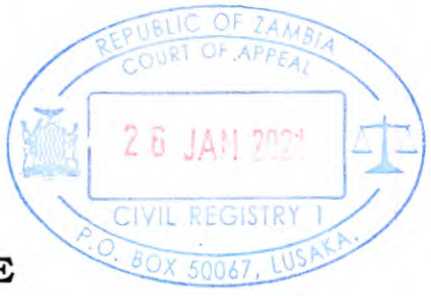
(I·T)

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA

Appeal No. 145/2019

(Civil Jurisdiction)



BETWEEN:

BURDEN MFUNGWE **1ST APPELLANT**

YOTA INTERNATIONAL LTD **2ND APPELLANT**

AND

MOSHEN ZABAD HAINDER **1ST RESPONDENT**

IRFAN SULEMAN NARBHANDH **2ND RESPONDENT**

Mchenga DJP, Majula and Siavwapa, JJA
On 27th August, 2020 and 26th January, 2021

For the 1st Appellant	:	*In Person*
For the 2nd Appellant	:	*Mr. R. Musumali of SLM Legal Practitioners*
For the 1st Respondent	:	*Mr. T. Ngulube of Messrs Tutwa S. Ngulube and Company*
For the 2nd Respondent	:	*Mr. C. Sianondo of Messrs Malambo & Company*

J U D G M E N T

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

1. *Match Corporation Limited vs Development Bank of Zambia & The Attorney-General (1999) ZR 13 (SC).*
2. *JZ Car Hire Limited vs Chala and Another (2002) ZR 112 (SC).*

3. *Nkongolo Farm Limited vs Zambia National Commercial Bank Limited, Kent Choice Limited (In Receivership) Charles Haruperi (2005) ZR 78 (SC)*
4. *Sithole vs State Lotteries Board (1975) ZR 106*
5. *Buchman vs The Attorney-General (1993 – 4) ZR.131.*
6. *Mususu Kalenga Building Limited & Winnie Kalenga vs Richman's Money Lenders Enterprises (1999) ZR.27.*
7. *Roland Leon Norton vs Nicholas Lastron (2010) Vol. 1, ZR 358.*
8. *Martin Nguvulu & 34 others vs Marasa Holdings Limited (SCZ Appeal No. 108/2016)*
9. *Ndongo vs Moses Mulongo and Roostice Banda (S.C.Z. Judgment No. 4 of 2011)*
10. *London Ngoma & Another vs LCL Co Ltd Appeal No 122/2017*
11. *Mirriam Mbolela vs Adam Bota (Supreme Court Judgment No 26 of 2017)*
12. *Sablehand Zambia Limited vs Zambia Revenue Authority (2005) ZR 109 (SC)*
13. *Admark Limited vs Zambia Revenue Authority (2006) Z.R.43*
14. *Mwenya & Randee vs Kapinga (1993) ZR 2*
15. *Hatten vs Russel (1888) 38 Ch. D 347*
16. *Steedman vs Dinkle (1916) 1 AC 275*
17. *Chisha vs Holland (2014) ZR 188*
18. *Colgate Palmolive (Z) Inc vs Able Shemu and 110 Others SCZ Appeal No. 181 of 2005*
19. *Nkhata and Four Others vs The Attorney-General Of Zambia (1966) Z.R. 124 (C.A.)*
20. *Collett vs Van Zyl Brothers Ltd (1966) ZR 65 (CA)*
21. *Scherer vs Country Investments Limited (1986) 1 WLR 615*
22. *Matale James Kabwe vs Mulungushi Limited, SCZ Appeal No.90/1996*

Legislation and other authorities referred to:

1. Intestate Succession Act, Chapter 59 of the Laws of Zambia

2. Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia
3. Simon Gouldings; William Blake Odgers (1996) *Odger's On Civil Court Actions* (24th Edition) London: Sweet & Maxwell
4. Edward Fry (2012) *A treatise on the specific performance of contracts* (6th Edition) Universal Law Publishing Co: New Delhi

1.0 Background

1.1 The background to this appeal is that the 1st respondent, Moshen Zabad Haider and the 2nd appellant, Yota International Limited were plaintiffs in the court below. The 1st appellant, Burden Mfungwe was the defendant while the 2nd respondent, Ifran Suleman Narbhandh was an interested party who was later joined to the proceedings. The major dispute revolved around a piece of land known as Stand No. 33323, Lusaka which the 1st appellant sold to the other three parties without disclosing the previous transactions he had over the same property.

1.2 The case in the court below involved a dispute concerning a property known as Stand No. 33323, Lusaka that belonged to the late Mackwello Mfungwe who was the registered proprietor and holder of a certificate of title in that respect. Following his demise, the 1st appellant was appointed administrator of the estate of Mackwello Mfungwe.

1.3 On 28th August, 2007, the 1st appellant executed a contract of sale with the 2nd appellant for a portion of Stand 33323 in extent of 0.3228 hectares. The value of the piece of land was

K500,000,000 (unrebased). A deposit of K300,000,000 was paid to the 1st appellant leaving a balance of K200,000,000 which has not been paid to-date.

1.4 It was in evidence that the 1st appellant did not produce the certificate of title because he had mortgaged the property to Meanwood Finance Corporation Limited where he had obtained a loan of K155,400,000. Further to the transaction there was no consent to assign and no property transfer tax was paid.

