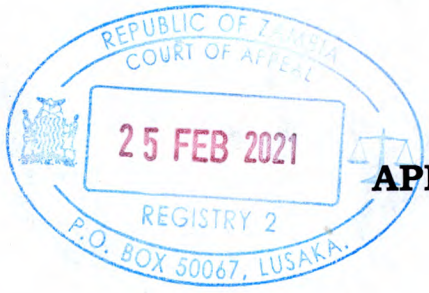
IN THE COURT OF APPEAL OF ZAMBIA **Appeal/186/2019**
HOLDEN AT NDOLA
(Civil Jurisdiction)



BETWEEN:

EDSON MWANZA **APPELLANT**

AND

CHIBULUMA CHATI FARMS LIMITED **1ST RESPONDENT**
MPALA ERNEST PILULA **2ND RESPONDENT**
KRIS KARLA **3RD RESPONDENT**
KARLSONS COMPANY LIMITED **4TH RESPONDENT**

Coram: Kondolo, Makungu and Majula JJA
On the 19th February, 2021 and 25th February, 2021

For the appellant: Mr. B. Katebe of Kitwe Chambers
For the 1st, 3rd & 4th respondents: Mr.K. Musukwa of Nyirongo & Company
For the 2nd respondent: Mr.R. Mandona of Chilupe & Permanent Chambers

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JUDGMENT

Makungu, JA delivered the Judgment of the Court.

Case referred to:

1. *Nkhata and Four Others v. The Attorney General (1966) Z.R. 124.*
2. *Ndongo v. Moses Mulyango, Roostico Banda (2011) Z.R vol 1, 187.*
3. *Anti-Corruption Commission v. Barnet Development Corporation Limited (2008) Z.R 69 vol 1 (SC)*
4. *Peter Militis v. Wilson Kafuko Chiwala (2009) ZR 34*
5. *Gerardus Adrianus Van Boxtel v. Rosalyn Mary Kearney (a minor by Charles Kearney her father and next friend) (1987) Z.R. 63 (S.C.)*
6. *Gondwe v. Ngwira (Appeal No. 37 Of 2015) (2017) 175*

7. *Foss v. Harbottle (1843) 67 ER 189*
8. *Valentine Webster & Chaisa Kayope v. Attorney General SCZ Judgement 18 of 2011*
9. *Khalid Mohamed v. Attorney General (1982) ZR 49*
10. *Salomon v. A. Salomon Company Limited (1897) AC 22*
11. *Mwenya and Randee v. Kapinga SCZ Judgment No. 4 of 1998*

Legislation referred to:

1. *Companies Act, Cap 388 of the Laws of Zambia*

Other authorities:

1. *Halsbury's Laws of England 4 Edition, volume 3, page no*

1.0 INTRODUCTION

1.1 This is an appeal by the plaintiff against the Judgment dated 2nd May, 2019 delivered by Madam Justice Y. Chembe dismissing the plaintiff's claims over farm 3380, Kalulushi. On 10th May 2019, the 1st, 3rd and 4th defendants were granted leave to issue a writ of possession directed at evicting the plaintiff from subdivision D of farm 3380. The plaintiff lodged another appeal under cause no. CAZ/8/247/2019, which was by court ruling dated 9th July, 2020 consolidated with this appeal.

2.0 BACKGROUND

2.1 The brief history of this appeal is that: The plaintiff commenced an action by writ of summons against the 1st defendant on 9th January, 2017. The matter was consolidated with cause numbers 2014/HK/756 and 2017/HK/82 as they related to the same subject matter and the same parties. After consolidation, the plaintiff filed a fresh writ of summons on 14th February, 2018 which was amended on 28th February, 2019. The reliefs sought in the amended writ were as follows:

i. *An order that the subdivision and allocation of the farm was unfair and unlawful.*
ii. *That the same allocation of subdivisions therefore be set aside and the farm be returned to the Management Buyout Team.*
iii. *An order that any title issued pursuant to the unlawful subdivision be cancelled.*
iv. *An order that the 2nd defendant return to the plaintiff the various assets including cattle unlawfully taken.*
v. *Damages for inconvenience*
vi. *Costs.*

2.2 On 20th March, 2018 the 2nd defendant filed in a defence and counter claimed the following reliefs:

i. *Damages for trespass.*

ii. *Aggravated damages for trespass.*

iii. *A declaration that the plaintiff is not entitled to re-enter the 2nd defendant's property or interfere with his quiet enjoyment.*

iv. *An order of injunction retraining the plaintiff by himself, his employees, servants or agents from entering, re-entering or grazing cattle on 2nd defendant's land.*

v. *Interest and costs.*

2.3 The 1st and 3rd defendant also filed in a defence and a counter claim. The court claim was for:

i. *A declaration that farm No. 3380 Kalulushi was legally bought by the 1st defendant.*

ii. *An injunction to restrain the plaintiff from interfering with ownership of the farm.*

iii. *A declaratory order that the 3rd defendant is the legal owner of subdivision D of farm 3380 Kalulushi.*

iv. *An injunction to eject the plaintiff and his agents from subdivision D of farm 3380 Kalulushi and to restrain him from interfering with its ownership.*

v. *Mesne profits.*

vi. *Damages for trespass.*

vii. *Damages for assault.*

viii. *Compensation for seized equipment.*

ix. *Interest and costs.*

2.4 The 4th defendant made a counter claim for the following reliefs:

i. *Refund of the sum of K14, 200.00 plus interest.*

ii. *An order of injunction directing the plaintiff to surrender the stock equipment and furniture used at Umulu Bar and Restaurant to the 4th defendant.*

iii. *Alternatively, payment of the sum of $1,885,000.00 being the value of Umulu business.*

iv. *Refund of the money used to obtain Certificate of Title in the sum of $25,000.00.*

v. *Damages for loss of business.*

vi. *Exemplary damages.*

vii. *Interest and costs.*

3.0 PLAINTIFF'S CASE

3.1 The plaintiff's case rested on the evidence of two witnesses. The first witness was Edson Mwanza, the plaintiff and the second witness was Christopher Katongo, a Livestock Supervisor at Chibuluma Chati Farms.

