

**IN THE SUPREME COURT OF ZAMBIA**  
**HOLDEN AT LUSAKA**  
(CIVIL JURISDICTION)

**APPEAL NO.13/2023**  
**SCZ/08/23/2023**

**GILLIAN KASEMPA MUTINTA**



**APPELLANT**

AND

**NEW FUTURE FINANCIAL**  
**COMPANY LIMITED**

**1<sup>ST</sup> RESPONDENT**

**ZHONO CHENG ZAMBIA MINING**  
**MATERIALS LIMITED**

**2<sup>ND</sup> RESPONDENT**

*CORAM: Hamaundu, Wood, Kabuka, JJS on 1<sup>st</sup> October, 2024 and  
10<sup>th</sup> January, 2025*

For the Appellant: Mr. I. Tindi - Messrs Zambezi Chambers  
For the Respondents: Mr. G. Hakainsi - Messrs L.M Chambers

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## **J U D G M E N T**

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**Wood JS**, delivered the Judgment of the Court.

**Cases referred to:**

1. *Masauso Zulu v Avondale Housing Project Limited* (1982) Z.R. 172.
2. *Holmes Limited v Buildwell Construction Company Limited* (1973) Z.R.474

3. *Santley v Wilde (1899) Ch 474*
4. *Motor Vessel "LillianS" v Caltex Oil (Kenya) Limited [1989] KLR.19*
5. *Antonio Ventriglia, Manuela Ventriglia v Finsbury Investments Limited Appeal No. 02/2019*
6. *JCN Holdings Limited v Development Bank of Zambia*
7. *Irene Chinjavata v Administrator General (2004) Z.R. 184*

**Legislation referred to and other works:**

1. *Section 43(2) of the Intestate Succession Act Cap 59 of the Laws of Zambia.*
2. *Chitty on Contracts, Volume 1, 29<sup>th</sup> Edition 2004*

**Introduction**

- 1) This is an appeal against a judgment of the Court of Appeal which held that the transaction between the appellant and the 1<sup>st</sup> respondent was in effect not a loan but a contract of sale of a property known as Stand 462 Chilanga.

**Background**

- 2) Mrs. Gillian Kasempa Mutinta, the appellant herein, is a widow. Her late husband, Joseph Mubanga, was the registered owner of Stand No. 462 Chilanga ("the property"). The appellant was appointed as an Administratrix of the estate of the late Joseph Mubanga by the Lusaka Local Court.

- 3) According to a deed of assent dated 7<sup>th</sup> July, 2017, the property was vested in the appellant for the benefit of Mumba Mubanga, Mulenga Mubanga and Chipengo Mubanga. It is not clear from the record of appeal if the vesting order was endorsed on the certificate of title while it was still registered in the name of the late Joseph Mubanga.
- 4) What is clear however is that, there was an assignment of this property on 4<sup>th</sup> July, 2019 from the appellant to the 2<sup>nd</sup> respondent for the sum of US\$67,800.00. Prior to the assignment, there was a valuation done by Realnet Property Consultants dated 4<sup>th</sup> November, 2016, which valued the property at ZMW 3,450,000. There was also a contract of sale dated 12<sup>th</sup> July, 2017 that stipulated as follows:

*“The Purchaser: Wang Liang (T/A New Future Financial Company Limited)*

*The Vendor Gillian Mutinta Kasempa*

*Date: the 12 day of July 2017*

*Signing Place: The office of New Future Financial Company Limited”.*

1. *As Agreed by two parties, the vendor promises and agrees to sell her properties including the land, houses and the appurtenant to the purchaser where the plot is Stand No. 462. The detailed descriptions of the property including the land have been written down in the schedule hereto.*
2. *The vendor will sell her properties including the land, houses and appurtenant to the purchaser at a total price agreed by the two parties in the sum of US\$67,800 (Sixty-Seven Thousand Eight Hundred US Dollars only). In return, agreed by the two parties, the vendor will transfer her properties and all the facilities on the land including the houses to Zhong Cheng Zambia Mining and Building Materials Company Limited. The company has, however, granted the vendor an option to buy back the properties including the land, houses and the appurtenant before the agreed date and the purchaser will accordingly reserve the properties including the land, houses and the appurtenant for 6 months. If the vendor refunds the total amount of US\$67,800 (Sixty-Seven Thousand Eight Hundred US Dollars only) to the purchaser before the 11<sup>th</sup> day of January 2018, the purchaser will ensure to transfer or hand back the certificate of title and relevant documents to the vendor. If the vendor cannot pay back the money before the agreed date (the 11<sup>th</sup> day of January 2018), the property including the land, houses and the appurtenant will be fully transferred to Zhong Cheng Zambia Mining and Building Materials Company Limited. And the purchaser will have the right to dispose them by himself/herself. The vendor promise that he/she agrees to*

