

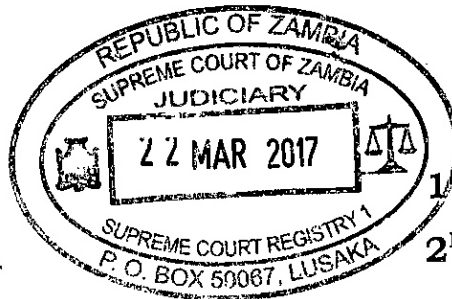
IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

APPEAL No. 121/2014

BETWEEN:

BARNABAS NGORIMA

ROSEMARY NGORIMA



1ST APPELLANT

2ND APPELLANT

AND

**ZAMBIA CONSOLIDATED COPPER
MINES LIMITED**

1ST RESPONDENT

BENSON CHOMBA

2ND RESPONDENT

CORAM: Muyovwe, Kabuka, Chinyama, JJS
on 7th March, 2017 and 14th March, 2017

For the Appellants: Messrs Eric Silwamba, Linyama and Jalasi
Legal Practitioners

For the 1st Respondent: No appearance

For the 2nd Respondent: Mr. S.A.G. Twumasi, Messrs Kitwe
Chambers

J U D G M E N T

MUYOVWE, JS delivered the judgment of the court.

Cases referred to:

1. Beatrice Muimui vs. Sylvia Chunda Appeal No. 50/2000
2. Crabb vs. Arun District Council (1975) 3 All ER 865, CA
3. Inwards vs. Baker (1965) 1 All ER at 448, 449
4. Buchman vs. The Attorney-General (1995/97) Z.R. 131

5. **Mususu Kalenga Building Ltd; Winnie Kalenga vs. Richman's Money Lenders Enterprises (1999) Z.R. 27**
6. **Simwanza Namposya vs. Zambia State Insurance Corporation (2010) Z.R. Vol. 2 339**
7. **Attorney-General Ministry of Works and Supply and Rose Makano vs. Joseph Emmanuel Frazer and Peggy Sikumba Frazer (2001) Z.R. 87**

On the 27th December, 2013 the High Court sitting at Ndola delivered a judgment dismissing the appellants' claim against the respondents which included a claim for specific performance and a declaration that the 1st respondent should have sold House No. 16 Entebbe Avenue, Mufulira, Zambia to the appellants. The lower court also granted vacant possession to the 2nd respondent as the bona fide purchaser of the house.

The undisputed facts on which the judgment of the lower court is premised is that the 1st appellant is the husband to the 2nd appellant and they were both employed by the 1st respondent. The 1st appellant came from Southern Rhodesia (later re-named Zimbabwe) in 1959. He joined the then Mufulira Mine in 1961 and was allocated the house in issue. In 1974 he became an established resident and acquired Zambian citizenship in 2006. The 1st appellant retired in 1996 though he was offered a two year

contract a month after retirement. According to the 1st appellant, he should have been offered the house as a sitting tenant having occupied the house for over 40 years.

The 2nd appellant retired in 1993. Together with other retirees she took out an action against the 1st respondent claiming underpayment of their retirement benefits. The case was determined in their favour in 2001 and she was then paid the balance of her retirement benefits. According to the 2nd appellant, she was eligible to purchase the house as a sitting tenant and as a retired employee of the 1st respondent who was underpaid her benefits.

The 1st respondent's defence is that in 1997, the appellants were not eligible to purchase the house as the 1st appellant was not a Zambian and the 2nd appellant had retired and was paid her terminal benefits. The 1st respondent did not offer the house to the appellants but instead offered it to the 2nd respondent. By notification dated 27th March 1998, the 1st respondent notified the 1st appellant as lessee of the said house, of the sale of the house to

the 2nd respondent. Further, the 1st respondent entered into a contract of sale with the 2nd respondent on 10th January 1998.

According to the 2nd respondent, he was offered the house for sale on 15th September 1997 and on 10th January, 1998 a contract of sale was executed between himself and the 1st respondent. The purchase price of K9,887,000.00 was thereafter deducted from his benefits in full and final settlement of the sale.

In his judgment, the learned judge relying, *inter alia*, on the case of **Beatrice Muimui vs. Sylvia Chunda**¹ was alive to the fact that being a sitting tenant was not the only criteria for eligibility to purchase a government or quasi-government house. The learned judge addressed his mind to the rules governing the sale of ZCCM houses and held that the 1st appellant was not eligible to purchase the house as he was not a Zambian. With regard to the 2nd appellant she was not eligible to purchase the house as she had already retired at the time of sale of the houses.

