

IN THE SUPREME COURT OF ZAMBIA Appeal No. 147/2011
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:

KAPEMBWA SINKALA

APPELLANT

AND

MWENYA MAKASA

RESPONDENT

Coram: Chibesakunda, Ag/CJ, Phiri and Muyovwe, JJS
On the 2nd December, 2014 and 19th October, 2016

For the Appellant: Messrs Chanda Chizu and Associates

For the Respondent: Mr. K. Chenda, Messrs Legal Resources
Chambers

JUDGMENT

MUYOVWE, JS, delivered the Judgment of the Court.

Cases referred to:

1. Mine Workers Union of Zambia vs. Sam Makumba and Henry Mambwe Chama Appeal No. 34/2009
2. Admark Limited vs. Zambia Revenue Authority SCZ Judgment No. 9 of 2006
3. Anderson Kambela Mazoka and Others vs. Mwanawasa and Others (2005) Z.R. 138.
4. Anti-Corruption Commission vs. Barnett Development Corporation Limited (2008) Z.R. 69
5. Attorney-General vs. Kakoma (1975) Z.R. 212
6. Gredhill vs. Hunter (1880) 14 Ch. D 492
7. Attorney General vs. Achiume (1983) Z.R. 1

8. **Galaunia Farms Ltd vs. National Milling Company Ltd and Another (2004) Z.R. 1**
9. **Hanif Mohammed vs. Yusuf Ibrahim Issa Ismail Appeal No. 146/2013**
10. **Eddie Christopher Musonda vs. Lawrence Zimba SCZ No. 4/2012**
11. **Nkhata and Four Others vs. The Attorney General (1966) Z.R.124**

Legislation referred to:

1. **Evidence Act Chapter 43 of the Laws of Zambia**
2. **Housing (Statutory and Improvement Areas) Act Cap 194 of the Laws of Zambia**

When we heard this appeal, we sat with the Hon. Madam Justice Chibesakunda who has since retired and therefore, this is a majority judgment.

This is an appeal against the judgment of the High Court sitting at Lusaka which dismissed the appellant's claim for House No. 26 Chibuli Road, Chilenje South Lusaka.

This case has its genesis in the Local Court where the respondent, who was the plaintiff won the day. However, the appellant appealed to the Subordinate Court where the matter was heard *de novo* and the court found in favour of the respondent. Again the appellant appealed to the High Court but he lost the appeal in the High Court, hence this appeal before us.

The dispute is between two relatives. According to the appellant, initially the respondent was occupying the house which belonged to the Lusaka City Council (herein after called "the Council"). The respondent was offered to purchase the house but he did not take up the offer as he had a building project in Kasama and with the consent of the respondent, the appellant paid for the house. Later, the respondent signed documents transferring the house over to the appellant. The appellant stated that all this was done through his lawyers Messrs Chifumu Banda and Associates who obtained title deeds in his name in 1989. It was the respondent who evicted his niece Vivian Makasa in order to give vacant possession to the appellant. Thereafter, the appellant put tenants in the house.

In 1989, the appellant said he gave the respondent K15,000 (unrebated) to assist him in his building project in Kasama and in 1990 he gave financial assistance to the respondent in the sum of K10,000. It was a shock to the appellant that the respondent could come back after 14 years to claim the house after he allowed him to purchase it.

On the other hand, the respondent's evidence was that he was in occupation of the said house since 1971 and in 1987 he bought the house from the Council for K23,000. According to the respondent, he sent the appellant to make the payment at the Council. The appellant found tenants for the house and literally took charge of the respondent's house. As the two were related, the respondent trusted the appellant especially that they had a cordial relationship.

To his dismay, the respondent received rentals only once in April, 2002 because the appellant kept giving excuses for not remitting rentals to him. The appellant advised him not to go to the house in order to allow the tenant to have quiet enjoyment of the house. The respondent reported the appellant to the police over the non-remittance of rentals to no avail. The respondent denied ever signing the deed of transfer and he maintained that the signature on the deed of transfer was not his.

During trial in the Subordinate Court, a subpoena was issued summoning Christopher Chipasha from the Lusaka City Council Registry who testified that there was some irregularity in the manner the certificate of title was issued to the appellant.