*execute the contract and all the necessary documents for transferring the ownership of the Title Deed and the property. The vendor is in charge of removing the people inside the property as well”.*

- 5) The contract was signed on behalf of the 1<sup>st</sup> respondent and by the appellant. To complete the narrative in so far as the conveyancing aspect of this appeal is concerned, State’s consent to assign for US\$67,800.00 was obtained on 13<sup>th</sup> July, 2017. The consent was valid for a period of twelve months from 13<sup>th</sup> July, 2017, but it is worth noting that this consent had expired at the time the assignment was being registered on 4<sup>th</sup> July, 2019.
- 6) We shall return to the letters of administration, the deed of assent, the valuation report, the contract of sale, the State’s consent to assign, and the assignment a little later in our judgment.
- 7) In June 2017, the appellant visited her friend Mr. Mundia to seek advice over her financial challenges. She was having challenges in trying to pay for her daughter’s school fees who was studying in the Caribbean. Mr. Mundia introduced her to

Mr. Banda, the credit officer of the 1<sup>st</sup> respondent. The appellant later had a meeting at the 1<sup>st</sup> respondent's office with Mr. Mundia and Mr. Banda, where she informed Mr. Banda that she needed a credit facility of ZMW300,000.00. She was advised that she would have to pay back ZMW600,000.00; that the loans were collateral based; and that she needed to pledge a property whose value was above the loan amount.

- 8) The appellant agreed to the terms and was advised to present a certificate of title. She used her late husband's certificate of title. Later, the property was transferred to the appellant with the help of Mr. Moffat Mwanambulo who was the 1<sup>st</sup> respondent's officer. Moffat Mwanambulo appears as a witness to a signature in the deed of assent.
- 9) The property was inspected by Linda, from the 1<sup>st</sup> respondent to assess whether it was worth the loan. The 1<sup>st</sup> respondent confirmed that the property was worth the value of ZMW3,450,000.00 stated in the valuation report. Later, the property was assigned to the appellant and the title deeds were collected from the Ministry of Lands.

- 10) On her return to the respondent's office, the appellant was requested to sign an agreement prepared for the loan. The agreement, however, showed a different amount from what she had expected. When she enquired, she was told by two Chinese ladies who attended to her that interest was to be paid upfront. That meant the principal amount, interest, security and other service charges, reflected in the document as one figure.
- 11) Upon signing the document, she was told by the two ladies that they could only disburse ZMK100,000.00 cash and the remaining balance of ZMK2000,000.00 would be paid by bank transfer. She was given the ZMK100,000.00 and was asked to acknowledge receipt for it. The document she signed did not contain the actual amount but the justification given for the anomaly was that the interest was paid upfront.
- 12) The document purports that she collected the sum of ZMK393,928.00 on 13<sup>th</sup> July 2017 in cash, which was incorrect. It should be noted that, the appellant on the same day signed two receipts, one for US\$67,800.00 showing a balance of ZMW400,708.00 while the other receipt showed a balance of ZMW393,928.00. A copy of the agreement was not given to her

immediately. She was told that the 1<sup>st</sup> respondent's boss needed to sign it before she got a copy.

- 13) The following day, which was 14<sup>th</sup> July 2017, the appellant's account held at Zanaco Lusaka Centre Branch was credited with an amount of ZMW200,000.00 from the 1<sup>st</sup> respondent and the narration for the transaction was as follows:

*“Fund Transfer: LOANS (TRANSFER) B/O QIAOLING WUSHA: Beneficiary 0491849100177 GILLIAN MUTITA KAHEMPA MUBANGA Border Of 1/Quialing WU/1715216102/PLOT 10785 MULUNGU Credit Account: 0491849100177”.*

- 14) The appellant only went to collect her copy of the document referred to in paragraphs 12, 13, and 14, when the respondent's officer responsible for the transaction, returned from China and was shocked to be given a document labelled '*Contract of Sale.*' She immediately questioned the document, but was assured that the document was just what it was and that the certificate of title would be handed back to her when she settled the loan.
- 15) The loan obtained by the appellant was required to be paid back within six months but when it fell due on 11<sup>th</sup> January, 2018 she was still financially challenged. The appellant decided to



sell the property to pay off the loan and settle other financial problems that she had. When she went to see the 1<sup>st</sup> respondent's manager to ask for an extension of time within which to settle the loan, she was asked to put it in writing, which she did, through her lawyers Messrs Keith Mweemba advocates.