3.2 In brief, their evidence was that, the plaintiff was employed as an accounts assistant for Mulungushi Investments Limited a subsidiary of Zambia Consolidated Copper Mines Investment Holdings PLC (ZCCM- IH). In 1996 when Mulungushi Investments Limited went under liquidation, management decided to dispose of its twelve farms. The employees were advised to form groups to purchase the farms as a way of

empowering them. The plaintiff, Patrick Kangwa, M. Chisakuta and Fred Nkhuwa formed a group named Management Buyout Team (MBOT) to buy Chibuluma Chati farm.

3.3 By letter dated 7th August, 1996 the farms were handed over to the MBOT. The purchase price of the farm was K250,000,000.00 on condition that they pay 10% of the purchase price before the signing of a contract. The assets which were sold together with the farm included: 20 cows, 10 pigs, a Land Cruiser, Mitsubishi truck, a hammer mill and various farming equipment. The MBOT managed to pay 10% of the purchase price and a contract was drawn up between ZCCM and the MBOT which the plaintiff signed on behalf of the buyer. Clause 7 (b) of the contract of sale prohibited the sale of the farm prior to the transfer of title.

3.4 The plaintiff further alleged that the 2nd defendant who was the General Manager of Nkhana Division of ZCCM used intimidation to join the MBOT. He also brought 5 animals to the farm and did other activities. When the plaintiff requested him to start paying rent, he declined.

3.5 Later, without consulting anyone, the 2nd defendant incorporated a company called Chibuluma Chati Farms Limited (the 1st defendant) and forced all the MBOT members to become shareholders. The shareholding was as follows: The 2nd defendant as the major shareholder had 11,000 shares, W. Musama 3,500 shares, M.Chisakuta 7,000, Partrick Kangwa 7,000 shares, Boniface Mutale 3,000 shares, Douglas Bhela 3,000 shares, Samuel Phiri 3,000 shares, Fred Nkuwa 2,000 shares, Benjamin Mumba 2000 shares, Goliath Phiri 2,000 shares and the plaintiff 2,000 shares.

3.6 The plaintiff's further evidence was that, the balance of the purchase price amounting to K157,500 million was paid by MBOT as evidenced by the receipts of K65, 500 million and K66 million. He denied that the purchase price was paid by the 1st defendant.

3.7 After, paying the full purchase price to ZCCM, the plaintiff informed the seller in writing that some people had taken over the MBOT and that the title deed should only be issued in the name of a person who appeared on the handover letter. Despite this, the title deeds were released in the name of the

1st defendant. The plaintiff objected to this but the 2nd defendant refused to have the title deeds corrected.

3.8 Thereafter, the farm was subdivided with the 2nd defendant getting portion C, Boniface Mutale portion B, Douglas Bella portion A, the 3rd defendant was given a house where the plaintiff's sister had been living and portion D of the farm, the unmarked area remained with the 1st defendant and the plaintiff got portion E of farm 3380 and portion J of farm 1848. Portion J was sold to him by ZCCM I.H at K 14 million. According to the plaintiff, the subdivision of farm 3380 was not authorised.

4.0 1ST AND 2ND DEFENDANTS' CASE

4.1 The 1st and 2nd defendants' defence rested on the evidence of the 2nd defendant. The 2nd defendant's evidence was that, from 1991 to 1996 he was employed as General Manager of ZCCM – Nkana Division. From 1996 to 1997 he worked as a Consultant Engineer for the same company. He learnt about the sale of the Chibuluma Chati Farm through management briefs. After Mulungushi Investments handed over the farm to the MBOT, two members of the MBOT, Chisakuta and Kangwa

requested him to join them because the team needed finances and guidance on how to operate the farm.

4.2 At the first meeting he had with the MBOT, he was appointed Chairman of the team and Chisakuta as Secretary. He was tasked to look for credible people to bring technical, financial and material assistance to the farm. That is how; he introduced William Musama, Bonnie Mutale, Douglas Bhela and Samuel Aaron Phiri to the team. The MBOT approved of the inclusion and there was no objection from the plaintiff who also attended those meetings. After the expansion of the group, it was realised that the business could not be managed by the MBOT composed of individuals. The expanded MBOT thus agreed to incorporate the 1st defendant company to run farm 3380 and own all its assets. The idea was that the 1st defendant company would employ managers who would report to the Chibuluma Chati Farms Limited Board of Directors. Each member was given the role of director or shareholder.

4.3 According to the 2nd defendant, ZCCM was aware of the said developments because it started sending correspondence directly to the 1st defendant company. The shares in the 1st

defendant company were allotted in accordance with the individual's capacity to pay. The 2nd defendant's further evidence was that, Chibuluma and Chati were two different farms. Chibuluma was the main farm, while Chati was a training school. Portion J of Farm No. 1848 was annexed to Chibuluma Farm at the time ZCCM audited its surface rights. So the offer to the MBOT included portion J.

4.4 The 2nd defendant denied coercing the plaintiff to sign the Shareholders Register. Stating that, all the MBOT members were aware of the incorporation of the 1st defendant company and that after its incorporation, the MBOT would cease to exist.

4.5 He stated further that, at the time of incorporation, the contract of sale had not yet been entered into although the offer letter was in existence. Later, the contract of sale was signed. The purchase price of the farm was K250 million with a condition to pay 10% of the purchase price and the balance in instalments. The deposit of K25 million was paid in two instalments of K19 million and K6 million. He paid K4.8

million through a personal cheque to ZCCM as contribution towards the K25 million.

4.6 After, paying the 10% deposit, the shareholders held meetings to discuss how they would raise the balance of the purchase price. They decided to sale Chati farm at K70 million. Chibuluma farm was by agreement of the interested parties subdivided and offered to the existing shareholders including the plaintiff, D. Bhela, Kris Karla, B. Mutale and Ernest Mpala Pilula. The proceeds of sale of portion J were used to relieve the management of the debt due to the farm employees.

4.7 He explained that, in order to pay off the outstanding balance of K157 million, three members volunteered to raise the money. It was agreed that those who had money would pay for those who did not have and enter into personal agreements for repayment. The 3rd defendant Kris Karla paid K66 million to cover his and the plaintiff's portion. He (2nd defendant) paid K60 million to cover his and B. Mutale's portion. Andy Ndubila paid K31 million to cover his and D. Bhela's portion. The K66 million plus K31 million was deposited by the plaintiff to the seller. The K60 million was paid separately.

