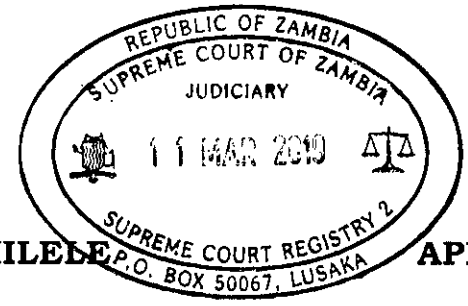
IN THE SUPREME COURT OF ZAMBIA **Appeal No.33/2016**
HOLDEN AT NDOLA
(Civil Jurisdiction)



BETWEEN:

HUSTY MOFFAT MWACHILELE **APPELLANT**

AND

LUSAKA CITY COUNCIL **RESPONDENT**

CORAM: **Mambilima CJ, Kajimanga and Kabuka, JJS**

On 5th and 11th March 2019

For the Appellant: No Appearance

For the Respondent: Ms B. Bulaya, Director of Legal Services

J U D G M E N T

Kajimanga, JS delivered the judgment of the court

Cases referred to:

1. **Rosemary Phiri Madaza v Awadh Keren Colleen (2008) Z.R. 12**
2. **Nkongolo Farm Limited v Zambia National Commercial Bank and 2 Others (2005) Z.R. 78**
3. **Davies Jokie Kasote v The People (1977) Z.R. 75**
4. **Grindlays Bank International (Z) Limited v Nahar Investments Limited (1990-1992) Z.R. 86**
5. **Lusaka West Development Company Limited and 2 Others v Turnkey Properties Limited (1990-1992) Z.R. 1**
6. **Miller v Minister of Pensions [1947] 2 ALL ER 372**
7. **Attorney General v Marcus Kampumba Achiume (1983) Z.R. 1**
8. **Nkhata and 4 Others v Attorney General (1966) Z.R. 124**
9. **Morris v Baron & Co [1918] A.C. 1**
10. **Zambia Bata Shoe Company Ltd vs Vin Mas Limited (1993 – 1994) Z.R. 136**

Legislation referred to:

Local Government Act Chapter 281 of the Laws of Zambia, Sections 30 and 67

Introduction

1. This appeal emanates from a judgment of the High Court (Mchenga J., as he then was) delivered on 29th June 2015. By that judgment, the appellant's claims against the respondent for a declaration that he was the rightful owner of Stand No. 3244 Chilimbulu Road, Lusaka ("the property") and consequential damages were dismissed.

2. The appeal discusses the effect of a buyer accepting a refund of the purchase price for the sale of land and specifically, whether such an act would extinguish the buyer's interests in the property.

Background to the appeal

3. The appellant applied to the respondent for the purchase of a commercial plot following an advertisement. By a letter dated 30th July 1998, he was offered the property for K25,000,000.00 (unrebased). On 18th November 1998, the appellant paid the full purchase price to the respondent.

4. In August 2009, the appellant sold the property to one Mohamed Yusuf Patel (the third party in the court below) for K350,000,000.00 (unrebased) and was paid a total of K200,000,000.00 (unrebased). The appellant could not, however, complete the sale of the property to the third party as the respondent subsequently raised an issue concerning the appellant's offer letter. The appellant followed up the matter with the respondent and when it failed to issue him with title deeds, he commenced a court action against the respondent.

5. By a consent order dated 15th January 2009, the appellant withdrew the case against the respondent to facilitate an *ex-curia* settlement. There was a condition that the appellant was at liberty to take out a fresh action against the respondent in the event that the parties failed to resolve the matter. During the *ex-curia* negotiations, it was agreed between the parties that the third party be offered a lease for the property by the respondent; that the third party should pay the appellant the sum of K150,000,000.00 being the outstanding consideration agreed between them; and that the respondent should refund the sum of K25,000,000.00 which the appellant paid for the

property.

6. Following this agreement, the respondent refunded the appellant the sum of K25,000,000.00 and offered the property to the third party. Despite receiving this offer, the third party did not pay the appellant the balance of K150,000,000.00. The appellant purported to repay the respondent the sum of K25,000,000.00 and took out a fresh action against the respondent in the court below pursuant to the consent order executed between them.

Pleadings in the High Court

7. The appellant sought a declaration that he is the rightful owner of the property and that the respondent do attend to the execution of all necessary documentation to secure the appellant's certificate of title for the property; consequential damages; interest thereon; and costs.

8. The appellant contended that following his initial payment of the purchase price, the respondent decided to increase the cost of the property from K25,000,000.00 to K400,000,000.00 (unrebased) before deducing title in repudiation of the contract

and subsequently cancelled the offer. The appellant, therefore, alleged that the respondent was deliberately and in bad faith, preventing him from securing the certificate of title in his name which he was rightfully entitled to.