1.5 On 18th May, 2012, the 1st appellant executed a contract of sale of land with the 2nd respondent for subdivision B of Stand No.33323. The purchase price was stated as K400,000,000 (unrebased) and the parcel of land was measuring 6025 square meters.

1.6 Sometime in 2011, the 2nd respondent purchased a parcel of land from the 1st appellant which had been previously sold to the 2nd appellant. After paying the purchase price for the properties, the documents were submitted to the Lusaka City Council. Subsequently the 2nd respondent was issued a certificate of title which was in extent of 6422 square meters being subdivision "B" of Stand No. 33323, Lusaka.

1.7 The evidence further reveals that on 10th June, 2017, the 1st appellant executed a contract of sale of land with the 2nd respondent for 8994 square meters being the remaining extent

of Stand No.33323, Lusaka. The purchase price was set at K2,080,000 and according to the 1st appellant, although this was couched as a contract of sale, it was a loan.

1.8 Upon discovering conflicting interests in the piece of the land, the 2nd respondent and the 2nd appellant commenced an action in the court below seeking, *inter alia,* a declaration that they are legitimate owners of the portions of land they purchased from the 1st appellant. They also sought vacant possession and damages for loss of use of the land.

1.9 Upon being confronted with court process, the 1st appellant filed two defences, one against each of the plaintiffs. In relation to the 2nd respondent, the 1st appellant admitted being paid the full purchase price. He, however, alleged that the 2nd respondent fraudulently extended the boundary of his property. He counterclaimed damages for breach of contract.

1.10 In relation to the 2nd appellant's claims, the 1st appellant alleged that the former breached the contract of sale by failing to pay the balance of K200,000,000 out of the agreed K500,000,000 purchase price. He counterclaimed damages for breach of contract and an order for rescission of the contract.

2.0 Findings of fact and decision of the lower court

2.1 The matter proceeded to trial and after analyzing the evidence presented by the parties, the learned trial Judge (Maria Mapani – Kawimbe J.) made the following findings of fact:

(a) In relation to the 2nd respondent's case, the court below found that going by the contract of sale between the 1st appellant and the 2nd respondent dated 18th May, 2012, the 2nd respondent bought a total of 6025 square meters and not 6422 of subdivision B of Stand 33323. She consequently dismissed the allegation of fraud on the part of the 2nd respondent but ordered that he surrenders 397 extra land he acquired to the 1st appellant.

(b) In relation to the 2nd appellant's case, the court found that the 2nd appellant inordinately failed to register its interest in the land it purchased in terms of section 4 of the **Lands and Deeds Registry Act**. She held that due to the long period that the 2nd appellant failed to register its interest, the contract was frustrated. She subsequently dismissed all the 2nd appellant's claims.

(c) Turning to the 2nd respondent's case, the court found that the contract of sale between the 2nd respondent and the 1st appellant was clear and unambiguous. The 1st appellant sold to the 2nd respondent the remaining extent of Stand No. 33323. She dismissed the assertion that it was a loan and consequently declared the 2nd respondent as the beneficial

owner of land in extent of 8994 square meters. She further awarded damages for loss of use against the 1st and 2nd appellants.

3.0 Grounds of appeal

3.1 The appellants were dissatisfied with the judgment of the court below and have since appealed to this court advancing the following grounds of appeal:

"1st Appellant's Grounds of Appeal

1. *The trial judge erred in law and fact when she held that the 1st respondent was entitled to an order of possession of 6025 square meters of land on subdivision B of Stand No 33323, Lusaka, whilst the sale was null and void as the documents show that the sale was done by an administrator who merely vested the property into himself and therefore required leave of court pursuant to section 19(2) of the Intestate Succession Act and an evaluation report before the sale;*
2. *The trial judge erred and misdirected herself in law and fact when she held that the allegations of fraud were not proved by the appellant against the 1st respondent (page J37) whilst there was clear evidence on record that the 1st respondent engaged a new surveyor other than the one agreed by the parties who drew a survey diagram that fraudulently included 17 X 17 square meters, 2 square meters and consequently a certificate of title No. 17242 acquiring 6,422 square meters fraudulently instead of 6025 square meters as indicated in the contract of*

sale and assigned in respect of subdivision B of Stand No. 33323, Lusaka;

3. *The trial judge erred in law and fact when she held that the contract for the sale of land between the defendant and the interested party was clear and unambiguous (J45, Paragraph 2) whilst there is latent ambiguity in view of the evidence by DW1, DW2 and DW3 that the contract of sale was in essence a loan, which the court failed to consider;*
4. *The trial court erred in law and fact when it held that the interested party is the beneficial owner of the land to the extent of 8994 square meters being the remaining extent of Stand No. 33323, Lusaka, whilst the contract of sale is null and void in view of the fact that the documents on record show that the appellant transacted as the administrator of the estate after vesting the property into himself hence the need for having obtained leave of the court pursuant to section 19(2) of the Intestate Succession Act and in view of no evaluation report and the appellant's failure to sign consent to assign;*
5. *The trial judge erred in law and fact when she expunged the appellant's bundle of documents from the proceedings on the ground that it is prejudicial to the interested party who had already testified whilst no prejudice was shown by the interested party who could have cross-examined the appellant if necessary thereby prejudicing the case for the appellant; and*
6. *The trial judge erred in law and fact in failing to effectively evaluate the evidence of the three defence witnesses against*

the interested party before her and thereby failed to arrive at a decision based on the evidence and facts before her in favour of the defendant.

