IN THE SUPREME COURT OF ZAMBIA **Appeal No.166/2014**
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:

RAPHAEL MWALE **APPELLANT**

AND

CAROLINE T. DAKA **RESPONDENT**

CORAM: Mwanamwambwa, DCJ, Kajimanga and Kabuka JJS
On the 6th June 2017 and the 13th of June 2017

FOR THE APPELLANT: In Person

FOR THE RESPONDENT: Mr. Z. Musonda, Senior Legal Aid Officer, National Legal Aid Clinic for Women

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J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Case referred to:

Sithole v Zambia State Lotteries Board (1975) ZR106

Legislation referred to:

The Housing (Statutory and Improvement Areas) Act, Chapter 194 of the Laws of Zambia, Section 26

Work referred to:

Rules of the Supreme Court 1999 Edition, Order 18/12/18

This is an appeal from the decision of the High Court delivered on 10th December 2013 dismissing the appellant's claims against the respondent.

By a writ of summons and statement of claim dated 6th December 2011, the appellant claimed for an order to render an account and surrender of all rentals collected from 1st March 2011; a declaration that the change of title of Plot 7428/378 (House No.242/05) Kaunda Square II (the property) from Elifala Mtonga (deceased) to Caroline T. Daka was fraudulent and therefore null and void; any other relief the court may deem fit; and costs.

In his statement of claim, the appellant contended that he was a judgment creditor and the deceased was a judgment debtor in cause number 1993/HP/1586. A writ of elegit was executed against the deceased's property on 13th May, 1999 and the property was handed over to him. The Sheriff's seizure form was taken to the Lusaka City Council (the Council) where it was received and stamped by the Council Deeds Registry. Unknown to the appellant, the

respondent and the deceased, by conspiracy and fraud with other persons, changed the title of the property from the deceased to the respondent on 27th October 2000. The deceased issued an *ex parte* process and caused a writ of possession to be executed on 18th May, 2001 and consequently re-occupied the property when the principal sum, interest and costs had not been recovered. The process of setting aside the writ of possession was frustrated by the demise of the deceased's lawyer and subsequently himself. The writ of elegit was re-issued on 23rd November, 2010 and executed by the Sheriff on 1st March, 2011 and the tenants occupying the property agreed to be taken over. The respondent is claiming ownership of the property, having evicted survivors of the deceased by an unknown legal process, and collecting the rentals.

The respondent filed a defence and counterclaim to the writ in which she refuted the appellant's claims and asserted that she was a bona fide purchaser for value, as she had no notice of the court proceedings between the appellant and the deceased or that the property had any encumbrance on it. In her counterclaim, the respondent sought a declaration that she was the bonafide purchaser for value of the property; damages for trespass; damages for breach

of covenant for quiet enjoyment of the property; costs; interest on the sum payable at the commercial bank lending rate; and any other relief that the court deemed fit.

The evidence of the appellant at the hearing was that he obtained a judgment against the deceased under cause number 1993/HP/1538. In order to enforce the judgment, a writ of elegit was issued and executed against the property which was at the time registered in the deceased's name. Following execution of the writ of elegit, the appellant leased the house to the Zambia Police and began to recover the judgment debt from the rentals.

The appellant testified that he went to the deeds registry at the Council to place a caveat but was advised by the registry staff that there was no need to do so and that instead, he could give them a copy of the Sheriff's seizure notice in respect of the writ of elegit which he did and they received, stamped and retained it. According to the appellant, the Sheriff's seizure notice stopped the transfer of the property because it was no longer in the possession of the owner.

It was the appellant's testimony that on an unknown date, his tenants were evicted but he challenged the eviction and by a court

order dated 15th August 2001, they were reinstated. The deceased later re-occupied the house after obtaining a writ of possession on 16th October 2003. Attempts to set aside the writ of possession were unsuccessful due to continued adjournments and failure by the deceased to attend court. The appellant subsequently discovered that the title to the house had been changed from the deceased into the respondent's name. On 1st March 2011, the appellant attempted to re-issue the writ of elegit but the process was frustrated by the respondent who at that point was claiming to have title to the house and had begun to collect rentals from the tenants occupying the house.

