

IN THE SUPREME COURT FOR ZAMBIA

APPEAL NO.64/2008

HOLDEN AT KABWE AND LUSAKA

SCZ/8/22/2008

(Civil Jurisdiction)

BETWEEN:

**DAVID HOWES
DANIEL SIMULOKA
VIVIAN KANONDO
WALKER MIYOBA
JANET B. MUSUNGA
A.B. MBATA
CONSTANTINE CHIMUKA
ALFRED HANANKUNI
STEMON LUMAMBA**

**1ST APPELLANT
2ND APPELLANT
3RD APPELLANT
4TH APPELLANT
5TH APPELLANT
6TH APPELLANT
7TH APPELLANT
8TH APPELLANT
9TH APPELLANT**

AND

BETTY BUTTS CARBIN *(Sued in her capacity as
Trustee of the Estate of the late DAISY BUTTS)*

RESPONDENT

**CORAM: Sakala, C.J., Chibesakunda, Mwanamwambwa, J.J.S.,
On 11th August 2009 and 2nd February 2012**

*For The Appellants: Mr. S.S.Zulu, S.C., of Messrs Zulu &
Company.*
*For the Respondent: Mr.B. Moshia of Messrs Chilupe &
Company*

JUDGMENT

Mwanamwambwa, JS, delivered the Judgment of the Court.

Cases Referred to:

- 1. Zambia Building and Civil Engineering and Contractors Limited v Georgopollos [1972] Z. R. 228.**
- 2. Wesley Mulungushi v Catherine Chomba [2004] Z.R. 96.**

Legislation referred to:

- 1. The Trusts Restriction Act, CAP 63 of the Laws of Zambia. Sections 3 (c), 4 (a), (b), 5 (1) (a), (b), (c), and 6 (1).**

- 2. The Lands and Deeds Registry Act, CAP 185 of the Laws of Zambia, Section 35.**
- 3. The Statute of Frauds, 1677, Section 4.**

The delay in delivering this judgment is deeply regretted. It is due to heavy workload.

This is an appeal against the Judgment of the High Court of 16th January 2008. By that Judgment, the High Court refused to make declarations and orders in favour of the Appellants.

At the centre of this case is PLOT NO. 403 MONZE. The property consists of some shops. The property was initially owned by the late Mr. Fredrick Charles Butts. He died on 16th October 1961, and left a will. In that will, he gave and bequeathed the property in question to his two sons, namely Mr. James Anthony Butts and Mr. Charles Michael Butts, in equal shares. However, the will also provided that his wife, Mrs. Daisy Butts, would have full use of the property, including receiving rent, income or fruits accruing from the property, during her life.

On 25th March 1964, the property in question was transferred into the names of the two sons, James Anthony Butts and Charles Michael Butts and their mother, as joint tenants. They were issued with a joint Certificate of Title,

which appears at page 152 of Volume II of the record of appeal. Mrs. Daisy Butts died on 3rd February 1974. She left a Will. Her Will does not mention the property in question.

The Respondent, Mrs. Betty Butts Carbin, is the daughter to Mr. James Anthony Butts, one of the sons to the original owner and Mrs. Daisy Butts. Therefore, she is the granddaughter to the original owner.

The Appellants claim to be tenants of shops on the property. They contend that they bought the sub-divisions of the property from Mr. Mwenya Lwatula, a Trustee of the property and also Lawyer from Ellis and Company. Ellis and Company were administering the property on behalf of Mrs. Margaret Joyce Butts and Mr. Charles Michael Butts. Mr. Lwatula was sued as the 2nd Respondent in the Court below. It appears that he is no longer a party to this appeal. Their evidence is that the Respondent's grandfather offered to sell them the property, when they were tenants. That they bought the property in about 1981. That before they could be issued with Certificates of Title, the Respondent placed a caveat on the property. She also presented the Appellants with documents that she was the legal owner of the property and that they should pay rent to her. They started paying rent to her. Later, the Respondent tried to take possession of the property. That prompted them to commence this action. They did so by

originating summons, seeking determination of the following questions:

- i. Whether the Respondent is a beneficiary of the estate of the late Mrs. Daisy Butts;**
- ii. Whether the Respondent is within her rights to collect rentals from properties on Plot No. 403, Monze, belonging to the estate of the late Mrs. Daisy Butts; and**
- iii. Whether the Appellants having paid the full purchase price for Sub-Divisions 1-9 of Plot No. 403, Monze, are not entitled to be issued with the Title Deeds, in respect thereof.**

