IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No.200/2015
SCZ/8/227/2015

BETWEEN:

DON SICHINGA — 1ST APPELLANT

YORAM SHAMALAMBO — 2ND APPELLANT

AND

WEBSTER DICKSON SHABUSALE — RESPONDENT

Coram: Mambilima, CJ, Wood and Kaoma, JJS.

On 10th July, 2018 and on 1st August, 2018

For the Appellants: N/A

For the Respondent: Mr. K. Shepande- Shepande & Company

J U D G M E N T

Kaoma, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Stanley Mwambazi v Morrester Farms Limited (1984) Z.R. 98**
2. **Rosemary Phiri Madaza v Awadh Karen Coleen (2008) 1 Z.R. 12**
3. **Oscar Chinyanta and 31 others v Alasia Building Construction Ltd and Tap Zambia Limited - Appeal No. 158 of 2015**
4. **Liamond Choka v Ivor Chilufya (2002) Z.R. 33**
5. **Greater London Council v Jenkins (1975) 1 WLR 155**

Legislation referred to:

1. **Rules of the Supreme Court (White Book) 1999, Order 28 rules (3) and (4), Order 33 (3) and Order 113**
2. **Supreme Court of Zambia Act, Cap 25, section 25**
3. **High Court Rules, Cap 27 Order 3 (2) and Order 30(21)**
4. **Lands and Deeds Registry Act, Cap 185, sections 33 and 34.**

Other works referred to:

1. **Black's Law Dictionary 6th edition, 1995, page 555**

This is an appeal against a judgment of the High Court granting the respondent possession of Farm 18974/M, Mumbwa.

The background facts to this appeal are that the respondent is the title holder of the property in issue which is in extent 100 hectares. The appellants occupy about 10 to 15 hectares of this land. In February, 2012 the respondent commenced legal action against the appellants by originating summons pursuant to **Order 113** of the **Rules of the Supreme Court (White Book) 1999** seeking summary possession of the portions of his land occupied by the appellants.

The affidavit evidence that was placed before the court below revealed, that the respondent, his siblings and his parents had been in occupation of the property as early as 1948. The property was under customary tenure. In October, 2000 the respondent applied to Chief Shakumbila, in whose chiefdom the land is situated, to have the land converted to leasehold tenure. The proposed site plan gave the extent of the land known as Lot 16532/M. This included Lots 18974/M and 18975/M. The land covered 200 hectares. On 26th December, 2000 the Chief approved the application.

Subsequently, the respondent applied to the Mumbwa District Council for further action on the conversion of the land to leasehold tenure. In May, 2002 the Council also approved the application for the 200 hectares after inspection of the subject property (page 35) and then recommended to the Commissioner of Lands to have the land converted to leasehold tenure. The respondent also applied to the Commissioner of Lands for title deeds for the 200 hectares.

On 18th December, 2003 the Ministry of Lands wrote to the respondent in connection with his application for Lot 16532/M raising concern that the proposed small holding encompassed the road linking Lusaka and Shibuyunji and that this being a main road, it could not pass through the proposed farm as shown on the site plan. He was advised to re-plan the farm to leave out the road and to consult the Central Province Planning Authority and the Local Council, to assist in re-planning the small holding. According to the respondent, the farm was re-planned as advised.

On 11th October, 2005 the respondent was issued with a certificate of title in respect of Lot 18974/M. At the hearing of the appeal we were informed by counsel for the respondent that because of the re-planning, which left out the road as advised by

the Ministry of Lands, the respondent obtained two separate certificates of title, for Lot 18974/M and for Lot 18975/M.

The respondent alleged that the appellants had encroached on Lot 18974/M by building structures thereon and carrying on farming activities and that they were squatters on his land and remained there without his licence or consent. He further deposed that his effort to remove them from his land had proved futile. The respondent had annexed to his affidavit in support relevant documents to show how the land was converted from customary tenure to leasehold tenure.

In their affidavit in opposition to originating summons, the appellants deposed, among other things, that the respondent had wrongly commenced the action concerning ownership of land by originating summons requiring the court to make declarations instead of using a writ of summons as required by the law because parties were required to give evidence and be cross-examined.