- 16) The appellant was called by Mr. Zulu, the 1<sup>st</sup> respondent's employee and asked to meet with a new team at the 1<sup>st</sup> respondent's office. She did so, and was shocked to learn that all those who had shown interest in buying the property sooner or later lost interest. To her disappointment, a printout from the Lands Register showed that a new certificate of title number CT\_59841 had been issued to Zhong Cheng Zambia Mining and Building Materials Company Limited (the 2<sup>nd</sup> respondent), without her authorizing the transfer of ownership.

### **Proceedings before the High Court**

- 17) In 2020 the appellant commenced an action in the High Court claiming:

- i. A declaration that the purported registered assignment of the property from the appellant to the 2<sup>nd</sup> respondent was fraudulent and therefore null and void.
- ii. A declaration that the transaction of 12<sup>th</sup> July 2017 between the appellant and the 1<sup>st</sup> respondent to advance to the appellant the sum of K300,000.00 was for all intents and purposes a mortgage and not a sale.

18) In their defence the respondents averred that;

- (i) The 1<sup>st</sup> respondent did not transact with the appellant as a money lender but as a purchaser and that the 2<sup>nd</sup> respondent had not purportedly assumed ownership but was in actual fact the duly registered owner of the property.
- (ii) The appellant did not obtain a loan, but voluntarily entered into a contract of sale of the property with the 1<sup>st</sup> appellant on 12<sup>th</sup> July 2017, which had an option to buy back the property at US\$67,800.00 within six months of signing the contract.

19) In their counterclaim, the respondent averred that;

- (i) The 1<sup>st</sup> respondent had since changed the ownership of the property in issue into the 2<sup>nd</sup> respondent's name.
- (ii) The appellant had at her own instance entered into a contract of sale with the 1<sup>st</sup> respondent in connection with the property.
- (iii) The appellant had defaulted by not paying back the money within six months and was therefore no longer entitled to the property.
- (iv) The respondents were seeking an order for possession in respect of the property.
- (v) The respondents were seeking mesne profits or a capital occupation fee. Alternatively, an order directing the appellant to pay back US\$67,000.00 together with a monetary loss of US\$42,500.00.

20) At the hearing of the matter, the appellant's evidence was materially, as set out in the background. Further evidence from Elimeth Kasempa, who was one of the appellant's witnesses, corroborated the appellant's evidence in respect of the payment of the sum of ZMK100,000.00. She also mentioned that the appellant walked out of the 1<sup>st</sup> respondent's office with the

money but did not take any documents she had signed, as she was told that they would be availed to her later.

- 21) Derek Mundia another of the appellant's witnesses testified that, he had accompanied the appellant to meet Mr. Banda. During the meeting he recalled the appellant expressing interest in obtaining a loan facility from the 1<sup>st</sup> respondent and that Mr. Banda explained issues to do with the interest expected to be paid and the modalities of how the money obtained would be paid back. Mr. Banda even explained that property needed to be pledged for such loans and the value expected in respect of the property.
- 22) The record of proceedings shows that the questions asked in cross-examination were never recorded by the presiding judge. This is undesirable because a record of proceedings should reflect both the questions asked and the answers given. This helps with understanding the context in which the answers by a witness were being given. In this appeal, we have been left to rely on the answers only.
- 23) The answers by the appellant in cross-examination show that she denied signing the assignment and that the signature was

not her signature. She explained that the receipt showed that, she had received money for the sale of her house. She said she had a document which showed that, it was a mortgage for ZMK300,000.00 and that she had defaulted. The receipt showed that, it was US\$67,800.00. In re-examination she explained that, she did not sign a contract of sale and that the signature was not hers. She said that, she had signed for a loan for which there was collateral and not a contract of sale. As such, the contents of the contract of sale did not reflect the nature of the agreement she had with the 1<sup>st</sup> respondent.