While acknowledging that the 2nd appellant with her colleagues sued the 1st respondent for underpayment of their

retirement package, the learned judge pointed out that this had nothing to do with the sale of the house in issue and could not be of any assistance to the 2nd appellant in this case. In addition, the 2nd appellant received no offer to purchase the house. On the other hand, the learned judge found that the 2nd respondent, was given an offer although he was not a sitting tenant and was therefore a bona fide purchaser.

The learned judge accordingly dismissed the appellants' case with costs.

In their notice of appeal filed on 29th January, 2014 the appellants advanced four grounds of appeal couched in the following terms:

- 1. The court below erred both at law and in fact when it found that the 1st appellant was not entitled to purchase House No. 16 Entebbe Avenue, Mufulira on the grounds that he was not Zambian when in fact he later acquired citizenship and as such became eligible;**
- 2. The court below erred both at law and in fact when having found that the 1st appellant later acquired Zambian citizenship he failed to exercise his equitable**

jurisdiction under Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia;

- 3. The court below erred both at law and in fact when it found that notwithstanding the 2nd appellant had taken out an action for under payment of her terminal benefit the learned trial judge still proceeded to deem the partial payment as full and final settlement and as such disqualified the 2nd appellant from her right to purchase House No. 16 Entebbe Avenue, Mufulira; and**
- 4. The court below erred both at law and in fact when it failed to exercise his equitable jurisdiction under Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia.**

On behalf of the appellants, Messrs Eric Silwamba, Jalasi and Linyama Legal Practitioners filed heads of argument. On 24th February, 2017 they filed a Notice of Non- Appearance. Suffice to note that the four grounds of appeal were argued as one ground. Although Messrs Tembo Mulengeshi and Chanda Legal Practitioners filed a Notice of Appointment as Additional Advocates, no submissions were filed by Counsel.

The gist of Counsel's argument is that since the appellants were sitting tenants who had resided in the house for 46 years , the lower court should have exercised its equitable jurisdiction under

Section 13 of the High Court Act. According to Counsel, the fact that the 1st appellant became a Zambian subsequently and the fact that the 2nd appellant was only paid full benefits after determination of her case in the High Court, these special circumstances should have compelled the learned judge to exercise his equitable jurisdiction under the High Court Act. Counsel argued that the cases relied on by the learned judge such as the case of **Beatrice Muimui vs. Sylvia Chundu**¹ can be distinguished from this case as in those cases, the Court was not called upon to exercise its equitable jurisdiction. It was argued that should we apply the strict principles of common law, this would result in unfairness as the appellants will lose a house they have lived in for 46 years when equity would have granted the relief sought. The case of **Crabb vs. Arun District Council**² was relied on where it was stated, *inter alia*, that:

"And it was the Privy Council who said that the court must look at the circumstances in each case to decide in what way the equity can be satisfied..."

We were also referred, *inter alia*, to the case of **Inwards vs. Baker**³ particularly the observation by Lord Denning where he

stated that in order to determine whether the court should exercise its equitable jurisdiction, it must consider the following:

"First is there equity established? Secondly, what is the extent of the equity, if one is established? And, thirdly, what is the relief appropriate to satisfy the equity?"

Counsel took the view that the circumstances of this case clearly established an equity which qualified the appellants to purchase the house which has been their home for 46 years.

We were urged to allow this appeal with costs.

Mr. Twumasi, learned Counsel for the 2nd respondent relied on his heads of argument filed herein.

Counsel argued grounds two and four together. Relying on the cases of **Buchman vs. The Attorney-General**⁴ and **Mususu Kalenga Building Ltd, Winnie Kalenga vs. Richman's Money Lenders Enterprises**⁵ it was submitted that the appellants did not plead equity in the court below and are therefore precluded from raising it in this court.

In response to ground one and three, Counsel argued that in relation to the 1st appellant, the trial court found that he only acquired Zambian citizenship in 2006 and he was, therefore, not eligible to purchase the house in 1997. With regard to the 2nd appellant, Counsel reminded us that the lower court found as a fact that she retired and was paid her terminal benefits before the empowerment scheme was established.

To buttress his argument on this point, Counsel referred us to several authorities including the case of **Simwanza Namposya vs. Zambia State Insurance Corporation**⁶ where we stated that we will not disturb findings of fact unless it can be shown that the findings are perverse or made in the absence of relevant evidence or based on a misapprehension of facts such that on a proper view of the evidence no trial court acting correctly, could have reasonably made. Counsel argued that there is nothing on record that can compel us to reverse the findings of the lower court. He urged us to dismiss all the grounds of appeal.