The appellant testified that the respondent conspired with the deceased to have the title changed into her name and that ownership was changed before payment was made for the house. The appellant stated that although the respondent claimed to have bought the house for K22,000,000.00 (now K22,000.00), there was evidence that the K16,000,000.00 (K16,000.00) cheque that her employer paid to the deceased as the purchase price was actually encashed by her. He testified that as a result of the transaction, the respondent was

charged and dismissed from employment. According to the appellant, the respondent did not occupy the house after she purportedly purchased it. The deceased remained in possession of the house until his death and the respondent only moved into the house after she obtained a default judgment against the deceased's estate.

The appellant further testified that the records at the Council showed that the property was encumbered and he wondered how the deceased and the respondent managed to change the title. He stated that his interest in the house ought to have been given priority before ownership was changed to the respondent. Further, the respondent should have known of his interest, as she was turned away by his tenants when she went to inspect the house. It was his evidence that the respondent was told by his tenants that the house was under probe. He, accordingly, prayed for the court to nullify the transfer of the property to the respondent to allow him recover what was due to him from the deceased.

The respondent's evidence in the court below was that she was offered to purchase the property by the deceased for K22,000,000.00 (now K22,000.00). Upon the offer being made, the respondent

approached her employer, Zanaco Bank, for a loan. A search was conducted by the Bank on the property but they did not discover any encumbrances on it. Afterwards, a deposit in the sum of K5,000,000.00 (now K5,000.00) was paid to the deceased to enable him clear outstanding bills and surrender the title to her. In October 2000, the deceased was paid a cheque in the sum of K16,500,000.00 (now K16,500.00). She later demanded for the keys to the house. However, the deceased said he was unable to surrender them to her because he had a court case and he requested her to wait until 14th November 2000 when judgment was scheduled to be delivered.

The respondent stated that she told the deceased that she would hold onto the cheque pending delivery of the judgment. Thereafter, the deceased was no where to be seen until February 2001 when he came to ask for some money and she gave him K500,000.00 (now K500.00). She explained that she did not release the K16,500,000.00 (K16,500.00) cheque because the deceased had failed to give her vacant possession of the house. Further, that although the cheque was deposited in her account, this was done with the approval of the bank manager.

The respondent also testified that she told the deceased that she was losing out on rentals because of his continued stay in the house and he agreed to pay rent for his stay in the house with the understanding that the same would be deducted from the purchase price. However, he continued to ask for money from her and to occupy the house until his death. The respondent stated that she only took possession of the house in 2007, when the deceased passed away and after a court action was taken against the administrator of the deceased's estate. According to the respondent, when the rentals and the money which the deceased used to collect from her were deducted, it was found that at the time of his death he was the one owing her money.

The respondent further testified that when the deceased took possession of the house from the appellant he had in fact received money from another person and he began to demand for the title deed so that he could refund her. When she refused to give him the title deed, he went to her employers and told them that she did not give him the money for the house and consequently she was suspended and later dismissed from employment. She stated that she only

obtained the title deed from her former employer when she paid off the loan.

It was also her testimony that the first time she saw the appellant was when she was still employed by the Bank and he told her that he had a case with the deceased but she refused to get into any agreement with him. She, however, admitted that she was aware of the court proceedings between the appellant and the deceased but she disregarded them because she did not have any documents relating to it prior to the writ of elegit. She testified that from the time she took possession of the house, the appellant had been going to the house and he even evicted her tenants using bailiffs. She subsequently reported the matter to the police and although they confirmed that it was her house, the appellant continued to harass her tenants. The respondent stated that the case between the appellant and the deceased had taken 19 years and that the deceased was in the house from 2003 until 2007 when she took possession. She, therefore, wondered why the appellant did not claim his money from the deceased. Further, the respondent denied having obtained title to the property fraudulently, as the conveyance was done by the Bank.

Upon considering the evidence and submissions of both parties, the learned trial judge found that the property in dispute fell under the **Housing (Statutory and Improvement Areas) Act, Chapter 194 of the Laws of Zambia** (the Act). In particular, that section 26 of the Act deals with registration of interests and it provides as follows:

> **"Any person-**
>
> **(a) claiming to be entitled to or to be beneficially interested in any land or interest therein by virtue of any unregistered agreement or other document or transmission, or of any trust expressed or implied, or otherwise howsoever; or**
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> **(b) transferring any land or interest therein to any other person to be held in trust; or**
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> **(c) claiming to be a purchaser or mortgagee of any land;**
>
> **may at any time lodge with the registrar a caveat in the prescribed form."**

The learned trial judge noted that section 13 of the Act provides that a document purporting to transfer or in any way to affect any land, shall be deemed to be registered as soon as a memorial to that effect has been entered in the register. He also stated that there was provision in section 14(1) of the Act that documents requiring registration under the Act shall be registered using the prescribed

form and their priority shall be determined by the date of registration and not when they were executed. In addition, he noted that section 29 of the Act provides that as long as a caveat remains in force, the registrar shall not make any entry on the register having the effect of transferring or otherwise affecting the land or interest protected by such caveat.