- 24) When Derrick Mundia was asked in cross-examination, he stated that, he was present at the first meeting which was a meeting for a loan and that the appellant asked for a loan and pledged her property as collateral. Elimeth Kasempa stated in her evidence that, she did not see any document to show that the agreement was a loan and not a sale. What she knew was that, the transaction related to a loan. She had accompanied the appellant to the 1<sup>st</sup> respondent and that, the 1<sup>st</sup> respondent's employee told her that, she was processing a loan.

25) The signature in dispute was subjected to a forensic examination. The forensic examination report concluded that:

*“The primary features in terms of proportion alignment, stroke connection which is consistent indicates with certainty that the signature alleged to have been signed by Gillian Mutinta Kasempa is not similar with his [her] submitted Random specimen signature samples.”*

26) The 1<sup>st</sup> respondent’s witness stated in his witness statement that the 1<sup>st</sup> respondent had executed a contract with the appellant for the sale of the property on 12<sup>th</sup> July, 2017 and that, on 13<sup>th</sup> July, 2017, the 1<sup>st</sup> respondent paid the appellant US\$67,800.00. The appellant had an option of buying back the property from the 1<sup>st</sup> respondent if she paid back the amount advanced to her failing which ownership of the property would be changed to the 2<sup>nd</sup> respondent. The respondent failed to pay back on the 11<sup>th</sup> January, 2018 which was the due date. The certificate of title was issued to the 2<sup>nd</sup> respondent on 4<sup>th</sup> July, 2019.

27) In his amended witness statement filed on 30<sup>th</sup> October 2020, the 1<sup>st</sup> respondent’s witness repeated what he stated in his earlier statement that, the appellant *“had the option of buying*

*back the property from the 1<sup>st</sup> respondent if he [she] paid back the amount advanced to him [her].”*

- 28) In re-examination, he stated that, the appellant “*had come to ask for a loan*” and that, the bank narration showed that it was a loan but that, the bank entry showing a loan was not correct.
- 29) In cross-examination, he stated that the loan amount was ZMK300,000.00 but, the document reflected what was loaned as US\$67,800.00. (Sixty-Seven Thousand Eight Hundred US Dollars Only).

### **Judgment of the High Court**

- 30) Faced with the evidence as summarised above, the learned judge of the High Court held that:
- i. The evidence was that, the appellant did not sign any deed of assignment. He warned himself against relying on the handwriting expert’s opinion but still concluded that, the assertion by the respondents that the appellant had executed a deed of assignment had not been proved. He also held that the purported assignment of the property had been “*smudged with fraud*” and declared the registered assignment of the property null and void.

- ii. Having nullified the assignment of the property, he ordered that, the certificate of title registered in the 2<sup>nd</sup> respondent's name be altered back to the appellant.
- iii. The money received by the appellant from the 1<sup>st</sup> respondent was a loan and not for a sale and he relied on the 1<sup>st</sup> respondent's witness statement to support this finding. The intention of the parties was for all intents and purposes to treat the transaction as a loan.
- iv. The charging of interest at 47% for a period of six months was to be limited to the sum of ZMK300,000.00 which was disbursed to the appellant and was to run from the date the loan was disbursed until date of full payment.
- v. The amount disbursed to the appellant was ZMK300,000.00 and not US\$67,800.00 that was being claimed by the 1<sup>st</sup> respondent. Therefore, the sum due to the 1<sup>st</sup> respondent was ZMK300,000.00 together with interest.
- vi. The respondents should pay the appellant's costs.

### **Appeal to the Court of Appeal**

31) The respondents filed seven grounds of appeal before the Court of Appeal to set aside the High Court judgment. The first ground of appeal was that the reference to the assignment being



smudged with fraud was arrived at without giving balanced and unbiased reasons and an analysis of the evidence.

- 32) The second ground of appeal was that fraud was not proved to the required standard.
- 33) The third ground of appeal dealt with the finding that, the transaction was a loan and not a sale which was made without giving proper reasons or a balanced and unbiased evaluation of the evidence.
- 34) The fourth ground related to the reliance by the judge on the Money Lenders Act without deciding on whether the transaction fell under the Money Lenders Act.
- 35) Ground five was that, the High Court erred in law and fact when it held that, the amount payable by the appellant was ZMK300,000.00 without considering the amount indicated in the contract of sale and the receipt for payment of the purchase price.
- 36) The sixth ground of appeal questioned the Judge's discretion in awarding the appellant costs.
- 37) The seventh and last ground of appeal was that, the court below made a wholesale dismissal of the respondent's

counterclaims without giving proper and due consideration of each claim.