2nd Appellant's Grounds of Appeal

1. *The learned High Court Judge erred in law and fact when she dismissed the 2nd appellant's claim to register the assignment deed out of time and documents relating to the conveyance to be executed on behalf of the 1st appellant by the Deputy Registrar despite evidence on record revealing that the appellant in 2007 purchased a proposed subdivision to stand No. 33323, Lusaka, in extent of 0.3228 hectares from the 1st appellant;*
2. *The Learned trial Judge in the court below erred in law and fact when she held that the contract of sale between the 1st and 2nd appellants was frustrated due to the long period of non-performance and therefore there is no contract to enforce by the 2nd appellant against the 1st appellant;*
3. *The learned trial judge erred in law and in fact when she declared that the 2nd respondent is the beneficial owner of land in extent of 8994 square meters being the remaining extent of stand No. 33323, Lusaka, in spite of the 2nd appellant's prior equitable and legal interest in the property in extent of 0.3228 hectares and being lawfully in possession of the original certificate of title to the remaining extent of Stand No. 33323, Lusaka;*

4. *The learned trial judge erred in law and in fact when she entered judgment in favour of the respondents without the 1st appellant being heard at trial of the matter; and*
5. *The learned trial judge erred in law and in fact when she awarded damages to the 2nd respondent against the 1st appellant for loss of use of land.*

4.0 1st Appellant's arguments

4.1 In support of grounds three and four, counsel for the 1st appellant argued that in light of the fact that at the time of signing the contract of sale with the respondent, the 1st appellant was an administrator of the estate of Mackwello Mfungwe, consent of the court was required prior to selling the portion of land in terms of section 19(2) of the Intestate Succession Act. It was contended that in the absence of such consent, the contracts aforesaid were illegal and void *ab initio*.

4.2 The thrust of the 1st appellant's submission in relation to ground two was that the 1st respondent acquired an extra 397 square meters of land fraudulently as alleged in the particulars in the court below. We were accordingly called upon to hold that fraud was properly alleged and proved to the requisite standard.

4.3 In the third ground of appeal, the 1st appellant's grievance emanates from the trial court's finding that the contract of sale between the 1st appellant and the interested party was not a

loan but a contract for sale of land. The argument by counsel is that this was in contrast to the evidence of the 1st appellant and his witnesses which was to the effect that it was a loan. We were urged to reverse the finding of fact by the trial Judge.

4.4 The kernel of the submission with respect to ground five was that the trial Judge erred when she expunged the 1st appellant's bundle of documents from the proceedings on the ground that it was prejudicial to the interested party who had already testified. It was contended that no prejudice was shown by the interested party.

4.5 Turning to ground six, it was submitted that the court below failed to evaluate the evidence of three defence witnesses against the interested party and thereby failed to arrive at a just decision based on the evidence. In concluding his submisions, we were urged to allow the appeal.

5.0 2nd Appellant's arguments

5.1 In support of its grounds of appeal, there were heads of arguments filed on behalf of the 2nd appellant. Learned counsel, Mr. Musumali argued in relation to ground one that the lower court erred when it declined to order that an assignment deed executed in December, 2007 be registered out of time at the Lands and Deeds registry. He pointed out that although section 5 of the **Lands and Deeds Registry Act** requires such documents to be registered within 30 days from

execution, section 6 grants the court discretion to extend time for good reason. There being no legal reason advanced by the learned Judge in declining to order registration of the 2nd appellant's assignment, we were called upon to reverse the finding of fact.

5.2 Moving to ground two, it was contended that the lower court erred by invoking the doctrine of frustration to a contract of sale between the 1st appellant and the 2nd appellant. Counsel argued that there can be no frustration when the subject matter of the contract is still active and the terms are capable of enforcement. In support of this submission, counsel referred us to the case of ***Match Corporation Limited vs Development Bank of Zambia and The Attorney General***[1] where it was held that it is inappropriate to invoke the doctrine of frustration where a contract can still be performed.

5.3 On ground three, the 2nd appellant was disconsolate with the holding of the court below when it declared the 2nd respondent as the beneficial owner of the remaining extent of Stand No.33323, Lusaka. That this was despite the fact that the 2nd appellant was the initial purchaser in 2007 as compared to the 2nd respondent who only purchased the same portion in 2017 on a duplicate copy of title.

5.4 In relation to ground five it was contended that the learned trial Judge erred when she awarded damages to the 2nd respondent against the 2nd appellant who had an equitable

interest in the land in dispute. It was contended further that the 2nd respondent failed to prove damage suffered against the 2nd appellant. The case of ***JZ Car Hire Limited vs Chala and Another***[2] was called in aid for the principle that it is for a party claiming damages to prove the damage regardless of the opponent's case. Counsel concluded by urging us to allow the appeal.