On the evidence before him, the learned trial judge found that the appellant did not comply with section 26 of the Act when he purported to have his interest in the property registered by having the Sheriff's seizure notice stamped at the Council deeds registry. He stated that the lodging of a caveat is the prescribed mode for registering an interest in a property under the Act. The learned trial judge rejected the appellant's claim that having the seizure notice stamped was as good as placing a caveat on the property. He found that since the procedure was not complied with, no notice was given to either the Council officials or the respondent, of the appellant's interest in the property. In the circumstances, it could not be said that the registration of the transfer of the property from the deceased to the respondent was fraudulent.

The learned trial judge also found that section 14 of the Act makes it clear that the priority in interest in a property is dependent on the date of registration and that since the appellant's interest was never registered, it could not be said that the writ of elegit had priority over the sale transaction between the deceased and the respondent. He held that since the appellant's interest was not registered through a caveat, there was nothing irregular with the registration of the respondent's purchase of the property. Further, that section 29 of the Act which would have stopped the registration of transfer of title is only applicable in cases where a caveat has been lodged.

The learned trial judge, accordingly, found that the appellant failed to prove his claim that the transfer of the property from the deceased to the respondent was fraudulent and that the respondent was a party to such fraud. In the premises, the learned trial judge held that the transfer of the property to the respondent would not be nullified and neither would the respondent be ordered to render an account or surrender all rentals collected from 1st March 2011.

Dissatisfied with the above decision, the appellant has now appealed on three grounds. Ground one is that the learned trial judge

erred in fact and law by not determining fraud in the face of overwhelming documentary and oral evidence before him, including criminal prosecution of the respondent. Ground two is that the learned trial judge misdirected himself in fact and law by not addressing himself to the plaintiff's interest and benefit duly issued out of court namely, the writ of elegit which remains unextinguished. Ground three is that the learned trial judge misdirected himself in fact and law by addressing himself to normal conveyancing under the Act.

At the hearing, the appellant stated that he would entirely rely on his heads of argument. The learned counsel for the respondent applied for leave to file the respondent's heads of argument out of time pursuant to rule 12 of the Supreme Court Rules, Supreme Court Act Chapter 25 of the Laws of Zambia. We rejected the application. The basis of our refusal was that the delay was inordinate as the respondent had ample time from 24th October, 2014 to file the heads of argument but neglected to do so.

In support of ground one the appellant, in his heads of argument, submitted that he had a lawful writ of elegit issued by the court on 28th March 1999 which the learned trial judge recognized.

He referred us to the judgment of the lower court, particularly at page 15, lines 6 - 10 of the record of appeal. We were also referred to the writ of elegit dated 25th March 1999, appearing at pages 29 - 31 of the record of appeal.

According to the appellant, it was a notorious fact that the respondent and the judgment debtor (the deceased) were aware that the property was under a writ of elegit and that to circumvent a due process of the court is the highest level of lawlessness. It was his contention that the changing of title by both parties was fraudulent and that the learned trial judge erred in failing to find that there was fraud when evidence was overwhelming. Further, he contended that the case of **Sithole v Zambia State Lotteries Board,** which the learned trial judge cited in his judgment, did not serve any purpose and instead, it showed how he was in serious error as the court in that case held, *inter alia*, that:

> **"(i) The High Court has power to give a declaratory judgment but the power is a discretionary one. The discretion should be exercised with care and caution and judicially. In particular the court will not make a declaratory judgment where an adequate alternative remedy is available."**

(iv) If a party alleges fraud the extent of the onus on the party alleging is greater than a simple balance of probabilities."

The appellant submitted that the learned trial judge had before him a writ of elegit dated 28th March 1999, the Sheriff's seizure notice stamped by the Council on 13th October 1999, appearing at page 39 and the title deed of the property in the name of the deceased, appearing at page 44 of the record of appeal. It was the appellant's submission that he began to enjoy the fruits of his judgment by renting the house to Zambia Police. Therefore, it was inconceivable that title to the property had changed to the respondent on 27th October, 2000, when the judgment debt had not been liquidated.