Based upon the above, the Appellants sought the following reliefs:-

- (i) A declaration that they are the rightful owners of the properties that they purchased from part of Plot No. 403, Monze from Mr. Lwatula, then the 2nd Respondent, who was then the duly appointed Trustee of the Trust of the Will of the late Fredrick Charles Butts, relating to Plot No. 403, Monze:**
- (ii) An Order that the caveat placed on Plot No. 403, Monze by the Respondent, be removed to enable completion of the sale transaction relating to Sub-Division 1-9 of the said Plot, to the Appellants;**
- (iii) An Order that the Respondent, in her capacity as Trustee of the Will of the late Fredrick Charles Butts relating to Plot No. 403, Monze, completes the transaction of the sale of the properties on Plot No. 403, Monze, to all the Appellants, by way of specific performance;**
- (iv) An injunction to restrain the Respondent from evicting the Appellants from their properties, on Plot No. 403, Monze, until the whole matter is dissolved.**

The Appellants conceded that the Respondent was a Trustee of the property in issue and that there was no letter offering them to buy the property.

After evaluating the affidavit and oral evidence, the learned trial Judge found:

- 1. That Mr. Charles Michael Butts and his wife, Mrs. Margaret Joyce Butts, did not acquire interest in the property, resulting from the Will of Mrs. Daisy Butts. Therefore, they could not give instructions to Ellis and Company, to dispose of the property, or otherwise, on the strength of her Will.**
- 2. That there was no valid contract of sale of the property to the Appellants.**
- 3. That the 'sale' of the property to the Appellants was questionable and invalid.**
- 4. That as holder of a power of Attorney from Mr. James Anthony Butts, the Respondent was within her rights to collect rentals from the property in issue.**

Accordingly, he refused to make the declarations and orders requested for. He dismissed the matter and discharged the injunction.

There are nine (9) grounds of appeal. Out of these, grounds one, two, four and six are inter-related. Grounds five and seven are also inter-related. Whereas grounds three, eight and nine, stand alone. For convenience and to avoid repetition, we shall deal with grounds one, two, four and six together. Next, we shall deal with grounds five and seven together.

Thereafter, we shall deal with grounds three, eight and nine, separately.

Grounds one, two, four and six read as follows:

- “1. The learned trial Judge was wrong at law by failing to find that under Section 5 of the Trusts Restriction Act, CAP 63 when the Act came into force in 1970, the Monze property in issue did vest in Mrs. Daisy Butts absolutely who was a tenant for life under the Will of Fredrick Michael Butts to the exclusion of her two sons Charles Michael and James Anthony.**
- “2. The learned trial Judge was wrong at law by finding that Charles Michael Butts and his wife Mrs. Margaret Joyce Butts had no interest in the Monze property, resulting from Mrs. Daisy Butt’s Will and therefore could not give instructions to Messrs Ellis and Company to dispose of the property or otherwise on strength of her Will.”**
- “4. The learned trial Judge misdirected himself by finding that Anthony James Butts was joint owner of the property as at law his beneficial interest under Fredrick Butt’s Will was extinguished by the Trusts Restriction Act, and Daisy Butts did not include him in her Will.”**
- “6. The learned trial Judge misdirected himself by finding that the estate of Daisy Butts did not include the property at Monze.”**

On **ground one**, on behalf of the Appellants, Mr. Zulu, State Counsel, submits that under **The Trusts Restrictions Act, CAP 63** of the Laws of Zambia, Mrs. Daisy Butts became the absolute owner of the property at Monze, under the Will of her late husband, Mr. Fredrick Michael Butts, because she was a life tenant, on the basis of paragraph 4 of the Will. He

submits that **Section 3** of the Act, prohibits a person from making any disposition, whereunder property vests in possession at a future date, after commencement of this Act. That under **Section 6 (1)** of the Act, any property under Trust which at the commencement of the Act, was to vest in possession at a future date, for instance in a Will, such trust or disposition shall be deemed to have been made after commencement of the Act. That under **Section 5 (1) (a)** of the Act, after commencement of the Act, a settlement shall have effect as a disposition in fee simple or absolutely, as the case may be, to the tenant for life, in this case, Mrs. Daisy Butts. He adds that the gift of the Monze property to the children, Charles Michael and James Anthony is not saved under **Section 4 (b)** of the Act because the Will did not contain a provision that on the remarriage of Mrs. Daisy Butts, the widow, the property shall forthwith vest beneficially in such children. He adds that although the will was made in 1961, that disposition was, by virtue of Section 5 of the Act, deemed to have been made after 24th December 1970, when the Act came into effect. That after December 1970, the Monze property became the property of the widow, absolutely. She was no longer a tenant for life and was at liberty to dispose it as she saw fit. That she bequeathed it to Charles Butt and his wife. The wife instructed Ellis and Company to sell the property. Therefore, the Respondent has no entitlement to the property.