6.0 1st respondent's arguments

6.1 On his part the 1st respondent filed his heads of argument on 27th August, 2020. The same were also relied on at the hearing of the appeal. Counsel for the 1st respondent, Mr. T. Ngulube only focused on grounds that were affecting his client's case. The kernel of Mr. Ngulube's argument in response to grounds one and four were that the 1st respondent is a bona fide purchaser who bought the property in good faith without any notice of fraud or illegality. It was contended that the learned trial Judge was therefore on firm ground when she granted the 1st respondent an order of possession of subdivision B of Stand 33323 Lusaka.

6.2 Reacting to ground two in which the 1st appellant alleged fraud, it was argued that fraud must be proved to a standard higher than a mere balance of probabilities. As authority for this argument, he cited the cases of ***Nkongolo Farm Limited vs Zambia National Commercial Bank Limited, Kent Choice Limited (In Receivership) Charles Haruperi*** and

Sithole vs State Lotteries Board[4] **.** He spiritedly argued that the 1st appellant failed to discharge its burden of proof, hence his appeal should fail.

7.0 2nd Respondent's arguments in response to the 1st appellant's arguments.

7.1 In response to ground four, Mr. Sianondo argued that the provisions of section 19(2) of the **Intestate Succession Act**, which require an administrator to obtain consent before selling a house, cannot aid the 1st appellant since he sold the property in his own right. That this was after a lodgment of a 'Deed of Assent' which vested the legal estate of the property in issue to himself. It was therefore contended that leave of court is only required when one is selling as a personal representative which was not the case at the time the 1st appellant sold the property to the 2nd respondent.

7.2 Mr. Sianondo went on to submit that the issue of lack of consent as regards the sale by the 1st appellant to the 2nd respondent was never raised in the court below and cannot therefore be raised on appeal. Mr. Sianondo adverted to the cases of ***Buchman vs The Attorney-General***[5] and ***Mususu Kalenga Building Limited & Winnie Kalenga vs Richman's Money Lenders Enterprises.***[6] Both cases espouse the principle that where an issue is not raised in the

court below, it is not competent for any party to raise it on appeal.

7.3 In relation to ground three, Mr. Sianondo argued that there is nowhere in the contract between the 1st appellant and the 2nd respondent where the contract says it is a loan. The parties to the said contract are therefore bound by its terms and cannot now be heard to contradict the written terms. To support his proposition, counsel sought refuge in a number of authorities including the case of ***Roland Leon Norton vs Nicholas Lastron***[7] where it was held that parties are bound by a contract even if it is a bad one provided it is valid.

7.4 In response to ground five, it was contended that the lower court was on firm ground to expunge the 1st appellant's bundle of documents after the 2nd respondent had closed his case. That this would have resulted in the 2nd respondent being prejudiced considering that it would not have had an opportunity to comment on the documents that were to be filed.

7.5 In relation to ground six Mr. Sianondo argued that the court below properly evaluated the evidence that was before it from which it made findings of fact. This approach is supported by the guidance of the Supreme Court as stated in the case of ***Martin Nguvulo & 34 others vs Marasa Holdings Limited***[8] where it was held that:

"To the extent that much of the findings of the lower court which informed its conclusion on the substance of the activities of the 21st October, 2014 are based on facts, we are loathe to disturb."

8.0 2nd Respondent's arguments in response to the 2nd appellant's arguments.

8.1 The gist of the 2nd respondent's submission in response to the 2nd appellant's case was that the contract between the appellant has irregularities which cannot be cured by registration of documents. He pointed out the lack of consent from the High Court to sell the property on the part of the 2nd appellant and the inordinate delay to complete the transaction. We were referred to the case of the ***Ndongo vs Moses Mulongo & Roostice Banda***[9] for the principle that mere payment of a deposit towards the purchase price does not transfer ownership to the buyer as much more is required.

8.2 Counsel argued that from August, 2007, the 2nd appellant only made an effort to register the relevant documents in 2016 which was 9 years later.

8.3 The combined arguments for grounds three and five were that the 2nd appellant's land is not part of the property which the 2nd respondent purchased. It was therefore argued that the 2nd appellant's argument against the 2nd respondent is misconceived.

8.4 Counsel further conceded that there should not have been a liability for damages against the 2nd appellant but instead the 1st appellant. We were accordingly urged to dismiss the appeal.

9.0 Hearing of the appeal and arguments canvassed

9.1 The matter came up for hearing of the appeal on 27th August, 2020. At the hearing, the 1st appellant (who was in person) and counsel for the other parties confirmed having filed heads of argument upon which they entirely relied. Counsel also made brief oral submissions in augmentation. The 1st appellant however sought for an adjournment to enable him to engage another advocate. We declined the request for an adjournment but we nonetheless granted him leave to file heads of argument in reply within two weeks. That notwithstanding, we noted from the record that at the time of writing this judgment, the 1st appellant had not filed his heads of argument in reply.

9.2 Mr. Musumali indicated that the 2nd appellant was abandoning ground four. Relying on the documents filed in support of the appeal, he implored us to allow the appeal by the 2nd appellant with costs.

9.3 On behalf of the 1st respondent, Mr. Ngulube briefly submitted that fraud was neither alleged nor proved by the 1st appellant. He vociferously argued that the issue of fraud was an

afterthought to deviate the court's attention from the real issue in controversy. He referred us to pages 546, 547 and 548 where the 1st appellant admitted having sold the 1st respondent 625 square meters of land. He submitted that the issue of the 1st respondent getting more land does not therefore arise. He also cited pages 551 and 552 where it was stated that the site plan was similar.

