IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 24 OF 2018**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

NALUMINO MUBALU **APPELLANT**

AND

THE COMMISIONER OF LANDS **1st RESPONDENT**

DUNCAN MUSAMA **2nd RESPONDENT**

CORAM: Chashi, Siavwapa and Ngulube, JJA

ON: 24th April and 24th July 2018

For the Appellant: *K. Mwale, Messrs Legal Resources Chambers*

For the 1st Respondent: *N/A*

For the 2nd Respondent: *Messrs A.M.C Legal Practitioners - Notice of non-attendance*

J U D G M E N T

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. ***Anort Kabwe, Charity Mumba Kabwe v James Daka, Attorney General and Albert Mbazima (2006) ZR, 12***
2. ***Nicos Adonopoulos and Evangelos Antonopoulus v Awanji Farms Limited and The Attorney General (2010) ZR, 414, Vol 1***
3. ***Eustace Spaita Bobo and Another v The Commissioner of Lands and Another – 2005/HP/1108 – Un reported***
4. ***Mususu Kalenga Building Limited and Another v Richmans Money Lenders Enterprises (1999) ZR, 27***

5. ***Shadrick Wamusula Simumba v Juma Banda and Lusaka City Council (2013) ZR, Vol 2,178***

Legislation referred to:

1. ***The Lands Act, Chapter 184 of the Laws of Zambia***
2. ***The Lands (The Lands Tribunal) Rules – Statutory Instrument No. 90 of 1996***

This is an appeal from the Judgment of the High Court which was delivered on 8th November 2017.

The background to the matter is that, the Appellant was offered Property No.L/23342, Silverest, Lusaka (the Property) by the Commissioner of Lands (the Commissioner) on 1st December 2010 and was subsequently issued with a certificate of title.

Amongst the terms in the letter of offer, were that she had to put up a building to the value of K500.00 (rebased) within eighteen months and had to complete the foundation within nine months.

As admitted by the Appellant, the terms were not met in the following five years, prompting the Commissioner pursuant to Section 13 of ***The Lands Act***[1] to issue a notice of intention to re-enter which was served by way of an advertisement in the Zambia Daily Mail Newspaper on 30th June 2014.

On 3rd July 2015, the Commissioner issued a certificate of re-entry and the Property was on 28th October 2015 offered to the 2nd Respondent.

The Appellant only became aware of the re-entry sometime in November 2015. She then made representations to the Commissioner both in person and in writing, which representations were not successful.

It was the Commissioner's view that, the Appellant was in breach of the terms for failure to develop the Property and that, all the legal procedures were followed in the repossession of the Property and subsequent allocation to the 2nd Respondent.

This prompted the Appellant to lodge a complaint before the Lands Tribunal, challenging the re entry and seeking the following reliefs:

(1) A declaration that the Appellant is entitled to the Property.
(2) An Order directing the Commissioner to cancel the purported offer to the 2nd Respondent.
(3) An Order directing the Commissioner to offer the Property to the Appellant

After considering the evidence before it, the Lands Tribunal made several findings of fact; that the Appellant did receive the notice of intention to re-enter; and upon receipt did make representations to the Commissioner in writing and by dialogue, in person on several occasions. Further that, upon considering the representations, the Commissioner decided to repossess the Property, as at the time it had still remained undeveloped.

According to the Lands Tribunal, the Commissioner strictly complied with the procedure as spelt out in Section 13 of ***The Lands Act***[1] before repossessing the Property.

On the mode of service of the notice of re-entry, the Tribunal referred to the cases of **Anort Kabwe, Charity Mumba Kabwe v James Daka, Attorney General and Albert Mbazima** and **Eustace Spaita Bobo and Another v the Commissioner of Lands and Another**[3] in which cases it was held that the mode of service is normally by way of registered mail to the last known postal address.

Despite the Tribunal acknowledging that the two authorities were indeed binding on the Tribunal, it went on a frolic of its own and made reference to several South African authorities and ***The Lands (The Lands Tribunal) Rules***[2] and arrived at the conclusion that service by way of substituted service was applicable and a recognised mode of service.

As a consequence, the Lands Tribunal dismissed the complaint.

The Appellant then appealed to the High Court, advancing three grounds of appeal, namely:

(1) That the Lands Tribunal misdirected itself in law and fact when it found that the Commissioner had strictly complied with Section 13 of ***The Lands Act***[1], when re-entering the Property.