He also referred us to the assignment dated 30th October 2000 at pages 47 - 49 of the record of appeal which indicated that the vendor had received K22,000,000.00 (K22,000.00) as full payment. We were further referred to the cheque dated 30th October 2001, payable to the deceased, appearing at page 52 of the record of appeal which the appellant submitted was purporting to pay for the house one year after the assignment and change of title.

The appellant further submitted that the learned trial judge had before him the police call out to the respondent, issued at the instance of the deceased, a copy of the police bond for a charge of forgery and obtaining money by false pretences and correspondence between the lawyers of the deceased and the respondent, appearing at pages 51, 66 and 69 - 72 of the record of appeal, respectively. According to the appellant, the documents referred to reveal that the transaction on the property was fraudulent and that it fell within the provisions of the Act, which allows for change of title to be declared null and void.

In support of ground two, the appellant submitted that the learned trial judge misdirected himself when he ignored his interest, that is to say, the judgment debt that had to be realized from the property which the respondent was frustrating with a title deed ill-gotten from the deceased.

In support of ground three, the appellant submitted that the learned trial judge misdirected himself by belabouring on the conveyancing process under section 26 of the Act. The appellant contended that the writ of elegit is a court order, which cannot be

subjected to any conveyancing rules as it was a stand-alone arrangement and the steps which the appellant took to inform the Council by placing on file the Sheriff's seizure form is more than sufficient to inform all concerned parties that the house was under a court order and not available for any other form of registration or manipulation by court orders. He further submitted that the learned trial judge ought to have restricted himself to the function of a writ of elegit, which provides for possession of property for rental purposes until certain sums have been recovered and that doing otherwise amounted to contempt of court.

In conclusion, the appellant prayed that this court grants him the reliefs he sought in the court below.

We have considered the record of appeal, the judgment appealed against and the appellant's heads of argument. In ground one, the appellant asserts that the lower court erred by failing to determine fraud in the face of overwhelming documentary and oral evidence. In support of this ground the appellant's argument is that he had a lawful writ of elegit issued by the court which the learned trial judge recognized. The respondent and the deceased were aware that the

property was under a writ of elegit and that therefore, the changing of title of the property by both parties when the judgment debt had not been settled was fraudulent. Further, that the assignment dated 30th October, 2000 indicating that the deceased had received K22,000,000.00 (K22,000.00) as full payment; the cheque dated 30th October, 2001 payable to the deceased purporting to be payment for the property one year after the assignment and change of title; the police call out to the respondent issued at the deceased's instance; a copy of the police bond for a charge of forgery and obtaining money by false pretences; and correspondence between the lawyers of the deceased and the respondent reveal that the transaction on the property was fraudulent. That therefore, the change of title was amenable to be declared null and void under the Act.

Ground two is that it was a misdirection on the part of the learned trial judge by not addressing himself to the appellant's interest and benefit namely, the writ of elegit which remains unextinguished. In support of this ground the appellant contends that it was a misdirection by the learned trial judge to ignore his interest that the judgment debt had to be realised from the property

which was being frustrated by the title deed improperly obtained from the deceased by the respondent.

Ground three is that it was a misdirection by the learned trial judge to address himself to the statutory conveyancing provisions of property under the Act. He submitted, in support of this ground, that the learned trial judge was wrong to belabour on the conveyancing process under section 26 of the Act. According to him, a writ of elegit being a court order, could not be subjected to any conveyancing rules as the Sheriff's seizure form placed at the Council registry was sufficient notification to all concerned parties that the property was under a court order and, therefore, not available for any other form of registration.

