

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



B E T W E E N:

BINWELL MUTAKA

PLAINTIFF

AND

SILWIMBA

1st DEFENDANT

ANNIE MUSUMALI KABAMBA

2nd DEFENDANT

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on 21st
February, 2017**

For the Plaintiff : *Mr. N. Botha & Mrs. M.M. Nkunika, Messrs
Makebi Zulu Advocates*
For the Defendant : *No Appearance*

J U D G M E N T

Case Authorities Referred To:

1. *Khalid Mohammed v The Attorney General (1982) Z.R 49*
2. *Clementina Banda, Emmanuel Njanje v Boniface Mudimba 2010/HP/A39*

Other Works Referred To:

1. *Land Law in Zambia, Cases and Materials, Frederick S. Mudenda, 2007*

The Plaintiff commenced this action by way of Originating Summons pursuant to Order 113 Rule 1 of the Supreme Court on 10th September, 2012. By an order of the Court dated 9th October, 2015, these proceedings continued as though they had been commenced by Writ of Summons. The Plaintiff seeks the following reliefs:

- (i) *The Plaintiff does recover possession of Stand No. 37050, Lusaka on the ground that the Plaintiff is entitled to possession and that the persons in occupation are in occupation without licence or consent.*
- (ii) *An injunction restraining the defendants and any other person in occupation of Stand No. 37050 from trespassing, occupying, disposing of or carrying out any further construction; and*
- (iii) *Costs and any other relief the court deems fit.*

The Defendants did not enter appearance even though they had been duly served with Court process. The Defendants did not appear at trial even after they were duly served the notice of hearing in this matter on 23rd January, 2013, as shown in the Affidavit of Service filed into Court by the Plaintiff on 2nd February, 2017. Having been satisfied that the Defendants were duly served with the

notice of hearing, I proceeded to hear the matter pursuant to Order XXXV Rule 3 of the High Court Rules.

Binwell Mutaka the Plaintiff testified as **PW1**. His evidence was that sometime in 1999 he and others illegally settled on Farm No. 610 Foxdale, a property belonging to the Catholic Church. They were consequently ejected from the farm and temporarily relocated to the Independence Stadium by the Government. They stayed at the stadium for a while and when their case was presented to the late President Dr. Levy P. Mwanawasa, he directed the Forest Department to resettle them on Farm No. 28, a former forest reserve, lying opposite the SOS Village in Chazanga Compound along Great North Road.

PW1 testified that since a large a number of families were affected by the eviction, a directive was issued by Mr. S. Daka, an officer at the Ministry of Lands, to organize all the affected families into three groups, so that they could be allocated land in phases. The groups were created as directed and each had a Chairperson

and Secretary. Lists of the affected families were subsequently drawn up and submitted to the Ministry of Lands.

It was PW1's evidence that he was allocated Stand No. 36938 which comprised a commercial and residential plot. PW1 told the Court that he subsequently had a marital dispute with his wife, which ended in divorce in the Magistrate's Court. As part of the property settlement, PW1 maintained Stand No 36938, while his wife was granted their matrimonial home.

PW1 testified that after the property settlement order, he went to check on his plot and discovered that his structures had been demolished. Further, he found unknown people who were developing his plot and they told him that they had bought his land from the Movement for Multi Democracy (MMD) Party cadres. Armed with the information, PW1 stated that he decided to commence this action in Court. He also stated that he was not in possession of a certificate of title because the Ministry of Lands

officials told the affected families that they would issue a common title for the entire property.

PW1 testified that he later discovered that the 1st Defendant had sold his land to an unknown person in 2014. PW1 contended that since he was the owner of the property, he was entitled to possess it and because of his displacement, he had encountered serious financial problems. He prayed to the Court to grant him the reliefs set out in his originating process.

Masauso Phiri testified as **PW2**. He confirmed PW1's evidence that he was one of the persons that illegally occupied Farm No. 610 in Foxdale belonging to the Catholic Church. He also gave evidence on how the illegal occupants were ejected from that farm. He repeated PW1's evidence on how the late President Dr. Levy P. Mwanawasa instructed the Forest Department to relocate all the Ng'ombe displaced persons to Farm No. 28 along Great North Road.

It was PW2's evidence that the affected families were organized into three groups of beneficiaries for the purposes of land. PW2 stated that the lists of beneficiaries were compiled and submitted to the Ministry of Lands. He also stated that he was Secretary of the group where PW1 was registered.

It was PW2's evidence that on 18th March, 2009, the Ministry of Lands began to allocate land in phases to the beneficiaries whose names appeared on the lists. PW1 was allocated Stand No. 36938 which was subsequently grabbed by MMD Party cadres and thereafter sold to unknown persons who were not on the lists of beneficiaries under the late President's initiative.

Learned Counsels for the Plaintiff filed written submissions, for which, I am indebted. I will not reproduce them suffice to state that I will refer to them in the judgment.