9. About the same time, an action was also taken out against the respondent by the third party in which he was claiming specific performance of the contract entered into between the appellant and the respondent for the sale and purchase the property; or in the alternative; damages for breach of contract; interest thereon; costs; and further or other relief the court may deem fit.

10. The basis upon which the third party made the claim was that following receipt of the offer to purchase the property, he effected payment to the respondent of the sum of K400,000,000.00 on 1st November 2010, as purchase price. However, on 8th November 2011, the respondent withdrew the offer despite that a contract was already in place. The third party contended, therefore, that the respondent was preventing the completion of the contract of sale by failing to perform its part of the obligations.

11. On the application of the third party, the two actions against the respondent were consolidated. A defence was then filed by the respondent disputing both claims. As regards the appellant, the respondent contended that the offer he received was not made by the council as there were no minutes to support it and the format of the offer letter suggested that it was forged. It was further contended that the money paid by the appellant to the respondent was received in error. Consequently, the offer was cancelled and the respondent refunded the purchase price of K25,000,000.00 to the appellant which he accepted. That the transaction having been rescinded, the respondent was not under any legal obligation to process the title deeds in favour of the appellant.

12. In response to the third party's claims, the respondent contended that the payment he made in respect of the property was rejected by the respondent who reported the payment to the Anti-Corruption Commission which issued restriction orders for the non-release of the funds involved in the sale of the property and was made a subject of corruption investigations. According to the respondent, the withdrawal of the offer was made in good

faith and as a way to prevent further irregularities of land alienation. Further, that the contract between it and the third party was not consummated as the matter had not yet been presented to the council and to the Minister of Local Government and Housing for approval as provided by the law.

13. In reply, the appellant asserted that he never accepted the cancellation of his contract with the respondent and further, that he repaid the K25,000,000.00 to the respondent. Thus, the respondent was legally obligated to process title deeds in his favour.

Evidence of the parties in the High Court

14. The appellant's evidence was that the letter offering him the property, authored by the respondent's Director of Legal Services, was genuine and that it was on the basis of the same that the respondent accepted the K25,000,000.00 he paid for it. Following the sale of the property to the third party, he approached the respondent for the title deeds but they gave excuses and he was later informed that the offer had been cancelled. He then retained counsel and sued the respondent but the matter was referred to mediation. During mediation, it

was agreed that the respondent would refund him the K25,000,000.00 he paid for the property and that the third party would pay him K150,000,000.00 after being given a fourteen year lease for the property by the respondent.

15. His evidence also disclosed that he was refunded the K25,000,000.00 and the third party was given a fourteen year lease but he did not pay him the K150,000,000.00 He then went back to the respondent and repaid the K25,000,000.00 by cheque on the basis of the initial offer letter which according to him was never cancelled. It was his evidence that he was the rightful owner of the property because the mediation failed and that he attempted to refund the K200,000,000.00 he received from the third party but he did not accept it.

16. The testimony of PW2, Gilbert Lungu, was that between 2007 and 2011, he acted as the respondent's director of legal services. During that time, he dealt with the matter between the appellant and the respondent relating to the property which was referred to mediation. When mediation did not succeed, he engaged the appellant's lawyers and persuaded the appellant to

withdraw the matter from court so that it could be settled *ex curia*.

17. During his interaction with the appellant, he learnt that he had sold the property to the third party at K350,000,000.00 and that K200,000,000.00 had already been paid to him. In their discussion, it was agreed that the property would be sold to the third party on condition that the appellant, who had demanded K800,000,000.00 from the respondent as interest for having kept his money for 10 years, would accept a refund of K25,000,000.00 and not claim interest on it. To avoid unnecessary costs and with the consent of the appellant, it was agreed that he sells the property to the third party at a price of his choice. In that way, he would not lose out on the K150,000,000.00 balance due from the third party.

18. PW2 also testified that instead of directly selling the property to the third party, he decided to offer him a fourteen year lease in the hope that he would pay the K150,000,000.00 to the appellant. He would thereafter offer it for sale to the third party as a sitting tenant but that did not work because the third party said he would only pay the appellant if the property was sold to

him. Additionally, the matter could not be concluded because the council did not sit between 2008 and 2010 and the transaction was not approved and that was how the appellant came back to court.

19. His evidence also disclosed that at the time, he did not realise that his approach to solving the problem was going to lead to more difficulties. He conceded that he did not seek the authority of the respondent before entering into the transactions with the appellant and the third party and that they subsequently refused to endorse his approach to resolving the problem. Further, that the respondent only makes decisions when it meets and the Mayor or Town Clerk cannot make executive decisions. He stated, however, that he informed the Town Clerk of what had transpired but before he could prepare a report, he was suspended.

