellant was that he paid in the name of the 2nd respondent a sum of K80 million to National Housing Authority and kept receipts. He did not say that he paid the 2nd respondent K80 million.

[12] The appellant has argued in relation to the second ground of appeal that the Court of Appeal had made an erroneous

conclusion as it lacked material on which to declare the 2nd respondent as the beneficial owner of the property when the appellant had all the time been the beneficial owner. This was so because there was nowhere in the record of appeal to support the assertion that the 2nd respondent was the beneficial owner of the property. This was so because, from the time the property was bought the 2nd respondent did not receive any benefits. What is on record is that the appellant through his company Kay Marketing received rent and managed the property from inception in 2001. The appellant relied on the affidavit of Mrs. Bertha Mwansa which stated that she was consulted by the appellant whether he could purchase the property using the 2nd respondent and that as far as she was aware the property was held in trust by the 2nd respondent and was managed and rented out by the appellant. This, according to the appellant, demonstrated that even though he was not the registered owner of the property, he was the beneficial owner as was established in the case of *Re Vandervell's Trusts (No. 2)*³ quoted in *Hayton & Marshall, Commentary and Cases on the Law of Trusts and Equitable*

Remedies Sweet & Maxwell London (1996), 10th edition where Mr. Vandervell who was the registered owner of shares in the company was not the beneficial owner of the shares. It was therefore a fallacy to regard the 2nd respondent as a beneficial owner without any supporting evidence. We note that this argument does not address the issue that a beneficial owner is subject to statutory laws regulating interest or title transfer. We shall return to it later in our judgment.

[13] The third ground of appeal dealt with the question of whether or not the 1st respondent was a bona fide purchaser for value without notice. The argument by the appellant was that the Court of Appeal shied away from upholding or reversing the trial court's finding that the 1st respondent was not a bona fide purchaser for value who could benefit from the contract of sale of the property entered into with the 2nd respondent; and if it reversed that finding, no cogent reason was given for doing so. The Court of Appeal acknowledged that the High Court had found that the 1st respondent was not a bona fide purchaser for value of the property without notice; the 2nd respondent was not a beneficial owner and had no authority to sell the

J15

property to the 1st respondent and that the property belonged to the appellant by virtue of a resulting trust that had been created in his favour when he paid the full purchase price for the property. The Court of Appeal for its own reason, set aside the finding that the appellant had paid the full purchase price and reversed the trial court's finding that the appellant was the beneficial owner without giving reasons but did not reverse the finding that the 1st respondent was not a bona fide purchaser. It was not sufficient for the appellate court to keep quiet and offer no reasons or to merely reverse without giving reasons. The appellant goes on to argue that the Court of Appeal having kept quiet on the trial court's finding that the 1st respondent was a bona fide purchaser for value; it could only mean that the finding was not reversed. It then became a misdirection to uphold a contract of sale between the 1st and 2nd respondents.

[14] In ground four, the appellant argued that the Court of Appeal shied away from upholding or reversing the trial court's finding that the 1st respondent was not a bona fide purchaser for value who could not benefit from the contract of sale

relating to the property entered into with the 2nd respondent. If it reversed that finding it gave no cogent reason for so doing.

[15] The argument being advanced by the appellant under the fifth ground of appeal is that the Court of Appeal was imputing that the appellant connived with the 2nd respondent for the 2nd respondent not to come to court for trial. The Court of Appeal was also implying that the respondent had not freely and voluntarily repented her earlier denial that the appellant was the owner of the property. There was no evidence on record or during trial on which the Court of Appeal could have based that observation.

[16] Under the sixth ground of appeal, the appellant has argued that the burden of proof in civil matters is on a balance of probabilities. The insistence on producing documentary evidence to prove a claim was a misdirection. The appellant relied on the case of *Zambia Railways Limited v Pauline S. Mundia and another*⁴ to support the argument that the standard of proof required of a plaintiff in civil matters is that the plaintiff must prove his case on the balance of

J17

probabilities. This can be through the oral evidence of witnesses who were physically present, through documents or through real evidence which includes material objects produced in court or visits to a site. The appellant's claim that he requested the 2nd respondent to apply for the property on his behalf and that he financed the purchase could have been proved, and indeed was proved by the oral evidence of Mr. Samuel Mwansa and the affidavit evidence of Mrs. Bertha Nsofwa Mwansa without requiring the appellant to provide documentary evidence. The appellant urged us to allow the appeal on the basis of his arguments and set aside the judgment of the Court of Appeal.