On **ground two**, Mr. Zulu submits that after 1970, by operation of Law, the Monze property was owned absolutely by Mrs. Daisy Butts. He submits that since Mrs. Daisy Butts did not in her will, bequeath the Monze property specifically to any person, it forms part of her residuary estate, in which Mr. Charles Michael Butts and his wife, Margaret Joyce Butts, were beneficiaries. That at the death of Mrs. Daisy Butts, on 3rd February 1974, the Monze property, became the property of Mr. Charles Michael Butts and his wife, Mrs. Margaret Joyce Butts. They could, therefore, give instructions to Messrs Ellis and Company to dispose of the property.

On **ground four**, Mr. Zulu repeats his submissions under ground one and two, to the effect that after the passing of the Act in December 1970, the Monze property was owned absolutely by Mrs. Daisy Butts, who in her Will did not include Mr. James Anthony Butts, as a beneficiary in her residuary estate, which included the Monze property.

On **ground six**, Mr. Zulu repeats his submissions on ground two.

On behalf of the Respondent, Mr. Mosha argued grounds one, two, four and six together. He submits that the record clearly shows that the learned trial Judge addressed himself to the law relating to Trusts, when he made a distinction between

a bequest and a life usufruct, as per pages 17 and 18 of the record of proceedings. He submits that on the facts, there was no settlement in favour of Mrs. Daisy Butts. That she acquired no legal interest in the land in issue, upon the Trust Restriction Act coming into force in 1970, as the property did not vest in her absolutely or at all. He points out that at page 152 of the record of appeal is the Certificate of Title issued to the two sons in 1964, in respect of the property. That Mrs. Daisy Butts died in 1974. Then the property was vested in the two brothers. So it could not have been part of her estate. Therefore, grounds two, four and six of appeal should not succeed, as Mrs. Margaret Joyce Butts was a beneficiary under the estate of Mrs. Daisy Butts, who only had a life usufruct in the Monze property. Consequently, she had no capacity to issue instructions to Messrs Ellis and Company to dispose of the property on the strength of Mrs. Daisy Butt's Will.

We have examined grounds one, two, four and six and have considered submissions by Counsel thereon. These grounds hinge on the meaning and effect of Sections 3 (c), 4 (b), 5 (1) (a), (b) and (c), and 6 (1) of the **Trusts Resctrictions Act, CAP 63** of the Laws of Zambia (*hereinafter referred to as "THE ACT"*). These Sections read as follows:-

- "3. Save as hereinafter provided, after commencement of this Act, person shall not –**
(c) make any disposition whereunder property vests in possession at a future date."

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- "4. Nothing in this Act shall apply to:-**

(b) a disposition whereunder property is limited to, or in trust for, a widow, either for her life or for some other period, with a gift over in favour of children, if such disposition contains a provision that on the re-marriage of the widow the property shall forthwith vest beneficially in such children.”

“5. (1) Subject to the provisions of Section four, and notwithstanding anything to the contrary, contained in any other law, after commencement of this Act –

(a) A settlement shall have effect as a disposition in fee simple or absolutely as the case may be, to the tenant for life;

(b) A trust shall have effect as a disposition in fee simple or absolutely, as the case may be, to the beneficiary;

(c) A disposition whereunder property vests in possession at a future date shall be ineffective to create or vest any such interest.”

“6. (1) where at the commencement of this Act property is held under the existing settlement or trust, or a disposition is in existence whereunder property shall vest in possession at a future date, such settlement, trust or disposition shall be deemed to have been made after the commencement of this Act and accordingly, the provisions of Section Five shall apply.”

