

**IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 22 OF 2019
HOLDEN AT KABWE**

(Civil Jurisdiction)

BETWEEN:

BINWELL SIAME

LOMANZE BANDA

AND

REGINA CHAPITAMBILI



1st APPELLANT

2nd APPELLANT

RESPONDENT

CORAM: Chashi, Mulongoti and Lengalenga, JJA

ON: 16th and 23rd October, 2019

For the Appellant:

*M. Mushipe (Ms.) Mesdames Mushipe &
Associates.*

For the Respondent:

*D.K. Kasote, Messrs Chifumu Banda &
Associates.*

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. **Anti-Corruption Commission v Barnet Development Corporation Limited (2008) ZR 69**
2. **Robson Banda v Varisto Mulenga - SCZ Judgment No. 16 of 2003**
3. **Midland Breweries (Pvt) Limited v David Munyenyembe - SCZ Judgment No. 3 of 2012**
4. **Yengwe Farms Limited and Another v Commissioner of Lands and Another - SCZ Judgment No. 11 of 1999**
5. **Nkhata and Others v Attorney General (1966) ZR 124**
6. **Macha Rainsford Hanziba and 21 Others v Lusaka Water and Sewerage Company - CAZ Appeal No. 111 of 2017**
7. **Hygrotech Zambia Limited v Greenbelt Fertilizers Limited - SCZ Appeal No. 138 of 2015**
8. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172**

Legislation referred to:

1. **The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia**

Other works referred to:

1. **Phipson and Elliot, Manual of the Law of Evidence, 11th Edition (2001)**

1.0 INTRODUCTION

- 1.1 This appeal emanates from the Judgment of the High Court, delivered by Hon. Mrs. Justice M. Mapani – Kawimbe on 16th November, 2017.
- 1.2 In the said Judgment, the learned trial Judge ruled in favour of the Respondent and held that the Appellants misapprehended their boundary and illegally built structures on the Respondent's property.

2.0 BACKGROUND TO THE CASE

- 2.1 The brief background to this matter is that the 1st and 2nd Appellants, who are husband and wife and the Respondent herein are registered proprietors of land parcels in Maloni Village, in the Lusaka West area described as Lot No. 6284/M/8 and Lot No. 6285/M/2 respectively. The said land parcels are adjacent to each other.

2.2 Sometime in 2015, the Appellants had some of their structures demolished by State Police on account of being illegal and encroaching on neighbouring land. The Appellants, thereafter, alleged that the demolition by State Police was illegal as it was done without a court order and that it was instigated by the Respondent. This impelled the action in the court below.

3.0 THE CASE AND ARGUMENTS IN THE COURT BELOW

3.1 The Appellants commenced an action against the Respondent by way of Writ of Summons seeking the following reliefs:

- a) A declaration that the Appellants are the beneficial owners of Lot No. 6284/M Lusaka.
- b) Damages for trespass.
- c) Compensation for loss of the demolished property valued at K560,000.00.
- d) Costs.

3.2 The Appellants' case is that they are the legal owners of Lot No. 6284/M Lusaka, on which the Respondent had encroached, trespassed and demolished property valued

at K560,000.00. In addition, the Respondent allocated and sold portions of the Appellants' land without their consent.

3.3 On her part, the Respondent settled a Defence disputing the Appellants' claims. The Respondent asserted that she is a neighbour to the Appellants and the legal owner of Lot No. 6285/M Lusaka, which land was allocated to her by the Kafue District Council. She had the property surveyed and was subsequently issued with a Certificate of Title No. 16235, which is distinct from that of the Appellants.

3.4 The Respondent alleged that the Appellants had a propensity of encroaching and selling portions of land that did not belong to them.

With regard, to the demolished structures, the Respondent averred that the Appellants encroached on her land and built the structures illegally before a survey was done by Kayo Surveyors at the behest of the Surveyor General.

Further according to the Respondent, the demolition exercise was carried out by Zambia Police after receiving numerous complaints of encroachment and illegal structures in the area.