Christopher Chipasha stated that among the irregularities he discovered were that no registration fee was paid; no fee for consent to transfer was paid and no clearance certificate from the Zambia Revenue Authority for the transaction and the deed of transfer was not properly signed.

In her judgment, after considering the six grounds of appeal, the learned judge upheld the judgment of the Subordinate Court. The learned judge agreed with the findings of the Subordinate Court that there was fraud in the manner the appellant obtained his certificate of title from the Council and ordered its cancellation and that a fresh certificate of title be issued to the respondent. The learned judge dismissed the appellant's appeal with costs to the respondent.

Dissatisfied by the High Court judgment, the appellant has now come before us advancing five grounds of appeal. In ground one and two the appellant attacks the finding by the learned judge that the respondent was the legal owner of the disputed property and the order that all rental monies be paid to the respondent. In ground three, it is alleged that the learned judge disregarded the evidence of David Mbita (PW2) and instead relied

heavily on the evidence of Christopher Chipasha (PW3) whose evidence was seriously challenged in cross-examination. In ground four and five, the contention is that the court erred in finding that the conveyancing process was shrouded with irregularities; that the court should not have ordered the cancellation of the appellant's certificate of title and a new certificate of title issued in favour of the respondent.

Counsel for the appellant filed heads of argument on 21st November, 2014 and on 25th November, 2014 Counsel filed a Notice of Non-appearance indicating that the appellant did not desire to be present either in person or by legal practitioner at the hearing of the appeal and would rely entirely on the heads of argument. We therefore proceeded to hear the appeal in the absence of the appellant and his Counsel.

In support of ground one, it was submitted, *inter alia*, that the property in issue was legally vested in the appellant as evidenced by the certificate of title which was produced in the court below. It was contended that the Council having issued the appellant with a certificate of title, it was an error on the part of the learned judge to hold that the property vested in the

the appellant would have been on notice and would have taken steps to rectify any anomalies. We were reminded that the transaction between the parties was based on mutual trust as they were related to each other and, therefore, not all aspects were reduced into writing.

The gist of the argument in support of ground two is that the learned judge erred when she ordered that rental monies be paid to the respondent. It was submitted that the respondent had no tenancy agreement with any person over the disputed property and, therefore, there was no ground upon which he could be paid any rentals or indeed any rental refunds as ordered by the learned judge.

In support of ground three, it was argued that the evidence of David Mbita Mbao was critical as he was a witness to the signing of the deed of transfer between the parties. We were invited to examine the documents on record, which according to Counsel clearly depict the respondent's signature and that the respondent cannot deny that he signed the deed of transfer because the signature on the documents are the same. In comparison, it was submitted that the evidence of Christopher

Chipasha the witness from the Council was inconsistent and he confused the conveyancing process of sale of land on one hand and mere transfer of property on the other.

Counsel took the view that the learned judge attached wrong weight to Christopher Chipasha's evidence given the eye witness evidence from David Mbita Mbao who witnessed the signing of the deed of transfer by the respondent which was also witnessed by one M. Matanda at Messrs Chifumu Banda and Associates on 2nd August, 1988. We were referred to **Section 3(1) and 5(1) of the Evidence Act Chapter 43 of the Laws of Zambia**, which provides that:

"3(1) In any civil proceedings where direct oral evidence of a fact would be admissible any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say:

a) If the maker of the statement either -

(i) Had personal knowledge of the matters dealt with by the statement; or..."

" 5(1) In estimating the weight, if any, to be attached to a statement admissible as evidence by virtue of this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the person who supplied the information

contained or recorded in the statement did so contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the person, or any person concerned with making or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts.

(a) If the maker of the statement either

(i) Had personal knowledge of the matters dealt with by the statement..."

Counsel's argument is that the lower court should have borne in mind **Section 3(1)** and **Section 5(1) of the Evidence Act** and ought to have established whether David Mbita Mbao had any incentive to conceal or misrepresent the fact that he witnessed the signing of the deed of transfer between the parties. It was submitted that more weight should have been attached to the evidence of David Mbita Mbao whose testimony directly spoke to the facts in issue.