On 25th March 1964, the property in dispute was transferred in the names of the two brothers, James Anthony Butts and Charles Michael Butts and their mother, Mrs. Daisy Butts, as joint tenants. This is as per Certificate of Title at page 152 of the record of appeal. That followed the death of Mr. Fredrick Butts, the Testator in 1961. In our view, on 25th March 1964, the property was vested in the two brothers. However, their mother had a life interest in the property until 3rd of February 1974, when she died. Her interest expired on her death. The Act took effect on 24th December 1970. That

was six years after the property had vested in the two brothers, James Anthony and Charles Michael. Section 6 (1) of the Act affects property, which as at 24th December 1970, is to vest at future date; that is a date later than the commencement of the Act. In such a situation, the settlement, trust or disposition vesting the property, shall be deemed to have been made after the commencement of the Act. In effect, in such a situation, Section 5 of the Act would apply and render such interest in property ineffective. In the present case, the interests of the two brothers in the property having vested earlier than the commencement date of the Act, we are of the view that Section 6 (1) of the Act does not apply and does not affect their interest in the Monze property. In short, Section 6 (1) of the Act does not affect an interest which has already vested. It affects an interest which is to vest at a future date. And a future date is one which falls after the commencement of the Act. Therefore, we hold that the property in question did not vest absolutely in Mrs. Daisy Butts, as a tenant for life, under her late husband's Will, to the exclusion of her two sons, James Anthony and Charles Michael.

Indeed, we note that the Will of Mrs. Daisy Butts does not mention the Monze property. On this particular issue, the Appellants argue that though not mentioned in the Will, the Monze property was the residue of the estate of Mrs. Daisy Butts under her Will. We do not accept this argument.

Residue is defined as: “a small amount of something that remains at the end of the process,” – **(See Oxford Advanced Learner’s Dictionary, 7th Edition)**. On the evidence, the property in question is a big structure. Initially it consisted of three plots. These were Plots 1, 2 and 3, Monze. Later, these were consolidated into one Plot; Plot 403, Monze. In our view, tangible property such as land and buildings in this case, cannot be classified as residue of an estate. Therefore, we hold that the Monze property did not pass on to Mr. Charles Michael Butts and Mrs. Margaret Joyce Butts, by way of residue of estate, under the will of Mrs. Daisy Butts. So, the two had no authority to give instructions to Ellis and Company, on the strength of her Will, to dispose of the property. **Accordingly, we dismiss grounds one, two, four and six of the appeal.**

Next, for convenience, we will deal with **grounds five** and **seven** before **ground three**. These read as follows:-

“5. The learned trial Judge misdirected himself by finding that the Power of Attorney by Anthony James Butts in favour of his daughter the Respondent was valid to deal with the property in issue.”

“7. The learned trial Judge misdirected himself by finding that as holder of Power of Attorney from James Anthony Butts the Respondent was within her rights to collect rentals from the properties in issue.”

On ground five, Mr. Zulu submits that the issues were:-

(a) whether Mr. Anthony Butts had any beneficial interest in the Monze property, which he could give to his daughter, the Respondent; and

(b) whether a Trustee may delegate his powers by powers of Attorney.

He argues that since Mrs Daisy Butts did not include Mr. James Anthony Butts in her Will, he had no beneficial interest in the Monze property, of which Mrs. Daisy Butts became the absolute owner after the Act came into force. He adds that if his legal argument is accepted, then it follows that the Respondent, Ms Betty Butts Carbin, had no beneficial interest in the Monze property. That the Certificate of Title, if any, in her name, was issued by an oversight or ignorance of the law. He refers to the caveat lodged by the Respondent on the property and the interest she stated thereon. He then says that he agrees with the testimony of Mr. Lwatula, that the Respondent, as Attorney for Mr. James Anthony Butts, could not exercise power as a Trustee in his place.

On **ground seven**, Mr. Zulu, repeats his submissions on ground five, the gist of which is that the Respondent had no beneficial interest in the Monze property.

We have considered the submissions on **grounds five and seven**. We repeat what we said on grounds one, two, four and six. And the gist of what we said was that the Monze property did not vest absolutely in Mrs. Daisy Butts, by operation of law in 1970. Her life interest in the property expired on 3rd February 1974, when she died. We add that the Monze property is still jointly owned by Mr. James Anthony Butts and

Mr. Charles Michael Butts. Accordingly, Mr. James Anthony Butts can pass his beneficiary interest in the property, to the Respondent, his daughter. And as such beneficiary, it was in order for him to sign the power of Attorney, in favour of his daughter, over the property as he did. We also reiterate that the Monze property did not form part of the residue of the estate of Mrs. Daisy Butts, under her Will. We wish to emphasize that Mr. Charles Michael Butts is entitled to deal with the Monze property, as a direct beneficiary of it, under his late father's Will and not as a beneficiary of the residue of the estate of his mother, under her Will.

