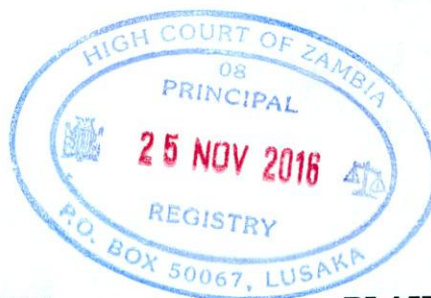


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

2005/HP/699



BETWEEN:

DEEVILIOUS B. LUNGU AND 10 OTHERS

PLAINTIFF

AND

**MARY BANDA
ATTORNEY GENERAL**

**1ST DEFENDANT
2ND DEFENDANT**

**Before the Honourable Mrs. Justice J.Z. Mulongoti
on the 25th day of November, 2016**

For the plaintiff:

Mr. M Sinyangwe of Wila Mutofwe & Associates

For the 1st defendant:

Ms S. Chambanenge of KBF & Partners

For the 2nd defendant:

*Ms G. Muyunda State Advocate, Attorney General's
Chambers*

J U D G M E N T

Cases referred to:

1. Attorney General v. E.B Jones Machinists (2000) ZR 114 (SC)
2. BP Zambia Limited v. The Attorney General SCZ Judgment No. 16 of 2012
3. Galaunia Farms Ltd v National Corporation Ltd (2004) ZR1(SC)
4. J.Z Car Hire Ltd v Malvin Chaala and Scirrocco Enterprises Ltd (2002) ZR 112 (SC)

Legislation referred to:

1. Section 14 (1) and (2) of The Sherriff's Act Chapter 37 of the Laws of Zambia

This is an action by the plaintiffs for damages occasioned to their residential properties amounting to K925,500,000.00 (old currency) at plot No. 3882/M pursuant to a writ of possession obtained by the 1st

defendant and executed by the Sheriff of Zambia on 3rd June, 2005. The plaintiffs allege that on 3rd June, 2005 the Sheriffs of Zambia by virtue of the writ of possession obtained by the first defendant demolished houses on the first defendant's plot number 3881/M and thereafter proceed to demolish the plaintiffs houses at plot 3882/M. As a result of the demolitions the plaintiffs have suffered damages, anguish, loss and discomfort. The damages to the eleven houses amounted to over K925,000,000.00 (old currency).

The first defendant filed a defence and counterclaim. She denied that the plaintiffs are the owners of the plot No. 3882/M and averred that it belonged to one Alan K. Simukoko who had sued the plaintiffs under cause No. 2006/HP/0526. She denied that the sheriffs by virtue of the writ of possession obtained by her demolished houses on 3881/M and went further to demolish at 3882/M. She averred that the plaintiffs will be put to strict proof thereof. Furthermore, that court orders are made by Judges and execution of them is left to the 2nd defendant's agents. Therefore, she denies any wrong doing and thus the plaintiffs' claims be dismissed with costs. The first

defendant counter claims against the plaintiffs damages for trespass and inconvenience.

The 2nd defendant also filed a defence admitting that its officers (sheriffs) demolished houses at plot 3881/M and denied that they did so at 3882/M. Further, that in the alternative it would plead indemnity under the Sheriffs Act and or omission of the bailiffs.

At trial all parties adduced oral evidence. The first plaintiff Deevilious Lungu, 42, testified as PW1 that on 3rd June, 2005 the Sheriff of Zambia demolished houses at L/3881/M and L/3882/M. When he got to the site he found the sheriffs destroying his house which was at L/3882/M. He testified that the piece of land at L/3882/M was subdivided and sold to the plaintiffs by the owner Mr. A.K. Mbewe an agent for Jarvis Mbawo. The sale arose out of court action No. 2001/HP/0380 in the High Court as a result of illegal squatters.