4.8 After, subdividing the farm, the owners begun farming on their own portions. The only remainder of farm 3380 which was free for all five owners was the dam.

4.9 The 3rd defendant started running Umulu Bar and Restaurant on his area and employed the plaintiff as Bar Manger.

4.10 Further evidence was that, a surveyor by the name of Thomas Zulu had been engaged to evaluate farm 3380. The 2nd defendant's contribution of K49 million translated into 198 hectares of land without the buildings. The plaintiff's claim of terminal benefits of K29 million and K39 million was converted into a debt swap and the board decided to give him portion J in lieu of the amounts due to him.

4.11 After he (2nd defendant) got his portion, he sold part of it to B. Mutale and obtained title deeds for the remaining portion. Between 2014 to 2015, he suffered a lot of interruptions, confrontations and harassment from the plaintiff which led him to obtain a restraining order against the plaintiff. The plaintiff's animals damaged his crops. The plaintiff also trespassed upon his land, cultivated some crops and leased

out part of the land. At one point, the plaintiff pointed a gun at the 2nd defendant's workers.

4.12 The 2nd defendant denied having kept cattle at the farm illegally, saying he took 5 heads of cattle to the farm after the farm management allowed people to graze their animals there at a fee.

5.0 3RD and 4th DEFENDANTS' CASE

5.1 The 3rd defendant testified on his own behalf and on behalf of the 4th defendant as follows: He was employed as Projects Manager by ZCCM. He joined the 1st defendant company as shareholder upon making monetary contribution towards the purchase of farm 3380.

5.2 In 2002 ZCCM wrote a letter addressed to and the 2nd defendant requesting for payment of K157 million being the balance of the purchase price of farm 3380. At that time, most members of the MBOT had withdrawn leaving only 6 members. The property was divided into 6 portions. His portion of land was valued at K53 million including buildings. He also paid K13 million and 14 million for the plaintiff's portion of land. In total, he paid K66 million towards the

purchase price of the farm in issue by cheque drawn on Karlsons Company Limited the (4th defendant) to ZCCM. He built a guest house, bar and restaurant on his portion of the land which he and the 4th defendant started running under the name and style of Umulu Bar and Restaurant. At some point, the plaintiff was employed as Manager of Umulu Bar and Restaurant.

5.3 In 2005, the plaintiff started interfering with the operations of the business which resulted in the 3rd defendant taking legal action against him.

5.4 In 2008, when the 3rd defendant informed the Chibuluma Chati, Farms Limited Board of Directors that the plaintiff had not paid for his portion of land, the plaintiff then requested to be given portion J and that he would leave 4 hectares thereof as an easement for Umulu.

5.5 On 24th March, 2013 the plaintiff wrote to Mr. Bhela one of the shareholders of the 1st defendant informing him that he was taking over the 3rd defendant's land since he was a foreigner. He forcefully took over the farm and started operating the Umulu business. The 3rd defendant stated that he had

invested about K800,000 in that business and that all documents and receipts were left at the business premises. The 3rd defendant stated further that the plaintiff was harassing all the workers at Umulu. He prayed that he be given portion J and portion E of farm 3380 as the plaintiff had not paid for it.

6.0 LOWER COURT'S DECISION

6.1 Upon considering the evidence before her, the learned trial Judge found that, the original members of the MBOT were the plaintiff, M. Chisakuta, F. Nhuwa and P. Kangwa. This group later expanded and some members left from time to time. The remaining members of the MBOT were DH Bbela, K.C karla, E. M. Pilula, A. Ndubila, M. Mutale and the plaintiff. That the incorporation of the 1st defendant company was agreed by the members of the MBOT who were present at that time, as it was seen fit to incorporate an entity with legal personality which would be used as a vehicle through which the MBOT could operate. The MBOT became part of the 1st defendant and it ceased to exist as such from the date of incorporation. That

none of the MBOT members were forced or coerced to join the proposed company as shareholders.

6.2 The lower court also found that, the assignment of farm 3380 was made in the name of the 1st defendant and was signed by the plaintiff and consequently the Certificate of Title was issued in the name of the 1st defendant.

6.3 As regards the question whether the subdivision of the farm was unlawful, the court found that, it was done pursuant to a company resolution and the plaintiff did not object to the farm being subdivided and shared amongst the shareholders. The sharing of the farm was compensation or reimbursement for their monetary contribution towards its purchase. In fact, the plaintiff benefitted from the resolution by acquisition of portions J and E. In view of this, the subdivision and sharing of the farm was lawful.

6.4 The court further also found that, there was no breach of the contract of sale as there was no evidence that the farm was sold to a third party because the evidence showed that the 1st defendant was in fact the purchaser. The trial court dismissed

the claim that, the Certificate of Title for the farm was acquired fraudulently as fraud was not pleaded.

6.5 Concerning the plaintiff's alternative argument that the farm was not shared fairly or equitably distributed since he received a small portion, the court found that the plaintiff seemed to have gotten the smallest share of the farm but his evidence on the criteria used to share the land was insufficient. The learned Judge accepted the 2nd defendant's evidence that the shares were according to the contributions made by each party.

6.6 The court further rejected the plaintiff's contention that portion J was acquired in a private transaction between the plaintiff and ZCCM as it was not part of Chibuluma Chati Farm because the evidence showed that he acquired portion J of farm 1848 on recommendation by the 1st defendant.

6.7 The court also dismissed the claim by the plaintiff that the 2nd defendant took away cattle and other assets belonging to the farm due to lack of evidence.

6.8 Turning to the 1st and 3rd defendant's counter claim, the court found that the 1st and 3rd defendants are the legal owners of

farm 3380 and subdivision D respectively for which they have Certificates of Title.

6.9 As regards the claims for damages for trespass and assault and the court found that the plaintiff had trespassed onto the 3rd defendant's land when he forcefully took possession of the land and that he also physically confronted the 3rd defendant and chased him away from the farm. This amounted to assault on the 3rd defendant and he was awarded damages accordingly.