20. It was also PW2's evidence that the third party's lease from the respondent was executed and all that remained was its ratification by the respondent. The failure to have the lease ratified left it with no legal force and the only valid document relating to the property was the letter of sale between the

appellant and the respondent. He stated that both the refund and the lease were supposed to be reported for ratification or to be noted by the respondent but that did not happen.

21. Regarding the respondent's allegation that the offer letter to the appellant was a forgery, PW2 testified that at the time he was dealing with the matter its authenticity was not an issue; that the respondent received money from the appellant for the property on the basis of the same letter; and that being in charge of the respondent's legal services, he would have known if the letter was a forgery.

22. He admitted that the respondent did not agree with the manner he dealt with the property but he denied the suggestion that the K25,000,000.00 was refunded to the appellant because it was received in error or that the offer letter was a forgery. He also denied the suggestion that there was no council authority for the property to be sold to the appellant in 1998. He admitted however, that when he inspected the council records, he did not find any minutes approving the sale of the property to the appellant. He stated that even if there were no minutes to

support the sale of the property to the appellant, he proceeded with the transaction because it had already been sold to him.

23. PW2's evidence further disclosed that he did not give the appellant title deeds because he did not agree with the price at which the property was sold to him. According to him, one can sell a property even if he only has an offer letter but that for one to change title, there must be a title deed. He said he only questioned the sale between the appellant and the respondent because of the amount the appellant paid for the property as, he wanted him to pay more before he could issue him with the title deed.

24. It was also PW2's testimony that since he was the respondent's agent, the contract entered into between the third party and the respondent was a perfect contract. There was an offer from the respondent that the third party accepted by paying the contract price of K400,000,000.00. He denied wrongly binding the respondent to the transaction and said that the respondent had no interest in the property because it had already been sold to the appellant. It was not the respondent's property at the time of the transaction and that was why it did not appear in the

respondent's asset register.

25. The evidence of Patricia Inonge Sianga Kabudula (DW) who testified on behalf of the respondent was that she worked for the respondent as a clerk and legal assistant in the legal department between 1980 and 2001 under the estates section where offer letters for plots were generated. However, she did not know anything about the sale of the property subject of this appeal. DW's evidence disclosed that an officer who drafts an offer letter is the one who prepares the reference number. She stated that although the reference on the offer letter to the appellant had her initials on it, she was not the author of the said letter and it was possible that someone else drafted it.

26. She testified that the offer letter was neither genuine nor prepared by the legal department as the plot number referenced on the letter was wrong; the letter was typed in block letters; and the letter did not contain a minute number. According to DW, an offer letter always has a minute number of the full council meeting that sat and approved the sale; the date on which it sat; and the conditions on which the property is being sold because offers are only made after a full council meeting.

Further, that she was not aware of a period when the council did not sit for the whole year.

27. She stated, however, that she was not aware of any complaint that the letter was forged or that the appellant paid K25,000,000.00 for the property. She admitted that she did not work in the same department as PW2 at the time he was director as she was in the valuation department.

28. The third party's evidence was that after buying the property from the appellant, he asked him for the title deed but he failed to produce it. Subsequently, he went to the respondent because he received information that the appellant's offer letter was not genuine and they were not going to process his application for title. The appellant later took the respondent to court and after they entered into a consent agreement, he was given a provisional offer letter to buy the property. The provisional offer letter was for K700,000,000.00 (unrebased) but he made a counter offer of K400,000,000.00 which the respondent accepted. He stated that the director of legal services who is in charge of all sales, prepared the offer letter and that the Town Clerk and the Mayor knew about it. Afterwards, he paid the

K400,000,000.00 with four bank certified cheques and the funds were debited from his account.

29. On 18th December 2009, the Town Clerk and the Mayor executed a lease with him but he never took occupation of the property because the clearance formalities took long. Despite the offer from the respondent, his sale agreement with the appellant stood and he was going to pay him K150,000,000.00 if the respondent sold him the property. He stated that at the time he was entering into an agreement with the respondent, the respondent was the owner because the appellant had signed a consent order to facilitate the lease agreement.

30. It was also the third party's evidence that three weeks after he made the payment, he received a letter from the Town Clerk advising that the respondent had no authority to sell the property and that the matter had been referred to the Anti-Corruption Commission (ACC) for investigations. The third party stated that he would have paid the balance of K150,000,000.00 to the appellant had the title deed been processed. The transaction with the appellant, however, did not

come to fruition because the respondent's position was that the appellant's offer letter was not genuine.

Consideration of the matter by the High Court

31. After considering the evidence and arguments of the parties, the learned trial judge found that three issues fell for determination namely, whether the appellant's offer letter was genuine or forged; whether any interests that the appellant had in the property were extinguished by his acceptance of the K25,000,000.00 refund in 2010; and whether the contract in which the respondent offered to sell the property to the third party at K400,000,000.00 had any legal force and was enforceable.