As all the three grounds of appeal are centred on the writ of elegit and therefore interrelated, they will be determined together. At the heart of the appellant's grounds of appeal is the allegation that the sale of the property to the respondent by the deceased was fraudulent. Where fraud is alleged, the standard of proof was described in the case of **Sithole v Zambia State Lotteries Board** as

follows:

> **"If a party alleges fraud the extent of the onus on the party alleging is greater than a simple balance of probabilities."**

The question for our determination, therefore, is whether the evidence adduced by the appellant in the court below satisfies the standard enunciated in the **Sithole** case. According to the appellant, the learned trial judge should have made a finding that the sale of the property was fraudulent because there was on record a writ of elegit, a Sheriff's seizure from duly stamped by the Council registry, title deeds in the deceased's name, assignment registered at the Council registry indicating that the deceased was paid K22,000,000.00 (K22,000.00) as full purchase price when in fact not, a cheque for K16,500,000.00 (K16,500.00), payable to the deceased but encashed by the respondent, a police call out to the respondent, a police bond for forgery and obtaining money by false pretences obtained by the respondent, evidence of the respondent's dismissal from employment and her criminal prosecution.

In our view, the documentary evidence referred to above does not in any way prove that the sale transaction was fraudulent, or that

the deceased and the respondent colluded to deprive the appellant of his interest in the property. Firstly, it is evident from the record of appeal that the sale transaction relating to the property was between the deceased and the respondent. The unchallenged evidence of the respondent is that the conveyancing was done by her employer at the time (the Bank), after conducting a search which revealed that the property was free from encumbrance. In our view, therefore, any shortcomings in the sale transaction should have been the concern of the deceased and not the appellant. Secondly, the appellant's interest in the property was solely to collect rentals pursuant to a writ of elegit obtained by the appellant under cause number 1993/HP/1586, in which the respondent was not a party. Given the above circumstances, the fact that ownership of the property was transferred to the respondent by the deceased before the judgment debt had been settled, does not in any way suggest or prove that the transfer was fraudulent. Needless to emphasise, a higher standard of proof is required to prove an allegation of fraud. According to **Order 18/12/18 of the Rules of the Supreme Court, 1999 Edition**,

> **"Fraudulent conduct must be distinctly alleged and ... distinctly proved, and it is not allowable to leave fraud to be inferred from the facts..."**

The view we take, therefore, is that the appellant's evidence on the allegation of fraud falls far short of the standard of proof set out in the **Sithole** case, which the appellant has in fact quoted and relied on out of context.

We have stated above that the appellant's only interest in the property was principally the collection of rentals from the property pursuant to the writ of elegit. To secure this interest he was required, as found by the learned trial judge, to lodge a caveat, pursuant to section 26(a) of the Act which legislates that:

> **"Any person-**
>
> **(a) Claiming to be entitled to or to be beneficially interested in any land or interest therein by virtue of any unregistered agreement or other document or transaction, or of any trust expressed or implied, or otherwise howsoever, ...**
>
> **(b) ...**
>
> **(c) ...**
>
> **may at any time lodge with the registrar a caveat in the prescribed form."** (emphasis added)

A writ of elegit or for that matter, any other court order which gives interest in land, must be registered in the appropriate deeds registry, if the interest of the person in whose favour it is granted has

to be protected. The undisputed evidence in the court below was that the appellant did not lodge a caveat. To this extent, his argument that the Sheriff's seizure form placed at the Council registry was sufficient notification to all concerned parties that the property was encumbered and that it was as good as placing a caveat flies in the teeth of section 26(a) of the Act. We, therefore, find that the learned trial judge was on firm ground when he held that the appellant did not comply with section 26(a) of the Act. If we may add, it was fatal for the appellant to follow the advice of the Council deed registry staff as he alleged, that there was no need to place a caveat as the mere stamping of the Sheriff's seizure form would suffice as notice preventing the transfer of the property to the respondent.

According to the appellant, it was unnecessary for the learned trial judge to belabour on the provisions of section 26 of the Act because the Sheriff's seizure form was sufficient notification that the property was not available for any form of registration. This attack on the learned trial judge is obviously without substance. In our opinion, it was apt for the learned trial judge in determining this matter, to discuss the requirements set out in section 26 of the Act in relation to the protection of an interest in land which falls under

the Act. As we have already observed, section 26 requires a person claiming an interest in land to lodge a caveat in the prescribed form as this is the only way interest in land can be protected.

For the reasons stated above, we are satisfied that the learned trial judge was on firm ground in rejecting the appellant's claims sought in the court below. In the final analysis, we find that there is no merit in this appeal, as all the three grounds have failed. We accordingly uphold the judgment of the court below. Costs shall follow the event and will be taxed in default of agreement.

M. S. Mwanamwambwa
DEPUTY CHIEF JUSTICE

C. Kajimanga
SUPREME COURT JUDGE

J. K. Kabuka
SUPREME COURT JUDGE