### **The Court of Appeal Judgment**

38) The Court of Appeal considered the grounds of appeal and held that:

- i. the appellant had admitted that, she had signed for the receipt of the money from the 1<sup>st</sup> respondent and that, she received the money for the sale of the property. In addition, the appellant admitted obtaining consent to assign and took it to the 1<sup>st</sup> respondent. She also executed the assignment. The Court of Appeal was convinced that, the appellant signed the contract of sale and the other documents. It therefore held that, it was misdirection on the part of the High Court to have held that, the assignment was null and void and smudged with fraud as the appellant willingly signed the contract of sale and assigned the property to the 2<sup>nd</sup> respondent.
- ii. the order to alter the certificate of title be reversed as the contract of sale and assignment were validly entered into between the appellant and the 1<sup>st</sup> respondent.
- iii. the appellant admitted that she signed the contract of sale relating to the property, obtained state's consent and the receipt showed that, she received money for the sale of the house. The evidence showed that, the transaction between

- the appellant and the 1<sup>st</sup> respondent was a sale which contained a buyback clause and not a loan agreement.
- iv. the High Court erred when it relied on the Money Lenders Act to determine the appropriate interest as the transaction was a sale and not a loan.
  - v. the acknowledgement receipt indicated that the appellant received US\$67,800.00 and agreed to pay it back on 11<sup>th</sup> January 2018 failing which the property would be transferred to the 2<sup>nd</sup> respondent. The High Court therefore erred when it held that the appellant should only pay back ZMK300,000.00.
  - vi. the appellant was the unsuccessful party and as such costs should have been awarded to the respondents.

### **Grounds of Appeal before this Court**

- 39) The Court of Appeal denied leave to appeal on 26<sup>th</sup> June 2023. The appellant renewed her application before a single judge of this Court. The single judge granted the appellant leave to appeal on 29<sup>th</sup> September 2023.
- 40) The appellant advanced six grounds of appeal which can be summarised as follows:
  - i. The Court of Appeal erred in law and fact when it reversed the trial court's finding that, the deed of

assignment was smudged with fraud without demonstrating that the finding was either perverse, made in the absence of relevant evidence or upon misapprehension of the facts and having ignored substantial evidence on record which supported the trial court's decision.

- ii. The Court of Appeal misdirected itself in law and fact when it reversed the High Court's order that, the certificate of title that was issued to the 2<sup>nd</sup> respondent be altered back to the appellant.
- iii. The Court of Appeal erred in law and fact when it held that the appellant received the purchase price and went on to obtain the consent to assign when the documentary evidence showed that, the purported receipt relied upon showed a date earlier than when the appellant received money through the bank.
- iv. The Court of Appeal erred in law and fact when it reversed the finding of the trial court that the transaction between the appellant and the 1<sup>st</sup> respondent was a loan and not a sale on the ground that the trial court made the finding in the absence of evidence when it had in fact referred to relevant portions of the evidence.
- v. The Court of Appeal misdirected itself in law and fact when it replaced the trial court's finding with its own in respect of the issue whether the transaction between the appellant and the 1<sup>st</sup> respondent was a loan or sale. This

finding was erroneously based on the testimony of the respondents' witness.

- vi. In the alternative, to ground four and five, the Court of Appeal failed to address itself to principles of law and equity that seek to protect borrowers in loan transactions such as the equitable right of redemption by relying on a purported contract of sale and receipt whose language connoted that it was a loan transaction and held that, the transaction was a sale.

- 41) The grounds of appeal all point to whether based on the evidence before it, the Court of Appeal had reached the right decision when it held that, the transaction was a sale and not a loan.

### **Appellant's arguments**

- 42) Counsel for the appellant submitted that, the Court of Appeal reversed the finding of the trial court that, the assignment the second respondent registered for the transfer of Stand No. 462, Chilanga was tainted with fraud and replaced it with its own without considering the principle on reversing findings of lower courts laid down in **Masauso Zulu v Avondale Housing Project**

**Limited**<sup>1</sup>. The reversal by the Court of Appeal was done against the backdrop of the appellant's grievance that, she had never signed the assignment dated 4<sup>th</sup> July, 2019 for the transfer of the property. There was also an unbalanced evaluation of her evidence by the Court of Appeal which was a misdirection.

- 43) Counsel further submitted that, the contract was in effect a loan and not a sale and that this could be discerned from the wording of the contract itself.

