

*(Civil Jurisdiction)*

**BETWEEN:**

**APPELLANT**

**AND**

## BETILE PHIRI

### 1<sup>st</sup> RESPONDENT

**JOYCE PHIRI**

## 2<sup>nd</sup> RESPONDENT

**SARAH PHIRI**

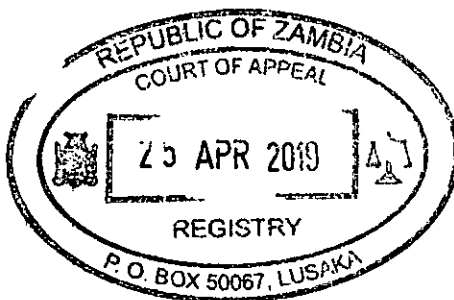
### 3<sup>rd</sup> RESPONDENT

**JUDITH PHIRI**

#### 4<sup>th</sup> RESPONDENT

## GASS PHIRI

### 5<sup>th</sup> RESPONDENT



**CORAM:** *Chashi, Sichinga and Lengalenga, JJA*

**ON: 20<sup>th</sup> February and 25<sup>th</sup> April 2019**

*For the Appellant: N. Nchito, SC, Messrs Nchito and Nchito  
Advocates*

*For the Respondents:* N/A

## JUDGMENT

**CHASHI, JA** delivered the Judgment of the Court.

**Cases referred to:**

1. **Siwale and Others v Siwale (1999) ZR, 84**
2. **Still Water Farms Limited v Mpongwe District and Others - SCZ Appeal No. 90 of 2001**
3. **Pilcher v Rawlins (1872) 7 Ch, 257**
4. **Edith Zewelani Nawakwi v Lusaka City Council and Another - SCZ Appeal No. 26 of 2001**
5. **Tembo v Alizwani - SCZ Judgment No. 6 of 1996**

6. **Magic Carpet Travel and Tours v Zambia National Commercial Bank Limited (1999) ZR 61**

**Legislation referred to:**

1. **The Lands Act, Chapter 184 of The Laws of Zambia**
2. **The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia**
3. **The Evidence Act, Chapter 43 of the Laws of Zambia**

**Other Works referred to:**

1. **Black's Law Dictionary, Brian A. Garner, Eight edition, Thomson West**
2. **Land Law in Zambia: cases and Materials by Fredrick S. Mudenda - 2007**
3. **Zambia Customary Land Documentation Tenure Assessment by Melisa Hall, James Murombezi, Mpala Nkonkomalimba, Pamela Sambo and Matt Sommerville, (USAID) Tetra Tech - June 2017**

This matter revolves around a piece of land in extent 5.88 hectares, which was originally traditional land (the Land). It had been owned by a Lazarous Phiri since 1956. When he died in 1976, it devolved upon his five children, the Respondents herein, who in 2004 executed a Consent Settlement Order before headman Lilanda, equally sharing the Land in portions of 1.2 hectares each.

In 2006 the Appellant bought some traditional land from the 1<sup>st</sup> Respondent at K31,500.00 and proceeded to apply for the necessary process in converting it to leasehold tenure and procured the certificate

of title dated 12<sup>th</sup> September 2014 in his name. The said certificate of title appears at page 97 of the record of appeal (the record).

The Appellant then proceeded to fence off the Land.

On 2<sup>nd</sup> September 2014, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents, filed a complaint in the Lands Tribunal, claiming the following reliefs:

- (1) That the 1<sup>st</sup> Respondent should take possession of his portion of 1.2 hectares and allocate it to the Appellant.
- (2) That each Respondent should take possession of its 1.2 hectares.
- (3) That the Appellant should be ordered to remove the fence he had erected.
- (4) A declaration that the Respondents are the bonafide beneficiaries of the Land.

At the Tribunal, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent's case was that they were not consulted over the sale of the Land and they did not consent to it being sold.

The 1<sup>st</sup> Respondent's position was that, he only sold his portion of 1.2 hectares to the Appellant and not all the Land.

The Appellant's case was that he bought the entire Land, having been shown the boundaries by the 1<sup>st</sup> Respondent and his wife and interviewing the neighbors.

According to the Appellant, since 2006, no one had come forward to make any claim until 2014, when one of the 1<sup>st</sup> Respondent's sister indicated that the Appellant needed to make an additional payment of K70,000.00 if he wanted to secure the Land.

At the Tribunal, the parties agreed that the matter should be adjudicated upon affidavit evidence only.

After considering affidavit evidence, the Tribunal formulated the following issues for determination.

- (1) Was the Appellant a bona fide purchaser for value without notice.
- (2) Do the Respondents have a legal or equitable right over the land.
- (3) Were the requirements under **The Lands Act**<sup>1</sup> for conversion of the Land from customary to leasehold tenure met.