9.4 Regarding the sale of the property, Mr. Ngulube argued that although the 1st appellant sold the property as an administrator, the sale was done in consultation with his family according to his own evidence in the court below. He argued that in any case this issue was never raised in the court below. He accordingly beseeched the court to dismiss the appeal with costs.

9.5 On behalf of the 2nd respondent, Mr Sianondo referred us to the court of appeal decision in ***London Ngoma & Another vs LCL Co Ltd***[10] where we discussed the import of section 28 of the **Lands and Deeds Registry Act**.

10.0 Consideration and decision of the Court

10.1 We have thoroughly scrutinized all the evidence before us, the arguments of the parties and the decision of the court below. we shall take all of the above into account in arriving at our decision.

10.2 To recapitulate the facts of this matter, the dispute among the parties arose from the 1st appellant's conduct of selling Stand No. 33323, Lusaka to all 3 parties without revealing to either of them. The 1st appellant came to be in possession of the property by virtue of being appointed as an administrator of the estate of the late Mackwello Mfungwe.

10.3 This appeal in our view raises numerous issues. The catalogue of issues are in relation to the Intestate Succession Act, doctrine of frustration, whether or not time was of the essence in completion of the sale, whether the contract of sale between the 1st appellant and the 2nd respondent was a loan agreement, fraud, and whether the trial court properly evaluated the evidence. Therefore, we shall explore the law in respect of each of these burning issues in determining the appeal.

11.0 Intestate succession

11.1 In the first and fourth grounds of appeal, the 1st appellant has adverted to the provisions of section 19(2) of the Intestate Succession Act. For ease of reference it behooves us to reproduce the same:

"19(2) Where an administrator considers that a sale of any of the property forming part of the estate of a deceased person is necessary or desirable in order to carry out his duties, the administrator may, with the authority of the court, sell the property in such manner as appears to him likely to secure receipt of the best price available for the property." (emphasis ours).

11.2 It is a requirement under section 19(2) for an administrator intending to enter into a contract of sale for a house to apply for authorization from the court before conclusion of the transaction. The reason behind this piece of legislation is that it is intended to protect the interest of the beneficiaries and put administrators in check. The failure to obtain consent or authorization from the court would lead to the sale being vitiated as it would be illegal and unenforceable.

11.3 The leading authority is that of ***Mirriam Mbolela vs Adam Bota***[11] where Kajimanga J.S. on behalf of the Supreme Court stated thus:

"The import of section 19(2) of the Act is very clear. It proscribes the sale of property (including real property) forming part of the estate of a deceased person without prior authority of the court. In the mind of the legislators, this statutory provision was intended to prevent administrators of estates of deceased persons from abusing their fiduciary responsibilities by selling property forming part of such estates, without due regard to the interest of the beneficiaries. No doubt, the court can only grant authority when it is satisfied that the sale would be in the interest of the beneficiaries. In our view, prior authority of the court is a sine qua non of a valid sale of such property"

He further went on to state that:

"In the absence of such authority, we agree with counsel for the appellant that the purported sale would be illegal and unenforceable. If we may add such a transaction would be null and void (ab initio)"

11.4 The thrust of the 1st appellant's argument is that the contract of sale is unenforceable for failure to obtain prior consent from the court in line with the provisions of section 19 (2) of the Act. He has argued that as an administrator of the estate of his late brother, he did not seek authority from court when he entered into the contract of sale.

11.5 Attractive as this argument may appear on the face of it and being mindful of the provisions of section 19(2) we find it does not hold water. The record reveals at page 259 that the 1st appellant entered into a contract for sale of land with the 2nd respondent as a beneficial owner.

11.6 Pertaining to the 1st respondent, the 1st appellant did sell in consultation with the beneficiaries. If he had not done so, it is the beneficiaries who should have reacted by calling in aid the provisions of section 19(2) of the Intestate Succession Act. As earlier stated, this provision is intended to protect the interests of beneficiaries and it would avail the beneficiaries in the event that the administrator proceeds to conduct a sale without their consent and the consent of the court.

11.7 As the administrator of the estate, we find it quite startling that he is the one who is seeking to invoke the provisions of section 19(2) and not the beneficiaries. We are satisfied that his argument in ground one in relation to failure to obtain leave of court cannot come to his aid and that the 1st

respondent entered into a valid contract of sale with the 1st appellant.

11.8 In light of the foregoing, we therefore find that ground one is devoid of merit and we dismiss it.

11.9 Turning to the 2nd respondent, where the argument is also centered on the provisions of section 19(2) of the Act, we note that the record reveals at page 259 that the 1st appellant entered into the contract for sale of land with the 2nd respondent as a beneficial owner. There was a deed of assent prior to this which vested the property to the 1st appellant. We are therefore in total agreement with Mr. Sianondo that the argument that he needed to obtain consent is not available to him for the reasons articulated above.

11.10 He cannot now turn around and seek to hide behind the provisions of section 19(2) of the Act to have the sale nullified. The position taken by the 1st appellant flies in the teeth of the evidence and we accordingly dismiss ground four for want of merit.