#### **Respondent's arguments**

- 44) Mr. Haakainsi on behalf of the respondents submitted that, contrary to the appellant's assertion, the Court of Appeal clearly demonstrated in its judgment, the finding of the trial judge was made in the absence of relevant evidence to support the said finding that the deed of assignment was tainted with fraud. The Court of Appeal explained the reasons and the basis for reversing the findings of the trial judge and as such, was correct to reverse the findings of the trial judge which were made in the absence of evidence on the record to support the findings. Instead of giving reasons for his decision, the judge merely

recognized the law applicable in relation to the evidence of an expert witness and did not apply the said law. The judge should have followed and applied the law accordingly by giving reasons why he thought the assignment was tainted with fraud.

- 45) Counsel for the respondents submitted that the Court should not attach much weight to the narration on the bank statement which states that, the money being transferred was a loan as this was just a mistake and was not correct.
- 46) According to counsel for the respondents, the contract between the parties had all the essential characteristics of a contract. There was an offer, acceptance and consideration. The evidence showed that, the appellant signed the contract of sale for her property, signed the receipt acknowledging having received the full purchase price for the sale of the house and proceeded to obtain State's Consent to assign to the 2<sup>nd</sup> respondent. Counsel, then advanced the argument that, when parties agree to the terms of a contract and reduce the same into writing, extrinsic evidence is not admissible to vary or contradict the terms of a contract. He relied on a passage from the case of ***Holmes Limited v Buildwell Construction Company***

**Limited**<sup>2</sup> and on a passage from **Chitty on Contract, Volume 1, 29<sup>th</sup> Edition 2004** in support of this argument.

The passage from the **Holmes Limited**<sup>1</sup> case reads as follows:

*“Where the parties have embodied the terms of their contract in a written document, extrinsic evidence is not generally admissible to add to, vary, subtract from or contradict the terms of the written contract.”*

The passage from Chitty is as follows:

*“The parol evidence rule governs what kind of evidence parties to a contract dispute can introduce when trying to determine the specific terms of a contract. The rule also prevents parties who have reduced their agreement to a final written document from later introducing other evidence, such as, the content of oral discussions in the negotiations process, as evidence of a different intent as to the terms of the contract. The rule provides that “extrinsic evidence is inadmissible to vary a written contract.” Exceptions to the parol evidence rule include errors or defects in the written contract due to mistake fraud, duress, or illegality.”*

- 47) We must state at this point that, it is a misconception to argue that extrinsic evidence is not admissible to vary or contradict the terms of a contract because there are exceptions to the rule. *Bruce-Lyle, J in Holmes Limited* quite clearly held so when he



used the words "*it is not generally admissible...*" and the passage from Chitty also states so and gives examples of exceptions to the parol evidence rule.

### **The hearing on 1<sup>st</sup> October 2024**

- 48) During oral arguments on 1<sup>st</sup> October, 2024, the Court asked the parties whether the Local Court had jurisdiction to grant letters of administration for an estate more than K50,000.00 and whether it was proper to register an assignment using an expired state's consent. Both advocates to their credit conceded that the Local Court had no jurisdiction to do so, and that registration of an assignment could not be done with an expired consent. Mr Haakainsi also conceded that the appellant equally had no jurisdiction to deal with the property.
- 49) The appellant's heads of argument focused on what counsel referred to as the unbalanced evaluation of the appellant's evidence and that this amounted to a misdirection by the Court of Appeal. The arguments also dwelt on whether there was any fraud in how the deed of assignment was executed. The appellant had submitted at length that there was fraud and that

her assertion was supported by the unchallenged handwriting expert, who confirmed that, there were strong dissimilarities between the signature on the deed of assignment in question with the random specimen signatures of the appellant.

- 50) The next issue raised by the appellant was in connection with the purchase price. The point being argued here was that the Court of Appeal had erroneously concluded that the appellant had received the purchase price. The appellant had received money from the 1<sup>st</sup> respondent on 14<sup>th</sup> July, 2017 in respect of a loan and not as part of the purchase price.
- 51) When dealing with the issue of whether the transaction was a loan or a sale, counsel for the appellant submitted that, the Court of Appeal did not state why it was not satisfied with the trial court's reasoning when it found that the transaction was a loan and not a sale. The issue of whether it was a loan or a sale could not be determined by merely referring to the disputed contract and disregarding other documentary evidence and testimonies of the witnesses which suggested it was a loan contrary to the title of the contract. The respondents' own witness had testified that it was a loan. Further, the narration

on the bank statement, as quoted in paragraph 13, stated that the sum being transferred was a loan. As such, the Court of Appeal should not have interfered with the trial court's findings of fact. There was no basis for doing so as the guidelines stipulated in *Masauso Zulu v Avondale Housing Project Limited*<sup>1</sup> had not been met.