In ground four, Counsel repeated his arguments in ground three. It was submitted that if the respondent was transparent in his dealings he ought to have joined the Council as a party as the decision was going to affect the Council looking at the cancellation order made by the court. That in any event, the failure by the Council to do their job properly could not be

imputed to the respondent let alone the appellant. Counsel took the view that the learned judge misapprehended the facts and evidence before her and ended up holding wrongly that the transfer of the property was shrouded with irregularities. On this argument, we were referred to the case of **Mine Workers Union of Zambia vs. Sam Makumba and Henry Mambwe Chama**¹ where this court pronounced itself on the circumstances in which an appellate court can reverse findings of facts.

Further, in their submission, Counsel insinuated that Christopher Chipasha had a hand in the disappearance of the Council file. It was contended that the witness did not have the blessing of the Council at the time when he gave evidence on behalf of the respondent. With these misgivings, we were urged to reverse the finding of the lower court that the conveyancing process was shrouded with irregularity.

In ground five, Counsel indicated that they were repeating their arguments in ground one, three and four. It was emphasized that fraud was not pleaded as a defence and the learned judge was wrong to dismiss the appellant's case based on fraud which demands a higher standard of proof. In support of

this argument, Counsel cited many cases including **Admark Limited vs. Zambia Revenue Authority²** and **Anderson Kambela Mazoka and Others vs. Mwanawasa and Others.³**

Further, it was submitted that the respondent did not complain anywhere about the transaction which involved his lawyers Messrs Chifumu Banda and Associates. Counsel argued that the respondent should not be allowed to deny his lawyers as there was evidence clearly showing that they acted on his behalf in the transaction between him and the appellant. Counsel submitted that the respondent's bare denial that he signed the deed of transfer is not sufficient in the face of documents on record which show that he signed the deed of transfer as the signature is the same on all the documents produced in the court below.

We were also referred to Section 8 (1) and Section 34 (1) of the Housing (Statutory and Improvement Areas Act) which read together provide, *inter alia*, that a certificate of title issued by the registrar shall not be challenged except on ground of fraud, misrepresentation or mistake.

In conclusion Counsel urged us to allow the appeal and set aside the judgment of the court below.

At the hearing of this appeal, Counsel for the respondent Mr. Chenda was granted leave to file his heads of argument out of time.

In his heads of argument, Counsel opted to begin by addressing grounds one, four and five together. According to Counsel, the findings of the court below in ground one, four and five were premised on the fact that there was no dispute that the respondent had applied to purchase and did in fact purchase the property in dispute. Further, that the finding by the High Court was premised on the unexplained irregularities that surrounded the purported transfer of the property from the respondent to the appellant. It was submitted that Section 34 (1)(c) of the Lands and Deeds Registry Act should be read together with Section 8 (1) of the **Housing (Statutory and Improvement Areas) Act** as the two provisions provide, amongst others, that fraud can lead to cancellation of a certificate of title. This is also in line with the holding in the case of **Anti-Corruption Commission vs. Barnett**

Development Corporation Limited⁴ in which we stated as follows:

"We agree that under Section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of land by the holder of the certificate, in this case the respondent. But we also know that under the same section or Section 34, a certificate of title can be challenged and cancelled for fraud or for reasons of impropriety in its acquisition. So the statement that a certificate of title is conclusive evidence of ownership of land is only true when there is no challenge based on fraud. We note that in this appeal, the appellant is alleging fraud. We allow ground one."

In relation to the issue raised by the appellant that fraud was not pleaded, Counsel relied on the case of **Anderson Kambela Mazoka and Others vs. Levy Mwanawasa and Others**³ where it was held that:

"In cases where any matter not pleaded is let in evidence, and not objected to by the other side, the court is not and should not be precluded from considering it. The resolution of the issue will depend on the weight the court will attach to the evidence of unpleaded issues."

It was submitted that on the strength of the **Mazoka case**³ the court below was on firm ground when it considered the evidence of fraud.

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It was submitted that on the strength of the **Mazoka case**³ the court below was on firm ground when it considered the evidence of fraud.