(2) That the Lands Tribunal misdirected itself in law and fact when it found that the Appellant had made representations after receiving the notice of intention to re-enter from the Commissioner.

(3) That the Lands Tribunal misdirected itself in law and fact when it found that the correct mode of service was used by the Commissioner and that the law allocates risk of non-receipt of the notice of intention to re-enter on the title holder and not the Commissioner.

After considering the appeal, the learned Judge of the High Court upheld the Judgment of the Lands Tribunal and dismissed the appeal.

Dissatisfied with the Judgment, the Appellant has now appealed to this Court launching four grounds of appeal couched as follows:

(1) The High Court erred in law and fact when it found that the commissioner had strictly complied with Section 13 of The Lands Act, when re-entering the Property.

(2) The High Court erred in law and fact when it failed to take into consideration the effect of the size of the advertisement in the daily newspaper in affecting the Appellant's ability to make representation within the time frame allowed by Section 13 of ***The Lands Act***[1].

(3) The High Court erred in law and fact when it found that the Appellant had made representations to the Commissioner in compliance with Section 13 of ***The Lands Act***[1].

(4) The High Court erred in law and fact when it found that the correct mode of service was used by the Commissioner when re-entering the Property.

At the hearing of the appeal, Mr. Mwale, Counsel for the Appellant relied on the Appellant's heads of argument which he augmented with brief oral submissions.

Counsel argued the first, second and third grounds of appeal together. It was Counsel's contention that the Commissioner did not strictly comply with the procedure and requirements for a valid re-entry of the Property as stipulated under Section 13 of ***The Lands Act***[1]. Further, that, the Appellant did not make representations to the Commissioner and the court below did not factor in the effect of the

size of the advertisement in effecting the Appellants ability to make representations to the Commissioner.

Our attention was drawn to Section 13 which provides as follows:

> *"13 (1) Where a lessee breaches a term or a condition of a covenant under this Act, the President shall give the lessee three months' notice of his intention to cause a certificate of re-entry to be entered in the register in respect of the land held by the lessee and requesting him to make representations as to why a certificate of re-entry should not be entered in the register.*
>
> *(2) If the lessee does not within three months make the representations required under subsection (1), or if after making representations, the President is not satisfied that a breach of a term or a condition of a covenant by the lessee was not intentional or was beyond the control of the lessee, he may cause the certificate of re-entry to be entered in the register.*
>
> *(3) A lessee aggrieved with the decision of the President to cause a certificate to be entered in the register may within thirty days appeal to the Lands Tribunal for an Order that the register be rectified."*

Counsel submitted that the findings by the learned Judge that the Lands Tribunal did not err when it found that the Appellant was given an opportunity to make representations, to the extent that, as even

after the three months had elapsed after the advert was placed in the Newspaper and the Property had been repossessed were incorrect.

According to Counsel, the Commissioner is not mandated to consider a plea from a lessee whose property has been a subject of re-entry as the property ceases to be that of the lessee in breach of the condition, once the Commissioner re-enters the property in the lands register. Furthermore, the time frame allowed by Section 13 on the right to be heard before extinguishing of a lessee's right to the property is three months from the date of the issuance of the notice of intention to re-enter. The Commissioner is not mandated to hear an aggrieved lessee after the lapse of the three months period allowed by Section 13.

It was Counsel's contention that the Appellant did not make representations within the period recognised under Section 13, to show cause why a certificate of re-entry should not be entered.

Our attention was drawn to the **Anort Kabwe**[1] case where the Supreme Court opined as follows:

> *"A repossession effected in circumstances where a lessee is not afforded an opportunity to dialogue with the Commissioner of lands, with a view to having an extension of period in which to develop the land cannot be said to be valid repossession."*

We were also referred to the High Court case of **Nicos Adonopoulos and Evangelos Antonopoulus v Awanji Farms Limited and The Attorney General**[2] where it was held as follows:

> *"1. The purpose of the requirement under Section 13 of* ***The Lands Act***[1] *is to afford a lessee who is in default to dialogue with the Commissioner of Lands with the intention to extend the period within which he is required to develop the property.*
>
> *2. A repossession effected in circumstances where the lessee is not afforded an opportunity to dialogue is not valid."*

Counsel further cited the High Court case of **Eustace Spaita Bobo and Another v The Commissioner of Lands and Another**[3] where the court observed that:

> *"This provision of the law would seem to be in tune with the principles of natural Justice in that the lessee ought to be afforded an opportunity to make representations."*

It was submitted that, emanating from the aforestated authorities, any repossession effected by the Commissioner without affording the lessee an opportunity to dialogue with a view to extending the period within which the lessee is required to develop the property is not valid at law and such repossession is null and void.