For these reasons, **grounds five** and **seven** fail.

We now move to **ground three**. This ground is that the learned trial Judge misdirected himself by finding that there were no valid contracts between the Appellants and Mr. Mwenya Lwatula, on behalf of the Vendor and that the whole process was questionable.

On ground three, Mr. Zulu points out that, Mrs. Daisy Butts, by her Will, appointed the Senior Law Partners in Webb Low and Barry in Bulawayo, to be the Executors of her Will. That the Law firm also was acting for her and Mr. Charles Michael Butts. That Messrs Ellis and Company, Lusaka, were

agents for Messrs Webb, Low and Barry. That Messrs Ellis and Company were also acting for Mr. Charles Michael Butts and his wife, Mrs. Margaret Joyce Butts, in relation to the Monze properties. That Messrs Ellis and company were instructed to sell the properties, by the beneficiaries, Mr. Charles Michael Butts and Mrs. Margaret Joyce Butts. That moreover, Messrs Ellis and Company were instructed directly, by Mr. and Mrs C. M. Butts, to sell the property, as per page 113 of the record of appeal. That Messrs Ellis and Company received purchase monies from the Appellants, as per receipts at pages 179-185, and 194-200 of the record of appeal. He submits that the said receipts amount to contract of sale and purchase, on behalf of the Vendor and Purchasers. That the fact that contracts of sale at pages 201-227 may not have been signed on behalf of the Vendors does not mean that there was no contract of sale, in view of the fact that there are documents, in the form of receipts, by the Vendor's Advocates, relating to the sale.

In reply, on behalf of the Respondent, Mr. Mosha submits that Mr. Lwatula, who was appointed as a Trustee of Mrs. Daisy Butts' Will, did not have the right to sell as the dispositions of the various shops on the Monze property were carried out between 1980 and 1981; whilst his name was included on the Certificate of Title in 1983. That moreover, at the time of said dispositions, Plot 403, as it is known, was not in existence, as the consolidation of Plots Numbers 1, 2 and 3, Monze, was only

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finalised in 1986, on the strength of the forged Deed of Surrender. That one wonders about the particulars of the properties that Mr. Lwatula supposedly sold. Therefore, he could pass no Title to any of the Appellants. Accordingly, the learned trial Judge correctly observed that Mr. Lwatula was not entitled to sell the property in 1980 and 1981 and that the Respondent had an interest in the property, as the daughter of Mr. James Anthony Butts, the joint owner of the property and that she held a power of Attorney from her father over the property.

We have considered **ground three** and the submissions of Counsel. As we see it, there are two issues in ground three. One is whether the receipts between Ellis and Company and the Appellants, constituted a note or memorandum to satisfy Section 4 of **the Statute of Frauds 1677**. That Section requires that a contract of sale of land be in writing. Second is whether Mr. Charles Michael Butts and Mrs. Joyce Margaret Butts, as beneficiaries of the residue of the estate of Mrs. Daisy Butts, under her Will, were entitled to instruct Ellis and Company, to sell the Monze property.

With regard to the first issue, the letter at page 113 of the record of appeal establishes that on 29th August 1979, Mr. Charles Michael Butts and Mrs. Margaret Joyce Butts instructed Ellis and Company to sell the properties in Monze.

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The page shows that they did so as beneficiaries of the residue of estate of the late Mrs. Daisy Butts, under her Will.

On this very issue, two cases provide guidance. These are **Zambia Building and Civil Engineering and Contractors Limited v Georgopollos (1)** and **Wesley Mulungushi v Catherine Chomba (2)**.

The first case held as follows:- ***“It is well settled that the memorandum required by the Statute of Frauds need not be in any particular forms and may be constituted by two or more documents which are clearly connected by reasonable inference.”***

The second case held that for a note or memorandum to satisfy Section 4 of **the Statute of Frauds 1677**, the agreement itself need not be in writing. A note or memorandum of it is sufficient, provided that it contains all the material terms of the contract, such as names, or adequate identification of the subject matter and the nature of the consideration.