3.5 In view of the foregoing, the Respondent's counterclaim sought the following reliefs as against the Appellants:

- i) An Order that the Appellants stick to their perimeters of Lot No. 6284/M Lusaka West and leave Lot No. 6285/M belonging to the Respondent.
- ii) An Order that Lot No. 6284/M and 6285/M are different.
- iii) Costs.

4.0 DECISION OF THE COURT BELOW

4.1 Upon considering the evidence and the arguments of both parties, the learned Judge made the following findings:

- (1) The Appellants and the Respondent own neighbouring farms and were both issued with certificates of title to their respective properties following recommendations from Kafue District Council.
- (2) It is incontrovertible that the Appellants built structures on the Respondent's land which were subsequently demolished by Zambia Police.

- 4.2 The learned trial Judge then opined that the issue she was being asked to determine is whether the Respondent encroached the Appellants' land.
- 4.3 In resolving the issue, the learned Judge relied on section 33 of **The Lands and Deeds Registry Act**¹ and the case of **Anti - Corruption Commission v Barnet Development Corporation Limited**¹ and found that the Appellants and the Respondent were both issued with certificates of title, which was conclusive evidence that they were legitimate owners of their respective lands.
- 4.4 Further that, the lay out plan clearly defined the perimeter of each property and showed that the Appellants' structures were built on the Respondent's property. She found that the Appellants illegally built structures on the neighbouring properties including that of the Respondent, which was as a result of their failure to recognise their boundary. She found therefore, that there was nothing wrong with the action taken by Zambia Police to demolish the illegally built structures.

4.5 Based on the foregoing, the learned Judge dismissed the Appellants' claim for lack of merit and upheld the Respondent's counter claim.

5.0 GROUNDS OF APPEAL

5.1 The Appellants being aggrieved by the dismissal of their claims, have appealed to this Court and advanced seventeen grounds of appeal, which in our view, could have been condensed into two or three grounds as they are basically questioning the learned Judge's findings of fact. We therefore, see no need to reproduce the grounds of appeal verbatim.

5.2 After a perusal of the said grounds of appeal, we discern two issues which stand out for our determination:

a) Whether the learned trial Judge was on firm ground when she relied on the lay out plan prepared by Kayo Surveyors and found that the Respondent and the Appellants were legitimate owners of their respective lands and consequently, that the Appellants

encroached on the Respondent's land by building illegal structures thereon.

b) Whether the Respondent is entitled to compensate the Appellant for the demolished structures.

6.0 THE ARGUMENTS IN SUPPORT OF THE APPEAL

6.1 Heads of argument were filed on behalf of both parties by their respective learned Counsel and relied upon in their entirety.

6.2 In support of the first issue, Ms. Mushipe, Counsel for the Appellants argued that the lower court misdirected itself when it made a finding that the Respondent was the legitimate owner of Lot No. 6285/M, when the issue to be determined between the parties was one of encroachment; being whether the Respondent encroached on Lot No. 6284/M, belonging to the Appellants.

6.3 Counsel referred us to Section 33 of **the Lands and Deeds Registry Act**¹ and the case of **Anti-Corruption Commission v Barnet Development Corporation Limited**¹ and submitted that the Appellants were issued

with a certificate of title earlier than the Respondent and it is therefore conclusive evidence of ownership against the Respondent in the absence of fraud or impropriety in its acquisition.

6.4 According to the Appellant, the allocation and issuance of certificates of title are within the purview of Ministry of Lands and it follows that, where there are any errors with regard to boundaries, they ought to be borne by the Ministry and not the Appellant. It was submitted that the Appellant should not have to suffer the consequences of such errors by having their properties demolished, when they satisfied all the legal procedures and requirements in obtaining the certificate of title. The title issued to them was legal and valid.

6.5 The Appellant further criticised the lower court for failure to take into account the Appellants' overwhelming documentary evidence on record. In support, thereof, reliance was placed on the cases of **Midlands Breweries (pvt) Limited v David Munyenyebe²** and **Robson Banda (Suing as administrator of the estate of the late**

Rosemary Phiri) v Varisto Mulenga (Sued as administrator of the estate of the late Steven Kabamba)³ where the Supreme Court interfered with findings of fact of the lower court on the ground that the lower court in assessing and evaluating the evidence, failed to take into account the Appellant's documentary evidence.