Finally, Counsel decided to also argue in the alternative and argued all the grounds together. The position taken by Counsel for

the 2nd respondent under this segment is that by advancing equity as a defence, the appellants admitted that by law, they were not entitled to the reliefs they sought from the court below. Counsel submitted that the application of equity is subject to the law in Zambia taking into account **Section 2 of the English Law (Extent of application) Act Cap 11 of the Laws of Zambia.**

It was argued that even if the appellants had pleaded equity in this action, the court would have considered it in light of the law of the land. In support of this argument, Counsel cited the case of the **Attorney-General, Ministry of Works and Supply and Rose Makano vs. Joseph Emmanuel Frazer and Peggy Sikumba Frazer**⁷ where we stated that:

"The Lands Act, requires that for a non-Zambian who is permanent resident to qualify to own land he must obtain consent in writing under the President's hand."

Counsel emphasized that the whole scheme was to empower Zambians which excluded the 1st appellant. Counsel repeated his earlier arguments that the trial court made findings of fact which cannot be reversed. He reiterated that the **Beatrice Muimui**¹ case

is good law and that the appellants never raised the issue of equity at the trial but they merely asserted their right to purchase the house as sitting tenants.

We have considered the evidence on record, the judgment of the lower court and the submissions by Counsel for the parties.

The facts of this case are not in dispute.

We will first deal with grounds two and four. Mr. Twumasi's argument on these grounds is that the appellants did not plead equity in the court below and that therefore, they cannot raise this issue before us. We agree with Mr. Twumasi and affirm our decision in **Buchman vs. The Attorney-General**⁴ that a matter which was not raised in the lower court cannot be raised in a higher court. It is clear from the record that the appellants did not raise the issue of equity in the court below and we cannot entertain the issue in this court. Grounds two and four therefore fail.

Turning to grounds one and three, we note that the real issue raised for determination in this appeal is whether the appellants were eligible to purchase the house which they have occupied for

the last 46 years? In considering eligibility, we will deal with each ground separately. Ground one specifically addresses the 1st appellant's plight while ground three relates to the 2nd appellant.

Starting with the 1st appellant, although he was a sitting tenant, he was not a Zambian in 1997 when the 1st respondent embarked on the sale of its houses to Zambian employees. And we have stated in a plethora of cases that being a sitting tenant is not the only criteria. The 1st appellant only obtained Zambian citizenship in 2006 long after the house was offered to the 2nd respondent. It is inconceivable that the 1st appellant could expect to be offered the house when he was not a Zambian in 1997. We fail to appreciate Counsel's argument in view of the circumstances that the 1st appellant found himself. All things considered, the 1st respondent had every right to offer the house to another employee who met the requirements and could not wait until the 1st appellant had obtained Zambian citizenship. The 1st appellant had no leg to stand on as he was clearly not eligible to purchase the house.

With regard to the 2nd appellant, she retired in 1993 and was paid her terminal benefits. She discovered that she was underpaid

and took legal action together with her fellow retirees. As the learned judge observed, she had no offer from the 1st respondent. The house was offered to the 2nd respondent on the 15th September, 1997 by which date the 2nd appellant had already retired. The fact that the 2nd appellant had a pending matter in court for underpayment of retirement benefits could not prevent the 1st respondent from selling the house to another employee who met the requirements under the rules of sale. The learned judge properly addressed himself to the issue when he stated in his judgment that:

"Ultimately, the 2nd plaintiff has failed to prove that the court decided in her favour to the effect that she was underpaid. Even assuming that that was the case, she still would only be entitled to the balance on her terminal benefits and not the house.

This is most significant because by the time the case was disposed of, House No. 16 Entebbe Avenue, Mufulira Zambia had already been offered and sold to the 2nd defendant. If at all the court had found that the 2nd plaintiff was entitled to an offer, it would not be to the house in issue but to any other house that may have been available."

We cannot fault the learned judge for his conclusion which was based on the evidence before him. It is clear that the appellants were not eligible to purchase the house in issue and,

therefore, the 1st respondent had the right to offer it to the 2nd respondent or indeed any other person who met the requirements as per rules of sale.

In conclusion, it is clear to us that the appellants are riding on sympathy because they have stayed in the house for 46 years but sympathy cannot earn them an offer of sale. The house was sold in 1997 yet they refused to give vacant possession to the bona fide purchaser of the house. This appeal lacks merit. We dismiss it with costs to the 2nd respondent to be taxed in default of agreement.



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E.N.C. MUYOVWE
SUPREME COURT JUDGE



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J.K. KABUKA
SUPREME COURT JUDGE



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J. CHINYAMA
SUPREME COURT JUDGE