They also alleged that the pieces of land the respondent was illegally claiming under his certificate of title were in Chiyaba Village, which was established in 1931 and far away from the land which was occupied by the respondent's father and grandfather.

The appellants further alleged fraud on the part of the respondent in the manner he obtained the certificate of title on the basis that the documents which he used in obtaining the certificate of title were wrongly made and signed by people who were not the authority over land as required by the Lands Act.

On 14th March, 2013 the appellants filed a notice of intention to raise preliminary issue pursuant to **Order 33/3** of the **White Book**, raising the same issues that were raised in their affidavit in opposition to originating summons. They alleged that the approval document by Chief Shakumbila was forged as it was not signed by him but by one, A. Shachele. They also asserted that **Order 113** is for squatters and they were not squatters in their own village as only the headman and Chief in the area could declare them squatters. They insisted that the respondent did not follow the procedure required for converting customary land to leasehold tenure by using shortcuts of obtaining the title deed without a proper description of the land covered by the title deed.

The record shows that when the matter came up on 17th December, 2013 counsel for the appellants took the view that the preliminary issues raised by the appellants would be more

adequately addressed by joining the Attorney-General and the Commissioner of Lands. Counsel intimated that they would be making a formal application later. As there was no objection by counsel for the respondent, the court decided to proceed with the main matter. It was only after counsel for the respondent had addressed the court on the substantive matter that counsel for the appellants requested for an adjournment to facilitate the joining of the Attorney-General and the Commissioner of Lands.

On 13th February, 2014 an application was made to join the Attorney-General. In the affidavit in support, the appellants repeated their suspicion that the title deed upon which the respondent was relying was fraudulently obtained and consequently gave him no rights over the disputed property.

They further alleged that the document granting the respondent consent, purportedly under the hand of Chief Shakumbila was signed by a person other than the chief which person was known to all the parties as not being the chief. Furthermore, that the 2nd appellant and his family had been in occupation of the land since 1907 and the 1st appellant more recently and consequently believed that the Ministry of Lands would

not have issued a title in respect of that property had the procedure been duly followed and inspection carried out as claimed.

The appellants further asserted that the land in issue was the only home the 2nd appellant and his family had ever known; and that the land, had been and is part of the villages of Matako, Shankemba and Chiyaba occupied by various families.

There was objection to this application and one Paul Kachimba, a Legal Officer at the Ministry of Lands deposed, in an affidavit in opposition, that according to their records, Chief Shakumbila gave consent for the respondent to convert the land in dispute from customary to leasehold tenure and that the laid down procedures were followed, so there was no need to join the Attorney General or Commissioner of Lands on the basis that they needed to clarify on the ownership of the property as the Commissioner of Lands could always be called upon as a witness.

The record shows that on 4th March, 2014 counsel for the respondent had replied verbally to the affidavit in support of the application for joinder. Thereafter counsel for the appellants responded to the respondent's submissions on the main matter.

On 31st March, 2014 the Attorney General was represented at the hearing by an Assistant Senior State Advocate. She relied on the affidavit in opposition to the application for joinder. In reply counsel for the appellants submitted that the reason they asked for the Commissioner of Lands to be joined was to resolve the issue that the "plaintiff" raised in relation to ownership of land in view of the fact that the 2nd appellant had been in occupation of the land since 2008 and as such had nowhere else to go; and that the Ministry of Lands had an interest in the matter as it affected the interest of people who had no title and yet had lived on that land for a very long time.

After hearing the parties, the court ordered that the Attorney General be joined to the proceedings as a third party. However, the Attorney-General did not attend court at the next hearing on 24th February, 2015. Counsel for the respondent took the view that the Attorney General did not want to be joined in spite of the order that they be joined and that the appellants should just close their case.

In response, counsel for the appellants stated that the reason they wanted the Attorney General was to clarify some of the issues raised by the appellants pertaining to the land having been a

village. Counsel reluctantly closed the appellants' case. The court adjourned the matter for judgment to 17th April, 2015 whilst pointing out that the Attorney General was given enough time to be heard on the issues raised by the appellants but that they were not forthcoming.