6.6 Counsel contended that, the lower court ought to have found that the land in question belonged to the Appellants as they had acquired their title earlier than the Respondent. It was further submitted that, the learned trial Judge's finding to the effect that the Appellants built the structures on the Respondent's land was perverse and not supported by any evidence on record. We were referred to the case of **Yengwe Farms Limited & Another v Commissioner of Lands & Another**⁴ and section 34 of the **Lands and Deeds Registry Act**¹.

6.7 Another line of attack relates to the appointment of Kayo Surveyors. It was argued that the Appellants had their land surveyed by a government surveyor from the office of

the Surveyor – General, which by law is the most competent office to carry out land surveys while the Respondent had her land surveyed by a private surveyor, known as Kayo Surveyors.

6.8 According to Counsel, the Respondent's argument that Kayo surveyors were the authorized surveyors in the area was uncorroborated as there was no evidence adduced to show that Kayo surveyors were exclusively authorized to conduct surveys in Maloni Village. That, therefore, in the absence of such evidence, nothing stopped the Appellant from appointing a government Surveyor to survey her land. It was argued that, had Kayo surveyors been the only surveyor appointed to survey Maloni village, Ministry of Lands would not have approved the Appellant's certificate of title.

As such, the lower court fell into serious error when it ignored the survey done by the government surveyor and preferred the private surveyor who carried out a survey after the government surveyor had already recommended the boundaries. Further that, there was no evidence to

prove that the Appellants' survey diagram was not genuine and could not be relied upon to ascertain the perimeter of their property, when the said diagrams were duly approved and issued by the Surveyor General.

6.9 Counsel further argued that, the lay out plan prepared by Kayo surveyors did not reflect what is contained in the site plan prepared by the government Surveyor. It was submitted that as a result of the Respondent's encroachment, the Appellants are left with less than 3 hectares out of the 7.026 hectares covered by their certificate of title. Further that, the buildings erected by the Appellants were within the confines of Lot No. 6284/M as delineated in the certificate of title and as such there was no need for them to seek permission from the Respondent to erect any buildings on their land. Thus, the lower court failed to resolve the actual issue of encroachment before it. Reliance was placed on the case of **Nkhata and Others v Attorney General**⁵.

6.10 With regard to the second issue, it was argued that the Respondent's action of demolishing the Appellants'

property without a court order was illegal and that the lower court ought to have penalized the Respondent by ordering her to compensate the Appellants for the demolished buildings.

7.0 ARGUMENTS IN OPPOSITION OF THE APPEAL

7.1 Mr. Kasote, Counsel for the Respondent placed reliance on section 33 of **The Lands and Deeds Registry Act**¹ and submitted that the lower court was on firm ground when it found that the Respondent was the legitimate owner of Lot. No. 6285/M, as she was issued with a certificate of title to that effect and the Appellants were similarly issued with a title relating to Lot No. 6284/M.

7.2 It was further submitted, at page 140 of the record, that PW1, in her own testimony conceded that she built structures on Lot No. 6285/M and Lot No. 6278/M which were not her plots and it is these structures that had been demolished by State Police.

Counsel submitted that, the fact that the Appellants obtained their title before the Respondent was inconsequential. The Appellants' land was surveyed in

May 2014 and approved on 4th September and that of the Respondent in January 2014 and approved on 18th November, 2014, which fact was admitted by PW1 at page 141 of the record.

7.3 With regard to the appointment of Kayo surveyors, it was submitted that, the fact that, Kayo Surveyors had no letter of appointment as an approved surveyor in the area was immaterial. According to the Respondent, had the Appellants attended the meeting where Kayo surveyors were appointed and allowed to survey their land, they would have been aware of their boundaries. With regard to the submission that the Appellant's land was reduced to less than 3 hectares, it was argued that no evidence was adduced from the Appellants' witnesses to support that claim.

7.4 With regard to the demolition of the properties, the Respondent argued that it was known to the Appellants that the demolition of the structures was at the instance of State Agents; Zambia Police and not the Respondent. Counsel referred us to the case of **Nkhata and 4 Others v**

The Attorney General⁵ and submitted that this was not an appropriate case in which to reverse the findings of the lower court.