12.0 Fraud

12.1 The 2nd ground of appeal attacks the trial judge's finding that allegations of fraud were not proved against the 1st respondent. The 1st appellant's argument is that there was evidence on record that the 1st respondent engaged a new

surveyor other than the one agreed by the parties who drew a survey diagram that fraudulently included more square meters than what had been agreed. That consequently a certificate of title No. 17242 was fraudulently obtained stating the extent of the land as 6,422 square meters instead of 6,025 square meters which was indicated in the contract of sale.

The 1st appellant in his defence and counter claim at page 87 of the record of appeal pleaded fraud in his counter claim and outlined the particulars of fraud on page 89. In support of his submission he referred us to ***Sablehand Zambia Limited vs Zambia Revenue Authority[12].*** The thrust of his argument on appeal before us was that the learned trial Judge, therefore, fell into error when she did not make a specific finding of fraud, on the evidence before her, in respect of the 1st respondent.

12.2 In response to ground two, Mr. Ngulube's response was that there was no evidence to substantiate his claims and that fraud must be proved on a higher standard than a mere balance of probabilities. He also called in aid the case of ***Sablehand Zambia Limited vs Zambia Revenue Authority[12]***. He therefore rebuffed the claim by the 1st appellant that the trial judge ought to have made a specific finding of fraud.

12.3 Further the learned authors of **ODGERS ON CIVIL COURT ACTIONS 24th Edition Sweet & Maxwell 1996** paragraph 11.13 – 11.12 at pages 242 -243 provide as follows:

> *"A party must in any pleading subsequent to a statement of claim plead specifically any matter for example... the expiry of a relevant period of limitation, fraud or any fact showing illegality – which he alleges makes any relevant claim or defence of the opposite party not maintainable; or (b) which if specifically pleaded, might take the opposite party by surprise;..."*

12.4 The provisions of Order 18/8 of the white book were considered by the apex court in the case of ***Admark Limited vs Zambia Revenue Authority***[13] where it was held:

> *"(i) The purpose of pleadings is to ensure that in advance of trial, the issues in dispute between the parties are defined.*
> *(ii) Order 18 Rule 8 of the Supreme Court Practice sets out those matters which must be specifically pleaded before they can be relied upon by a party in its defence."*

12.5 The record reveals that fraud was pleaded particulars of which were outlined. The contention by the 1st appellant is that the trial Judge did not make a specific finding of fraud, whereas the respondent has forcefully argued that fraud was not proven.

12.6 We have exercised our minds in relation to the positions taken by respective counsel on this ground. As correctly submitted

by Mr. Ngulube, fraud must be proved on a standard higher than the balance of probabilities. This is line with the holding in ***Sithole vs State Lotteries Board***[4] at page 115 where it was observed that *"if a party alleges fraud the extent of the onus is greater that a simple balance of probabilities."* This priniciple was also articulated in the case of ***Sableland Zambia Limited***.[12]

12.7 On the allegation of fraud, the learned trial Judge evaluated the evidence that was before her and arrived at the decision that it was not proved to the requisite standard. This is what she said:

> *"The Defendant pleaded that the 1st Plaintiff fraudulently acquired extra land without his consent. The 1st Plaintiff contended that the parties engaged a surveyor and the Defendant's advocates submitted the documents to the Lusaka City Council for approval of the documents. Other than making the averments, I find that the Defendant did not lead any evidence to prove that the documents submitted by his advocates were interfered with by the Plaintiff. He equally did not produce any evidence to show that the surveyor acted without his consent. I therefore find that the allegation of fraud was not proved."*

12.8 On the evidence on record, we are of the view that the learned trial Judge correctly disbelieved the evidence of the 1st appellant when he alleged fraud against the 1st respondent. The evidence was below the standard set by

the ***Sithole***[4] case. For the foregoing reasons, we dismiss ground two, for lack of merit.

2nd appellant

13.0 Registration of assignment deed out of time

13.1 In ground one of the appeal, the 2nd appellant's grievance stems from the fact that the trial court declined to grant an order to register the deed of assignment out of time at the lands and deeds Registry. Section 4 of the Lands and Deeds Registry Act requires all documents regarding an interest in land to be registered within 30 days at the lands and deeds Registry. This section enacts as follows:

"4 (1) Every document purporting to grant, convey or transfer land or any interest in land, or to be a lease or agreement for lease or permit of occupation of land for a longer term than one year, or to create any charge upon land, whether by way of mortgage or otherwise, or which evidences the satisfaction of any mortgage or charge, and all bills of sale of personal property whereof the guarantor remains in apparent possession, unless already registered pursuant to the provisions of "The North-Eastern Rhodesia Lands and Deeds Registration Regulations, 1905" of "The North-Western Rhodesia Lands and Deeds Registry Proclamation, 1910", must be registered within the times hereinafter specified in the Registry or in a District Registry if eligible for registration in such District Registry;

Provided that if a document creating a floating charge upon land has been registered under the provisions of section ninety-nine of the Companies Act or section thirty-two of the Cooperative

Societies Act, it need not be registered under the provisions of this part unless and until such charge has crystallized or become fixed."