On the first issue, the Tribunal found that the demand by the Respondents for additional payment should have alerted the Appellant that there could be other interests and rights.

That the necessary consultations should have been made at the time as the Appellant was still in the process of converting the Land.

Further, there was also no evidence that the Chief or the local authority had sought the consent of the Respondents.

On the second issue, after taking into consideration Section 7 of **The Lands Act**<sup>1</sup> which provides for recognition of customary tenure and Section 3 (4) which prohibits the President from alienating any land held under customary law, without consultation, the Tribunal was of the view that the Respondents had a legal right.

As regards the third issue, in the absence of necessary consent and relying on the cases of **Siwale and Others v Siwale**<sup>1</sup> and **Still Water Farms Limited v Mpongwe District and Others**<sup>2</sup> where it was held that failure to obtain consent from all affected parties is fatal, even where title deeds have been obtained and land developed, the Tribunal found that the requirements were not met.

After resolving the issues, the Tribunal granted the reliefs which were being sought.

Dissatisfied with the Judgment, the Appellant appealed to the High Court advancing three grounds of appeal as follows:

- (1) The court below erred in law and fact when it found that the Appellant was not a bona fide purchaser for value without notice as it was presumed he had constructive notice.
- (2) That the court below erred in law and fact when it found that the Appellant was not the holder of the customary land since 2006 as he required the express consent of the Respondents.
- (3) The court below erred in law and fact when it held that the Tribunal was on firm ground not to admit the recordings in which the Respondents allegedly schemed to reverse the sale.

On the first ground, the learned Judge in the court below opined that the defence of a *bona fide* purchaser for value without notice is confined to prior interests or rights in equity and was not applicable in *casu* as the Respondents had a legal right as opposed to equitable interests. He was however of the view that, this being customary land, the Appellant being a Zambian, should have had constructive notice as ordinarily customary land would be subject of interests and rights from more than one person and usually close family members.

According to the learned Judge, had the Appellant made reasonable inquiries, not only from the 1<sup>st</sup> Respondent, but other family members and the headman, he would have found that the 1<sup>st</sup> Respondent had siblings who had a legal interest in the Land. In addition, that, as rightly

held by the Tribunal, after being made aware of the additional payment claims, the Appellant should not have ignored the same and proceeded to obtain the certificate of title.

On the second ground, the learned Judge was of the view, taking into consideration the consent settlement Order, that the 1<sup>st</sup> Respondent had no right to transact in other portions of the land apart from his allotment and as such the Appellant could not acquire a superior interest.

On the third ground, the parties had agreed that the dispute would be determined on affidavit evidence only. According to the learned Judge, the attempt to introduce the recordings by way of further affidavit in opposition would have meant that the recording would have been just for the Tribunal to evaluate, without the person seeking to introduce it being subjected to cross examination. That, accepting such evidence would be prejudicial to the Respondents.

The Appellant being dissatisfied with the learned Judge's Judgment has now appealed to this Court recasting the grounds of appeal as follows:

- (1) That the court below erred in law and fact when it found that the Appellant was not a bona fide purchaser for value without notice of the Land in question from 2006 as it presumed he had constructive notice of the Respondent's interests.

- (2) That the court below erred in law and fact when it found that the Appellant was not the holder of the customary Land since 2006 as he required the express consent of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents.
- (3) That the court below erred in law and fact when it held that the Tribunal was on firm ground not to admit the recordings as it would be prejudicial to the Respondents.

At the hearing of the appeal, the Respondents were not in attendance.

Mr. Nchito, State Counsel, Counsel for the Appellant, informed us that the Respondents had been served by substituted service and an affidavit of service had to that effect been filed.

It was on that basis, that we decided to proceed and hear the appeal.

State Counsel in arguing the first ground, drew our attention to page J7 of the Judgment in the court below, at page 13, lines 4 to 20 of the record, where the learned Judge held that the Appellant was not a bona fide purchaser for value without notice. The case of **Pilcher v Rawlins**<sup>3</sup> was cited, where it was stated that the plea of bona fide purchaser of a legal estate **for value without notice is "an absolute, unqualified, unanswerable defence."** That the four requirements that have to be met are that the purchaser:

- (i) acted in good faith.
- (ii) purchased a legal estate or interest.
- (iii) furnished consideration in money or money worth.
- (iv) had no notice of equitable interest.

State Counsel submitted that the Appellant acted in good faith when he purchased the property in 2006 at the value of K31,500.00 as evidenced by the formal contract of sale of 2008 and further documentation from the Chieftainess, Surveyor and Local authority.

That the Appellant followed the necessary steps in converting the Land in accordance with Section 8 of **The Lands Act** and Regulations (2) and (3) of **The Lands (Customary Tenure) (Conversion) Regulations**. The Appellant enjoyed eight (8) undisturbed years of farming and developing the Land without any indication of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents' interest.