6.10 Turning to the claim for mesne profits, the court found that the plaintiff had taken occupation of the 3rd defendant's land without paying him rent and therefore he was entitled to mesne profits. The court further issued an order of injunction restraining the plaintiff and his agents from interfering with the ownership of the 3rd defendants" land.

6.11 The 1st and 3rd defendant were awarded interest on all sums due at the Bank of Zambia prescribed rate from the date of Judgment until payment and legal costs.

6.12 The learned trial Judge declared the 2nd defendant as the legal owner of subdivision C and awarded him damages for trespass

and an order of injunction restraining the plaintiff and his agents from entering upon his land plus costs.

6.13 The 4th defendant's counter claim for K14,200,000, US$ 25,000 and US$ 1,885,000, was dismissed for lack of evidence. The Judge however awarded damages to the 4th defendant for loss of business at Umulu during the period when the plaintiff took possession of the business premises. The claim for stock, equipment and furniture was dismissed due to lack of evidence.

7.0 AMENDED APPEAL

7.1 The appellant filed in the following amended grounds of appeal:

i. *The learned trial court erred in law and fact when it held that the MBOT and Chibuluma Chati Farms Limited became one when the MBOT was composed of natural legal persons and Chibuluma Chati Farms Limited was an artificial legal person.*

ii. *The court below erred in law and fact when it held that on the basis of the evidence before it, it would not find that the acquisition of farm 3380 by the 1st defendant was unlawful when the said farm was offered and exclusively handed over to the appellant P. Kangwa, M. Chisakuta*

and F. Nkhuwa as MBOT by Mulungushi Investments Limited.

iii. *The learned trial court erred in law and fact when it held that there was no evidence that the subdivisions were sold to the shareholders as the witness testified that the farm was shared when the evidence from the Lands Register showed that there was consideration in the assignments of subdivisions C & D of farm No. 3380 from the 1st respondent to the 2nd and 3rd respondent respectively.*

iv. *The learned trial court erred in law and fact when it found as fact that the sharing was done through a resolution of the company when no such resolution was produced in the court below.*

v. *The learned trial court erred in law and fact when it held that the fraud was neither pleaded nor proved when the pleadings clearly showed that the appellant had pleaded fraud as shown in the various paragraphs of the amended statement of claim in the consolidated action as well as the relief to cancel any title deed issued pursuant to the unlawful subdivision and had proved the same.*

vi. *The learned trial court below erred in law and fact when it held that the appellant had failed to prove that the distribution of farm 3380 was unfair or inequitable when the court below found as a fact that the appellant was given the smallest portion.*

vii. *The learned trial court erred in law and fact when it held that the 1st respondent lawfully acquired farm 3380 when no contract of sale existed between Mulungushi Investments Limited or ZCCM and the 1st respondent.*

viii. *The court below erred in law and fact when it awarded the 3rd respondent damages for assault which was not pleaded.*

ix. *The learned trial court erred in law and fact when it awarded the 3rd respondent damages for trespass in respect of land that was offered and sold to the appellant, P. Kangwa, M. Chisakuta and F. Nkhuwa as MBOT by Mulungushi Investments Limited.*

x. *The learned trial court erred in law and fact when it awarded the 3rd respondent mesne profits when the same was not well articulated as found by the court below and in respect of land that was offered and sold to the appellant, P. Kangwa, M. Chisakuta and F. Nkhuwa as MBOT by Mulungushi Investments Limited.*

xi. *The learned trial court below erred in law and fact when it granted the 1st respondent an order of injunction against the appellant when such a relief was not pleaded.*

xii. *The court below erred in law and fact when it granted the 3rd respondent an order of injunction against the appellant in respect of land that was offered and sold to the appellant, P. Kangwa, M. Chisakuta and F. Nkhuwa as MBOT by Mulungushi investment Limited.*

xiii. *The court below erred in law and fact when it found as fact that the appellant took possession of the 4th respondent's business in the absence of any evidence or at all but solely based on the appellant's demeanour.*

xiv. *The court below erred in law and fact when it held that the 4th respondent must have suffered loss of business in the absence of evidence but on assumption of the court below.*

xv. *The court below erred in law and fact when it awarded the 2nd respondent damages for trespass in respect of land that was offered and sold to the appellant, P. Kangwa, M. Chisakuta and F. Nkhuwa as MBOT by Mulungushi Investments Limited.*

xvi. *The learned trial court below erred in law and fact when it granted the 2nd respondent an order of injunction against the appellant in respect of land that was offered and sold to the appellant, P. Kangwa, M. Chisakuta and F. Nkhuwa as MBOT by Mulungushi Investment Limited.*

8.0 APPELLANT'S ARGUMENTS

8.1 The appellant's counsel relied on the heads of argument filed on 14th October, 2019 and 23rd July, 2020. Grounds 8 and 11 were abandoned. In support of ground one, it was submitted that the contract of sale was only binding between P. Kangwa, M. Chisakuta, F. Nkhuwa and E. Mwanza (original MBOT) and

ZCCM as they were the only parties to the contract and they had made a substantial payment of K19,200,000 towards the 10% of the purchase price. The MBOT never acted on behalf of or in the name of the 1st respondent at the time Chibuluma Chati Farms was handed over to them by Mulungushi Investments Limited in 1996.

8.2 Counsel submitted further that, according to **Section 28 of the Companies Act,** the 1st respondent was required to adopt a contract entered into on its behalf by ordinary resolution not later than fifteen months after its incorporation but no such resolution was produced. According to counsel, Chibuluma Chati Farm Limited and the MBOT never became one at law.

8.3 Grounds 2 and 7 were argued together as follows: the 1st respondent did not purchase farm 3380 from the original MBOT because that would have been in a breach of clause 7 (b) of the contract of sale. According to counsel, the 1st respondent only took over the debt of the outstanding purchase price of the farm on behalf of the MBOT. The 1st respondent could not have paid for the purchase of the farm which it was not offered. It was further argued that the money

the respondents' paid was for rent and sale of assets that were on the farm.