[17] In response, the 1st respondent argued grounds one and six together. The argument under these two grounds was that the Court of Appeal did not err when it set aside the finding of the trial court that the K80 million purchase price for the property was provided by the appellant and further that the imposition of or presumption of a resulting trust in favour of the appellant collapsed as it had no limb to stand on in the absence of proof that the appellant provided the funds which

the 2nd respondent used to purchase the property in question. The 1st respondent relied on the well-known principle laid down in *Zulu v Avondale Housing Project Limited*² on when a superior court can set aside findings of fact made by a trial judge. We have explained the principle in this case in the earlier part of this judgment. The trial court found that the appellant paid the sum of K80 million for the purchase of the property but the finding of the trial court was not supported by any form of evidence on record. The receipts in the record of appeal cumulatively in the total sum of K80million are all in the names of the 2nd respondent and there is no evidence on record to show that the said sum of money was advanced by the appellant. In the absence of such evidence to support the finding of the trial court, the Court of Appeal reversed the finding of the trial court for lack of evidence.

[18] The 1st respondent has argued that for a resulting trust to be imposed, there must be an express or implied intention by the donor and that the transferor must have a beneficiary or proprietary interest in the property. In the same vein, a resulting trust will arise when, according to *Lewin on Trusts*

13th edition, Walter Banks 1928 Sweet & Maxwell at page 178
“...real or personal property is purchased in the name of a stranger, a resulting trust will be presumed in favour of the person who is proved to have paid the purchase money....” as was decided in the case of *Dyer v Dyer* (1788)⁵. Even though the appellant has argued that he provided the purchase price, the 1st respondent argued that there was no evidence of such intention. This, according to the 1st respondent, showed that the requisite requirements or ingredients for the imposition or presumption of a resulting trust were absent. The evidence also showed that the appellant acted as the 2nd respondent’s advocate in the conveyancing transaction. In addition, the 1st respondent relied on the 2nd respondent’s defence in which she asserted that she was the registered owner of the property and did not need the appellant’s consent or authority to effect the transfer of title to the 1st respondent. Turning to the documentary evidence, the 1st respondent emphasized the point that when National Housing Authority sought clarification as to who the owner was, the appellant replied that he was the 2nd respondent’s advocate. The appellant did

not show any proof that he advanced the consideration for the property for him to be deemed a beneficial owner of the property. The evidence in the High Court showed that the 2nd respondent had paid the sum of K80 million for the property. The 1st respondent wondered how the appellant who was an advocate who had been called to the Bar in 1978 did not have any document to secure his interest. The appellant pointed out that even assuming that a resulting trust was created, it should have been registered. In this case the evidence showed that it had not been registered at the Lands and Deeds Registry and as such was contrary to section 4(1) of the Lands and Deeds Registry Act which stipulates that such a document should have been registered within a period of time failing which it shall be null and void and shall be of no effect whatsoever as was held in the cases of *Sundi v Ravalialia*⁶ and *Krige and another v Christian Council of Zambia*⁷. In his attempt to strengthen his argument that there was no proof of a resulting trust, the appellant referred us to the case of *Khalid Mohamed v The Attorney General*⁸ and urged us to follow the principle laid down in that case which is that a

plaintiff cannot succeed automatically whenever a defence has failed; he must prove his case. In the appeal at hand, the appellant had a burden to prove that he had requested the 2nd respondent to apply for the property on his behalf. The attempt by the appellant to prove his case by oral evidence was not enough in the light of the documentary evidence confirming that the property was offered to, purchased and owned by the 2nd respondent.

- [19] The 1st respondent argued grounds three and four together. The argument in relation to these grounds was based on an evaluation of the respondent and his witnesses in the High Court. The argument was that the Court of Appeal had sufficient material on record on which it premised its declaration that the 1st respondent was a bona fide purchaser for value without notice of any encumbrance. The appellant relied on the evidence of the Registrar of Lands who testified that there was no adverse interest or encumbrance on the property at the point the 1st respondent entered into a contract of sale on 27th May, 2011. The 1st respondent testified that the Commissioner of Lands after being satisfied with the

