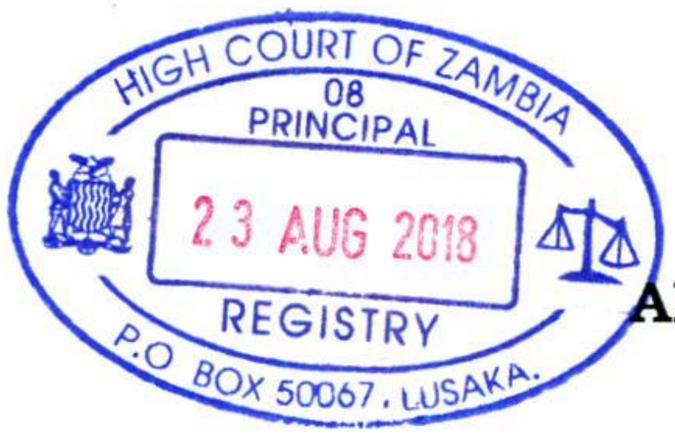
IN THE HIGH COURT FOR ZAMBIA **2018/HPA/001**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

MAXWELL TEMBO **APPELLANT**

AND

GEOFFREY TAMBULUKANI **RESPONDENT**

BEFORE HONORABLE MR. JUSTICE MWILA CHITABO, SC

For the Appellant: *Ms. K. Parshotam and Ms. C. Bwalya of Messrs Andrew & Partners*

For the Respondent: *Ms. G.C Chilekwa and Ms T.B Kasonka of Messrs AB & David*

J U D G M E N T

Cases referred to:

(i) *Khalid Mohamed v. The Attorney General (1982) ZR 49*
(ii) *Shadreck Wamusula Simumba v. Juma Banda and Lusaka City Council (2013) 2 ZR 178*
(iii) *Haurice Maurice Chilufya v. Chrispin Kangunda (1999) ZR 166*
(iv) *Trevor Limpic v. Rachael Mawere and 2 others SCZ, Judgment No. 35/2014, Appeal No. 121/2000*

This is an appeal by the Appellant Maxwell Tembo (who was the first Respondent in the tribunal below) against the Judgment of the Lands Tribunal delivered on 12th December, 2017.

The grounds as crafted in the memorandum of appeal advances 2 grounds.

Ground 1

That the Honorable Members erred in Law and in fact when they held that the Respondent Geoffrey Tambulukani (who was the complainant in the court below) is the legal owner of Plot No. 15236/1080, Kamwala South (herein referred to as the property) and not the Appellant.

Ground 2

That the Honourable Members erred in law and in fact when they did not make a finding that the Appellant is not a bonafide purchaser for value.

The record in the Tribunal reveals that the parties agreed to rely on affidavit evidence. The Tribunal's record reveals that after 5 adjournments the Tribunal on its 6th sitting confirmed with the Learned Attorneys for the parties that it will rely on the documentary evidence inclusive of the affidavits and adjourned for Judgment.

The genesis of this matter is that the complainant (now Appellant) launched proceedings against the Respondent and Lusaka City Council on 13th August, 2015. The grounds were that:-

(1)The 1st Respondent had illegally encroached on the property which the Plaintiff owned.

(2)That the 2nd Respondent has unlawfully and purportedly allocated property to the 1st Respondent (in the Court).

The reliefs sought were that

(i) A declaration that the complainant is entitled to property aforesaid.

(ii) An order directing the 2nd Respondent to cancel the purported offer of the property to the 1st Respondent.

(iii) An order directing the 2nd Respondent to update the file for the property.

(iv) An order directing the 1st Respondent to demolish the illegal structure and restore the land to its original status before the purported construction took place and order the 2nd Respondent to enforce the enforcement notice.

(v) Any other relief the tribunal may deem fit.

The complaint was supported by the complainant. The essence of which was that the property was originally offered to Esther Mulenga on 22nd July, 1994 as exhibited as *"GT1"*.

The survey and service charges were paid under receipt 242134 on 16th August, 1994 marked *"GT3"*.

The property was on 5th January, 1996 transferred to Hope Chanda as shown in the Land record card marked *"GT4"*.

On 13th June, 2001 he acquired the property from Hope Chanda as evidenced by *"GT5"* being transfer payment in respect of the property is evidenced by exhibit *"GT6"*. The transfer letter was conveyed to the 2nd Respondent by letter dated 19th April, 2001 marked *"GT7"*.

On 17th March, 2006, an application for permission to develop as evidenced by *"GT9"* which plans were approved on 18th July, 2006 marked as *"GT8"*.

Between 2005 and 2006 he planted fruit trees and laid a foundation for the house.

The dependent then discovered that someone was building on his foundation, a slab had been constructed and the surrounding area had been cleared.