13.2 Further, section 6 of the Lands and Deeds Registry Act provides that:

"6. Any document required to be registered as aforesaid and not registered within the time specified in the last preceding section shall be null and void:
Provided that:
The Court may extend the time within which such document must be registered, or authorize its registration after the expiration of such period on such terms as to costs and otherwise as it shall think fit, if satisfied that the failure to register was unavoidable, or that there are any special circumstances which afford ground for giving relief from the results of such failure, and that no injustice will be caused by allowing registration..."

13.3 It is clear from the foregoing that documents pertaining to an interest in land ought to be filed within 30 days. However section 6 of the Lands and Deeds Registry Act does give an opportunity to parties who have fallen foul of the 30 day window period within which to register an assignment to apply to the court to extend the time. What this means therefore is that the failure to file the documents within 30 days is not fatal as there is a possibility of an extension of time being granted by the court. That being said we will now turn to consider the aspect of notice to complete.

14.0 Notice to Complete

14.1 The question of whether time was of essence in completion of the contract of sale was interrogated in the case of ***Mwenya & Randee vs Kapinga***[14] where it was observed that:

"In relation to delay Cheshire and Fifoot's Law of Contract 10th edition on page 449 paragraphs 1, 2, and 3 thereof puts the matter thus:

By way of summary, it may be said that time is essential firstly, if the parties expressly stipulate in the contract that it shall be so; secondly if in a case where one party has been guilty of undue delay, he is notified by the other that unless, performance is completed within a reasonable time the contract will be regarded as at end; and lastly, if the nature of the surrounding circumstances or of the subject makes it imperative that the agreed date should be precisely observed."

14.2 The Supreme Court took the view in this case that there was in existence a memorandum or note of which time was not of the essence and that there was no unreasonable delay and no completion statement was issued.

14.3 The learned author of **Fry on Specific Performance**, states as follows on page 503:

"In order to render time thus essential, it must be clearly and expressly stipulated and must also have been clearly contemplated and intended by the parties that it shall be so; it is not enough that time is merely mentioned ***DURING WHICH OR BEFORE WHICH SOMETHING*** *shall be done."*

14.4 In ***Hatten vs Russel***[15] it was stated that:

"Where a contract for sale between the vendor and purchaser fixes a day for completion and provides that if the purchase is not completed on that day, the purchaser shall pay interest from that day until completion, time is not of the essence of the contract so as to entitle the purchaser immediately to repudiate the contract, if in consequence of a defect of conveyance merely and not of title, the vendor is unable on his part to complete the contract on the day fixed. Where the defect is simply one of conveyance and time is not of essence of the contract, the purchaser is not entitled to repudiate after notice to remove the defect within a reasonable time and the vendor has failed to do so."

14.5 In ***Steedman vs Dinkle***[16] the Court of Appeal stated the law as follows:

"Courts of Equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance where justice requires it, even though literal terms as to stipulation as to time have not been observed. But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply by providing that time is to be of the essence of the bargain... If, indeed, the parties, having originally so provided, have expressly or by implication waived the provision made, the jurisdiction will again attach."

14.6 Parties to a contract should ideally agree on a specific time when the sale of property should be completed. As failure to complete may be detrimental to one of parties.

14.7 It is clear from the authorities that a *"time of the essence"* clause for sale of land should be included where timing is crucial. It serves the purpose of making it clear that failure to uphold a contractual deadline will amount to a material breach of the contract entitling the aggrieved party to terminate the entire contract for sale of land.

14.8 What can be gleaned from the aforecited cases is that time will not be of the essence unless the agreement expressly so provides. If the parties have executed a contract of sale and there is a default on the part of one of the parties, the avenue that is available is to give 'notice to complete' of not less than 14 days. This is provided for in the Law Association of Zambia General Conditions of Sale, 1997 (applicable at the time) which stipulate in condition 21(a) that:

"If either party shall fail to perform it's part of the contract the other party may give to the defaulting party or its advocate at least fourteen day notice in writing specifying the default complained of and requiring the defaulting party to make good before the expiration of such default."

14.9 Turning to the case at hand, the facts reveal that there was no 'time of the essence' clause, hence there was no deadline for completion of the sale. Had it been a term of the contract signifying that time was of essence, the 2nd appellant would have been found to have breached a material term. In line with the authority of ***Mwenya & Another vs Kapinga***[15]

aforecited, it is clear that time was not of the essence as it was not so expressed in the case in *casu*.

14.10 Further, we have not seen any 'notice to complete' pursuant to condition 21(a) of the Law Association of Zambia General Conditions of Sale 1997 after execution of the contract issued by the 1st appellant. Having not done so militates against the 1st appellant and he thus cannot claim that there was a fundamental breach of the contract.

14.11 In ***Chisha vs Holland***[17] on page 188 Chisanga J (as she then was) opined that:

"Time not having been of the essence due to failure to properly serve a Notice to Complete after execution of contract, the defendant could only rescind the contract on the plaintiff's implied repudiation of the contract. The onus to show implied repudiation of the contract by the plaintiff has not been discharged by the defendant. I find therefore, that the purported rescission was wrongful as it was premised on an ineffective Notice to Complete."

We are duly persuaded by the above opinion as it represents the correct position of the law.

14.12 The long and short is that, in the present case a time of essence clause was not there and therefore the 1st appellant cannot seek to rely on it. In addition there was no 'notice to complete' issued pursuant to the Law Association of Zambia General Conditions of Sale. The 1st appellant cannot therefore rely on the time factor and consider the contract frustrated.