Counsel urged us to find that the Commissioner did not comply with the provisions of Section 13.

On the size of the advertisement, it was submitted that the print size was clearly illegible and as such the entire purpose of a legal notice, as to put the recipient on alert was not satisfied.

In respect to the fourth ground of appeal, Counsel submitted that in Order for the Commissioner to lawfully cause a certificate of re-entry to be entered in the lands register, the notice of intention to re-enter ought to be served by way of postal service.

It was submitted that the lower court misapprehended the law as regards the correct mode of service as ***The Lands Tribunal Rules***[2] which the Tribunal relied on are not applicable to service of the notice of intention to re-enter. The **Anort Kabwe**[1] case was cited where the Supreme Court on the mode of service observed as follows:

> *"(1) The mode of service of the notice to cause a certificate of re-entry to be entered in the register for a breach of a covenant in the lease as provided for in Section 13(2) of the Lands Act is cardinal to the validation of the subsequent acts of the Commissioner of Lands in disposing of the land to another person.*
>
> *(2) If the notice is properly served, normally by providing proof that it was by registered post using the last known address of the lessee from whom the land is to be taken away, the registered owner will be able to make representations, under the law, to show why he could not develop the land within the period allowed under the lease.*
>
> *(3) if the notice is not properly served and there is no evidence to that effect, there is no way the lessee*

would know so as to make meaningful representations."

Reliance was also placed on the High Court case of **Eustace Spaita Bobo**[3] where it was observed as follows:

*"The essence of Section 13 of **The Lands Act** is to afford the lessee to either make a representation or/and amends of the alleged breach. It is therefore mandatory that the lessee is served with the notice of the intention to cause a certificate of re-entry to be entered. This means that apart from ensuring that the notice is served on the lessee, there should be proof of such service. Further, that only after the expiration of the three months' notice period should the President consider whether there has been any representations and if so whether he is satisfied that the breach was not intentional or beyond the control of the lessee."*

Counsel contended that, the reasons advanced by the Commissioner for failure to comply with the correct mode of service have no foundation at law and are illegal, null and void. The finding that the excuse proffered by the Commissioner was excusable in light of the fact that service by way of substituted service would be most economical and efficient mode of service taking into account the volume of people who breach terms or conditions, was wrong.

In conclusion, Counsel urged us to uphold the appeal.

There was no response from the 1st Respondent. The 2nd Respondent in response filed heads of argument together with a notice of non-attendance.

The 2nd Respondent responded to the four grounds of appeal separately.

In response to the first ground, it was submitted that the Appellant breached the terms and covenants when the Property remained undeveloped for five years.

As regards the mode of service of the notice of intention to re-enter, it was submitted that ***The Lands Tribunal Rules***[2] and case law are instructive on the procedure. The case of **Eustace Spaita Bobo**[2] was cited in that respect and submitted that Rules 27, 29 and 30 of the Rules were applicable and substituted service was therefore valid.

In respect to the second ground of appeal, our attention was drawn to the case of **Mususu Kalenga Building Limited and Another v Richmans Money Lenders Enterprises**[4], where it was held that, matters which were not before the trial court cannot be raised on appeal.

According to the 2nd Respondent, the issue of the size of the advertisement was not raised in the court below and cannot therefore be a subject of the appeal.

As regards the third ground of appeal, it was the 2nd Respondent's submission that, the Appellant engaged the Commissioner on several occasions and was therefore afforded an opportunity to be heard and dialogue with the Commissioner.

In response to the fourth ground of appeal, the 2nd Respondent submitted that, service of notice of intention to re-enter can legally be effected by substituted service in line with the Rules as it is a more convenient and effective mode of service. That the Tribunal was on firm ground when it found that the correct mode of service was used by the Commissioner when it advertised the notice.

The 2nd Respondent urged us to dismiss the appeal for lack of merit with costs.

We have considered the arguments by the parties together with the Judgment being impugned.

We shall consider all the four grounds of appeal together as they are related. The issues the appeal raise is twofold. Firstly, whether the mode of service of the notice by way of advertisement in the national newspaper was acceptable, proper and in order.