I have seriously considered the pleadings, evidence adduced and the submissions of Learned Counsels for the Plaintiff. The sole

issue to be determined is whether the Plaintiff is the true owner of Stand No. 36938. Ancillary to the issue is whether the Plaintiff is entitled to possession of Stand No. 36938.

There is no dispute that PW1 and others illegally settled on Farm No. 610, Foxdale Lusaka, a property of the Catholic Church, from which they were evicted in 2002. It is also not in dispute that after their eviction, the Government temporarily settled PW1 and the others at Independence Stadium. Thereafter, the late Republican President Dr. Levy P. Mwanawasa directed the Forest Department to permanently resettle PW1 and the others similarly circumstanced on Farm No. 28, a former forest reserve, lying along Great North Road. It is uncontroverted that title for the new owners of Farm No. 28 would be issued in common.

I am mindful that the Defendants have not contested this action. However, as aptly pointed out by Learned Counsel for the Plaintiff, the burden of proof lies with the Plaintiff to prove his case

even where a defence has failed. This principle of law is elucidated in the case of **Khalid Mohamed v The Attorney General**¹.

The Learned author **Frederick S. Mudenda, Land Law in Zambia Cases and Material**, defines an equitable right as follows:

"An equitable right is a right in personam; it is enforceable against certain persons only. It binds every transferee of Land except a bonafide purchaser for value of a legal estate in the land who had no notice of the equitable right."

The Learned author **Frederick S. Mudenda** goes on to quote **Mergarry's Manual of the Law of Real Property**, which summarizes the distinction between a legal and equitable right thus:-

"There is a great difference between legal and equitable rights. This is sometimes expressed by saying that legal rights are rights in rem, equitable rights are rights in personam. A legal interest in land is a right in the land itself, so that whoever acquires the land is bound by that right, whether he knew of it or not. A legal right is like a live electric wire which shocks those who touch it whether or not they know of it. Equity on the other hand would enforce equitable rights only against certain persons... Legal rights are good against the world; equitable rights are good against all persons except a bonafide purchaser of a legal estate, for value without notice and those claiming under such a purchaser....The extent to which a purchaser is bound by third party rights when acquiring property is often determined by whether the rights are equitable or legal..."

From the evidence adduced, both PW1 and PW2 testified that PW1 was allocated Stand No. 36938 on Farm 28 a former forest reserve after they had been evicted from Farm No. 610 Foxdale. PW1's name appeared as one of the beneficiaries at entry 156 in the Register of displaced Ng'ombe people of 2009. I therefore, have no hesitation in holding that PW1 is the true owner of Stand No. 36938.

Having so determined, I find that the rights transferred by the State as the legal owner of Farm No. 28 to PW1 and others similarly circumstanced created the first equitable interest in that land. The State as legal owner had an overriding interest which was good against the whole world. In essence, the State transferred rights to PW1 and the others, in a way that their rights in land cannot be challenged by anyone, including a bonafide purchaser for value and without notice.

The facts of this case reveal that PW1's land was grabbed by MMD party cadres who were not beneficiaries of the Presidential

initiative. Further, the MMD Party cadres who had no interest in PW1's land sold it to unknown persons.

In the case of **Clementina Banda Emmanuel Njanje v Boniface Mudimba** the Court held that:

“Prior equitable interest in law can only be defeated by a bona fide purchaser for value without notice. The following requirements need to be fulfilled when relying on the doctrine of bona fide purchaser for value without notice; a purchaser must act in good faith; must be a person who acquires an interest in property by grant rather than operation of law; must have given value for the property; must generally have obtained the legal interest in the property; and must have had no notice of the equitable interest at the time he gave his consideration for the conveyance.”

After carefully analyzing the evidence adduced, I find that the Defendants are not bonafide purchasers for value and without notice. It is plain to see that the Defendants bought land from MMD Party cadres who had no interest in the land. The transaction between the MMD Party cadres and the Defendants, in my considered view had no trace of good faith. It is also quite conceivable that the buyers of the land were aware that the party cadres had no interest in land and the whole transaction was shrouded in bad faith.

I find that it is hardly necessary for me to consider whether the Defendants met the other requirements of a bonafide purchaser for value without notice given the circumstances of sale of PW1's land.

Accordingly, I order that the Plaintiff should immediately recover possession of Stand No. 37050. In the originating process, the Plaintiff claims possession of Stand No. 37050, while in the evidence adduced before Court, reference was made to Stand No. 36938. Thus, if Stand No. 37050 is also known as Stand No. 36938, then the Court's order applies *mutatis mutandis*.

I further, order all trespassers on Stand No. 36938 to be immediately evicted and all illegal structures constructed thereon to be demolished without further recourse to Court. I award the Plaintiff damages to be assessed by the Learned Deputy Registrar.

Costs shall abide the event to be taxed in default of agreement.

Dated this 21st day of February, 2017

M. Mapani

M. Mapani-Kawimbe
HIGH COURT JUDGE