He must suffer the detrimental effect of not having included a time clause and failure to call in aid the provisions of condition 21(a) of the LAZ General Conditions of Sale.

15.0 Doctrine of frustration

15.1 We now turn to consider whether or not the contract between the 1st appellant and the 2nd appellant was frustrated due to the long period of non-performance. According to *Chitty on Contracts-General Principles (2004)* on page 1311 the learned authors state as follows with regard to when a contract can be frustrated:

"A contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfill the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract."

15.2 Granted the position that we have articulated in the preceding paragraphs that there was no time of the essence clause, it cannot be said that the contract for sale between the 1st appellant and the 2nd appellant was frustrated due to the long period in completing the contract. There is nothing on the record to show that the contract has been rendered physically or commercially impossible to fulfill or that the obligations have become radically different due to a long period of non-performance.

16.0 Loan

16.1 The 1st appellant in the third ground has expressed great unhappiness at the finding that the contract of sale of land between him and the 2nd respondent was clear and unambiguous. The thrust of the 1st appellant's argument is that it was a loan. We have examined the evidence on record and the findings of the lower court and it is clear to us that indeed this was a contract of sale. It was not a loan agreement as suggested by the 1st appellant. We therefore see no basis upon which we can assail the findings of the court below.

16.2 As has been cited in a plethora of authorities, parties are bound by a contract. We recall the case of ***Colgate Palmolive (Z) Inc vs Able Shemu and 110 Others***[18]. We align ourselves with this authority and accordingly dismiss the argument advanced in ground three that it was a loan agreement as opposed to a contract of sale. The 1st appellant was bound by the contract of sale.

16.0 Damages against the 2nd appellant

16.1 We now turn to ground five of the 2nd appellant's grounds of appeal in which the 2nd appellant faults the lower court for awarding damages to the 2nd respondent against the 2nd appellant for loss of use of land.

16.2 In the written submissions filed on behalf of the 2nd respondent, it was argued that in view of the fact that the land which the 2nd appellant occupies is owned by the 1st respondent as Subdivision B, there should not have been a liability for damages against the 2nd appellant in favour of the 2nd respondent. We could not agree more with counsel on the position taken in light of the fact that the 2nd appellant purchased the property on 16th December 2007 and was in possession of the original certificate of title. We accordingly quash the order for damages against the 2nd appellant.

17.0 Evaluation of evidence

17.1 It has been strenously argued that the Judge failed to effectively evaluate the evidence that was before her. In the case of ***Nkhata and Four Others vs The Attorney-General Of Zambia***[19] the principle set out was that findings of fact by a trial court cannot be reversed by an appellate court unless it can be positively demonstrated that the court below erred in accepting the evidence before it, or that the court erred in assessing and evaluating the evidence by taking into account some matter which ought to have been ignored or failing to take into account something that ought to have been considered, or that the trial Judge did not take proper advantage of having seen and heard the witness.

17.2 In *casu*, there was just a general assertion that the trial judge failed to evaluate the evidence that was before her. On the

basis of the ***Nkhata*** case we have been unable to fault the trial judge in her evaluation. Therefore this ground of appeal is bereft of merit and we dismiss it.

18.0 Costs

18.1 On behalf of the 2nd appellant, it has been argued that the lower court should not have ordered that costs be paid by the 2nd appellant. In addressing this issue we are alive to the principle that a successful party should not be deprived of his costs unless his conduct in the course of proceedings merits the court's displeasure; or unless his success is more apparent than real, for instance where only nominal damages are awarded. In ***Collett vs Van Zyl Brothers Ltd***[20], the Court of Appeal held:

"The award of costs in an action is at the discretion of a trial judge, such discretion must be exercised judiciously. A trial judge, in exercise of his discretion, should, as a matter of principle, view the litigation as a whole and see what was the substantial result, where he does not do so, the court of appeal is entitled to review the exercise of his discretion."

18.2 The principles governing the award of costs were further summarized by Dudley LJ, in the case of ***Scherer vs Country Investments Limited***[21] on page 64**:** +

"The normal rule is that costs follow the event. The party who seems to have unjustifiably brought another party before the court or given another party cause to obtain his rights, is required to recompense that other party in costs, but; the judge

has unlimited discretion to make what order as to costs he considers that the justice of the case requires. Consequently, a successful party has a reasonable expectation of obtaining an order to be paid the costs by the opposing party but has no right to such an order for it depends upon the exercise of the court's discretion."

18.3 The holding was adopted by the Supreme Court in the case of ***Matale James Kabwe vs Mulungushi Limited***[22]**.** It is trite law that in our jurisdiction the legal position is that, a successful litigant is generally entitled to costs.

18.4 We align ourselves to the authorities cited. In light of what we have discussed in the preceding paragraphs we see no basis why the 2nd appellant was condemned in costs. We accordingly set aside the order for costs.

18.5 The 1st appellant's appeal being entirely devoid of merit is accordingly dismissed and he shall bear the costs both in this court and the court below.

.....
C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

.....
B.M. Majula
COURT OF APPEAL JUDGE

.....
M.J. Siavwapa
COURT OF APPEAL JUDGE