It was then discovered that the person who had entered was the 1st Respondent. The later claimed that he had bought the plot at K12 million (now (K12, 000.00).

The dispute was referred to the 2nd Respondent who directed the 1st Respondent to stop construction to allow for investigations, but the 1st Respondent ignored the directive and continued to develop the land.

It was his deposition that when the 2nd dependent was making investigations they demanded from the Applicant and 1st Respondent to present documents in support of claims to the land. He submitted his but the Respondent did not. The 2nd Respondent then issued a notice to the 1st Respondent to demolish the illegal structure constructed by the 1st Respondent – the Enforcement Notice dated 15th February, 2006 reference CCM/ems/CPD/2/147 "marked GT 10" was issued.

This order was not complied with.

That he made physical follow up and in writing to the Director of Legal services of the Respondent as evidenced by exhibits "*GT11 and GT 12*".

On 17th November, 2010, the Acting building manager instructed the police commandant to bill the enforcement as per exhibit *"GT3"*.

The budget for the operation was issued by the Police Commandant on 13th February, 2011, marked "GT14".

The demolition could not be undertaken because the 1st Respondent appeared with a photocopy of the Land record of ownership and approved plans issued by the 2nd Respondent.

According to him, he was advised by the Registry staff of the Council who advised that the 2nd Respondent could not have issued the property to 1st Respondent which belonged to another person.

Meanwhile the file had gone missing from the 2nd Respondents registry.

The Land record card purportedly issued tot eh Respondent is marked "GT15". He further deposed that the Court grants him

(i) an order directing the 2nd Respondent to enforce the Enforcement Notice, and

(ii) an order to demolish the alleged illegal structure on property number 15326/1080, Kamwala South, Lusaka.

The 1st Respondent filed an opposing affidavit deposed by Maxwell Tembo. The essence of which was that he had noticed for many years that the plot had been abandoned for many years without developing. He applied to the Respondent and he was given an offer by the second Respondent by letter dated 7th November, 2005 marked "MT1".

He then paid service charges K324, 500 as evidenced by "MT2" which is a letter from the council. He then referred to the exhibits "MT3", "MT4" and "MT5" being 2nd Respondents rates, billing statement from Lusaka Water and Sewerage respectively.

He deposed that he had since been paying the various bills to the council, the Lusaka Water and Sewerage Limited and also to ZESCO Ltd as evidenced by exhibit marked "MT3", "MT4" and "MT5".

That the notice of demolition was illegal since he was the proprietor of the property.

He deposed that the council is estopped from claiming that he was in possession of invalid documents, pointing out that the council had issued the documents marked "MT3", "MT4" and "MT5". He finally prayed that the Tribunal upholds his ownership.

After hearing the matter, the Lands tribunal found for the complainant was the lawful owner of the property and any structures illegally put on the slab be demolished.

It was those holdings that provoked an appeal to this Court.

At the hearing Learned Counsels for the parties relied on the record of appeal and on their skeleton arguments and submissions.

I am indebted on the host of authorities referred to by the Advocates. I will however not replicate the same but I assure the parties that I have factored in all the legal issues traversed by the parties. In any event submissions are for the convenience of the Court and submissions no matter how spirited they are cannot be substitute of evidence.

On the onset, I disclose my mind to the burden and standard of proof. It is trite law that *"he who alleges must"*. This position was adequately dealt with by Ngulube, DCJ (as he then was). This was in the case of ***Khalid Mohamed v. The Attorney General***[1]. His Lordship put it this way:-

"An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable one. A plaintiff must prove his case and if it fails to do so the mere failure of the opponents defence does not entitle him to Judgment. I would not accept a proposition that even if the plaintiffs case has collapsed of its inanition or for some reason or other, Judgment should nevertheless be given to him on the ground that the defence set up by the opponent has also collapsed. Quite clearly the defendant in the circumstances would not even need a defence"

The lands Tribunal (herein after referred to as the court) made certain findings and declarations.

(i) *That the purported notice of intention to entry on the property was not a lessee of the property in issue. The registered owner of the property at all material times who was Hope Mwabi Chanda was not served with any notice of intention to re-enter at all. She could therefore have made representations to the council.*

(ii) *The purported entry was not even signed by the proper officers besides it being served on a non lessee. We nullify the re-entry forthwith.*

There is no appeal against the findings of the Court below and I reconfirm the findings and the order nullifying the purported entry.

(2) Building on substructure

The Appellant does not dispute that there was a slab on the plot upon which he elected to put up his structure.

It is trite law that it is duty of any person seeking to obtain title to the land, should do a diligent search on the property. Had the Appellant made diligent search, he could have discovered that the plot was encumbered. The fact that the plot had a slab set should have put the Appellant on an inquiry.