8.4 Counsel contended that the acquisition of the farm by the respondents was unlawful as they had no contract of sale with ZCCM. The lower court misdirected itself when it held that the contract signed by ZCCM and the appellant was invalid. The issue which the court needed to determine was whether the respondents were part of the MBOT in the offer letters of 8th August 1996 and 23rd April, 1998. The issue of whether the purchase price was partly paid by the respondents should not have influenced the court to hold that the 1st respondent was the lawful owner of the farm.

8.5 Further in his submissions counsel, insinuated that, the MBOT was taken over by the 1st respondent company and this is supported by the fact that William Musama signed the contract of sale in 2006 on behalf of ZCCM as Company Secretary after payment of the full purchase price. There was a conflict of interest because William Musama was a Shareholder, Director and Company Secretary of the 1st respondent. Counsel suggested that, the only recourse for the

respondents was to sue the appellant for recovery of the monies they paid on behalf of the appellant to ZCCM. The taking over of the debt by the 1st respondent did not in any way mean that the farm was sold to the 1st respondent.

8.6 The essence of the argument in support of ground 3 is that the farm was sold to the 2nd and 3rd respondents and not merely shared as held by the court below. This finding by the court was not supported by any evidence on record and it should be set aside in accordance with the principle espoused in the case of **Nkhata and four others v. The Attorney General.** (1)

8.7 In ground 4, counsel made reference to **Section 216 of the Companies Act and section 160(2) of the repealed Companies Act,** to argue that since there was no resolution of the Company to sell land to its shareholders, the findings of fact by the court below were perverse and should be set aside in line with the authority of **Ndongo v. Moses Mulyango, Roostico Banda.** (2)

8.9 In support of ground 5, counsel submitted that, the appellant had pleaded fraud, mistake or impropriety in the various paragraphs of the consolidated statement of claim on which he

relied to seek an order that any title deed issued pursuant to the unlawful subdivision be cancelled. Our attention was drawn to the case of **Anti-Corruption Commission v. Barnet Development Corporation Limited** [3] in support of the argument that a Certificate of Title can be cancelled for fraud or impropriety in its acquisition.

8.10 Counsel contended that the Certificate of Title in respect of the farm in the 1st respondent's name was acquired through intimidation and clout by the respondents through the various senior management positions they held in ZCCM and it ought to be cancelled.

8.11 In ground 6, counsel's argument was that the distribution of the farm was unfair or inequitable as the appellant was given the smallest portion. He submitted that subdivision J of farm 1848 which the appellant acquired in a private arrangement between him and ZCCM was not part of Chibuluma Chati Farms. Counsel contended that, its inclusion as part of the farm was used to deprive the appellant of an equitable share of farm 3380. He went on to show that the contributions towards the purchase price were as follows:

i. The appellant, P.Kangwa M. Chisakuta and F. Nkhuwa: K19,200,000.00

ii. The appellant K69,000,000.00 debt swap

iii. 2nd respondent K4,800,000.00

iv. 2nd respondent and Boniface Mutale K 60,000,000.00

v. 3rd respondent and appellant K66,000,000.00

vi. Andy Ndulubila and Douglas Bhela K31,000,000.00

Total **K250,000,000.00**

8.12 He submitted that the contribution of K69 million was used to acquire the Certificate of Title.

8.13 Counsel submitted further that, the 3rd respondent was not a shareholder in the 1st respondent company and was therefore not entitled to a share of the farm. He referred to **Section 48 of the repealed Companies Act** to support this submission.

8.14 Grounds 9 and 15 were argued together that, since the farm was sold to the appellant who was part of the MBOT, he cannot be said to have trespassed on his own land.

8.15 In support of ground 10, Counsel submitted that no evidence was led in the Court below to show that the appellant was a tenant of the 3rd respondent. Citing the case of **Peter Militis v.**

Wilson Kafuko Chiwala, [4] counsel maintained that it was a misdirection on the part of the lower court to award the 3rd defendant mesne profits which were not well articulated.

8.16 Grounds 12 and 16 were argued together that; the 2nd and 3rd respondents were never offered the farm. Therefore, it was a misdirection on the part of the court to grant an order of injunction against the appellant as farm 3380 was sold to him and the MBOT.

8.17 Grounds 13 and 14 were argued together as follows: the 4th respondent could have produced documentary evidence of financial statements to prove that it was a going concern and that it lost out on business. It was not for the court below to assess the same based on the credibility and demeanor of the witnesses. It was submitted that, the 4th respondent could not have suffered loss of business when it had failed to prove its claim for stock, equipment and furniture or its monetary value because the said items are needed in the running of a business. The appellant finally prayed that the appeal be allowed.

9.0 RESPONDENT'S ARGUMENTS

9.1 The respondents relied on the heads of argument filed on 13th November, 2019 and 13th November, 2020. In response to ground one, counsel for the 2nd respondent began by acknowledging that farm 3380 was initially offered to the MBOT which comprised of P. Kangwa, M. Chisakuta, F. Nkhuwa and E. Mwanza. He went on to state that, some members of the MBOT were bought out whilst others just left. He submitted that when the 1st respondent was incorporated, the initial MBOT members who included the appellant subscribed for shares in the company. The appellant attended meetings of the 1st respondent on how they would raise the money for the purchase price. Therefore, the trial court was on firm ground when it held that the MBOT and Chibuluma Chati Farm Limited became one or the MBOT was converted into the 1st respondent as it was done with full knowledge and participation of the appellant.

9.2 Further, the purchase price was paid by the 1st respondent and ZCCM knew it was dealing with the 1st respondent and

not the MBOT. This explains why the Certificate of Title was issued in the 1st respondent's name.

9.3 In response to grounds 2 and 7, counsel submitted that the findings of the lower court were not perverse as the 1st respondent had been incorporated to take over the responsibility of administering the farm and raising payments. There was no tenancy agreement to show that the 1st respondent was a tenant of the appellant or MBOT.

9.4 Counsel argued further that, the contract of sale cannot dictate how the purchaser should deal with the property once title has passed. Therefore, an argument that the contract of sale had special conditions that prohibited the sale or resell of the said land cannot hold. Notwithstanding, the provisions of the contract of sale, the Assignment was signed by the Appellant himself on behalf of the 1st Respondent. In the absence of fraud or misrepresentation the appellant is bound by the contract and assignment. Therefore, the assignment and subsequent issuance of the Certificate of Title to the 1st respondent is not in any way invalid.