documents, issued a certificate of title in the name of the 2nd respondent who was the beneficial and registered owner of the property. In addition, he had carried out a due diligence on the property by way of conducting several searches at the Ministry of Lands and National Housing Authority before he made up his mind to purchase the property. This all pointed to the fact that he was a bona fide purchaser who had no notice of any equitable interest at the time when he gave his consideration for the conveyance. As such, he was entitled to priority in equity as well as at law. There was, therefore, no justification to inflict injustice on the 1st respondent as an innocent bona fide purchaser for value. The 1st respondent argued that this was in accordance with our decision in *Frallen Investments Limited v Zambia Railways Limited, National College for Management Development*⁹. The 1st respondent also referred us to the case of *Clementina Banda, Emmanuel Njanje v Boniface Mudimba*¹⁰ in which it was held that for one to be declared a bona fide purchaser he must act in good faith; acquires an interest in the property by grant rather than operation of law; must have given value for the

property; must generally have obtained a legal interest in the property and must have had no notice of the equitable interest at the time he gave his consideration for the conveyance. The 1st respondent argued that he had proved all these elements to be considered a bona fide purchaser for value without notice.

[20] The argument in relation to the fifth ground of appeal was that the absence of the 2nd respondent at the time of the trial had no effect on the fact that she was the beneficial owner of the property and could therefore assign it. The purported deed of settlement dated 8th December, 2011 did not disclose any request to purchase the property for the appellant or whether the appellant provided the money to purchase the property. He, therefore, urged us to dismiss all the appellant's arguments as the appeal had no merit.

Consideration of the appeal by this court and decision

[21] When we heard the appeal, the parties indicated to us that they would rely on their heads of argument. They, however, made brief oral submissions which did not depart in substance from their filed heads of argument. We, therefore,

see no need to repeat them here. We will deal with all the grounds of appeal and arguments advanced by the parties together as they are interconnected.

[22] What then is a resulting trust? There are many variations to the definition of a resulting trust. The common definition is that a resulting trust (from the Latin 'resalire' meaning to 'to jump back') is the creation of an implied trust by operation of law, as where property gets transferred to one who pays nothing for it; and then is implied to have held the property for benefit of another person. The trust property is said to "result" back to the transferor. Resulting trusts according to paragraph 524 of *Halsbury's Laws of England, Volume 48, 4th edition* are of two kinds. A presumed resulting trust arises from the application of a rebuttable presumption of intention that property purchased wholly or partly by X but vested in Y's name should be held by Y on trust for X to the extent of X's share in the purchase. An automatic resulting trust arises where X transfers property to Y on trusts which for some reason fail to dispose wholly of X's beneficial ownership so that

Y automatically and irrebuttably holds the property on trust for X to the extent of X's undisposed of beneficial interest.”

The record of appeal also shows that Mrs. Bertha Mwansa deposed in her affidavit in support of the ex parte summons for an interim injunction that the appellant had approached her for advice on whether he could buy property from PHI where the 2nd respondent stood a better chance to get the offer. She further deposed that the appellant was the beneficial owner of the property in issue. We note from the cross-examination in the record that PW2's evidence on this aspect was not challenged nor was Mrs. Bertha Mwansa's assertion challenged. The cross-examination focused on the documentary evidence which showed that the 2nd respondent had the certificate of title issued in her name. The appellant further submitted that his evidence that he approached the 2nd respondent to purchase the property on his behalf and that he provided the K80million purchase price from his pension benefits was uncontroverted. We agree with this portion of the appellant's submission as the record again shows that this evidence was unchallenged.

[23] Taken on its own, the oral evidence makes a compelling narrative which is highly plausible and we understand why the trial judge was swayed by the evidence of the appellant and his witnesses. The trial judge was faced with evidence from a witness who looked after both the appellant and the second respondent in his house. His testimony that as a family they decided to resolve the matter and accept that the appellant was the owner of the property was largely unchallenged. The evidence of the appellant that he collected rent and kept it for his own use for more than ten years without the 2nd respondent claiming it was not disputed and so was his testimony that he built a cottage on the property. When looked at from a distance this evidence on its own makes a compelling case for a resulting trust. The documentary evidence, however, tells a different story. Receipts for payments to National Housing Authority indicate that they were issued in the name of the 2nd respondent apart from those relating to the adjacent property which were issued in the joint names of the appellant and the 2nd respondent. The documents from the appellant state quite plainly that he

