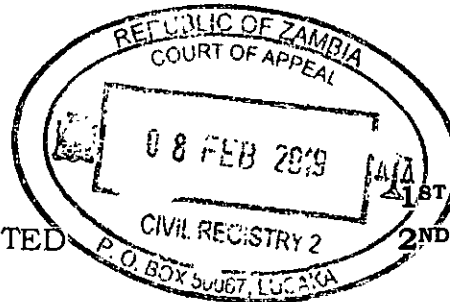


IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

Appeal No. 55/2018

B E T W E E N :

JOSEPHINE LEMISA
B & J POULTRY FARMS LIMITED



1ST APPELLANT
2ND APPELLANT

AND

HELEN MALAMA LABANYA

RESPONDENT

CORAM : Chishimba, Lengalenga and Siavwapa, JJA
21st November, 2018 and 8th February, 2019

For the Appellants : Mr F.M Hamakando- Messrs Batoka Chambers
For the Respondents : Mr A. Mumba & Mr E. Mwitwa of Merrs. Mwenye &
Mwitwa Advocates

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court.

CASES REFERRED TO:

1. **Buchman Vs. The Attorney General (1993-1994) Z. R. 131**
2. **Nevers Sekwila Mumba Vs. Muhabi Lungu (Suing in his capacity as National Secretary of the MMD) Selected Judgment No. 55 of 2014**
3. **Wilson Masauso Zulu Vs. Avondale Housing Project Limited (1982) ZR 172**
4. **Zambia Revenue Authority Vs. Hitech Trading Company Limited (2001) ZR 17**
5. **Barclays Bank (z) Plc. V. Zambia Union of Financial Institutions and Allied Workers SCZ Judgment No. 12 of 2007**
6. **and Mususu Kalenga Building Limited and Another v. Richmans Money lenders Enterprises SCZ Judgment No. 4 of 1999**
7. **Attorney General Vs. Marcus Achiume (1983) ZR1**

8. **Communications Authority of Zambia Vs. Vodacom Zambia Limited (2009) Z.R. 196.**
9. **Macha Rainsford Hanziba and 21 Others Vs. Lusaka Water and Sewerage Company CAZ Appeal No. 111 of 2017.**

LEGISLATION AND OTHER WORKS REFERRED TO:

1. The High Court Act Chapter 27 of the Laws of Zambia

This is an appeal against a Judgment of the High Court. The brief facts preceding the appeal are as follows; the 2nd Appellant is the registered owner of Stand Number 12683 Lusaka whilst the Respondent is owner of Stand Number 12684, Lusaka. The two properties share boundaries.

The Respondent had constructed a worker's cottage, sank a borehole and erected a wall fence on the boundary of her property. The 1st Appellant alleged that the borehole had been sunk on the 2nd Appellants property; a company in which she is a Director. The wall fence erected up by the Respondent was later demolished by the 1st Appellant who alleged that the wall fence was demolished by the unknown owners of stand 12682.

Following the demolition of the wall fence, the Appellants built a wall fence enclosing the Respondent's borehole and cottage alleging that the borehole and the cottage where constructed within the boundaries of the 2nd appellant's property. Efforts to resolve the

matter proved futile, and the respondent sued the appellants seeking the following reliefs;

- 1) A declaration that she is the rightful owner of stand 12684**
- 2) An order of or boundary clarification for the three properties stand 82,83 and 84 Lusaka**
- 3) Interim injunction**
- 4) Order that the constructed wall fence by the 1st Appellant inside the plots property is illegal**
- 5) Damages for trespass, malicious damage to property and loss of use of water pump.**
- 6) In the alternative, that the court found that the Plaintiff had constructed on the Appellants property, an order of compensation for the improvements and cost incurred be made.**

The appellants counter claimed for a declaration that the 2nd appellant is the rightful owner of stand 12683, Lusaka, where the respondent had erected a cottage and put up a borehole. They further sought damages for trespass.

On 10th September, 2013, the court granted an interim injunction restraining the appellants from trespassing and destroying the respondent's wall fence and using the water pump.