In this appeal, following these two cases, we agree with Mr. Zulu that the receipts at pages 179 to 185 and 194 to 200, constitute a note or memorandum to satisfy **Section 4 of the Statute of Fraud 1677**, so as to constitute contracts of sale of land to which they relate. They specify the names of the

purchasers. They adequately identify the subject matter – i.e. the shops on Stand No. 403, Monze. They state the nature of the consideration – i.e. purchase prices for the shops in question. The people who paid the money on the receipts are the Appellants. They were offered sale of the shops by Ellis and Company, on instructions of Mrs. Margaret Joyce Butts and Mr. Charles Michael Butts, as beneficiaries of the residue of the estate of Mrs. Daisy Butts, under her Will. The learned trial Judge erred in law to the extent he held that there were no contracts of sale, solely on the basis that the draft formal contracts of sale at pages 201 to 227 of the record of appeal were not signed by Mr. Charles Michael Butts and Mr. Mwenya Lwatula, who appear as Vendors therein. It is quite another matter as to whether Mrs. Margaret Joyce Butts and Mr. Michael James Butts were entitled, as beneficiaries of Mrs. Daisy Butts' Will, to instruct Ellis and Company to sell the shops. And this aspect will be dealt with when we consider the second issue under ground three.

As regards the second issue under this ground, we repeat what we said in grounds one, two, four and six that Mr. Charles James Butts and Mrs. Margaret Joyce Butts, as beneficiaries of the residue of the estate of Mrs. Daisy Butts under her Will, had no interest in the property in dispute. Therefore, they were not entitled to instruct Ellis and Company to sell the property. In effect, the contracts were not valid for lack of authority on

the part of the vendors. We have reached at the same conclusion like the learned trial Judge, but for a different reason. Accordingly, **grounds five** and **seven** fail.

Ground eight attacks the reliance by the learned trial Judge on the Ruling of the Lands Tribunal, which removed Mr. Lwatula, State Counsel, as Trustee, from the estate of Mr. Fredrick Butts.

On this ground, Mr. Zulu submits that the Lands Tribunal had no authority to entertain the Respondent's application, as the property in dispute was on the Certificate of Title. In support of his submission, he referred us to **Judgment No. 16/2005** of this Court, in which we said:

"We have said in many of our decisions that the Lands Tribunal has no jurisdiction to entertain a complaint over land if either part to the complaint has title. The only Court that has legal authority to order the Chief Registrar of Lands and Deeds to rectify the Register and cancel a Certificate of Title is the High Court with these comments. We declare the proceedings in the Lands Tribunal a nullity, for lack of jurisdiction. Consequently, we decline to entertain the appeal because it is incompetent and misconceived". (Unfortunately, the learned State Counsel did not give us the names of the parties to the case. And it is not reported).

He submits that in view of the above decision, Mr. Mwenya Lwatula should be a Trustee of Mr. Fredrick Butts. That Mr. Lwatula should not have been removed by the Lands Tribunal, as a Trustee and substituted by the Respondent, even on the Certificate of Title. He points out that the Respondent testified that currently the Title to the property is in her name. She did not say that the property was jointly registered with Mr. Charles Michael Butts, her uncle. He wonders how she removed Mr. Charles Michael Butts' name from the Certificate of Title at page 152 of the record of appeal.

On the time factor, he argues that, on the evidence, in 1980 and 1981, Mr. Lwatula was not a Trustee but he was selling as an Advocate, whose firm, Ellis and Company, was instructed by the beneficiaries, Mr. Charles Michael Butts and Mrs. Margaret Joyce Butts, as per letter at page 113 of the record of appeal. That he was appointed a Trustee by Mr. Charles Michael Butts in 1983, as per pages 153 to 157 and page 305 of the record of appeal. He submits that this appointment was valid because at the material time, Mr. Charles Michael Butts was the only Trustee of the estate of his father, as Mrs Daisy Butts had died in 1974 and Mr. James Anthony Butts was away in Brazil.

In reply on behalf of the Respondent, Mr. Moshia submits that Mr. Lwatula's appointment as a Trustee and his removal

as such by the Lands Tribunal becomes irrelevant, in light of the fact that he had no capacity to sell the properties in issue from the onset.

We have considered this ground and the arguments thereon. The land in issue has a Certificate of Title. On the authority cited by Mr. Zulu, and others before it, we agree with him that the Lands Tribunal had no jurisdiction to entertain an application over the property and to remove the name of Mr. Lwatula from its Certificate. Accordingly, we declare the proceedings of the Lands Tribunal over the property, a nullity, for lack of jurisdiction. True, the Respondent had a valid grievance over the property. But she should have gone to the High Court, the correct forum, for redress.

