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

SCZ/8/163/2014
Appeal No. 030/2015

B E T W E E N :

TEDDY PUTA **APPELLANT**

AND

AMBINDWIRE FRIDAY **RESPONDENT**

Coram: **Wood, Malila and Mutuna, JJS**
on 5th September 2017, and 6th September, 2017.

For the Appellant: Mrs. L. K. Mbaluku of Messrs L. K. Mbaluku & Company

For the Respondent: In person

J U D G M E N T

Malila, JS, delivered the judgment of the court.

Cases referred to:

1. *Bolton v. Bolton (1949) 2ALL ER 908.*
2. *Chongo Stanely Mukuma v. David Kangwa Nkonde, Selected Judgement No. 11 of 2015.*
3. *Zambia Revenue Authority v. Barclays Bank, Selected Judgment No. 15 of 2015.*
4. *Winnie Zaloumis (In her capacity as National Secretary for MMD) v. Felix Mutati & 3 Others, Selected Judgment No. 28 of 2016.*

Other materials:

- *Order 3 Rule 5 of the High Court Act, chapter 27 of the laws of Zambia.*
- *Halsbury Laws of England 4th Edition Volume 37 paragraph 452 and 489.*

In more ways than one, this appeal appears to dispel the common notion that possession is nine-tenths of the law. More grievously, however, it flags the issue whether, and if so, under what circumstances a trial judge may dispense with a trial of a cause before him/her altogether.

The dispute between the parties to this appeal related to eligibility to purchase a Zambia Consolidated Copper Mines (ZCCM) pool house situate at No. 13 Malimba Road, Chililabombwe. The contest, literally speaking, is between a party in physical possession of the property and another in possession merely of the certificate of title relating to the same property. The appeal is in essence, a legal fight between, on one hand, a sitting tenant who was not an employee of ZCCM, and on the other hand, an employee of ZCCM who was not a sitting tenant.

On the facts before it, the trial court found that occupation of a property by a sitting tenant was not, of itself and by itself alone, sufficient to render the party in occupation eligible to buy a parastatal or government pool house under the home ownership empowerment scheme, and in this case, to tilt the scales of justice in favour of the party in possession.

The litigation history of this case was somewhat unusual. The dispute now before us, had been adjudicated upon by the Subordinate Court of the First Class before it moved to the High Court. In the latter court, two puisne judges passed conflicting judgments at different times over the same dispute. We shall refer to the first of the two judges as the 'initial judge' while the second judge from whose judgment the appeal has arisen, shall be referred to as the 'trial judge.' We pause to observe that after the judgment of the initial judge, an appeal launched against that judgment reached the door steps of the Supreme Court before good sense prevailed and the matter was reverted to the High Court for a retrial.

Returning to the narrative of the sequence in which the background facts occurred, judgment in the Subordinate Court of the First Class was entered in favour of the appellant, Teddy Puta, who was the defendant in those proceedings. The respondent, Ambindwire Friday, then appealed to the High Court where the matter was heard *de novo* by the initial judge, namely Mukulwamutiyo J. He held that both the appellant and the respondent were eligible to purchase the subject property, reasoning that, as the appellant was an employee of a subsidiary of ZCCM, while the respondent was employed by ZCCM directly, both parties were, in keeping with available precedents on the issue, entitled to be offered to purchase the housing unit in question. In assessing who, between the two parties, had a better claim to be offered to buy the housing unit in question, the learned initial judge surmised that as the appellant was in occupation of the property while the respondent had never lived in it, he had a better claim. He, therefore, pronounced judgment in favour of the appellant.

The respondent then appealed to the Supreme Court against the judgment of the initial judge. Before that appeal could be heard, however, the parties settled a consent order to have the matter retried before the High Court as the Subordinate Court had, after all, no jurisdiction in the first place to hear a matter involving land.