The Court made a further order that Stand Number 12682, 12683 and 12684 Lusaka be surveyed and boundaries be verified in accordance with the quotation issued by the Survey Department dated 9th May 2013. Following the survey, a report was generated and produced into Court.

After hearing the evidence of all the witnesses, the learned trial Judge delivered a judgement granting the declaration that the respondent is the rightful owner of stand No 12684, Lusaka. The verification report having been admitted into evidence without objection, the court proceeded to accept the evidence of PW2 that there was an error in the initial survey of stand 12682 Lusaka, which affected the survey of the 2nd appellant's property, Stand 12683 as well as the respondent's property.

The learned trial Judge further found that there was an error in respect of the boundaries of the 2nd appellant's property thereby causing the property, Stand No. 12683, to encroach onto the respondent's property, Stand No. 12684 Lusaka.

The lower court also found as a fact that the borehole sunk by the respondent was properly sited on her property and was erroneously enclosed inside the boundary wall built by the 1st

appellant to demarcate the 2nd appellant's property, Stand No. 12683 from the respondent's property, Stand 12684. This, she held, was due to the erroneous survey of the appellants' property. The court consequently held that the description of Stand No. 12683 contained in the survey diagram attached to the 2nd Appellants certificate of title was wrong as the property described therein forms part of the Respondent's stand 12684 as per boundary verification report on record.

It was the court's further finding that the boundary fence built by the appellants was built on the Respondent's property without verifying the proper boundaries. This act, the court held, was tortuous but not illegal.

In respect of the claim for damages for trespass, malicious damage to property and loss of use of the water pump, the court found as a fact that the 1st Appellant demolished the wall built by the Respondent, an act amounting to trespass. The court added that the act of constructing another wall fence on the Respondent's property also amounted to trespass. The lower court therefore, held that the Respondent was entitled to recover damages from the Appellants for trespass as well as damages for malicious damage to

the property and for loss of use of the water pump. The court directed that the damages be assessed by the learned Deputy Registrar.

The learned trial Judge proceeded to order, that the 3 properties be resurveyed by the office of Surveyor General in accordance with the master plan for the area with the new diagram superseding the existing diagrams.

The Commissioner of lands was ordered to issue a certificate of title in respect of Stand No. 12684 after the re-survey and survey diagrams for the property are approved. The 1st Appellant was ordered to demolish the boundary wall built between stand 12683 Lusaka and stand 12684 which had enclosed the Respondent's water pump.

In respect of the counter claim, the court refused to make a declaration that the 2nd Appellant is legal owner of Stand No. 12683 Lusaka as it would serve no useful purpose because the issue was not in dispute. Equally the counter claim for trespass by the Appellants failed.

Dissatisfied with the decision of the lower court the Appellants raised two grounds of appeal namely;

- 1. That the learned trial Judge erred in law and in fact when she ordered for survey and beacon verification of Stand Nos 12682, 12683 and 12684 Chinika, Lusaka, in an interim when the issue of boundaries is what the court was to resolve. Further, the Honourable court erred in law and in fact when she admitted in evidence Beacon Verification Report which was conducted in the absence of the Appellants;***
- 2. That the Learned trial Judge erred in law and fact when she failed to note and realize that the size of Stand No. 12684 Chinika, Lusaka, ought to have reduced in area from 4416 Square meters after the encroachment by ZESCO power lines as per the testimony of the Respondent herein that Ministry of Lands ordered for the re-survey of Stand No. 12684 because ZESCO power lines had encroached.***

The Appellants filed into court heads of argument dated 4th April, 2018. The Appellants submits that the trial court ought not to have ordered the verification of the three properties in issue in the interim when the issue of beacon verification was before the court for determination. The court's error was further compounded by the fact that Stand No. 12683 is already surveyed and on title whilst the Respondent's property, Stand Number 12684, is unsurveyed and has no title.

The Appellants contended that the trial court should not have admitted the boundary verification report which verification was done in the absence of the Appellants.

In relation to ground 2, the Appellants argued that it was strange that the Respondent's survey diagrams conducted in September 2009 and February, 2013 occupied the same area. The Respondent in her testimony stated that she was instructed to resurvey her land to take into account the encroachment by ZESCO power lines. The Appellants added that the piece of land that the Respondent claims to have been encroached on by the 2nd Appellant is in fact the piece of land which was encroached upon by ZESCO Limited. The Appellants urged the court to grant the appeal with costs.