As things stand now, the Monze property is still jointly owned by the two brothers, Mr. James Anthony Butts and Mr. Charles Michael Butts, by virtue of the Will of their late father. Indeed, this is confirmed by the Deed of appointment of a new Trustee, Mr. Mwenya Lwatula, at pages 153 to 157 of the record of appeal. The Deed in question was drawn by Ellis and Company on 31st October 1983. **Accordingly, we allow ground eight of appeal.** The effect is that the name of Mr. Lwatula, as a Trustee, should be restored on the Certificate of Title to the property. Since the name of the Respondent is now on the Certificate of Title, Mr. Lwatula will join here thereon.

Ground nine says that the learned trial Judge was wrong at law by failing to find that on the facts of the case, the Appellants may have acquired title by prescription or adverse possession.

On ground nine, Mr. Zulu submits that on the facts of this matter, the Appellants acquired Title to the property in dispute by prescription or adverse possession. That this is so because they occupied the property for about 30 years. He adds that the learned trial Judge did not make a finding as to the effect of Section 5 of the Act on the beneficiary interests of the two sons of Mr. Butts Senior, in his Will or on the effect of Mrs. Daisy Butts' Will, on the beneficiary interest of Mr. James Anthony Butts, the father to the Respondent. He submits that had the learned trial Judge considered the effect of the Act on the dispositions in the two Wills, he would have come to the same conclusion as his earlier submission and the testimony of Mr. Lwatula, at pages 304 (22-28) and 305 (3-5). At those pages, Mr. Lwatula gave opinion evidence that by virtue of Section 5 of the Act, the interests of the two sons in the property fell off in 1970. That the property thus vested in Mrs. Daisy Butts absolutely. Further that in the residue of her Will, Mrs. Daisy Butts bequeathed the property in question to Mr. Charles Michael Butts and his wife, Mrs. Margaret Joyce Butts.

In response on behalf of the Respondent, Mr. Mosha submits that the learned trial Judge was not wrong in not finding in favour of the Appellants that they acquired Title by prescription or adverse possession, for two reasons. One is that the Appellants failed to raise the issue in the Court below. Second is that Section 35 of **the Lands and Deeds Registry Act** expressly prohibits the acquisition of title by adverse possession or prescription, with regards to land that has title deeds.

We have considered **ground 9** and have looked at Section 35 of **the Lands and Deeds Registry act**. It provides as follows:-

“35. After land has become the subject of a Certificate of Title, no title thereto, or to any right, privilege, or easement in, upon or over the same, shall be acquired by possession or use adversely to or in derogation of title of the Registered Proprietor.”

We agree with Mr. Mosha that Section 35 of **the Lands and Deeds Registry act, CAP 185** of the Laws of Zambia expressly prohibits acquisition of title by prescription or adverse possession, to land which is the subject of a Certificate of Title. The land in dispute here is the subject of a Certificate of Title.

As to the expert opinion evidence of Mr. Lwatula on the effect of Section 5 of the Act, on the beneficiary interest of the

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two sons, we note that in June 1983, he had expressed a view which is completely the opposite of what he said in Court on 24th January 2006. At page 162 of the record of appeal is a letter he

wrote to Mr. Charles Michael Butts, on 23rd June 1983. In that letter, he said that the Monze property was jointly owned by Mr. Charles Michael Butts and Mr. James Anthony Butts. The letter in question reads as follows:-

"ELLIS & COMPANY

Advocates, Solicitors and Notaries

P O Box 31902, Farmers House, Cairo Road, LUSAKA, ZAMBIA

BB.697A/MGM/MN

23rd June 1983

Mr. Charles Michael Butts

Plumtree Hotel

P O Box 24

PLUMTREE

ZIMBABWE

Dear Sir,

**RE: STAND NO. 403 MONZE (FORMERLY PLOT NOS 1 & 2 AND
THE R/E OF PLOT NO. 3**

We have received instructions to attend to the sale of the various subdivisions of Stand No. 403 Monze. Plot Nos. 1 and 2 and the Remaining Extent of Plot No. 3 have been consolidated to form Stand No. 403 Monze. Plot Nos. 1 and 2 and the R/E of Plot No. 3 will therefore have to be surrendered to the State and fresh lease given to the State for Stand No. 403 before the various subdivisions can be assigned.