According to PW1 a committee was formed to co-ordinate the sale. Some of the plaintiffs in the present case were part of that case and bought as a community a total of 2.8

acres and paid to Mbewe K6,000,000.00 (old currency) as the cost. The 2.8 acres were part of the land at L/3882/M. The remaining part was sold to a Mr. Alan Simukoko by Mr. Mbewe and Mbawo. That marked the end of the 2001 case.

PW1 testified that he and other plaintiffs were not part of the 2001 case. For his part, he approached the political party cadres of the Movement for Multiparty Democracy (MMD) in 1996 at Chainda and they sold him an 18 x 20 piece of land on L/3882/M. They even told him that they were trying to raise funds to finish off the purchase with Mbewe. Then on 3rd June, 2005, the sheriffs demolished his house. When he found the sheriffs on site, he inquired why they had gone to number 3882/M. He was shown a writ of possession dated 30th March, 2005. Upon reading it he noticed that it related to lot number 3881/M. He told the sheriffs they had come to the wrong plot. They told him they were misled by Mary Banda (1st defendant in casu) who was the plaintiff under cause No. 2003/HP/0314. Then they proceeded to the police together with agents for Mary Banda. The sheriffs told the police that they were misled. He narrated that because

tempers were high he advised the sheriffs to go back to their offices.

At 14:00 hours he and others went to the sheriffs' office to clarify the issue. They were referred to the lawyers at Banda - Kalokoni and Company. The lawyers told them to take whatever action they deemed fit, culminating in these proceedings. He testified that the sheriffs used bulldozers to demolish the houses and they razed all of them to the ground. He drew the Court's attention to page 3 of the plaintiff's bundle of documents and testified that the document was showing the claim or damage each plaintiff suffered. The total then was K925,000,000.00 which has increased as at today.

He urged the Court to order the defendants to pay damages for stress the plaintiffs have suffered as a result of the demolition, refund for rentals etc.

During cross examination by the first defendant's counsel he testified that the proof that he owned part of L/3882/M were receipts at pages 16 to 17 of the plaintiff's bundle of documents. The money was received by A. K. Mbewe on

behalf of Jervis Eziah Mbawo as shown in the Lands Register. He reiterated that the sheriffs demolished the plaintiffs' houses at L/3882/M after being misled by the first defendant.

PW2 Kalima Mukwaya, 47, testified that on 3rd June, 2005, around 04:00 to 05:00 hours in the morning, he heard a sound of a grader. He rushed to check and saw execution of demolition of structures at L/3881/M. Thereafter, the execution was extended to L/3882/M at his house which was demolished. He and others queried the court order the bailiffs were using. They discovered it was meant for L/3881/M and the demolition was stopped immediately.

PW2 further testified that in 2008 there was an issue over ownership of the plots by the plaintiffs. He bought his plot initially from his church mate who acquired it from A.K. Mbewe, the brother in law to Mbawo. Lot 3881/M belonged to the first defendant who had problems with squatters leading to the demolition. Meanwhile the plaintiffs who had issues with ownership of the plots at L/3882/M met with Mbawo and they entered into an

agreement with him. He agreed to offer the plaintiffs the plots and they accepted. Mr. Mbawo offered him the plot at K7,500,000.00 (old currency). He paid in instalments and the last few instalments were paid to the law firm of Mwansa Phiri and Associates as advised by Mbawo. In June 2016, the law firm asked him to pay scrutiny fees which he did. The same year Mr. Mbawo visited the place with a surveyor who he introduced to the community. He paid K77.00 for survey of his plot and was advised also to pay K400.00 for the site plan.

It was his testimony that he knew of no reason why execution at L/3881/M overlapped into L/3882/M. He sued to seek compensation for partial demolition of his house which is now a write off due to cracking as a result of the demolition. That from the date of demolition in 2005 to 2010 he started renting.

In cross examination he testified that from 2002 he had been residing at L/3882/M. He denied having a conversation with a General Chileshe to the effect that he was staying at L/3881/M. He said he paid for the plot

again in 2008 when Mbawo offered him because he was desperate and to avoid suffering.