9.5 The appellant failed to show evidence of intimidation on the part of the respondent. So the allegation of forcible takeover of the contract of sale cannot stand as the said Musama at the time of the sale was not secretary of the 1st respondent and the allegation of conflict of interest was not pleaded.

9.6 Further, the argument that the respondents ought to have sued for debt recovery of monies paid to ZCCM on behalf of the MBOT is misplaced. There was no agreement for assumption of debt and repayment of any monies and also such a position was never pleaded by the appellant and no evidence was laid by him on the issue.

9.7 Counsel argued that, the 3rd ground of appeal has merit because evidence on record shows that the farm was distributed to the shareholders upon resolution and not sold.

9.8 In response to the 4th ground, he submitted that, the appellant relied on the provisions of the Companies Act which has been repealed. It was further submitted that the actions of the shareholders in this matter were agreed upon by all the members including the appellant as seen by the documents showing the minutes of the 1st respondent. We were referred to

the case of **Gerardus Adrianus Van Boxtel v. Rosalyn Mary Kearney (a minor by Charles Kearney her father and next friend)** [5] where it was held that: -

> ***"Shareholders enjoy as a matter of right, overriding authority over the company's affairs. Where all the shareholder's happen to be present at a meeting where an intra vires decision is passed with the unanimous concurrence of all of them, then even if the meeting was defective..., the business transacted is valid as a member's decision."***

9.10 Counsel submitted that whether the laid down procedure was followed or not, the learned trial Judge was on firm ground in holding as she did because the shareholders had agreed.

9.11 On ground 5, our attention was drawn to **Volume 3 of Halsbury Laws of England 4th Edition** where it has been stated that: -

> ***"Where a party relies on any misrepresentation, fraud, breach of trust, willful default or undue influence by another party, he must supply the***

necessary particulars of his allegation in his pleadings."

9.12 Reference was also made to the case of **Gondwe v. Ngwira** [6] where it was held *inter alia* that:

"In civil cases fraud must be proved to a standard higher than a mere balance of probabilities. Fraud usually takes the form of a statement that is false or suppression of what is true..."

9.13 It was submitted that from the pleadings and evidence on record, the appellant did not show any fraudulent action on the part of the respondents neither did his pleadings disclose a claim for fraud or suppression of the truth by the respondents. Reliance was also placed on Order 18 Rule 12 sub rule 18 of the Rules of the Supreme Court 1999 Edition which provides as follows: -

"Fraud-Fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

9.14 As regards the 6th ground, it was submitted that the farm was shared according to the shareholder's contributions and area of interest at the time of completion of sale. The land and the buildings were also considered in sharing. The land with more buildings was more valuable than undeveloped land, hence value was put to the buildings.

9.15 Portion J of farm 1848 was sold as part of Chibuluma Chati Farm as evidenced by the letter from ZCCM to Kalulushi Municipality which clearly states that portion J of Farm 1848 was sold together with Farm 3380. The appellant was given portion J of Farm 1848 as a debt swap for his terminal benefits and it was paid within the K250 million. There was never a separate transaction between the appellant and ZCCM.

9.16 As regards the issue whether the 3rd respondent was a member of the 1st respondent, counsel submitted that the 3rd respondent was a shareholder of the 1st respondent and it was the duty of the secretary to ensure that the list of shareholders at PACRA was amended. According to the testimony of DW1, the 3rd respondent paid for his subscription to shares in the 1st

respondent, he attended meetings and even acted as Chair for the 1st respondent. The 3rd respondent's names also appear in the appellant's affidavit as a member of the MBOT.

9.17 Counsel contended that the rationale for sharing the farm in the manner that it was shared is sufficiently explained in the evidence before court.

9.18 It was argued further that the MBOT comprises the shareholders of the 1st respondent who currently are the appellant, the 2nd Respondent, the 3rd respondent, Mr. B. Mutale and Mr. D Bbela, all other members or shareholders have no interest in disputing how the farm was shared or how the subdivisions were arrived at and do not intend to have the subdivisions set aside or returned to the MBOT; as they are pleased and have each moved on to work individually on their portions of land. In support of this, counsel referred to the case of **Foss v. Harbottle** [7] where the court held:

> ***"There exists a majority rule principle" which stands for the proposition that the decisions and choices of the majority will always prevail over those of the minority. Thus if a decision is passed by the***

majority shareholders it will be binding on the rest of the Members of the company."

9.19 In light of this, we were urged to dismiss the appellant's prayer to set aside the subdivision as the portions were agreed upon by all the shareholders including the appellant.

9.20 In response to the 9th and 15th ground of the appeal, counsel for the respondent submitted that the trial court was on firm ground when it awarded damages for trespass as the appellant had no right to evict and take possession of the 2nd and 3rd respondent's parcels of land without their consent.

9.21 In response to the 10th ground of appeal, counsel submitted that the court was on firm ground when it awarded mesne profits as the evidence on record shows that the appellant forcefully evicted the 3rd respondent from his portion of land and took over the 4th respondents' business. The case of **Valentine Webster & Another v. Attorney General** [8] was cited on the definition of mesne profits.

9.22 In opposition to grounds 12 and 16 the contentions were as follows: when the court found that the 1st respondent legally bought the farm, it was logical to declare the 2nd and 3rd

respondents as the legal owners of subdivisions C and D of Farm 3380 respectively as they had acquired those rights after making contributions towards the purchase of the farm. Therefore, the learned Judge was on firm ground when she granted the injunction in favor of the respondents against the appellant.

9.23 In response to grounds 13 and 14, it was submitted that the 4th respondent was running a viable business on the said land when the appellant illegally took possession of the 3rd respondent's premises.

9.24 It was further submitted that, the appellant assaulted and threatened to kill the 3rd respondent with a gun. Therefore, the evidence that all the documents for the said business were left at the premises is cogent as the 3rd respondent had no time to remove documents from the premises where the 4th respondent's business was operating.

10.0 GROUND OF APPEAL UNDER APPEAL No. 123/2020

10.1 The sole ground of appeal advanced under appeal no.123/2020 by the appellant Edson Mwanza, was that: *The court below erred in law and fact when it declined to grant the*

application for an order to set aside the writ of possession issued and for an order to partially set aside the order dated 8th May, 2019.