It was further argued that the court below was entitled to take a stand in favour of the respondent after hearing the conflicting stories from both sides. The case of the **Attorney-General vs. Kakoma**⁵ was cited in support of this argument where we stated that a court is fully entitled to make findings of fact where the parties advance directly conflicting stories after hearing witnesses. Counsel submitted that it followed that after finding that the appellant's purported purchase of the property was shrouded with irregularity, the court below had to order the cancellation of the certificate of title held by the appellant.

In relation to ground two, it was submitted, *inter alia*, that the lower court having found that ownership of the property was vested in the respondent, it followed that the rental monies had to be paid to the respondent. In support of this argument, Counsel relied on the case of **Gredhill vs. Hunter**⁶ where the court stated that:

"an action to recover rents from the man who had improperly received them....you might have to establish your title in such an action, or in such a suit, because your right to rents might depend upon your title."

It was submitted that on the strength of the case of **Attorney-General vs. Achiume**⁷ we should not reverse the finding by the High Court that the respondent was the legal owner of the property as this finding was neither perverse nor made on a misapprehension of facts.

In response to ground three, it was submitted that the credibility and weight attached to David Mbita Mbao's evidence was rightly affected by the lower court's finding that the preparation and execution of the purported deed of transfer was shrouded with irregularities. It was pointed out that the purported deed of transfer contained the signature of only one witness instead of two which is the standard procedure and it lacked the signature of the purchaser. It was submitted that the irregularities surrounding the purchase of the property was compounded by the fact that the appellant, when given an opportunity was unable to explain these irregularities. Counsel repeated his argument that this court cannot reverse a finding of fact by a trial court without sufficient reason in line with the authorities already cited. Counsel argued that the two conflicting stories advanced by David Mbita Mbao and Christopher

Chipasha were examined by the lower court which settled for Christopher Chipasha's testimony who concisely pointed out the irregularities in the purported transfer of the property. Counsel also alluded to the irregularities in the purported transfer of the property from the respondent to the appellant, that is: the absence of consent fee or receipt confirming payment for the consent; the absence of the tax clearance certificate and receipt from Zambia Revenue Authority and the failure to produce evidence confirming the execution of the deed of transfer.

In conclusion, Counsel prayed that we uphold the decision of the court below in totality and dismiss the appeal. Counsel also prayed for costs.

We have considered the evidence in the court below, the judgment of the lower court and the arguments by the parties.

We will deal with all the grounds of appeal together as they are inter-related. The question in this appeal is whether the house in dispute was vested in the appellant or the respondent following the alleged execution of the deed of transfer and other documents produced by the parties before the trial court.

As we have noted, the matter was heard de novo before the Subordinate Court and both parties adduced evidence. On behalf of the appellant, it has been strongly argued that the signature on the documents on record attests to the fact that the respondent signed the deed of transfer in the presence of David Mbita Mbao. Further, that Messrs Chifumu Banda and Associates were the respondent's lawyers and he cannot turn around and deny that he signed the documents relating to the transfer of the house to the appellant. The correct position, as we have discerned from the evidence on record, is that Messrs Chifumu Banda and Associates were acting for the appellant. According to the appellant, he was acting as an agent for the respondent after being appointed orally by the respondent. We take the view that this is the reason why the respondent denied any knowledge of the transfer of the property as he had not appointed Messrs Chifumu Banda and Associates to act for him. This also confirms the fact that the respondent did not even know the tenants in the house as the appellant handled all transactions on his behalf. We are alive to the fact that it is possible in appropriate cases for one law firm to act for the

vendor and the purchaser or the transferor and the transferee but this was not so in this case.

Counsel for the appellant did allude to various documents which were allegedly signed by the respondent who denied that he signed the deed of transfer. In our view, Counsel for the appellant's argument that the signatures on the various documents produced belonged to the respondent is misplaced because this fact should have been proved by the appellant during trial in the Subordinate Court. The onus was on the appellant to prove his case on a balance of probabilities especially that the matter was heard *de novo*. In the case of **Galaunia Farms Ltd vs. National Milling Company Ltd and Another**⁸ we held that he who alleges must prove. Clearly, the appellant lamentably failed to prove his case and he has only himself to blame and cannot now before us shift the burden of proof to the respondent.