PW3 Eziah Jervis Mbawo, 72, testified that PW1 and the other plaintiffs were known to him as residents of L/3882/M. Initially, they were squatters but he entered into an agreement with them to regularise their stay. He applied to the council so the plaintiffs could be registered as permanent residents. He also applied for survey to the Ministry of Lands to allocate numbers and issue title deeds to them.

In cross examination by the first defendant's counsel, he testified that the plaintiffs were squatters from 2004 to 2005. He started regularising their stay between 2008 to 2010. The process is ongoing and has prolonged because he resides in Chipata. When re-examined, he clarified that he found out that the plaintiffs were squatters between 2004 and 2005 when he came to know of their presence.

That was the evidence on behalf of the plaintiffs.

The first defendant Mary Banda testified and called one witness. It was the first defendant's testimony that the plaintiffs encroached on her farm at lot No. 3881/M. She discovered this in 1992 and reported to the police. The police failed to chase them and advised her to sue them which she did. The Judge ruled in her favour and a writ of possession was issued to remove them. She testified further that she did not instruct the sheriffs to demolish at lot No. 3882/M. And that she was not even present when the sheriffs demolished the plaintiffs' houses. She drew the court's attention to page 3 of the defendant's bundle of documents and identified her certificate of title for lot number 3881/M.

She denied the plaintiffs' claim for damages on the basis that she did not send the sheriffs to lot 3882/M.

During cross examination, she testified that she got an order to demolish houses at lot 3881/M and that she knew the boundaries for her plot. She admitted that the plot was surveyed when the Judge who had conduct of the case

involving squatters ordered it. It was her testimony that her daughter and son were involved in payment of the sheriffs' fees and they knew about the sketch plan.

DW2 Doris Bwalya Banda Chileshe, 47, testified that plot 3881/M belonged to her parents; DW1 and her late father. After the death of her father in 1991 they neglected the plot. Later her late father's friends alerted the family that MMD squatters had invaded the land and some were even selling illegally. She started going to the plot and in the process met PW1 who was the head of the squatters. She told him the land belonged to her mother (DW1) and it was on title but PW1 ignored her and continued selling to unsuspecting citizens who became violent and unruly towards her. The family decided to sue the squatters. The case was before Judge Mushabati. DW2 further, testified that the Judge ordered that the land be surveyed before he could pass judgment. The Judge even asked the squatters to make peace with her mother with a view of her selling them the land. However, PW1 convinced them that her mother had no title. DW1 went back to court and obtained a writ of possession leading to demolition of the squatters' structures. DW2 testified that she paid the police to escort

the sheriffs. She took the sheriffs and police to the plot during the day together with a surveyor to look at beacons and boundaries. They later went and demolished but her family was not present. She further contended that the squatters being illegal did not know or differentiate between lots 3881/M and 3882/M.

In cross examination she testified that all she knew was that properties that were demolished were on lot 3881/M. She reiterated that as owners of 3881/M they were present during verification of beacons. When referred to pages 1 and 2 of the defendant's supplementary bundle of documents, she testified that she did not know the owners of lot 3882/M because they have been several. Some people say the owner is in Chipata and others say the first plaintiff is the owner.

When further cross examined she testified that no any member of her family was present during the demolition to show the demarcation to the sheriffs. She clarified that PW1 and others were part of the case before Judge Mushabati. When referred to page 20 of the plaintiffs bundle of documents, she admitted that the first plaintiff's

(PW1) name was not listed as a defendant but quipped that not all the names were listed. When referred to the sketch plan at page 19 of the plaintiff's bundle of documents, it was her testimony that the sketch encroached on 3881/M and bordered 3882/M. She also said that she was not aware that the demolished part was the little box in the corner.

When cross examined by the state advocate, she testified that she had never seen any document relating to lot 3882/M. When referred to pages 1 and 2 of the 1st defendant's supplementary bundle of documents, which is a certificate of title for plot 3882/M, she testified that her lawyer filed the document and she had never seen it before. She conceded that she was aware of the boundaries prior to the demolition exercise but she could not state the exact extent.