On 14th April, 2015 the 1st appellant applied to arrest judgment mainly on the basis that they were not heard on their allegation that the certificate of title relating to the disputed land was obtained by way of fraud. The next day the court stayed the delivery of the judgment until interpartes hearing of the application. The application was heard on 5th May, 2015. The appellants were now represented by counsel of Jaques and Partners, Kitwe.

On 22nd July, 2015 the court denied the application on the basis that the appellants were ably represented by counsel from Legal Aid who could have applied to court for the matter to be heard by way of oral evidence if the affidavit evidence did not suffice.

The next day the court delivered the judgment appealed against granting the respondent vacant possession of the subject property. The rationale for the decision was that according to **section 33 of the Lands and Deeds Registry Act, Cap 185** a

certificate of title is conclusive evidence of ownership in the absence of fraud and that the appellants did not show that the respondent obtained the certificate of title fraudulently. The court, therefore, found that the appellants were squatters.

Dissatisfied with the judgment, the appellants appealed to this Court on two grounds of appeal as follows:

1. **The learned trial Judge erred in fact and in law when she proceeded to make findings of fact based purely on affidavit evidence which was neither proven nor admitted by way of hearing witnesses.**

2. **The learned trial Judge erred in fact and in law when she failed to order or direct that the matter be heard by way of full trial and thereby preventing the litigants in the Court below an opportunity to be heard on the many contentious issues which arose in the case, particularly the allegation that a certificate of title was fraudulently obtained.**

In support of the appeal, counsel for the appellants filed heads of argument but did not attend the hearing of the appeal. Nonetheless, we shall take into account the written heads of argument. The two grounds of appeal have been argued together. The gist of the arguments is still that the affidavit in opposition to originating summons had raised triable issues about the manner in which the certificate of title had been obtained regarding the disputed land which could only be resolved by way of a full trial.

Order 28 Rules 3 and **4** of the **White Book** was cited as authority.

It was argued that the 1st appellant had tried to insist on calling witnesses and both had attempted to arrest the judgment on the basis that there were allegations of fraud and contentious matters which ought to have been resolved by way of trial. To support this argument, the appellants cited the case of **Stanley Mwambazi v Morrester Farms Limited**[1]. He also quoted **section 13** of the **High Court Act, Cap 27** concerning the duty of the trial court to ensure that all matters in controversy are dealt with.

It was argued that even in the absence of an application, the court could have invoked its jurisdiction as prescribed in **Order 3(2)** of the **High Court Rules**, **Cap 27** which empowers the court, in all causes and matter, to make any interlocutory order which it considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the Order or not. We hasten to say that this argument relates to the ruling of the court below on the application to arrest delivery of the judgment which has not been appealed against.

The appellants further contended that given that the disputed piece of land was purportedly converted from traditional land to state land, an inference may be drawn that the appellants were not

at the trial at which they could call the witnesses they sought to distinctly prove the allegation of fraud. The case of **Rosemary Phiri Madaza v Awadh Karen Coleen**[2] was quoted which dealt with the requirements to be met by a party alleging fraud.

Finally, we were invited to invoke **section 25(b) (iv)** and **(c)** of the Supreme Court of Zambia Act, Cap 25 requiring this Court to remit the case to the High Court for further hearing, with such instructions as regards the taking of further evidence or if it appears to this Court that a new trial should be held, to set aside the judgment appealed against and to order a new trial.

In response, counsel for the respondent submitted that ground 1 is anchored on the fact that judgment was passed against the appellants based purely on affidavit evidence which was neither proven nor admitted by way of hearing witnesses. He referred to **Black's Law Dictionary 6th ed, 1995 at page 555** where 'evidence' is defined as any species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc, for the purpose of inducing belief in the minds of the court or jury as to their contention.

It was argued that by submitting that the documentary evidence relied on by the respondent ought to have been further proved by oral evidence of witnesses, the appellants imply that documentary evidence carried less weight than or is somehow inferior to oral evidence, an implication which is a gross misconception with no legal basis. Counsel also quoted a book titled 'An Outline of the Law of Evidence' by Rupert Cross (full citation not provided) where the learned author states that the weight of evidence is a question of fact and is affected by various factors.