The Respondents filed into court Heads of Argument dated 11th May, 2018. In response to ground 1, the Respondent submits that the procedure adopted by the Appellants to assail an interim order of the court on appeal is flawed. At the time the interim order dated 10th September 2013 was made, the Appellants had an option to either appeal against the decision of the lower court or make an

application before the lower court to review the Order pursuant **Order 39 of the High Court Rules.**

The Respondent argued that the Appellants cannot now appeal against an Order granted 5 years ago when the report in issue was admitted into evidence and formed part of the record without objection from the Appellants in line with **Order 5 Rule 21 of the High Court Rules.** In any event, the Appellants, having failed to appeal against the order promptly, slept on its rights and the appeal against the order cannot be entertained at this stage. In addition, that the trial Judge was on firm ground when she ordered a joint verification of the properties in issue as she was entitled to do so pursuant **Order 3 Rule 2 of the High Court Rules.**

The Respondent contends that the Appellants cannot argue that the survey and boundary verification was done in their absence when the Appellants were aware of the verification exercise and neglected to attend and to pay the verification fees as ordered by the court.

It was submitted that having failed to raise an objection regarding the report in the court below, the Appellants are precluded from doing so at this stage. We were referred to the cases

of ***Buchman Vs. The Attorney General*** ⁽¹⁾ and ***Nevers Sekwila Mumba Vs. Muhabi Lungu (Suing in his capacity as National Secretary of the MMD)*** ⁽²⁾ where the Supreme Court stated that a matter not raised in the court below cannot be raised on appeal.

The Respondent contended that there being no appeal or review against the order of the lower court and there being no objection as to the admission of the report, the trial court was entitled to rely on the said report when determining the matter. We were referred to the case of ***Wilson Masauso Zulu Vs. Avondale Housing Project Limited*** ⁽³⁾ where the Court stated that a trial court ought to make findings of fact based on the available evidence.

In relation to ground 2, the Respondent argued that the issue raised regarding the encroachment by ZESCO was never raised by the Appellants nor was evidence led in this regard in the court below. This, according to the Respondent, is tantamount to leading evidence from the bar which is frowned upon. We were referred to the case of ***Zambia Revenue Authority Vs. Hitech Trading Company Limited*** ⁽⁴⁾ where the court stated that arguments from the bar cannot substitute sworn evidence.

It was argued that the Judgment of the Court as well as the Report shows that the survey and boundary verification was based on the Lusaka City Council master plan. The correct diagrams relating to the properties in issue were approved by the Surveyor General. This evidence was not rebutted by the Appellant in the lower court.

The Respondent submitted that there is no legal basis for assailing the judgment of the lower court as the grounds of appeal by the Appellants lack merit and ought to be dismissed with costs.

We have considered the appeal, the judgment of the lower court and the submissions by Counsel together with the authorities cited.

The first ground of appeal relates to the survey and boundary verification order made by the learned trial judge in respect of Stand Numbers 12682, 12683 and 12684. The gist of the Appellants' argument being that the issue of the survey and beacon verification was one that the parties called upon the court to determine. Therefore, the court ought not to have made the said order in the interim. The Appellants further argued that the trial

court should not have admitted the verification report owing to the fact that the verification was conducted in their absence.

In respect of the verification report ordered by the court, the record will show that it arose at the time of the application for an interim order of injunction. Though the appellants were not in attendance at the hearing of the application on 10th of September 2013, there was an affidavit in opposition, hence the court proceeding. At page 249 of the record, the court had stated that the exhibited report attached to the affidavit namely the beacon verification done by a surveyor engaged by the appellants only represented their views. The court then rejected this earlier verification report and stated that the verification exercise should be conducted on the basis of the quotation issued by the survey department dated 9th May 2013.

The interim injunction dated 10th September 2013 at page 103 of the record further ordered that;

“Stand No. 12682, Chinika Lusaka and stand No. 12683 Chinika Lusaka and stand No. 12684 Chinika Lusaka be surveyed and boundaries be verified in accordance with the Quotation issued by the Survey Department dated 9th May 2013”.