8.0 DECISION OF THIS COURT

8.1 We have considered the record, the impugned Judgment, the arguments of both parties and the authorities cited therein.

8.2 As earlier alluded to, this whole appeal consists mainly of an attack of findings of fact. The Appellants attack the learned trial Judge's finding that they encroached on the Respondent's land by building illegal structures thereon in view of the overwhelming evidence to the contrary.

8.3 It is necessary at this point to remind ourselves of our role as an Appellate court. That role, although notorious, bears repeating. It was succinctly propounded by this Court in our recent decision of **Macha Rainford Hanziba and 21 Others v Lusaka Water and Sewerage Company**⁶ that an Appellate Court will only interfere with findings of fact of a lower court where it is satisfied that the findings in

question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts, or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make.

8.4 It is clear from the evidence on record and as rightly found by the trial Judge at page J16 of her Judgment, this appeal is centered on a dispute over trespass and encroachment of boundaries. In resolving this issue, the learned Judge relied on a lay out plan prepared by Kayo Surveyors, who she found to have been the only firm appointed by the Surveyor – General to conduct all surveys in Maloni Village, Lusaka West. The lay out plan defined the perimeter of each property and also showed that the Appellants' structures were built on the Respondent's land.

8.5 It is this finding that the Appellants are discontented with and have faulted the learned trial Judge's reliance on the lay out plan; firstly, because it was prepared by a private

firm in the absence of any proof that they were the only firm authorized to conduct surveys in the area and secondly, that the trial Judge ought to have given greater weight to the certificate of title issued to the Appellants which delineated the extent of the property.

8.6 We have perused the evidence on record and at page 145 is the evidence of DW2, **Chisala Raphael Kayombo**, a registered land surveyor, who testified that, at a meeting held by the Surveyor General, he was appointed as the land surveyor in Maloni village to survey the properties in that area which were on the approved site plan. The appointment was necessitated by the fact that there was a lot of confusion and inconsistency in the manner that surveys were carried out in the area. He went on to testify that he surveyed the Respondent's land, confirmed that the beacons were correct and he went ahead to prepare a survey diagram which was approved. He further testified that when he surveyed the Plaintiff's land, he was rebuffed.

- 8.7 He proceeded to state that according to the lay out plan, the owner of the Lot No. 6284/M being the Appellants, built on Lot No. 6285/M belonging to the Respondent.
- 8.8 We have had sight of the proceedings in the court below and note that when DW2 gave his evidence, the Appellants opted not to challenge his evidence in cross examination, which we find odd, as his evidence, in our view, was cardinal in resolving the issue of the boundaries. The evidence of DW2 went unchallenged and therefore, the only inference that could reasonably be drawn by the lower court was that Kayo Surveyors were the duly appointed surveyors of Maloni Village. The Appellants, cannot now be heard to complain that there was no appointment letter exhibited by the Respondent when they had the opportunity in the court below to challenge such evidence. We are, therefore, of the view that this was an afterthought on the part of the Appellants. Based on the foregoing, we cannot fault the learned trial Judge for having found as she did.

8.9 With regard to whether the Respondent encroached on the Appellant's land, the trial Judge concluded in a pertinent portion as follows:

"I have considered DW1's certificate of title and find that she is the legitimate owner of Lot No. 6285/M Lusaka. On the other hand, the Plaintiffs are the legitimate owners of Lot No. 6284/M, Lusaka. According to the lay out plan, the perimeter of each property is clearly defined. It also shows that the Plaintiffs structures are built on DW1's property.

It is, therefore, perplexing that DW1 was sued by the Plaintiffs over houses, which they built without her consent. In my view, had the Plaintiffs yielded to Kayo surveyors, they could have avoided their crisis. PW1 testified that a surveyor from the Ministry of Lands drew her survey diagram but did not convince me that it was sanctioned by the Surveyor General."

8.10 It is clear from the above portion of the Judgment that the learned Judge placed greater reliance on the lay out plan to resolve the dispute between the parties.