- 52) Counsel for the appellant was concerned with the proliferation of contracts of sale with buyback clauses which were in effect loan agreements. He submitted that courts ought to examine the effect of certain clauses if indeed they mean that the transaction between the parties was a sale, or a loan transaction disguised as a sale. He also raised the question of the equity of redemption in transactions of this kind. He referred the Court to the case of **Santley v Wilde**<sup>3</sup> which established the principle of equity of redemption. He submitted that, it ensures that any provision in an agreement with a lender that prevents the borrower from redeeming their property is considered void and that the equity of redemption upholds the borrower's right to reclaim their property upon repayment of the loan.

53) In conclusion, counsel wondered how the contract between the parties could be described as a sale and not a loan when the natural and ordinary meaning showed quite clearly that it was a loan.

### **Consideration of the Appeal and Decision of this Court**

54) We have considered the record of appeal, the grounds of appeal, the written submissions and the oral submissions relating to this matter. We note from the record that, there are two issues which need to be addressed in this appeal. The first issue is whether the appellant had the authority to enter into the contract. The second issue is whether she had the power to pledge the property as collateral.

55) It is quite clear from the evidence that the appellant was not the owner of the property in issue. She obtained Letters of Administration from the Local Court. The Local Court had no jurisdiction to grant Letters of Administration for a property valued at ZMW3,450,000.00 as this was contrary to **section 43(2) of the Intestate Succession Act Cap 59 of the Laws of Zambia** which states as follows:

*“(2) A local court shall have and may exercise jurisdiction in matters relating to succession if the value of the estate does not exceed fifty thousand kwacha.”*

56) Consequently, the appellant had no authority to vest the property in herself and thereafter, pledge it as collateral or sell it. We must make it clear that what she had, was capacity to borrow in her own name and be liable for the debt in her own name, without using the property as collateral because she did not own it.

57) In the Kenyan case of **Owners of the Motor Vessel “LillianS” v Caltex Oil (Kenya) Limited** <sup>4</sup> it was held that:

*“Jurisdiction is everything [and that] without it, a court has no power to make one more step”.*

It was further held in this case that:

*“Where the court takes it upon itself to exercise a jurisdiction which it does not possess. Its decision amounts to nothing...”*

58) The *Owners of the Motor Vessel “Lillian S”* <sup>4</sup> was quoted with approval in the case of *Antonio Ventriglia, Manuela Ventriglia v Finsbury Investments Limited* <sup>5</sup>. A similar holding was made in the case of *JCN Holdings Limited v Development Bank of Zambia* <sup>6</sup> in which we held that:

*“It is clear from the Chikuta and New Plast Industries cases that if a court has no jurisdiction to hear and determine a matter, it cannot make any lawful order or grant any remedies sought by a party to that matter.”*

- 59) The authorities cited above, show that since the Local Court had no jurisdiction to grant of the Letters of Administration, what followed, was a nullity and of no legal effect. In other words, the appellant could enter into a contract with the 1<sup>st</sup> respondent for a loan but could not vest the property in herself, pledge the property as collateral, or even sell it.
- 60) As reproduced earlier in paragraph 4, the contents of the contract itself can only be described as incoherent. The contract refers to properties and not property. The 1<sup>st</sup> respondent is a purchaser, and the second respondent is a purchaser as well. The appellant has in the contract agreed with the 1<sup>st</sup> respondent to *“... buy back the properties...”* before 11<sup>th</sup> January, 2018 *and the purchaser will accordingly reserve the properties including the land, houses and the appurtenant for 6 months if the vendor refunds the total amount of 67800.00\$ (Sixty-Seven Thousand Eight Hundred Us dollars) to the purchaser before the 11 day of January 2018.”* It is not clear

how the 2<sup>nd</sup> respondent would have achieved this feat because by that time, the 2<sup>nd</sup> respondent would have been the title holder. Further, it refers to a “refund.” It would be illogical to sell a property and thereafter request a refund within six months. The contract of sale further states that the “... *purchaser will ensure to transfer or hand back the certificate of title and relevant documents to the vendor...*” It defies logic as to why a purchaser who has sold to a third party would still want to transfer or hand back a certificate of title to a vendor.