was acting on behalf of the 2nd respondent as counsel and in any event there is no evidence to prove that he used his own money to pay for the property. The money for the property was paid in cash and receipts were issued in the name of the 2nd respondent while the adjacent property was paid for by cheque. The appellant could have easily proved that since he was using his pension, he withdrew the various amounts in cash from his account and paid for the property. Payment for the adjacent property could have been proved from the paid cheques. Had he done so, he could have relied on the case of *Dyer v Dyer*⁵ which held that where a party provides the purchase price in its entirety, then there is a presumption that he retains the beneficial interest in the property in its entirety, by virtue of a resulting trust, if there is no other evidence to rebut this presumption. In *Dyer v Dyer*⁵ the father had paid the full purchase price and, therefore, he retained the full equitable title and the eldest son held the legal title on trust for his father. In the present case there is evidence to rebut the presumption of a resulting trust in view of the appellant's own letters which show that he was acting as the 2nd

respondent's advocate. While we agree with the principle that appellate courts should not lightly interfere with findings of fact of a lower court, we agree with the Court of Appeal that there was need to interfere with the findings of fact made by the trial court as the findings were perverse given the documentary evidence which rebutted the presumption of a resulting trust and the absence of proof of payment by the appellant.

[24] The appellant argued that the Court of Appeal should not have relied on paragraph 2 of the 2nd respondent's affidavit to conclude that it was a robust defence. We have reproduced the paragraph in the earlier part of this judgment.

[25] The appellant has argued that the Court of Appeal took paragraph 2 of the 2nd respondent's affidavit in opposition to be a "robust defence" not taking into account the fact that the 2nd respondent had failed to put the appellant to strict proof since she skipped court hearings. The evidence of the appellant was that he paid in the name of the 2nd respondent a sum of K80 million to National Housing Authority and kept

receipts. He did not say that he paid the 2nd respondent K80 million.

[26] We should point out that the paragraph referred to by the Court of Appeal is not drafted in accordance with Order 5 rules 15 and 16 the High Court Rules, Cap 27 of the Laws of Zambia which state that an affidavit shall not contain extraneous matter by way of objection or prayer or legal argument or conclusion and that every affidavit shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true. More importantly, we also note that the Court of Appeal relied on the affidavit in opposition as a “robust defence.” A denial in an affidavit cannot be a substitute for a defence in a pleading. The Court of Appeal however, quite properly considered whether or not the appellant had proved his case as against the 2nd respondent. Although the appellant has dwelt at length on the oral evidence of the witnesses to try and establish the fact that this proved the creation of a resulting trust, there is no evidence of a memorandum in writing to support the creation

of a resulting trust. We have no doubt that the oral evidence may be persuasive particularly in the light of the evidence of Mr. Samuel Mwansa who brought up the appellant and the second respondent and whose evidence was not challenged. We should, however, not lose sight of the fundamental principle that this was a dealing in land which required a memorandum in writing in accordance with section 7 of the Statute of Frauds of 16th April 1677. No such memorandum was tendered in evidence. In addition, the appellant's own documentary evidence describes himself as the 2nd respondent's advocate. In his letter dated 24th May, 2001 addressed to Messrs Chilupe & Co. he states that he is forwarding "*...our client's national registration card for your use in the processing of the title deeds.*" In a letter dated 4th February, 2010 addressed to National Housing Authority, the appellant states in his last paragraph that "*We wish to further confirm that house No. 22974 still belong(s) to Ms. Mable Mwansa and only wrote our letter of 3rd November, 2010 as advocates who acted for her at the time she was purchasing the house.*" This letter was in response to a query raised by

National Housing Authority over the status of the ownership of the property on 15th December, 2010. The various receipts from National Housing Authority for money paid for the property show that they were issued in the name of the 2nd respondent. Two receipts for the adjacent property which was later offered to the 2nd respondent were issued in the joint names of the appellant and the 2nd respondent. The appellant has argued that one does not need to execute an instrument to create a resulting trust as there is authority in *Hayton & Marshall, Commentary and Cases on Law of Trust and Equitable Remedies 10th edition, Sweet and Maxwell, London (1996) at page 82* which states that “A resulting trust for the settlor is born and dies without any writing at all. It comes into existence wherever there is a gap in the beneficial ownership,” Arising out of this authority, the appellant has argued that evidence that he was the beneficial owner is found in the affidavit of Mrs. Bertha Mwansa and the evidence that he collected rent from the property through an entity called Kay Marketing. On a proper evaluation of the evidence, according to the appellant, there was material on which the trial judge

based the finding that the appellant had provided the K80 million purchase price and could not have been faulted for declaring a resulting trust in favour of the appellant having found that the appellant had provided the purchase price. The appellant has for this proposition cited *Lewin on Trusts, Waiter Banks (1928) Sweet and Maxwell, London (13th edition) at page 178* which reads as follows:

“When real or personal property is purchased in the name of a stranger, a resulting trust will be presumed in favour of the person who is proved to have paid the purchase money in the character of the purchaser.”