Secondly, arising from the answer to the first issue whether the Commissioner strictly complied with the provisions of Section 13 of ***The Lands Act***[1].

In addressing the first issue, as earlier alluded to, the Lands Tribunal acknowledged the Supreme Court decision in the **Anort Kabwe**[1] case where it was held that, normally the mode of service of the notice of intention to re-enter was by registered post using the last known address of the lessee.

This is what Silomba, JS at page 17 of the Judgment said;

"The mode of service of the Notice of intention to cause a certificate of re-entry to be entered in the register for a breach of covenant in the lease as provided for in Section 13 (2) of ***The Lands Act*** *is cardinal to the validation of the subsequent acts of the Commissioner of Lands in disposing of the land to another person. We say so because if the notice is properly served, normally by providing proof that it was by registered post using the last known address of the lessee from whom the land is to be taken away, the registered owner will be enabled to make representations under the law to show, why he could not develop the land within the time allowed under the lease.*

If the land is eventually taken over because of being in breach despite the warnings from the Commissioner of Lands, the registered owner cannot successfully challenge the action to deprive him of the land."

Arising from the words of Silomba JS, it can be deduced that, the normal mode of service of the notice of intention to re-enter is by registered post to the lessees' last known postal address and the Commissioner must provide proof that the notice was served as such.

In view of this binding case law, there was no need for the Lands Tribunal to ignore the same and venture into the South African authorities and the Tribunal Rules in justifying substituted service by advertisement as a convenient mode of service. The Tribunal was

bound by the principle of *stare decisis* and erred in attempting to depart from the Supreme Court decisions in the **Anort Kabwe**[1] case.

It should also be noted that rules 27, 28 and 29 in respect to services of notices relate specifically to service of notices subject to proceedings under the Lands Tribunal and are not applicable to service of notices of intention to re-enter under ***The Lands Act***[1].

It follows from the aforestated that the mode of service which was adopted by the Commissioner was wrong and not in compliance with the law as set out by the Supreme Court in the **Anort Kabwe**[1] case.

It will be noted from the record that, the Appellant only became aware of the repossession as earlier alluded to, sometime in November 2015.

This was after the certificate of re-entry was issued on 28th October 2015 and the Property was offered to the 2nd Respondent on the same date.

It is evident that the Appellant was not afforded an opportunity to make representations within three months from the date of the notice of intention to re-enter.

At the time the Appellant was making representations, the Property had already been repossessed and offered to the 2nd Respondent.

The Appellant's representations were in futility and were bound to fail.

In view of the aforestated, although the Appellant, as admitted, was in breach of the terms of offer, he was however entitled to be given an opportunity to make representations, why she could not develop the Property within the stipulated period allowed under the lease.

The High Court decision in the **Nicos Adonopoulos[2]** case is derived from the principle set out in the **Anort Kabwe[1]** case. Equally was the High Court case of **Eustace Spaita Bobo[3]**. The cardinal principal laid out in those cases is that a repossession effected in circumstances where the lessee is not afforded an opportunity to dialogue is not valid.

The aforestated was reiterated in the Supreme Court case of **Shadrick Wamusula Simumba v Juma Banda and Lusaka City Council[5]** where it was held inter alia that:

> *"If repossession is effected in circumstances where the lessee is not given an opportunity to explain such repossession, the repossession could not be said to be valid."*

In view of the aforestated, the mode of service adopted was wrong as the Appellant was not afforded an opportunity to make representations; as such the Commissioner did not strictly comply with the provisions of Section 13 of ***The Lands Act[1]***.

Having found that, the mode of service was wrong, the issue of the size of the advertisement is otiose.

In the view that we have taken, the sum total of this appeal is that it succeeds. We accordingly overturn the Judgment in the court below

as the repossession effected by the Commissioner was illegal and as such the Commissioner as 1st Respondent was not justified in making the offer to the 2nd Respondent without following the due process of the law.

We accordingly declare the Appellant as legal owner of the Property and Order the Commissioner to accordingly rectify the Lands register.

Costs of the appeal in this Court and the court below shall be borne by the 1st Respondent. Same to be taxed in default of agreement.

J. CHASHI
COURT OF APPEAL JUDGE

M. J. SIAVWAPA
COURT OF APPEAL JUDGE

P. C. M. NGULUBE
COURT OF APPEAL JUDGE