When re-examined she testified that according to the sketch plan the encroachment is bordering 3881/M and 3882/M and whatever spilled from 3881/M to 3882/M was demolished and that some houses were very close as the box was also in between.

That was the evidence on behalf of the first defendant.

The 2nd defendant called one witness William Kashimbi, 53, an undersheriff referred to as DW3. He testified that he was part of the group of sheriffs who executed the writ of possession in issue. There were four sheriffs accompanied by police officers. The handling officer Charity Kabamba identified the houses through the beacons which were earlier shown to her by the plaintiff (1st defendant in casu). After that they removed the properties from the houses then started to demolish them. When cross examined by the plaintiffs' counsel, he testified that during demolition it is up to the owner to choose to be present or not. He denied discussing with PW1 over demolishing on the wrong land. In addition that no one told them to stop demolishing and that even if someone had, they were not going to stop because they had a court order.

When cross examined by the first defendant's counsel, he testified that the sheriffs never receive instructions from a third party and that no third party told them to demolish

property at L/3882/M. When further cross examined he testified that execution was done at 3881/M and that the sheriffs never went to L/3882/M.

That was the evidence on behalf of the second defendant.

Learned counsel for the plaintiffs submits that the plaintiffs have adequately discharged the burden of proving their case on a balance of probabilities that their homes which were on lot number 3882/M were wrongly demolished. According to counsel, the survey diagram used to execute the writ of possession does not clearly state, inter alia, the extent of the alleged encroachment, the meters between the boundaries of plot 3881/M and 3882/M and the conclusion made by the surveyor is not clear. Thus it cannot be relied on by the 1st defendant as being a proper illustration of the actual geographical position of the lot in question (3881/M) and to argue that it clearly shows the border of L/3881/M and 3882/M when in fact not.

Counsel contends that the first and second defendants omitted to get a proper description of the boundary of the land on which the writ was to be executed as per procedure. Quoting the authors of the book 'The Execution of Sheriffs Warrants' he argued that:

"a writ of possession directs the sheriff to put the plaintiff into possession of the buildings or land described in the judgment and that it must contain a specific description of the land".

It was also submitted that equally section 14 (2) of the Sheriffs Act indemnifies the sheriff from legal proceedings. Furthermore, that the authors of 'The Execution of Sheriffs' Warrants' also state that it is the responsibility of the sheriff to identify the premises to which the writ relates.

Thus, the second defendant being immune from legal proceedings resulting from any act or omission of execution of a writ, the first defendant is thus truly and justly indebted to the plaintiffs in the sum of K925,000.00 for demolishing their houses.

Learned Counsel for the first defendant submits that the first defendant is the owner of lot 3881/M as evidenced by

the certificate of title on pages 3 to 9 of the first defendant's bundle of documents. The plaintiffs have failed to prove for a fact that their houses were on No. 3882/M. That the first defendant engaged the sheriffs in accordance with sections 7 and 10 of the Sheriffs Act Chapter 37 of the Laws of Zambia.

After considering the evidence and submissions by counsel, it is common cause that there were disputes between the first defendant and some of the plaintiffs from as far back as the early 2000s. There were two cases in court over the same land which actually led to the execution of the writ of possession which has given rise to this present case. The plaintiffs contend that the second defendant acting on instructions from the first defendant wrongly demolished their houses which were built on lot 3882/M and not on the first defendant's lot 3881/M.

The issues that fall for determination are; whether the second defendant wrongly demolished the plaintiffs houses which were standing on lot number 3882/M and if so, is

the first defendant liable for the actions of the second defendant?