In response to ground 2, it was argued that the judge was on firm ground when she did not order that the matter be heard by way of a full trial. Counsel cited **Order 30 (21)** of the **High Court Rules**, which empowers the court, if it thinks expedient, in addition to or in lieu of affidavits, to examine any witness viva voce, or receive documents in evidence, and to summon any person to attend to produce documents, or to be examined or cross examined, in like manner as at the hearing of a suit. It was argued that while the court has the power to proceed as indicated above, this power is a discretionary one, and if the court does not think it expedient to call for such evidence, then it is not compelled to do so.

It was also argued that in this case, the Judge did not think it expedient to summon witnesses to provide viva voce evidence because the contentious issue raised by the appellants that the certificate of title held by the respondent was fraudulently obtained, was adequately addressed by evidence already before the court.

Reference was further made to the affidavit evidence of Paul Kachimba on the application for joinder showing that all the necessary procedures for conversion of customary land into state land and the acquisition of the certificate of title were duly, complied with, by the respondent. It was submitted that faced with such compelling evidence indicating absence of any fraud on the part of the respondent, it was not surprising that the trial judge did not think it expedient to call for further evidence, oral or otherwise.

It was further contended that in the absence of evidence or proof of fraud, save for a mere unsubstantiated claim, a legally obtained certificate of title, is in terms of **section 33** of the **Lands and Deeds Registry Act** conclusive evidence of ownership. We were urged to dismiss the appeal with costs.

We have perused the record of appeal and the arguments by the parties. The two grounds of appeal are entwined and in the

main, attack the court below for not conducting a trial on the basis of the allegation that the certificate of title for the subject property was obtained fraudulently by the respondent. Therefore, we shall deal with both grounds together.

The originating summons in this case was issued under **Order 113, rule 1** of the **White Book** which provides that:

> **"Where a person claims possession of land which he alleges is occupied sorely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of the order."**

In the recent case of **Oscar Chinyanta and others v Alasia Building Construction Limited and another**[3] we pointed out that for a claim of possession to be sustained under **Order 113**, there must be no dispute as to ownership of the land in issue. In the same case, we quoted the case of **Liamond Choka v Ivor Chilufya**[4] where we held that the summary procedure under **Order 113** can only be suitable for squatters and others without any genuine claim of right or who have since been transformed into squatters.

We further referred to **paragraph 113/8/2** of the **White Book** where the learned editors have stated that the court has no

discretion to prevent the use of this summary procedure where the circumstances are such as to bring them within its terms. We also quoted the case of **Greater London Council v Jenkins**[5] which shows that a landlord is entitled to use the summary proceedings under **Order 113** if he can demonstrate his right to do so, and that the court has no discretion to deny such use merely on the grounds that the proceedings are rapid and summary and that the defendants did not enter as squatters.

In the current case, the respondent alleged that he was the registered proprietor of the subject property and that the appellants entered into or remained in occupation of the land without his licence or consent. The question then is whether the appellants were squatters or trespassers and fell within **Order 113, rule 1**.

The appellants' contention is that the allegation of fraud was a serious issue which could only be resolved by way of a trial and that they could not bring witnesses to testify to specifically prove the fraud as there was no trial. As we said earlier, the court below found that the certificate of title for the subject property was conclusive evidence of ownership in terms of **section 33** of the **Lands and Deeds Registry Act**; that the appellants did not show

that the respondent obtained the certificate of title fraudulently; and that the appellants were squatters.

The question that arises is whether there was a serious dispute apparent to the respondent as regards the ownership of the subject property to prevent him from using **Order 113, rule 1** given that **paragraph 113/8/3** of the **White Book** states that when the existence of a serious dispute is apparent to a plaintiff, he should not use this procedure. We do not believe, in the circumstances of this case, that there was a serious dispute as to the title of the respondent to the subject property to bar him from using this procedure. In our view, the court below was on firm ground when it held, from the affidavit evidence before it, that the appellants did not have proof of ownership of the subject property.