The appellants were served with the interim order of injunction as well as notified of the verification exercise and the applicable survey fees required from the owners of the stands in issue subject of the exercise.

It is further not in issue that a report on the boundary verification in respect of stand 12684 Chinika area was conducted by the survey department. A report was issued dated May 2014 appearing at page 184 of the record. The appellants contend that the trial court should not have admitted the boundary verification report conducted in their absence.

We hold the view that, the appellants being aware of the verification exercise did not bother to attend the exercise. They sat on their rights and afterwards want to cry foul.

The record of appeal shows the appellants did not appeal against the order of verification made by the court nor was the issue raised in the court below. It is trite that a matter or issue which was not raised in a lower court cannot in general be raised in a higher court unless it is a legal point being raised. We refer to the cases of ***Barclays Bank (z) Plc. V. Zambia Union of Financial Institutions***

and Allied Workers SCZ⁽⁵⁾ and Mususu Kalenga Building Limited and Another v. Richmans Money lenders Enterprises SCZ⁽⁶⁾, where the Supreme Court affirmed the principle that an issue not raised in the court below cannot be raised on appeal.

We are further of the view that there was no objection by the appellants when the report in question was produced and admitted into evidence. Admissibility of documentary evidence can be objected to on point of law or in accordance with the provisions of the Evidence Act. The appellants' advocates never raised any objections. The court was therefore on firm ground in admitting it in evidence. The basis of admissibility is relevancy. The court proceeded to admit the Report into evidence and accordingly attached weight to it.

This documentary evidence was specifically pleaded to by the appellants. The plaintiff's supplementary bundle of documents further contained the report on the boundary verification exercise. Had the appellants chosen to object to its production, they would have done so even at the exchange and inspection of documents stage; later on even at trial. It is trite that a court may make any

interlocutory order that it deems fit or necessary for doing justice; pursuant to **Order 3 Rule 2 of the High Court Rules**.

We therefore, hold the view that the learned trial Judge was on firm ground when she ordered verification of the boundaries of the properties in question and admitted the subsequent report. How else would the court have determined the issue. We find no merit in this ground and dismiss it accordingly.

In ground two, the appellants contend that the learned trial judge erred in law and fact when she failed to take into account the fact that the Respondent's stand ought to have been reduced in size by 4,416 square meters after the encroachment by ZESCO.

We note that this ground of appeal seeks to assail the trial court's findings of fact to the effect that there was no encroachment by ZESCO and that the correct boundaries are as reflected in the verification report.

It is settled law that an appellate court will only reverse findings of fact which are perverse or made in the absence of any relevant evidence or upon a misapprehension of facts. We refer to the Supreme Court decisions in **Attorney General Vs. Marcus**

Achiume⁽⁷⁾ and Communications Authority of Zambia Vs. Vodacom Zambia Limited⁽⁸⁾. We echoed this position of the law in our decision in ***Macha Rainsford Hanziba and 21 Others Vs. Lusaka Water and Sewerage Company⁽⁹⁾***.

There was undisputed evidence in the lower court to the effect that the said verification report was based on the original master plan of the area in question. The Surveyor General conducted the survey in respect of stand numbers 12682, 12683 and 12684. The findings were specific, that the survey of stand 12682 did not strictly follow the approved site plan, hence transferring the error on to stand 12683. As a result of that shift, stand 12683 encroached on to stand 12684. There was no mention of any actual or alleged encroachment by ZESCO.

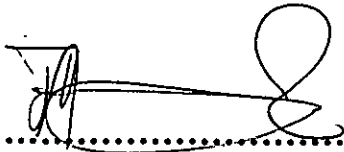
We therefore find no merit in ground two to assail the finding of fact by the lower court.

We are of the firm view that this is not a proper case for this court to interfere or reverse the findings of the trial court. Both grounds of appeal having failed, we accordingly dismiss the appeal with costs.



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F. M Chishimba
COURT OF APPEAL JUDGE



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F.M. Lengalenga
COURT OF APPEAL JUDGE



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M. J. Siavwapa
COURT OF APPEAL JUDGE