It was further submitted that, notice of any interest can be actual where the information is within the Appellant's knowledge, constructive where the interest could have been discovered upon diligent inquiries or imputed where an agent has actual or constructive notice of the interest.

The case of **Edith Zewelani Nawakwi v Lusaka City Council and Another**<sup>4</sup> was cited where the Supreme Court had this to say:

*“She deliberately or carelessly abstained from making inquiries that a prudent purchaser would have made. Purchasing of real property cannot be taken as casually as purchasing household goods.”*

State Counsel further cited the case of **Tembo v Alizwani**<sup>5</sup> and contended that from the said cases, the Supreme Court established that an intended purchaser of property must make prudent inquiries.

According to State Counsel, the 1<sup>st</sup> Respondent’s wife showed the Land to the Appellant prior to the purchase and the perimeters of the Land by pointing out the land marks and upon her request the Appellant paid a commitment fee.

Further that, the 1<sup>st</sup> Respondent did not mention any sibling alleged interests. That the transaction was also witnessed by the village chairman and vice headman.

State Counsel argued that the headman and Chieftainess as custodians of the customary land as at 2006 are the ones who would have known the other Respondent’s interest in the Land and would have declined to consent to the sale. That however, the Appellant was granted consent and proceeded with the conversion process.

It was further argued that, not only did the Appellant have no notice of the other Respondent's interest in the Land, until after the conclusion of the sale, conversion approvals and lodgment of documentation with the Ministry of Lands and therefore was a bona fide purchaser. That in that view, the Appellant acquired good title to the Land when the certificate of title was finally issued. Reliance in that respect was placed on the case of **Magic Carpet Travel and Tours v Zambia National Commercial Bank Limited**<sup>6</sup> and contended that the Appellant acquired the land as an innocent purchaser for value without any notice of fraud or encumbrances. That in accordance with the provisions of Section 33 of **The Lands and Deeds Registry Act**<sup>2</sup>, the certificate of title is conclusive evidence of ownership.

It was State Counsel's argument that, the Tribunal and the court below did not prudently consider all evidence advanced by the Appellant.

The second and third grounds of appeal were argued together.

State Counsel submitted that the Tribunal erred in not accepting the recordings containing a conversation between the Appellant, the village chairman, the 1<sup>st</sup> Respondent's wife and the 1<sup>st</sup> Respondent proving the scheme by the Respondents to unlawfully reverse the transaction. State Counsel drew our attention to Section 8 of **The Lands (Amendment) Act**<sup>3</sup>

which provides for conversion of customary land and submitted that the Appellant had followed the procedure under Statutory Instrument No. 89 of 1996 of **The Lands (Customary Tenure) Regulations (2) and (3)**. That when the Appellant purchased the Land, he became the customary holder of the Land. The 1<sup>st</sup> Respondent had given up possession and moved away from the Land after selling it to the Appellant.

That prior to July/August 2014 there was no record of the alleged interest by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents, and the court below failed to take into account that it was not possible for the Appellant to obtain consent from them when the Appellant was not aware of them, even after doing the due diligence and establishing that the Land had no encumbrances.

The Respondents did not file any arguments and as earlier alluded to were not in attendance at the hearing.

We have considered the Appellant's arguments and the Judgments of the Tribunal and the court below.

We shall consider the first and second grounds of appeal together as they are entwined.

The first and second grounds of appeal attacks the finding that the Appellant was not a bona fide purchaser for value without notice as it

was presumed that he had constructive notice and that he was not the holder of the Land since 2006 as he required the express consent of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents.

On the onset, we agree with the finding of the learned Judge in the court below that the defence of bonafide purchaser for value without notice is confined to prior interest or rights in equity and was not applicable in *casu* as the Respondents had a legal right as opposed to equitable interests.

The principle of *bona fide* purchaser determines the priority of competing claims to property. It allows the new proprietor to take the property free of the rights of another person who could have enforced some claim to it. It is an exception to the general rule that existing claims to property normally bind a new proprietor to whom it is transferred.

The rule developed in the Court of chancery where it was applied to resolve disputes over the priority of equitable claims.

The learned author of **Black's Law Dictionary**<sup>1</sup> defines *bona fide* purchaser as follows:

*"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the*

*seller's title; one who has paid in good faith valuable consideration for property without, notice of prior adverse claims."*

We also cannot fault the learned Judge for finding that, considering that the Land was under customary tenure, the Appellant being a Zambian should have had constructive notice for the simple reason that land under customary tenure, would ordinarily be subject of interests and rights from more than one person, and usually close family members, and the Appellant ought to have been aware of that.

Indeed, generally customary tenure systems are communal and their management is derived from customary norms and principles. Communal tenure refers to systems that combine individual/family rights to land and natural resources with group oversight and rules to keep land within the group.