The appellant also complained that the respondent did not plead fraud and that, therefore, the trial magistrate and the learned judge alike should not have ordered the cancellation of his certificate of title in view of this serious anomaly. In the case

of **Hanif Mohammed vs. Yusuf Ibrahim Issa Ismail**⁹ the appeal involved husband and wife. The wife had obtained a certificate of title for property belonging to her husband without his knowledge and consent. The certificate of title was issued to the wife on basis of a deed of gift signed by the husband. In fact, the husband was out of the country when the transaction was effected. Among the documents filed at the Lands and Deeds Registry was the husband's National Registration Card yet he had never obtained one. The husband denied ever signing the deed of gift. We held in that case that a trial judge faced with such serious anomalies and irregularities all pointing to fraud cannot turn a blind eye to such evidence on the ground that fraud was not specifically pleaded. Again, this is not to state that fraud must not be pleaded but the emphasis is that each case must be dealt with on its peculiar facts.

Another issue raised in this appeal is the acceptance of the evidence of Christopher Chipasha (the Council worker) over that of David Mbita Mbao the appellant's witness whose evidence was to the effect that he was a witness to the respondent signing the deed of transfer at Messrs Chifumu Banda and Associates.

Tied to this, is the attack on the finding by the learned judge that the conveyancing process was shrouded with irregularities. This finding was based on the evidence of Christopher Chipasha whom Counsel for the appellant argued was discredited in cross-examination. On the other hand, Counsel for the respondent argued that in view of the irregularities touching the very foundation of the certificate of title held by the appellant, this left the court below with no option but to order its cancellation. In the case of **Eddie Christopher Musonda vs. Lawrence Zimba**¹⁰ we stated that the trial court which has the opportunity of seeing and hearing witnesses is in the best position to discern who between the parties is telling the truth. Therefore, the learned judge cannot be faulted in her decision to uphold the trial court on its finding that Christopher Chipasha's evidence was more credible than that of David Mbita Mbao. We take the view that the mere fact that David Mbita Mbao witnessed the signing of the purported deed of transfer cannot help the appellant's case in the face of evidence that there was no clearance from Zambia Revenue Authority; no consent to transfer was obtained and no fees were paid. More importantly, any deed of transfer should speak for itself. This particular deed of transfer raised more

questions than answers. The transferor maintained that he did not sign it and the trial court believed his evidence that he did not sign the document and so it rested upon the appellant to sort issues with whoever assisted him to draft that document or better still, he had the option to call his lawyers Messrs Chifumu Banda and Associates to prove his case. The deed of transfer produced in the court below was not even signed by the appellant and yet he was a party to the deed.

This was the appellant's case and it rested on him to prove his case that his certificate of title was clean. Unfortunately, he failed to prove this and we cannot fault the learned judge for agreeing with the trial magistrate that there was fraud in the whole process. On the authority of **Nkhata and Others vs. The Attorney General**¹¹ and other established authorities we cannot fault the learned Judge in upholding the trial magistrate's finding on a matter of credibility and proper analysis of the evidence before it.

In sum, we find therefore, that, the learned judge cannot be faulted when she upheld the decision of the trial magistrate that the house in question duly vested in the respondent. It followed

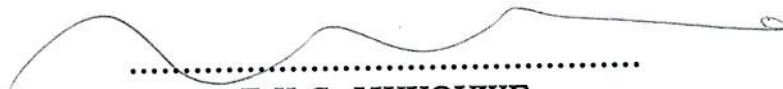
that the appellant's certificate of title had to be cancelled and a fresh one to issue in favour of the respondent.

With regard to the order that the rentals should be paid to the respondent, it is obvious that only a property owner can collect rentals for a house which is on rent. The house did not belong to the appellant and, therefore, he had no right to collect rentals. The argument that he is the one who rented out the house cannot be of any assistance to him as the house did not belong to him and he should have channeled the rentals to the respondent whom he said had appointed him as his agent.

In conclusion we find no merit in all the grounds of appeal and the appeal is accordingly dismissed with costs to the respondent to be taxed in default of agreement.



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G.S. PHIRI
SUPREME COURT JUDGE



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E.N.C. MUYOVWE
SUPREME COURT JUDGE