[27] The above principle is further expressed in the case of *Carreras Rothmans Limited v Freeman Mathews Treasure Limited*¹¹ as follows:

“The principle is that the equity fastens on the conscience of the person who receives from another property transferred for a specific purpose only and not, therefore, for the recipient’s own purposes, so that such a person will not be permitted to treat the property as his own or to use it for other than the stated purpose.”

[28] In the case of *The Venture*¹² it was held that:

“A party who provided part of the purchase money for the purchase of a yacht registered in the name of another was entitled to share in the proceeds of sale in the proportion which his contribution bore to the total of the purchase money.”

[29] The appellant has also argued that the trust of a legal estate results to a person who advances the purchase money regardless of whether the advance is for an illegal purpose. Thus, in the case of *Tribe v Tribe*¹³ the principle was established that the courts were more willing to examine the intention of the parties rather than relying on procedural prescriptions. Hence title to property can pass at law and in equity even if the transfer is made for an illegal purpose; and the fact that title has passed to the transferee does not preclude the transferor from bringing an action for restitution. The appellant concluded his argument in respect of the first ground of appeal by stating that the Court of Appeal misdirected itself when it reversed the finding of fact made by the trial judge which consequently led to the setting aside of the judgment.

[30] The appellant's arguments on a resulting trust are negated by the fact that the appellant has failed to prove one of the requirements being proof that he paid for the property. This would have been in the form of receipts that he actually paid

for the property which in our view is sufficient memorandum to satisfy the statute of frauds.

What we have is written memorandum to the contrary that the appellant was merely the 2nd respondent's counsel and that the property belonged to the 2nd respondent.

[31] The argument being advanced by the appellant under the fifth ground of appeal is that the Court of Appeal was imputing that the appellant connived with the 2nd respondent for the 2nd respondent not to come to court for trial. The Court of Appeal was also implying that the respondent had not freely and voluntarily repented her earlier denial that the appellant was the owner of the property. There was no evidence on record or during trial on which the Court of Appeal could have based that observation.

[32] We note that the trial court shifted the burden of proof to the respondents at J28 of the judgment. This was a misdirection. A plaintiff must prove his case at all times. This is what we held in *Khalid Mohamed v The Attorney General*⁸. Further, the appellant did not plead fraud over the issuance of the

certificate of title to the 2nd respondent. Section 33 of the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia stipulates that once a certificate of title to land is issued, it is in the absence of fraud, conclusive proof of ownership notwithstanding the existence in any other person of any estate or interest. The evidence that the appellant collected rent and the evidence of Mr. Samuel Mwansa and Mrs. Bertha Mwansa that the appellant had requested the 2nd respondent to secure him a house from National Housing Authority in the absence of proof of payment, does not create a resulting trust.

Section 7 of the Statute of Frauds stipulates that *“All declarations or creations of trusts or confidences of any lands tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust by his last will in writing or else they shall be utterly void and of none effect.”*

[33] Section 7 was amended by section 53 (2) of The Law of Property Act 1925 in relation to the creation of interests in land by parol. Section 53 (2) states that it does not affect the creation or operation of resulting, implied or constructive

trusts. The Statute of Frauds of 1677 does not make this distinction and does not define trusts so as to exclude resulting trusts. The Law of Property Act 1925 does not apply by virtue of section 2 (c) of the English Law (Extent of Application) Act, Cap 11 of the Laws of Zambia. It follows therefore that since we are bound by the provisions of the Statute of Frauds of 1677, section 7 applies and it is therefore a requirement for a memorandum in writing in order to create a resulting trust. Further, section 4 of the Lands and Deeds Registry Act, Cap 185 requires "Every document purporting to grant, convey or transfer land or any interest in land....." to be registered within a period of time prescribed in section 5 failing which it shall be null and void under section 6. The appellant has argued that one does not need to execute an instrument to create a resulting trust. A further reading of *Re Vandervell's Trustees Ltd (No. 2)*³ from which this argument was taken shows that there is a distinction between a trust of land and a trust of personality. A trust of personality can be created without writing whereas a trust of land requires to be in writing. In *Re Vandervell's Trustees Ltd (No.2)*³ the issues

related to trusts involving shares. In the present appeal, the issue involves land. It cannot, therefore, be argued by the appellant that there was no need to execute an instrument to create a resulting trust. Quite clearly the first ground of appeal cannot succeed and it is dismissed.