32. He found that the appellant's offer letter was irregular as there was no resolution that authorised the sale and for having the wrong plot number in the reference but that the respondent had failed to prove that it was forged.

33. On the consequences of the appellant having received the refund from the respondent, the trial judge found that by signing an agreement that allowed the respondent to lease out

the property he had bought and having received a refund of the K25,000,000.00 he had paid for it, he was deemed to have accepted that the property had reverted to the respondent. The learned trial judge opined that following the acceptance of the rescission of the offer, the only way the property could have reverted to the appellant was if the respondent had made a new offer to him after the collapse of his agreement with the third party but that this did not happen. Further, that the breach by the third party did not revert the property to the appellant but rather it only entitled him to sue the respondent for breach of contract.

34. He accordingly concluded that the respondent was the rightful owner of the property and that all the claims sought by the appellant fell off. He also found that the third party's claim for damages for breach of contract against the respondent failed as there was collusion between him and PW2 when the property was offered to him. It was his view that the appellant was part of this collusion and it was for this reason that he signed the agreement to withdraw the case from court and at the same time agreed to receive K150,000,000.00 balance from the third party.

35. The learned trial judge further found that the contract between the third party and the respondent had no legal force because the sale was not approved by a full council meeting or the Minister as is required by section 67 of the Local Government Act, chapter 281 of the laws of Zambia. He then ordered that the appellant refunds the K200,000,000.00 paid to him by the third party for failure of consideration which sum would attract interest at the short-term deposit rate from the date of judgment. It was also ordered that the respondent refunds the K400,000,000.00 paid to it by the third party with interest at the short-term bank deposit rate from the date of judgment.

The grounds of appeal to this Court

36. Dissatisfied with this decision, the appellant has launched an appeal to this Court advancing ten grounds as follows:

36.1 The Court below erred in law and in fact when it considered and accepted as true DW1's evidence that the offer letter was forged even when it had already found that the respondent herein did not specifically plead the details of the forgery.

36.2 The Court below erred both in law and fact when it held that DW1's evidence that council properties are only sold after the full council had authorised the sale was uncontested.

36.3 The Court below misdirected itself in law and fact when contrary to the evidence before it, accepted DW1's testimony that an offer letter indicates the council resolution that authorized the sale.

36.4 The Court below erred both in law and fact when it accepted DW1's testimony that the reference number also includes the plot number and that the person who prepares the offer letter includes their initials, in the absence of evidence to this effect.

36.5 The Court below fell into grave error both in law and fact when it found that the appellant's offer letter was irregular for not having the resolution that authorized the sale and for having the wrong plot number in the reference, even after having found that the respondent had failed to prove that the offer letter was forged.

36.6 The Court's finding that PW2 persuaded the appellant to withdraw the case from court because he had worked out how he could still deliver the stand to the third party even in the face of concerns over his letter, was made contrary to the evidence on record.

36.7 The Court below erred in both law and fact when contrary to evidence on record, it held that the appellant was part of the collusion between the respondent and one Mohamed Patel and that it was because of this collusion that he signed the consent agreement to withdraw the case from court and at the same time agreed to receive K150 million from the said Mohamed Patel.

36.8 The Court below erred in law and fact when he held that because of the alleged collusion involving the appellant, the principles set out in the cases of Grindlays Bank

International (Z) Limited v Nahar Investments Limited and Zambia Bata Shoe Company Limited v Vin Mas Limited were not applicable to this case.

36.9 The Court misdirected itself both in law and fact when it found that the respondent and not the appellant is the rightful owner of [the property] contrary to the evidence on record.

36.10 The Court below erred both in law and fact when it held that there was no evidence confirming that the appellant repaid the K25 million to the respondent.

The arguments presented by the parties

37. Both parties filed written heads of argument on which they relied. In support of ground one, it was submitted by the learned counsel for the appellant, that the law is very clear that when a party alleges forgery or fraud, he/she must supply the necessary particulars of the allegation in the pleadings. He relied on the cases of **Rosemary Phiri Madaza v Awadh Keren Colleen**[1] and **Nkongolo Farm Limited v Zambia National Commercial Bank and 2 Others.**[2]

38. It was his contention that the only averment in its pleadings with regard to the disputed letter of offer by the respondent in its Defence was to the effect that ***"...the format of the said offer letter clearly shows that it is not authentic but***

forged". However, no details of the disputed format were volunteered by the respondent. Further, the witness who was called by the respondent proved unreliable and her testimony was more of conjecture than factual as she lamentably failed to demonstrate how the document was not authentic. He argued that the respondent could have called experts to scientifically demonstrate how the letter of offer was a forgery but it did not do so. That the respondent failed to discharge the burden of proving that the letter of offer was a forgery.