Since this property is jointly owned by yourself and James Anthony Butts both your signatures are required to be on all the documents that have been and will be prepared – J.A. Butts has given General Power of Attorney to someone who resides in Zambia, thus there is someone here to sign all documents on his behalf. We are hereby suggesting that you also given Power of Attorney to someone who resides in Zambia to execute all the

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necessary documents on your behalf as we are unable to proceed any further in this matter.

A General Power of Attorney is enclosed herewith. You are required to fill in the blank spaces, as indicated in pencil, and execute it in the presence of a Notary Public. Thereafter, please return in the executed document to us.

Please let us have a very early reply.

**Yours faithfully,
ELLIS & COMPANY
SIGNED”**

Further, at pages 153 to 157 of the record of appeal is a Deed of appointment of a new Trustee. It is dated 31st October 1983; i.e. 9 years after Mrs. Daisy Butts had died. (*She died on 3rd February 1974*). It was drawn by Ellis and Company. By that Deed, Mr. Charles Michael Butts, appointed Mr. Mwenya Lwatula, of Ellis and Company: ***“to be a Trustee of the trusts of the Will relating to the said property described in the schedule hereto in place of the said Mrs. Daisy Butts and James Anthony Butts”***. The Will referred to, is that of Mr. Fredrick Charles Butts, who died on 16th October 1961. This is as per page 154. The property mentioned in the Deed of Appointment, is the Monze property in dispute. This is as per pages 155 and 156 of the record of appeal. The 4th recital on page 154 says: ***The said James Anthony Butts cannot now be found and is verily believed to have left the Republic of Zambia, in or about 1976, without leaving any forwarding or other address.”***

By this Deed, Ellis and Company acknowledges that as at 31st October 1983, Mr. James Anthony Butts, still had an interest in the Monze property, by virtue of the Will of his late father, dated 22nd September 1956.

Additionally, there is one issue that needs mention here. This issue may have a bearing on the interpretation in Court, placed by Ellis and Company, on Section 5 of the Act, in favour of the Appellants. At page 167 of the record of appeal is a letter addressed to Messrs Ellis and Company. It alleges that one of the Senior Partners in Ellis and Company is personally interested in one of the Plots comprised in the Monze property. The Partner in question, appears to be the 7th appellant. The letter reads as follows:-

"M.A. PATEL & COMPANY

Advocates: Notaries and Commissioners For Oaths

1-4 Codrington House, P O Box 30645, Nkwazi Road, LUSAKA, ZAMBIA

Tel: 221484; Res: 278572

LJS/gk/B.18

27th May 1992

Messrs Ellis & Company

Farmers House

Cairo Road

LUSAKA

Dear Sir,

RE: BUTTS ESTATE-STAND NO. 403 MONZE

We thank you for your letter BB.607/CHC/pcm, dated the 8th May 1992.

We regret to advise that we do not seem to be making any progress in this matter. The best thing to do is to ask the Court to make a ruling on the legality of what has since transpired. As advocates you have not been able to advise us on whose behalf you act. Messrs. Webb, Low & Barry of Zimbabwe, acting on behalf of one of the trustees of the Butts Estate, have failed to have yourselves account to them; our client does not seem to be doing any better either. To whom, as Advocates, are you accountable? We notice, with regret that one of your senior partner is personally interested in one of the plots comprised in Stand No. 403, Monze. If this is true, which we think it is, then your firm must disqualify itself from acting on behalf of the "Estate".

Please advise, us by return of post if it is your wish for us to proceed to Court or you will voluntarily disqualify yourselves.

Yours faithfully,

M.A. PATEL & COMPANY

SIGNED

AND RECEIVED AND STAMPED BY ELLIS ON 28 MAY 1992."

As we earlier said on grounds one, two, four and six, we do not accept the interpretation placed by the Appellants, on the Act, in relation to the beneficiary interests of the two Butts brothers, in the Monze property, under the Will of their late father. For these reasons, we dismiss ground 9 of appeal. On the totality of issues, this appeal is hereby dismissed. We award costs to the Respondent, to be taxed in default of agreement.

.....
E. L. SAKALA
CHIEF JUSTICE

.....
L.P. CHIBESAKUNDA
SUPREME COURT JUDGE

.....
M. S. MWANAMWAMBWA
SUPREME COURT JUDGE