It was under these circumstances that the matter was allocated to the trial judge. Owing to what could fairly be described as case management challenges on the part of the learned trial judge, she failed to conduct a trial of the matter on seven different dates appointed for trial on account of the absence of one counsel or the other at every such scheduled dates. It was like a cat-and-mouse game: when counsel for the appellant was present, counsel for the respondent was not, and *vice-versa*. When this pattern was broken and both counsel appeared, the trial was still derailed by technical objections. On the eighth attempt to hold the trial on the 22nd August 2013, both parties were again not present. The learned judge's patience may have reached its limit. She proceeded to issue a directive that the parties file a statement of agreed facts and issues for her

determination as, in her words, 'the issues are fairly straight forward.' She also ordered that the parties should file written submissions. She adjourned the matter to the 25th October, 2013 for judgment.

Almost predictably, the parties ignored those orders and did not file any agreed facts and issues as directed, though they proceeded to file their respective submissions. Following the filing of those submissions, the learned trial judge, with hindsight, must have realized the folly of proceeding in the manner she had intimated she would. Rather than proceed to deliver her judgment on the 25th October as she had indicated, the learned judge summoned the parties' advocates back to court on the 18th October 2013, to clarify issues that could probably have emerged and possibly clarified at trial had one been conducted. Her judgment was thus only delivered on the 27th December 2013.

In her judgment, the learned judge acknowledged the respective submissions of counsel for the parties and gave her reasons for proceeding to write her judgment without conducting a trial. The relevant passage in her judgment reads as follows:

> **I am indebted to both counsel for their spirited arguments. I have perused the record in full including previous proceedings. I am alive to the fact that there was no trial before me as already alluded to herein. Be that as it may, I am of the considered view that I can refer to the previous proceedings before my brother Justice Mukulwamutiyo as the High Court is a court of record and the parties' testimonies stand. They testified and cross-examined each other.**

Although indeed the High Court is a court of record, that is to say its acts and proceedings are kept on permanent record, it does not follow that when those proceedings are deemed irregular or rendered unusable through an order that fresh proceedings should be conducted, those proceedings retain their relevance and vitality in determining the dispute before the court. The court could, of course, take judicial notice of the record but not to rely on them exclusively.

What had been established in the lower courts during the trials conducted in the Subordinate Court and before the initial judge in the High Court was that the respondent was an employee of ZCCM but had never lived in the subject house. He was, nonetheless, offered to buy the said house by his employer; that he made payment for the house and proceeded to obtain a certificate of title in his name. The appellant, on the other hand, resided in the subject property. He had never worked for ZCCM, but had worked instead for Mpelembe Drilling Company Limited, a subsidiary of ZCCM, from 1993 as Shift Boss and was accommodated in the disputed house as an incidence of his employment. He later stopped work on account of some disciplinary issues. His argument was that, as a sitting tenant and an employee of a subsidiary of ZCCM, he was eligible to buy the house and was, accordingly, entitled to be offered the same to buy in preference to any other person otherwise eligible to purchase it.

In her judgment, the learned trial judge held that the respondent had, on the records and documents available before her, demonstrated to her satisfaction that the house in question

had been offered to him; that he had paid for it through deductions from his salary by his employer; that a contract of sale and assignment had been executed between ZCCM and he; and above all, that a certificate of title, which was conclusive evidence of ownership, had been issued to him. As there was no fraud or impropriety alleged or proved in the procurement of that certificate of title, the learned judge considered herself bound to give due recognition to it and what it represented.

Turning to the appellant, the learned trial judge found that he had ceased to be an employee of Mpelembe Drilling Company Limited on disciplinary grounds in 1995, before the policy to sell government and parastatal pool houses was effected. She pithily observed that he would only have been eligible to purchase the house in question if he had retired, or had been declared redundant, or had been medically discharged, and in any case, had not been paid his terminal benefits. She further observed that ceasing to be an employee through dismissal on disciplinary grounds took the appellant outside the qualification criteria for purchase of pool houses.