In fact, on 31st March, 2014 counsel for the appellants told the court that the reason they wanted the Commissioner of Lands to be joined was to resolve the issue of ownership of land considering that the 2nd appellant had been in occupation of the land since 2008 and therefore, had nowhere else to go; and that the Ministry of Lands had an interest in the matter as it affected the interest of people who had no title and yet had lived on that land for a very long time.

Furthermore, on 24th February, 2015 counsel for the appellants disclosed to the court that the reason they wanted the Attorney General was to clarify some of the issues raised by the appellants pertaining to the land having been a village.

It must be emphasised that whilst the appellants claimed that the subject property encompassed four villages and that the 2nd appellant's ancestors occupied the land from as early as 1907; the record shows that the appellants are the only people in occupation of the subject property. They did not produce any documents from either Chief Shakumbila or their village headman (if any); to show that they were on the land before it was converted from customary land to leasehold tenure.

Moreover, there was evidence to the effect that after the Chief had approved the respondent's application, officers from Mumbwa District Council went on site to inspect the land before the Council approved the application and recommended to the Commissioner of Lands to convert the land to leasehold tenure. There was no evidence that anyone occupied the land at the time of inspection.

The only concern raised by the Ministry of Lands in 2003 was that Lot 16532/M encompassed the road linking Lusaka and

Shibuyunji. The respondent was advised to re-plan the farm to leave out the road and according to him that was done. The concerns raised by the Council in 2012 in the letter at page 67 of the record of appeal came seven years after the respondent had been issued with a certificate of title for the subject property.

Further, if the 2nd appellant entered into occupation of the land in 2008, as stated by their counsel on 31st March, 2014 then he and his family could not have been in occupation of the land since 1907. Then again, if the 1st appellant entered the land more recently, as stated in their affidavit on the application for joinder, it means that both of them, entered the land when the respondent already held a certificate of title, and without his consent or licence.

Coming to the allegations of fraud, the question is whether this issue required to be tried. The learned editors of the White Book have explained at **paragraph 113/8/14**, that if the Court should hold that there is some issue or question that requires to be tried, or that for some other reason there ought to be a trial, it may give directions as to the further conduct of the proceedings, or may order the proceedings to continue as if begun by writ.

In **Rosemary Phiri Madaza v Awadh Karen Coleen**[2], we held that where fraud is an issue in the proceedings, a party wishing to rely on it must ensure, that it is clearly and distinctly alleged and further that, at the trial of the cause, the party alleging fraud must equally lead evidence, so that the allegation is clearly and distinctly proved. The question is whether this matter should have proceeded to trial for the appellants to lead evidence to clearly and distinctly prove the allegation. Our answer is in the negative.

First, the appellants claimed a right to remain in occupation of the subject property land as villagers. However, as the court below found, they did not prove ownership or disprove that they were squatters. In contrast, the respondent proved that he is the registered owner, with superior interest. The allegations of fraud did not, in any way, alter the appellants' status of being squatters and the court will not protect squatters from eviction.

Secondly, there was clear affidavit evidence by the respondent and by the Commissioner of Lands, although it related to the application for joinder, that the laid down procedures for conversion of customary land to leasehold tenure and for acquisition of the

certificate of title were followed by the respondent. Consequently, the allegations of fraud were unfounded and a mere suspicion.

Thirdly, it is clear to us that the appellants were discontented with the judgment only because they did not give oral evidence. However, the record shows that they were represented by Legal Aid counsel and that through their counsel; they fully participated in the proceedings. Therefore, they cannot afterward, be heard to mourn through another counsel, that the affidavit evidence was not proven or admitted by way of hearing witnesses. Put simply, there was no serious issue to try. Our view is that the two grounds of appeal lack merit.

In the event, this appeal is dismissed with costs. We uphold the judgment of the court below and grant immediate possession of the subject property to the respondent.

I.C. MAMBILIMA
CHIEF JUSTICE

A.M. WOOD
SUPREME COURT JUDGE

R.M.C. KAOMA
SUPREME COURT JUDGE