- 61) We take the view that, contrary to what the Court of Appeal held, the evidence on record in this matter does not lead to the conclusion that this was a contract with a buy back clause. When the contract is considered with all the other evidence, it all points to the conclusion that this was a loan and not a sale. The contract itself vacillates between a loan and a sale but leans more towards a loan. The ordinary and natural meaning of the contract leads to the conclusion that it was meant to be a loan and not a sale. The evidence of the appellant together with her witnesses and bank statement all show that this was a loan. The 1<sup>st</sup> respondent’s own witness described it as a loan.

62) Having found that the transaction was a loan and not a sale does not absolve the appellant from being liable for the K300,000.00 which factually is what she received from the 1<sup>st</sup> respondent and not US\$67,800.00. The sum of US\$67,800.00 was converted at the rate of K8.86 to US\$1.00 which came to ZMW600,708.00. The respondents had in their counterclaim claimed the sum of US\$67,800.00 as a refund and US\$42,500.00 for monetary loss made up of mesne profits or capital occupation. There was no basis for claiming US\$67,800.00 as only K300,000.00 was disbursed. There was also no basis for claiming the sum of US\$42,500.00 as the purported sale was a nullity. The 1<sup>st</sup> respondent is therefore only entitled to claim K300,000.00 together with interest or US\$33,900.00 together with interest at the bank lending rate on the US Dollar. Anything more would be usury.

63) Since the appellant borrowed ZMW300,000.00 at ZMW8.86 to US\$1.00, the appellant only borrowed US\$33,900.00 and not US\$67,800.00 as stated in the contract; interest should therefore, be calculated on what was borrowed and not on the sum of US\$67,800.00 or its US Dollar equivalent. The receipt in



the record of appeal does not refer to an agreed rate of interest. Interest will therefore have to be calculated in accordance with the case of **Irene Chinjavata v Administrator General** <sup>7</sup> which states that interest is payable at the short-term deposit rate from the date of the writ to date of judgment and thereafter, at the average lending rate as determined by Bank of Zambia up to date of payment.

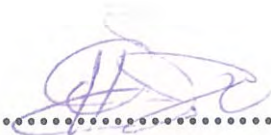
- 64) The house alone in the deceased's estate was valued at K3,450,000.00. It is quite clear to us that, the local court had exceeded its jurisdiction by granting letters of administration in an estate whose value exceeds fifty thousand Kwacha. We have said before that jurisdiction is everything and from nothing there is nothing. The conveyancing undertaken in relation to Stand No. 462 Chilanga cannot be sustained due to lack of jurisdiction. It follows that, the appellant had no authority to transfer the property into her name or pledge it as collateral for a loan. The consequences of this are that, in relation to the property, whatever actions followed the grant of the letters of administration, leading up to the assignment of the property to the 2<sup>nd</sup> respondent is a nullity.

65) The 2<sup>nd</sup> respondent cannot be heard to claim that it is an innocent purchaser for value without notice as it was closely involved in this transaction. Mr. Moffat Mwanambulo, the respondent's officer witnessed the deed of assent. The respondents were therefore aware of the transaction. In any event, if the 2<sup>nd</sup> respondent had carried out an official search of the Lands and Deeds Register, it would have discovered that, there was a grant of letters of administration which did not comply with **section 43 of the Intestate Succession Act, Cap. 59 of the Laws of Zambia.**

66) We wish to state in passing that, transactions with buy-back clauses are now the subject of increased litigation in our courts. The time has in our view, come for legislative intervention in transactions such as conveyancing and mortgages so that, it becomes mandatory for parties seeking to buy, sell or borrow using property as security, to obtain independent legal advice before doing so.

67) Since the conveyance is null and void, we set aside the judgment of the Court of Appeal and order that the certificate of title issued to the 2<sup>nd</sup> respondent be cancelled forthwith and the

title reverts to the deceased. The appellant shall remain liable for the loan as indicated in paragraph 64 above. The parties shall bear their respective costs of the appeal as the issue of jurisdiction was raised by the Court.



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**E. M. HAMAUNDU**  
**SUPREME COURT JUDGE**



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**A. M. WOOD**  
**SUPREME COURT JUDGE**



.....  
**J. K. KABUKA**  
**SUPREME COURT JUDGE**