39. Counsel submitted that the law on forged documents is clear and he cited the case of **Davies Jokie Kasote v The People**[3] where it was held that:

> **"A document is not a forgery merely because it contains misstatements of fact; no misstatement of fact, however extensive or material, can distort the nature of a document so as to make it purport to be what in fact it is not."**

40. He accordingly contended that the issues raised by the respondent's witness as to the authenticity of the letter of offer do not meet the criteria of what a forged document is.

41. In arguing ground two, counsel submitted that the

incontrovertible evidence on the record tendered by PW2 was that the during the pendency of mediation of the action, no full council meeting was convened from 2008 to 2010 as the then Town Clerk did not summon council meetings because the respondent's councilors were questioning his suitability to hold office. It was also PW2's testimony that he had persuaded the respondent's Town Clerk to have the earlier case withdrawn from court; and that the importance of settling with the appellant was necessitated by the fact that he was demanding for a payment of K800,000,000.00 from the respondent who had kept the K25,000,000.00 that the applicant had paid in acceptance of the offer for purchase of the property. Further, that PW2 testified that:

> **"To avoid unnecessary costs I resold the plot to Mr. Patel after getting consent from Mr. Mwachilele...my interest was to raise funds for Lusaka City Council."**

42. It was argued that PW2 who is alleged to have sold the respondent's property without a full council resolution was, at the material time, the respondent's Director of Legal Services. Thus, the respondent cannot abandon the decisions he made

whether right or wrong, as to outsiders like the appellant, he had ostensible or apparent authority when acting on behalf of the respondent. Reliance was placed on the case of **Grindlays Bank International (Z) Limited v Nahar Investments**[4] where it was held that:

> **"Where the fraudulent conduct of the servant falls within the scope of the servant's authority, actual or ostensible, the employer will be liable."**

43. Counsel, therefore, contended that the conduct of PW2 fell within the scope of his authority, actual or ostensible. Consequently, it cannot be the fault of the appellant that the respondent's legal advisor acted as he did because to the appellant, PW2 had authority to act on behalf of the respondent. Regarding counsel's instructions and settlement of matters, we were referred to the case of **Lusaka West Development Company Limited and 2 Others v Turnkey Properties Limited**[5] where this court held as follows:

> **"Although, quite clearly, the authority of counsel conducting litigation cannot be regarded as limitless when it comes to negotiating a compromise or a settlement and although counsel would in the ordinary course, take instructions from the client, we are satisfied that in this case counsel did have the authority of the Managing Director of the third appellant who equally had ostensible**

authority on behalf of the third appellant to give instructions to counsel. In turn counsel had ostensible authority to enter into the consent agreement in so far as his dealings affected the litigation with the other side. A consent agreement reached in circumstances such as in this case could possibly only have been allowed to be withdrawn if there were proper grounds upon which validity of any contract could be impugned, such as fraud or mistake."

44. In the same vein, counsel submitted, PW2 had the Town Clerk's approval to reach agreement with the appellant and details of which the appellant was not privy to. That in any event, the matter in the High Court having been referred to mediation, PW2 as counsel for the respondent, had jurisdiction to reach agreement with the appellant.

45. Grounds three, four and five were argued together as they dealt with the trial court's reference to the offer letter. It was submitted that having found that the letter was not forged or in other words, that it was authentic, the court should not have proceeded to find that the property belonged to the respondent as the appellant rightfully discharged his burden in proving that the offer letter was authentic. On the basis of the authenticity of the offer letter, counsel contended that the appellant's claim

should have been presumed to be bona fide. The case of **Miller v Minister of Pension,**[6] was called in aid of this argument.

46. Counsel contended, therefore, that the three grounds of appeal have merit and must be upheld as the court below ultimately found that the offer letter was not forged.

47. In support of ground six, it was submitted that the evidence on record clearly shows that the case was withdrawn from court on 15th January 2009 upon the parties filing a consent order to discontinue the action. That the appellant was then being represented by Messrs Chuula and Company and at the time, the third party was not even a party in the case. The lower court, therefore, veered out of the safe confines of judicial discretion when it arrived at the conclusion that PW2 persuaded the appellant to withdraw the case from court because he had worked out how he could still deliver the property to the third party even in the face of concerns over his offer letter, which was not underpinned by evidence on record.

48. Counsel argued that no evidence was proffered by any witness called by the respondent regarding the connivance the lower

court alleged. That indeed, there was no shred of evidence tendered in the court below to justify the court's finding under this ground of appeal. As such, this finding of fact by the court in the absence of evidence by any witness to support it calls for a reversal of the alleged findings. The case of **Attorney General v Marcus Kampamba Achiume**[7] was cited to buttress this point.