The lower Court rightly drew strength from the Supreme Court case of ***Shadrick Wamusula v. Juma Banda & Lusaka City Council***[2] where it was held:

> *"In the present case, since the development in question is a project of a small scale, if the changes were of a substantial nature such as the construction of a concrete slab, or even digging*[4] *and not necessarily a footing, such would fall within the meaning of a building or development because they change the character of the building on the land"*

The Court below came to a conclusion that the substructure which the complainant had put up on the plot and the fruit trees he grew around it amount to development and so the re-entry was not warranted.

A case in point is the Supreme Court of ***Honorius Maurice Chanda v. Chrispin Haluwa Kangunda*** where it was held that

"(i) *that Section 54 of the Land and Deeds Registry Act does not authorise fraud and this was a clear case of fraud. The law thus contemplated fraud.*

This was a case where a certificate of title cancelled by the Commissioner of Lands on a false recommendation that Mr. Chilufya had not developed the land when in fact there was development and had ZESCO power connected at the farm. Their Lordships observed at page 171 as follows:-

> *"There was in this case a very crude fraud and the result of the appeal already announced was inevitable"*

In the Chilufya case, the Court ordered the reversion of the certificate of title to Mr. Chilufya.

(3) FRAUD

In the case of ***Trevor Limpic v. Rachael Mawele and 2 others***[4] the Court of final resort referring to their previous Judgment had the following to say:-

> *"Furthermore, we made an order for compensation in a transaction which was clearly fraudulent. This is at variance with our decision in* ***R.R Sambo, N.N Sambo and Lusaka Urban District Council v. Paikani Mwanza (2009) ZR 79*** *where we declined to award compensation to the Appellants for improvements on account that the certificate of title was acquired fraudulently"*

(4) CREDIBILITY

The Court below after carefully analysing the evidence on record in affidavit evidence, the Court below that had the advantage of seeing the parties believed the complainant as being more truthful than the respondents.

I now turn to the 2 grounds of appeal that:

(i) the Honourable members (of the Tribunal) erred in law and in fact when they held that the Respondent is the legal owner of Plot 15326/1080

I have already alluded to the fact that the Court below found that Appellant and Lusaka City Council who were 2nd Respondents in the Court below, acted fraudulently.

It is trite law that an Appellate court will rarely disturb the findings of fact by the lower courts unless it is demonstrated that the findings were perverse, or there was no evidence on which to anchor the findings or that any court or tribunal properly directing itself could not have made such finding.

The rationale for the protective approach of the findings of fact is that the lower Court had the full benefit of seeing the litigants and is in a better position to determine the issue of credibility.

In the case in casu, the lower court preferred the affidavit evidence of the Respondent to that of the Appellant.

There is no evidence to persuade me to overturn the findings of fraud on the part of the Appellant. Ground number one hence has no leg to stand on and it is dismissed.

Ground 2

The Court below erred in law and in fact when they did not make a finding that the appellant is not a bonafide purchaser for value.

The Appellant in this matter is **Maxwell Tembo** who was the 1st Respondent in the Court below. The Court actually found that the Appellant was not a bonafide purchaser for value in view of the proven transgression of the Appellant in fraudulently obtaining questionable documents, which earlier on he had failed to prove.

In case, a point is missed. Ground 2 should have read that

> *"the Court below erred in law and in fact when they did not find that the Appellant was the bonafide purchaser for value"*

It is the duty of Counsel to proof read the legal documents to be filed into Court and ensure that they are meticulously in order.

The Superior Court of the High Court had occasion to pronounce itself on the subject. Modley, J (as he then was) put it this way:-

> *Finally I come to affidavits themselves, I find that there are numerous spelling errors, some omissions and alterations in the two supporting affidavits. The omissions and errors have not been corrected and the alterations have not been initiated by the person swearing the affidavits in the present case are*

disgraceful and appear and indicate a considerable degree of carelessness on the part of the advocate who drew up these affidavits. Judges have neither the time nor the disposition to act as school head masters to correct each and every word in documents drafted by counsel. It is the duty of counsel that all their paper work is in meticulous order before filing and that documents for purpose of Court proceedings conform with legal requirements"

I must hasten to add that the situation in the case in casu where there is only one instance in faulty framing of second ground of appeal is not as grave as the case was in ***Re – M'poyou and Kane Mounourou*** cited above. The point however remains that Court documents are to be properly scrutinized before filing.

In conclusion, the Court below was on firm ground when it found for the Complainant who is Respondent on appeal that, the Appellant fraudulently obtained "title".

The appeal is dismissed with the attending costs to be taxed in default of agreement.

Leave to appeal to the superior Court of Appeal is granted.

Delivered under my hand and seal this 23rd day of August, 2018

Mwila Chitabo, SC
Judge