As stated by the learned author of **Land Law in Zambia: Cases and Materials**<sup>2</sup>, at page 243, a purchaser is under obligation to undertake full investigation of title before completing his purchase. He can only plead notice if he made all usual and proper inquiries. If he does not do so or is careless or negligent, he is deemed to have constructive notice of all matter he would have discovered.

From the facts of this case, it is evident and we have no doubt that at the time Appellant was dealing with the 1<sup>st</sup> Respondent he was aware that the Land was customary land and should have known the implications of transacting in customary land. We shall revert to this issue in due course.

In addition, as correctly observed by the Tribunal and the learned Judge, the Appellant after having been made aware of the additional payment claims by the 1<sup>st</sup> Respondent's sister, should not have ignored the same and proceeded to obtain the certificate of title to the Land. This was a classical case of the Appellant converting the land to leasehold tenure and obtaining certificate of title, in order to deprive the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondent's unregistered interest in the Land, through registration. That amounts to fraud.

In addition, as correctly observed by the Tribunal and the learned Judge, the Appellant after having been made aware of the additional payment claims by the 1<sup>st</sup> Respondents sister, should not have ignored the same and proceeded to obtain the Certificate.

Reverting to the issue of transacting in customary land, the learned authors of **Zambia Customary Land Documentation Tenure Assessment**<sup>3</sup> at paragraph 1.2 had this to say:

*“The dual systems developed during colonialism allowed for the development of full property rights in land in the freehold sector, which facilitated the commoditization of land through land markets.*

*Customary tenure, on the other hand, not only prevented the emergence of land markets but also created new forms of land governance in which all customary lands were deemed to be held in trust for the people by chiefs or other traditional authorities. As a result, in Zambia customary land cannot be bought or sold and by law has no monetary value.” (the underlining is ours for emphasis only)*

However, customary land that has been converted to state leasehold tenure within customary areas often loses its relationship to the traditional authorities.

What that entails is that customary land can only be alienated, but cannot be bought or sold. Only land under leaseholds tenure can be bought or sold.

Arising from the aforestated, the defence of bona fide purchaser for value without notice was not available to the Appellant as at the time of the

transaction, the Land was customary land and therefore the essentials of being a *bona fide* purchaser for value were not met.

In the view we have taken, the ingredients of a bona fide purchaser of a legal estate for value without notice as enunciated in the **Pilcher**<sup>3</sup> case are inapplicable in *casu* and as earlier alluded to the defence was not available to the Appellant.

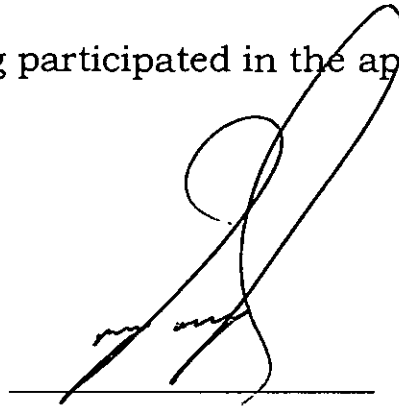
Consequently, grounds one and two have no merit.

We now turn to the third ground of appeal. This ground attacks the learned Judge's upholding of the Tribunals refusal to admit the recordings which the Appellant attempted to introduce into evidence.

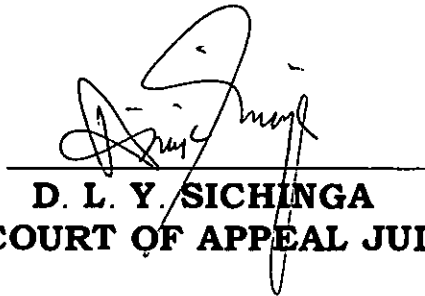
It is clear from the record that the parties before the Tribunal had agreed that the issues before the Tribunal would solely be determined on affidavit evidence. The attempt therefore by the Appellant to tender in electronic evidence by way of a further affidavit evidence was not only against the spirit of the agreement, but would have been prejudicial to the Respondents, as they would not have had the opportunity to interrogate and test the authenticity of the recordings and the laying of the foundation of the evidence in accordance with **The Evidence Act**<sup>3</sup>.

This ground equally has no merit. The sum total of this appeal is that all the three grounds of appeal having failed, the appeal is dismissed for lack of merit.

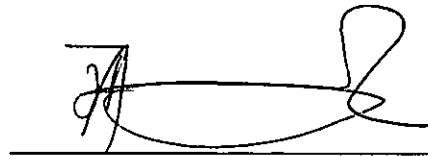
The Respondent not having participated in the appeal, we shall make no order as to costs.

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**J. CHASHI**  
**COURT OF APPEAL JUDGE**

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**D. L. Y. SICHINGA**  
**COURT OF APPEAL JUDGE**

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**F. M. LENGALENGA**  
**COURT OF APPEAL JUDGE**