[34] The appellant has argued in his third ground of appeal that the second respondent was never the beneficial owner of the property because the appellant was the one who was receiving the rent through Kay Marketing from the time the property was bought. The term 'beneficial owner' is a legal term where specific property rights ("use and title") in equity belong to a person even though legal title of the property belongs to another person. A beneficial owner is subject to a state's statutory laws regulating interest or title transfer. The evidence shows that the appellant was receiving rent through Kay Marketing although the 2nd respondent made a counterclaim for it which she did not prove during the trial of the matter. The argument that the 2nd respondent was not a beneficial owner is a moot point in view of section 33 of the Lands and Deeds Registry Act Cap 185 which stipulates that

“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...” The Court of Appeal should have referred to the 2nd respondent as the registered owner because this is what she was according to the certificate of title. This reference to the 2nd respondent as the beneficial owner is *de minimis* as the Court of Appeal ultimately held that the 2nd respondent had authority to sell the property by virtue of section 33 of the Lands and Deeds Registry Act.

[35] The argument that the 1st respondent was not a bona fide purchaser for value without notice being advanced by the appellant as his fourth ground of appeal is not supported by the evidence or the authorities cited. The record shows that the 1st respondent carried out a due diligence exercise in relation to the property prior to executing a contract of sale. He conducted searches at the Lands and Deeds Registry and National Housing Authority. He placed a caveat on the property after satisfying himself that there was no encumbrance and paid the purchase price. The cases of

*Frallen Investments Limited v Zambia Railways Limited and National College for Management Development*⁹ , *Clementina Banda and Emmanuel Njanje v Boniface Mudimba*¹⁰ and *Zambia Consolidated Copper Mines Limited v Eddie Katayi and Max Chilongo*¹³ were relied on by the 1st respondent to illustrate that he was indeed a bona fide purchaser for value without notice. Contrary to the appellant's argument that the Court of Appeal shied away from upholding or reversing the trial court's finding that the 1st respondent was not a bona fide purchaser for value without notice, the Court of Appeal at J23 of its judgment held that the 1st respondent had contracted to purchase the property without any legal encumbrance and was entitled to place a caveat on it. Earlier on at J23 the Court of Appeal held that the 2nd respondent could sell the property and that the contract between the 2nd respondent and 1st respondent was enforceable. These all point to the fact that the judgment of the High Court had been reversed and the appeal had been allowed.

[36] The fifth ground attacks the comment made by the Court of Appeal relating to the absence of the 2nd respondent during

the trial of the matter. We agree with the appellant that the 2nd respondent who was a party to the proceedings could not be expected to testify on the appellant's behalf as she would have been conflicted. The comment was therefore not appropriate.

[37] We have held in numerous cases that a litigant must always prove his case in order to be entitled to judgment. The case of *Khalid Mohamed v The Attorney General*⁸ referred to above states this point very clearly. A case may either be proved orally or through documentary evidence or both. However, some cases such as the present case due to the nature of the claim and the principle of law involved make it imperative to rely on documentary evidence in addition to oral testimony. It was therefore in the light of the requirement under section 7 of the Statute of Frauds of 1677, not a misdirection for the Court of Appeal to insist on documentary evidence. We therefore find no merit in this head of argument.

[38] We note that the appellant did not advance any argument in respect of the second ground of appeal in relation to the

adjacent property. The point being made in the second ground of appeal which is valid, is that there was proof that the appellant had paid for the adjacent land and as such a resulting trust in favour of the appellant should have been declared. We agree. The record of appeal shows that the appellant made two payments in the total sum of K45,000.00 (rebased) and that the 2nd respondent has not really claimed this money as belonging to her. It is however not clear if the adjacent property was ever assigned to the 2nd respondent by National Housing Authority. We are however constrained to comment further as National Housing Authority is not a party to this appeal.

Conclusion

[39] The appellant did not adduce evidence that he paid for the property with his own money giving rise to the creation of a resulting trust in his favour. The Appellant's documentary evidence rebutted the presumption that a resulting trust had been created in favour of the appellant as it showed that he was acting on behalf of the 2nd respondent in the conveyance.

J42

The appellant has succeeded nominally in respect of the second and fourth grounds of appeal but this has no effect on the judgment of the Court of Appeal. The appeal is therefore dismissed with costs to be agreed or taxed in default of agreement.



A.M. WOOD
SUPREME COURT JUDGE



R.M.C. KAOMA
SUPREME COURT JUDGE



N.K. MUTUNA
SUPREME COURT JUDGE