49. In arguing grounds seven and eight, counsel submitted that the finding by the learned trial judge that the appellant was part of the collusion between the third party and PW2 and that that was why he allegedly signed the consent agreement with the respondent to withdraw the case from court, was contrary to the evidence on record. He referred us to clause (iii) of the consent order to discontinue action under cause number 2008/HP/1101 which states as follows:

> **"That the Plaintiff and the Defendant consent and agree to resolving this matter ex-curia, however in the event that the parties are unable to finalise resolution between the parties the Plaintiff shall be at liberty to take out a fresh cause of action against the Defendant."**

50. It was his contention that since the appellant and respondent

failed to resolve the matter, the appellant reverted to court and issued fresh process in the High Court in cause number 2010/HP/1372 as provided for in the consent order. According to counsel, the court's findings on this score were, therefore, not supported by the evidence on record. In support of this proposition, counsel relied on the case of **Nkhata and Others v Attorney General**.[8] We were accordingly urged to discount the findings of the court below under the two grounds on the basis that the same are perverse, made in the absence of relevant evidence on the record or were based on a misapprehension of the relevant facts.

51. In support of grounds nine and ten, it was submitted that PW2 who was the respondent's Director of Legal Services at the material time testified that the property did not belong to the respondent. He referred us to the evidence in the record of appeal where PW2 stated as follows:

> **"The K25,000,000.00 was refunded to Mr. Mwachilele because I wanted to resale it at a higher price, it had a tickets office and a loading bay. The property was not Council property because we did not meet the conditions of paying indicating interest to be paid together with the K25,000,000.00."**

52. We were also referred to further evidence of PW2 in the record

of appeal where he testified that:

"I deprived him the right of entry to his property from the Council...When I was reselling, the property did not belong to the Council."

53. Our attention was again drawn to the evidence of PW2 in the record of appeal where he stated that:

"I said I bound the Council wrongly, it was my duty to settle on behalf of the Council. It was wrongly because Mr. Mwachilele was the rightful owner."

54. Based on the foregoing evidence, counsel argued that PW2 who had conduct of the case in the High Court on behalf of the respondent had ostensible authority to act for the said respondent. On the issue of ostensible authority, counsel placed reliance on the **Grindlays Bank**[4] and **Lusaka West Development Company Limited**[5] cases.

55. Counsel further submitted that PW2's testimony was very clear that the property was not the respondent's but the appellant's and that if PW2's conduct could be termed as fraudulent, as the lower court did, the same fell within his ostensible authority and bound the respondent, his employer. This, he contended,

entails that the property belongs to the appellant who returned the K25,000,000.00 to the respondent which had earlier been refunded to him thereby restoring him to the earlier position of ownership of the property.

56. It was clear, counsel contended, that the act of the appellant paying back the K25,000,000.00 to the respondent was unimpeached during examination-in-chief and cross-examination. He submitted that having reclaimed the property, the appellant was free to deal with it and he chose to sell it to the third party. Further, that at no time during the trial did the respondent claim to not having received back the K25,000,000.00 payment. As such, counsel argued, the lower court misdirected itself in reaching a position unsupported by evidence on the record.

57. In response to ground one, the learned counsel for the respondent submitted that it was evident from the offer letter on record and the testimony of the DW1 that the letter was irregular. According to counsel, the standard offer letter issued by the respondent provides for full council minutes of the council meeting authorizing the sale of the plot in accordance

with section 30 (1) of the Local Government Act Chapter 281 of the Laws of Zambia; conditions to be met by the offeree; complete details of the plot; and that the offer letter is prepared in lower case letters.

58. She contended, however, that the offer letter submitted by the appellant had several anomalies in that it had no council minute number showing that the sale had been approved by the full council; there were no conditions stipulated to be met by the offeree; the letter was prepared in block letters; the reference number on the offer letter reflected 120/4/105 as opposed to 120/4/3244; the property number was referred to as block number 3244 Chilumbulu Road instead of plot number 3244 when the former is normally used in reference to the sale of flats; and the initials stated on the offer letter were those of DW1 who in her testimony denied preparing the letter. It was argued, therefore, that the court below was on firm ground when it considered the irregularities of the offer letter and deemed it to be questionable.

59. In response to ground two, it was submitted that according to

the procedure on the sale of the sale of council property the respondent cannot effect any sale without the authorization of the full council as they are the final authority. In this case, the sale of the property needed authorization from the full council and the offer letter should have reflected the number of the full council meeting which authorized the sale which it did not.

60. She also contended that the appellant did not dispute DW1's evidence that the sale needed to be authorized by the full council as it is an irrefutable fact that the full council is the final authority. Further, the appellant did not put up a defence against this statement nor did he show the court otherwise and as such, the court properly ruled that DW1's evidence to that effect was uncontested.