11.0 APPELLANT'S ARGUMENT UNDER APPEAL NO.123/2020

11.1 The substance of the appellant's arguments were that; the respondent never claimed vacant possession of farm 3380 and or the remaining extent of the said farm in the court below. After delivering the judgment on 2nd May, 2019 the court became *functus officio* and should not have entertained the addition of an eviction order to the said judgment. Sneaking in the order of eviction was irregular and it should be set aside.

11.2 Counsel further argued that, since the order of eviction was erroneously made, the writ of possession should be set aside as well. This is because the appellant was not notified of the proceedings on the order of possession of farm 3380 and had no opportunity to make representations that subdivision E of farm 3380 was given to him. The respondents should have enforced the order of injunction and not take out a writ of possession which was irregular and riding on a sneaked in order of eviction.

12.0 RESPONDENT'S ARGUMENT UNDER APPEAL NO.123/2020

12.1 In opposition, counsel for the respondent stated that the respondent complied with the law when the writ of possession was issued against the appellant. The writ of possession was directed at evicting the appellant from subdivision D of farm 3380. The appellant did not challenge the order of injunction and the order granting leave to issue writ of possession dated 10th May, 2019. According to counsel, the appellant should have applied to set aside execution and not to stay that which had already taken place.

13.0 OUR DECISION

13.1 Having considered the record of appeal and counsels' written and oral submissions, we shall deal with grounds, 1,2,3,5,6,7,9,12,13,15 and 16 together as they are cross cutting. Grounds 4, 10 and 14 will be dealt with separately.

Grounds 1 – 7, 9, 12, 13 15 and 16

13.2 The appellant has alleged that the acquisition of farm 3380 by the 1st respondent was unlawful as it was offered to the MBOT. Further that the contract of sale was between the MBOT and ZCCM and the 1st respondent was not privy to it. Tied to this,

is the argument that the takeover of the MBOT by the 1st, 3rd and 4th respondents' was unlawful.

13.3 Our view is that although farm 3380 was initially offered to the original MBOT which comprised of P. Kangwa, M. Chisakuta, F. Nkhuwa and the appellant, the MBOT decided to co-opt more people into their team in order to raise capital and provide technical skill on farm management. This led to the group expanding as more people such as the 2nd defendant and others came on board. Since the MBOT comprised of individuals, the members of the MBOT decided to incorporate a company with legal personality as a vehicle through which they would manage the farm and deal with other entities. This resulted in the formation of the 1st respondent company. The evidence on record shows that the appellant and other shareholders had meetings to discuss the incorporation of the 1st respondent and there was no objection by the appellant. After incorporation of the 1st respondent company, all MBOT members subscribed for shares in the company. We see no evidence of the appellant being forced or coerced to subscribe for shares in the 1st respondent. In any case, he was a willing participant in the meetings of the company.

13.4 It is trite law that shareholders and directors of a company are separate entities from the company itself and that a company is a legal entity; (see **Salomon v. Salomon** [10]). We therefore hold that the 1st respondent had also become a member of the MBOT in its own right. The lower court therefore misdirected itself when it found that the MBOT seized to exist as it was incorporated into the 1st respondent and we set aside that finding as it was wrong in law.

13.5 We note that the offer letter for farm 3380 was addressed to the individuals making up the original MBOT and that the contract of sale was made between ZCCM and MBOT without mentioning any names. We agree with the trial court that this was an irregularity which made the contract between ZCCM and MBOT invalid since MBOT was an unincorporated association. However, it can be seen from the evidence on record that the 1st respondent was then incorporated as a legal entity to transact on behalf of the expanded MBOT.

13.6 In the minutes of the first board meeting dated 8th December, 1996, it was resolved that the 1st respondent would take over the debt of K250 million for the purchase price of the farm.

This clearly shows that the 1st respondent had become part of the MBOT. That is why the assignment of the farm was made in the names of the 1st respondent and signed by the appellant because *equity deems as done that which ought to have been done*. Later, the title deeds were issued in the name of the 1st respondent. The appellant himself was involved in the process and cannot now turn and say that the MBOT was taken over by the respondents through coercion.

13.7 It is important to note that the seller was aware of the expansion of the MBOT as shown in the letter on page 246 of the record; claiming payment of the balance from Messrs. E.M. Pilula, E. Mwanza (the appellant) and Kris Karla. Page 247 of the record shows that the seller issued a receipt to the 4th respondent for part payment of K66 million towards the purchase of the farm in issue. On page 248 is a letter from the 1st respondent to the seller that they had finished paying the full purchase price and indicating the amounts contributed by the 2nd respondent, 4th respondent and A. Ndulubi. The seller had no objection to this and therefore issuance of the Title Deeds to the 1st Respondent was proper. The instruction to subdivide the farm came from the 1st

respondent who was the registered owner as shown on page 273 of the record. This was also in order, so we can safely assume that the right procedures for subdividing the land were followed.

13.8 In the case of **Mwenya and Randee v. Kapinga,** it was held *inter alia* that:

> ***"For a note or memorandum to satisfy Section 4 of the Statute of Frauds, the agreement itself need not be in writing. A note of Memorandum of it is sufficient, provided that it contains all the material terms of the contract such as names or adequate identification of the parties, the description of the subject matter and the nature of the consideration."***

13.9 In the present case, the documents referred to in paragraph 13.7 are sufficient memoranda indicating that the seller had agreed with the expanded MBOT to sell them the farm.

13.10 Having acquired the Certificate of Title in its name; the 1st respondent became the legal owner of the farm. In the case of **Anti-Corruption Commission v. Barnett Development Corporation Limited,** it was held that, according to ***"Section***

33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of land by the holder of the certificate.....But under section 34, a certificate of title can be challenged and cancelled for fraud or for reasons of impropriety in its acquisition."

13.11 The authorities of **Gondwe and Ngwira, Halsbury's Laws of England vol 3, 4th edition** and **Order 18 Rule 12 sub rule 18 of the rules of the Supreme Court** indicate that the appellant should have specifically pleaded fraud with particulars and proved it to a degree higher than a balance of probability but he failed to do so.