Before I dwell into the issues, I wish to state that I note the plaintiffs' counsel's submissions that the second defendant is indemnified from legal proceedings for actions done in exercise of its duties. Indeed this is the position of the law which has been reaffirmed by the Supreme Court in cases like **Attorney General v E.B. Jones Machinists¹** and **BP Zambia Limited v The Attorney General²**. It is therefore, surprising that the plaintiffs decided to sue the second defendant in the first place. Their claims against the second defendant are accordingly dismissed.

Section 14 (2) of the Sherriff's Act provides that "in every case of execution, all steps which may be legally taken shall be taken on the demand of the party who issued such execution, and such party shall be liable for any damage arising from any irregular proceeding taken at his instance". Thus, the first defendant is the rightful person to be sued and is answerable for any acts or omissions of the sheriffs, if any during the demolition.

The question is, have the plaintiffs proved their case that the sheriffs on instruction of the first defendant wrongly demolished their houses which were on lot number 3882/M?

I wish to state from the outset that it is common cause that there were cases in court in the early 2000s involving disputes over the boundaries of the two pieces of land in question. It is also clear from the testimonies of the plaintiffs' witnesses especially PW2 and PW3 and also from DW1 and DW2 that at the time of the demolition in 2005, the plaintiffs were illegal occupants of lot 3882/M. PW2 testified that he was offered the plot by Mbawo in 2008 after it was discovered that the person he initially bought from in 2002 was not the owner. PW3 the original owner of lot 3882/M confirmed that the plaintiffs were squatters and he took pity on them when he decided to sale the plots to them sometime in 2004 to 2005. The process is still on going to date as the plaintiffs are yet to be offered the plots and given title. It is also a fact that the first defendant also had sued squatters who were on her land including some of the plaintiffs culminating in the writ of possession which led to the demolitions. During that case with the squatters

the boundaries were unclear prompting the Judge to order that the land be surveyed.

It is therefore, encumbered on the plaintiffs to prove their case by showing the extent of the boundaries between the two pieces of land. I note that apart from verbal assertions the plaintiffs did not adduce any other evidence. PW3 also did not do the same. He who alleges must prove as aptly submitted by the first defendant's counsel quoting the supreme court in **Galaunia Farms Ltd v National Corporation Ltd**³ that "*the burden to prove any allegation is always incumbent on the one who alleges.*" It is also trite that the plaintiffs must prove their case whatever may be said of the opponent's case. It is not for the first defendant to prove the boundaries of her land but for the plaintiffs to prove theirs and show the extent of the first defendant's encroachment during the demolition. If anything the plaintiffs only attempted to rely on the sketch plan/survey diagram which they allege the defendants used when conducting the demolitions. It is note worthy that their counsel submits that this sketch plan/survey diagram cannot be relied on because it does not clearly state the extent of the alleged encroachment, and the meters

between the boundaries of the two plots. Additionally, that the conclusion made by the surveyor is not clear.

According to counsel the defendants omitted to get a proper description of the boundary of the land on which the writ was to be executed. As alluded to above it is for the plaintiffs to prove their case. The plaintiffs are alleging that the defendants wrongly demolished their houses which were on lot 3882/M and not on lot 3881/M the subject of the writ of possession. The plaintiffs were supposed to adduce evidence to show the boundaries not the defendants. Furthermore, no evidence was adduced to prove the damage of K925,000.00. The letter the plaintiffs relied on through PW1 does not help their case at all. This is simply a letter addressed to the Solicitor General highlighting the plaintiffs' claims. There is no evidence to show how the figure of K925,000.00 was arrived at or the damage suffered by each plaintiff. The Supreme Court has guided in several cases such as **J.Z Car Hire Ltd v Malvin Chala and Scirrocco Enterprises Ltd**⁴ that it is for the party claiming damages to prove damages.

Consequently, I find that the plaintiffs have failed to prove their case to the required standard. It is accordingly dismissed. Equally, the first defendant did not adduce evidence to substantiate her counter claim, it is also dismissed.

In the circumstances, I order each party to bear own costs.

Delivered at Lusaka this 25th day of November, 2016.



J.Z. MULONGOTI
HIGH COURT JUDGE