61. As regards ground three, counsel reiterated the position that offer letters from the council should contain a council resolution authorizing the sale of the property. She submitted that the full council holds meetings quarterly to discuss the affairs of the council and authorize matters that require authorization. These meetings are minuted and are referred to as council resolutions. She argued that DW1's testimony to that effect was accurate as

the offer letter produced by the appellant needed to have a council resolution minute number to prove that it had been approved by the full council.

62. In response to ground four, counsel submitted that the appellant's offer letter had the reference 120/4/105 as opposed to 120/4/3244. That as per the standard provisions, the offer letter should state the correct plot number but, in this case, the plot number on the offer letter produced by the appellant was incorrect. Further, that the offer letter should state the initials of the person who prepared it. It was also her contention that the initials on the offer letter were that of DW1 but according to her testimony, she was not aware of the sale of the property and did not prepare the offer letter thereby confirming its irregularity.

63. In response to ground five, counsel restated the arguments advanced in grounds one to four.

64. Concerning grounds six and seven, counsel submitted that the court's findings in respect of these grounds was based on the evidence submitted by PW2. It was, therefore, adverse for the

appellant who was the plaintiff in the lower court to discredit his own witness' statement. As such, the lower court was on firm ground when it considered PW2's testimony and held that PW2 persuaded the appellant to withdraw the case from court because he had worked out how he could still deliver the property to the third party even in the face of concerns over his offer letter.

65. In response to ground eight, it was submitted that the appellant used the principles set out in the **Grindlays Bank**[4] case and **Zambia Bata Shoe Company Limited v Vin Mas Limited**[10] to justify his submission that the respondent be estopped from claiming that it had no authority to sell the property to the third party because of its own default. The court however disregarded this submission on the basis that the appellant had colluded with both the respondent and the third party, based on the evidence submitted by the appellant's witness (PW2).

66. The respondent's arguments in response to ground nine was that the respondent refunded the appellant the K25,000,000.00 which he had paid for the property on 27th January 2010. That by accepting the refund, the appellant relinquished all his rights

and or interest in the property and ownership reverted back to the respondent. Counsel submitted that the court below was, therefore, on firm ground when it held that the respondent and not the appellant is the rightful owner of the property.

67. In response to ground ten, it was submitted that the appellant did not produce any evidence to support his claim that he repaid the K25,000,000.00 reimbursed to him by the respondent. Counsel contended, therefore, that the court below was on firm ground when it determined that there was no evidence confirming that the appellant repaid the K25,000,000.00 to the respondent. She accordingly prayed that the appeal be dismissed with costs.

Decision by this Court

68. At the hearing of this appeal, there was no attendance by counsel for the appellant, a notice of non-attendance having been filed but the appellant was present.

69. We have considered the record of appeal, the judgment appealed against and the appellant's heads of argument. The appellant filed a memorandum of appeal containing ten grounds of appeal

which have been argued by counsel for both parties. As we see it, however, the question for our determination in this appeal is simply whether a valid contract of sale existed between the appellant and the respondent in respect of the property, at the time the proceedings from which this appeal emanates were commenced in the lower court. It is on this sole issue that the entire appeal hinges. Given the approach we have taken in determining this appeal, it will be unnecessary to consider the grounds of appeal in the manner they have been argued by counsel for the parties.

70. The sum and substance of the appellant's contention is that the repayment of the money to the respondent restored the appellant to the earlier position of being the owner of the property. Thus, it was a misdirection by the court below to hold that the property belonged to the respondent.

71. In arriving at its findings, the trial court stated as follows at pages J37 - J38 of its judgment:

> **"First of all, I have not seen any document indicating the terms of the settlement between the plaintiff and the respondent. The only document presented to court was the 2009 agreement between the plaintiff and the third party and it makes no mention**

of the property reverting to the plaintiff in the event of the third party not meeting his obligations under it. The authors of Chitty on Contracts, Third Edition, Vol.1, at paragraph 22-025, observed as follows:

> **A partially executed contract can be rescinded by agreement provided that there are obligations on both sides which remain unperformed. Similarly, a contract which has been fully performed by one party can be rescinded provided the other party returns the performance which he has received and in turn is released from his [own] obligation to perform under the contract...**
>
> **In paragraph 22-026, they also observed as follows:**
>
> **A contract [which] is rescinded by agreement is completely discharged and cannot be revived. The parties will frequently make express provision for the restoration of money paid or for payment for services performed or goods supplied under the contract prior to [rescission].**
>
> **Further in paragraph 22-028, they observed that:**
> **A rescission of a contract will [also] be implied where the parties have effected such an alteration of its terms as to substitute a new contract in place. The question whether a [rescission] has been effected is frequently one of considerable difficulty, for it is necessary to distinguish a [rescission of the contract] from a variation which [merely] qualifies the existing rights and obligations. If a [rescission] is effected the contract is extinguished; if only a variation, it continues to exist in an altered form.... [Rescission] will be presumed when the parties enter into a new agreement which is entirely inconsistent with the old, or, if not**