13.12 As regards the argument that the contract of sale proscribed selling of the farm, we take the view that once, a party to a contract acquires land, it is left to their discretion as to how to deal with that land. Contrary to the appellant's assertion that the land was subdivided and sold to the shareholders, we find no evidence to support the allegation that the land was outrightly sold to the respondents by the 1st respondent. However, there was sufficient evidence to show that the farm was shared amongst them proportionate to their contributions

towards the purchase price and that in the assignments the contributions were indicated as consideration. Clearly no valuation reports were produced so we cannot tell the exact values of the various subdivisions.

13.13 Coming to the argument that the farm was shared unfairly or inequitably, in the meeting held on 16th June, 2003 under matters arising, the farm was said to be approximately 489 hectares. Only 319 hectares were distributed as follows:

M. Pilula 137 hectares
B. Mutale 67 hectares
D.H Bhela 55 hectares
E. Mwanza 30 hectares
K.C Karla 30 hectares.

13.14 The undistributed land was 170 hectares which was to be distributed to all named shareholders. The appellant, who was present in the meeting, did not object to sharing the farm in that manner.

13.15 We cannot fault the learned trial judge for holding that the farm was shared in accordance with the financial investments made by each party towards the purchase of the farm and that the appellant did not articulate well the

criteria used to share. Moreover, getting a small portion, does not necessarily mean that the sharing was unfair.

13.16 The awards of damages for trespass to the 2nd and 3rd appellants were based on the cogent evidence on the record that the appellant trespassed. We note that the 2nd and 3rd respondents hold Certificates of Title to their portions of land which were not successfully impugned; see the case of **Anti-Corruption Commission.** [3] Under the circumstances, the injunctions were in order.

13.17 The issue of conflict of interest was not pleaded in the lower court and it is trite law that it should not be raised on appeal. We therefore will not consider it.

13.18 For the foregoing reasons, we find no merit in grounds 1,2,3,5,6,7,9,12,13,15 &16.

13.19 In ground 4, the appellant has challenged the lower court's Judgment for inferring that a written and signed company resolution to share the farm was made when the same was not exhibited. We agree with counsel for the appellant that since the resolution was not exhibited, the lower court

misdirected itself when it held that such a resolution existed.

13.20 However, we accept the respondent's submissions that even without a company resolution, the majority shareholders and other shareholders of the company and the MBOT agreed that the farm be subdivided and shared amongst the interested parties. See **Gerardus Adrianus Van Boxtel** [5] case quoted herein on page 32.

13.21 We therefore hold that there was a member's decision to subdivide and share the land in accordance with the interested parties contributions to the purchase price. We also rely on the **Foss v. Harbottle** case. Ground 4 is meritorious as we have held that there was no formal company resolution.

13.22 Turning to the argument on mesne profits, in the 10th ground of appeal; in the case of **Peter Militis v. Wilson Kafuko Chiwala,** [4] the Supreme Court held *inter alia* that:

"A landlord may recover in an action for mesne profits damages which he has suffered through being out of possession of the land. Mesne profits being damages for trespass, can only be claimed from the date when the

defendant ceased to hold the premises as a tenant and became a trespasser. The action for mesne profits does not lie unless either the landlord has recovered possession or the tenant's interest in the land has come to an end."

13.23 It is clear from the foregoing authority that mesne profits can only be awarded to a landlord where a tenant overstays after the end of the tenancy and becomes a trespasser. In this case, there was no evidence to show that the appellant was ever a tenant of the 3rd respondent. We therefore agree with counsel for the appellant that in the absence of such evidence, the lower court misdirected itself when it awarded mesne profits. We therefore find merit in ground 10 and it succeeds.

13.24 On ground 14, we are of the view that it was evident that the 4th respondent was running a bar and restaurant on the 3rd respondent's portion of the farm but was forcibly evicted by the appellant. This evidence was not rebutted by the appellant. The 4th respondent therefore had proved its claim for general damages for loss of business on the balance of probabilities; see **Khalid Mohamed v. Attorney General.**[9]

The special damages which by law were required to be specifically proven were rightly dismissed. We therefore find no merit in ground 14 and uphold the lower courts determination that the general damages for loss of business be assessed by the Deputy Registrar.

13.25 Turning to the ground of appeal that the lower court erred by declining to set aside the writ of possession and to partially set aside the Order dated 8th May, 2019; we are of the view that the Order of injunction dated 8th May, 2019 filed by the respondents' included a statement which was not made by the lower court in the Judgment appealed against and that, the "plaintiff himself, servants, employee or agents be removed from..." The Order was date stamped 8th May, 2019 by the court but signed on 10th May, 2019. On the same date, the 1st and 3rd defendants obtained an "Ex-parte order for leave to issue a writ of possession pursuant to the Judgment of the court dated 4th May, 2019 and Order 45 rule 3 of the rules of the Supreme Court."

13.26 It is clear that in the said Judgment, no order of possession was made, except that the appellant was restrained from

interfering with the respondents' quiet enjoyment of the land. The ex-parte order of possession was therefore erroneously made as it was not predicated on an order of possession. This ground of appeal therefore succeeds.

14.0 CONCLUSION

14.1 The appellant has succeeded on only 3 out of 15 grounds of appeal. We are alive to the law that costs are in the discretion of the court, which discretion should be exercised judicially. Normally costs follow the event but where an appellant's success is more apparent than real, he may not be awarded costs. The appellant has succeeded on mesne profits wrongfully granted, so he will not pay mesne profits. However, he will not be paid anything by the respondents. He has also succeeded on the writ of possession wrongfully granted but he is still restrained from disturbing the respondents' peaceful enjoyment of their pieces of land. The appellant also succeeded on the ground of lack of a formal company resolution but we have held that there was a valid member's agreement. His success is more apparent than real. Granting him costs under the

circumstances, will not meet the ends of justice as the respondents' are entitled to damages.

14.2 We therefore award costs here and in the court below to the respondents', the same to be taxed in default of agreement.

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M.K. KONDOLO
COURT OF APPEAL JUDGE

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

.....

B.M. MAJULA
COURT OF APPEAL JUDGE