8.11 It is a cardinal principle of the law of evidence that he who alleges must prove his case. The learned authors of **Phipson and Elliot, Manual of the Law of Evidence**¹ stated this position as follows:

“the general rule is that a party upon whom the persuasive burden of proof rests (i.e. usually the plaintiff) is entitled to a verdict if his evidence establishes a preponderance of probability in his favour. i.e. if he persuades the tribunal of fact that his version of the facts is more probable than that of his opponent.”

8.12 This principle has been aptly stated in a myriad of cases such as **Hygrotech Zambia Limited v Greenbelt Fertilizers Limited**⁷ and **Wilson Masauso Zulu v Avondale Housing Project Ltd**⁸.

8.13 Therefore, the burden of proof rests on the party who alleges to prove its case on a preponderance of probability. There must be evidence that is sufficient to justify the allegations. In this instance, the Appellants bore the onus of proving their case against the Respondent on a balance of probabilities. They had to prove by adducing evidence,

that the Respondent encroached on their land and that the certificate of title issued to the Respondent encompassed a portion of the Appellants' land.

8.14 On a perusal of the evidence on record, the Appellants in support of their case, exhibited a certificate of title containing a survey diagram and it is upon this document that the lower court was asked to determine the boundaries between the parties' lands. We have had sight of the said documents and in our view, they do confirm that the Appellants are the legitimate owners of Lot No. 6284/M, which fact is not in dispute. The question, however, we ask ourselves, is whether it was sufficient to justify the allegations against the Respondent and our answer is in the negative. The certificate of title and survey diagram alone in the absence of any other evidence, did not assist the lower court in making a finding that the Respondent encroached on the Appellants' land.

8.15 The Appellants' bore the burden to provide cogent and compelling evidence upon which the court could make a finding in their favour and in the absence of such evidence,

the Appellants did not prove their case against the Respondent on a preponderance of probability.

8.16 Based on the foregoing, it is impossible to depart from the findings of the lower court. In fact, it is worth noting as rightly argued by Mr. Kasote, that the 2nd Respondent in cross examination, at page 140 of the record, conceded that the structures which were demolished were on the Respondent's land and some other structures on Lot No. 6278 which belongs to another person.

8.17 It follows therefore, that the findings by the learned Judge were borne out of the evidence available to her and as such, we are of the view that this is not a proper case in which the findings ought to be reversed as the same were not perverse or made in the absence of relevant evidence.

8.18 With regard to the issue of whether the Respondent is liable to compensate the Appellants for the demolished properties, the lower court found that the Appellants were liable to be evicted without any compensation. It is clear that the Appellants were labouring under the belief that the demolition of their properties was instigated by the

Respondent. The Respondent on the other hand, maintained that the demolition was carried out by State Police as there were numerous complaints of encroachment and illegal structures in the area.

8.19 We note that DW4, **Alfred Nawa**, a senior assistant commissioner of police, testified that after he received some complaints from the farmers in the area about their land being encroached, an investigation was instituted which resulted in an operation order to demolish the illegal structures. He categorially stated that the Respondent did not lead the police to the demolition of the structures as the officers already had full information regarding the illegal structures.

8.20 It is clear from the evidence that the Appellants failed to prove that the demolition was instigated by the Respondent. PW1 and PW2 in their own evidence at page 138 and 142 confirmed that the police demolished their houses. It is therefore strange that the Appellants insist on attaching liability to the Respondent. The demolition was at the instance of the police officers and not the

Respondent. The lower court was therefore, on firm ground when it found that the Appellants are not entitled to compensation from the Respondent.

9.0 CONCLUSION

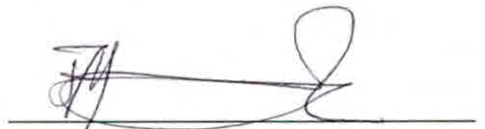
9.1 In totality, we find this appeal lacking in merit. Consequently, it is hereby dismissed with costs to the Respondent. Same to be taxed in default of agreement.

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J. CHASHI
COURT OF APPEAL JUDGE

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J. Z. MULONGOTI
COURT OF APPEAL JUDGE

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F. M. LENGALENGA
COURT OF APPEAL JUDGE