> **entirely inconsistent with it, to an extent that goes to the very root of it. The change must be fundamental.**
>
> **Finally, in paragraph 22-030, they noted as follows:**
> **Even if the original contract is one which is required by law to be made in writing, as in the case of a contract for the sale or other disposition of an interest in land, or to be evidenced by writing as in the case of [those] contracts within the Statute of Frauds 1677, an oral agreement is sufficient to effect its discharge. Nevertheless, the new agreement may itself be unenforceable unless so evidenced. Thus in *Morris v Baron & Co*[9] the original contract for the sale of cloth was one which was then required by s.4 of the Sale of Goods Act 1893 to be evidenced in writing. The subsequent oral agreement was sufficient to discharge the original contract, but was itself unenforceable for want of writing. In the result, no action could be maintained on the original contract since this had been extinguished, [nor] on the subsequent agreement since it was unenforceable.**

72. From the facts of this case, there is no doubt that the contract of sale between the appellant and the respondent in respect of the property was fully performed by the appellant as all ingredients to form a valid contract were present and all that remained was for the respondent to effect title in the appellant's name. When this did not happen, the appellant took the respondent to court. After the discontinuance of the court proceedings against the respondent, the appellant agreed to be

refunded the K25,000,000.00 which he had paid the respondent for the property so as to enable the respondent to lease the property to the third party with the option to purchase it and thereafter, he would receive the K150,000,000.00 balance owed to him by the third party. It is also not in dispute that the third party defaulted in completing the transaction by failing to settle the said balance once the property was offered to him thereby prompting the appellant to purport to pay back the K25,000,000.00 to the respondent.

73. In our view, the agreement to refund the appellant the K25,000,000.00 and the subsequent offer of the property to the third party amounted to a fundamental alteration of the terms of the contract of sale between the appellant and the respondent to the effect that the same was substituted by a new contract. The terms of this new contract are, without doubt, inconsistent with the original contract to the extent that goes to the root of it. The learned trial judge, therefore, correctly concluded that the effect of the appellant receiving the refund of K25,000,000.00 was to rescind the respondent's offer of the property to the appellant. According to the learned authors of

Chitty on Contracts Third Edition, Volume 1, this effectively means that the original contract was completely discharged and any rights and obligations arising under it were extinguished. Thus, at the time that the refund of the K25,000,000.00 was made, the respondent was released from its obligations to perform under that contract and the appellant had relinquished his rights over the property.

74. It is submitted by the appellant that by paying back the K25,000,000.00, he had reclaimed the property and was at liberty to deal with it as he wished. Going by the excerpt from **Chitty on Contracts** quoted above, this argument is flawed in that a contract that is rescinded by agreement cannot be revived. Further, on the evidence before us, there is nothing to show that the property would revert to the appellant in the event that the third party failed to pay the agreed sum of K150,000,000.00. If at all the parties had agreed to such an arrangement, the same ought to have been evidenced in writing in order to be enforceable. In the absence of such evidence, the appellant cannot rely on his purported repayment of the

purchase price to the respondent as a basis for restoring the original sale agreement.

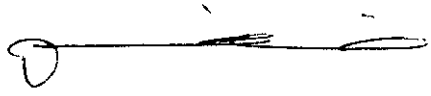
75. In any event, the alleged repayment of K25,000,000.00 to the respondent by the appellant is not backed by cogent evidence. The record of appeal shows that unlike the first payment, the appellant did not produce an official receipt from the respondent acknowledging the repayment. This was acknowledged by the appellant in his evidence to the following effect:

> **"The 2nd payment... was not acknowledged because there was already a receipt. There was no need to acknowledge it. They did not process it because there was connivance between them and Mr. Patel."**

76. In the circumstances, we agree with the following finding by the trial judge at page J44 of the judgment:

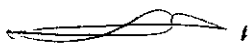
> **"As regards the plaintiff's claim that he repaid the K25 million to the defendant, I find that there is no evidence confirming that the cheque he produced during the trial was actually received by the defendant. This being the case I will make no order for its refund by the defendant. Having found that the defendant is the rightful owner of the stand the plaintiff's claims for the defendant to execute documents to secure his certificate of title, consequential damages and interest thereon, fall off."**

77. For the reasons stated above, we are satisfied that the learned trial judge was on firm ground in rejecting the appellant's claims sought in the court below. Accordingly, the judgment of the court below is upheld and this appeal is dismissed as it lacks merit. Costs shall follow the event, to be taxed in default of agreement.



I. C. Mambilima
CHIEF JUSTICE

C. Kajimanga
SUPREME COURT JUDGE



J. K. Kabuka
SUPREME COURT JUDGE