The learned judge also held that being a sitting tenant was not the only criterion employed in determining eligibility to purchase government and parastatal pool houses under the policy and rules for the purchase of such houses. She gave the appellant 90 days within which to vacate the subject house. She also, rather gratuitously, advised him to pursue recovery of a refund of any moneys paid towards the purchase of the house in issue from ZCCM, if he was so minded. We learnt from the respondent at the hearing of the appeal that he successfully caused the eviction of the appellant from the subject house and took occupation of it on 27th December 2013.

It is against this judgment that the appellant has appealed assailing the judgment on five grounds. These were structured as follows:

GROUND ONE

The court below erred in law, fact and procedure when she went ahead to pass judgment without conducting a proper trial in this matter.

GROUND TWO

The court below erred in law and fact when she ruled against the appellant Teddy Puta on ground that he left employment in 1995 when in fact he only left employment in 2005 and thus he was

in employment in 1997 when the Home Empowerment Policy was implemented.

The court did not consider the appellant's 2003-2005 payslips in the appellant's bundle and Teddy Puta's evidence shown in the supplementary record of appeal which clearly indicated that he only left employment with ZCCM's direct subsidiary Mpelembe Drilling Company Limited in 2005.

The court further erred by basing on termination of employment which issue was never raised in the proceedings before her and as such it was not addressed by either parties.

GROUND THREE

The court below erred in law and in fact when she ruled against the appellant who was not only a sitting tenant but also had a connection with ZCCM having been an employee of Mpelembe Drilling Company Limited a direct subsidiary of ZCCM. He was thus entitled to the first priority to purchase the house in issue in line with the government of the Republic of Zambia home empowerment policy. The respondent had in fact conceded to this.

GROUND FOUR

The court below erred in law and fact when she ruled against the appellant on the ground that he failed to demonstrate any impropriety in the acquisition of the title by the respondent when in fact:

(a) There was no trial in this matter and therefore no opportunity to show impropriety.

(b) The appellant had shown in the documents that he was the one rightly entitled to first priority to purchase the

house but ZCCM opted to improperly offer it to a non-sitting tenant who did not qualify under the Home Empowerment Policy.

(c) The appellant had shown in his documents that he and others had filed a caveat restricting the issuance of titles to non-sitting tenants but this was nevertheless done to circumvent justice.

(d) The record showed that the respondent had misrepresented facts by applying to purchase the house in issue as a sitting tenant when in fact not.

(e) The record showed that both ZCCM and the respondent had acknowledged and conceded to the fact that the appellant and other Mpelembe Drilling Company employees were entitled to the first priority to purchase the houses but nevertheless offered the same to the respondent who was a non-sitting tenant without according the appellant the first option to purchase.

All the above pointing to impropriety

GROUND FIVE

The court below erred in law and fact when she proceeded to pass judgment without trial in this matter when it was brought to her attention that there was another case challenging the issuance of title to the respondent before the same Kitwe High Court.

Mrs. Mbaluku, learned counsel for the appellant, relied on the heads of argument filed in court. The respondent, appearing in person, equally placed reliance on the heads of arguments filed.

It is clear from the grounds of appeal that the dominant accusation the appellant makes against the trial judge is that she misapprehended the relevant facts before passing her judgment. The overarching complaint of the appellant, as we understand it, is that he was denied procedural justice as, in the absence of a trial, he had no opportunity to put up his case meaningfully to the court and that the court, for its part, made glaring mistakes on findings of fact.

Besides being raised as a substantive ground of appeal under ground one, the issue of the initial judge passing a judgment without a trial is raised again in grounds two, four and five. In these grounds of appeal, the appellant makes a claim that the trial judge reached wrong conclusions on purely factual issues. To us this allegation is hardly surprising given that the learned trial judge did not hear witnesses testify. Rather than consider the individual arguments as they were raised in the parties' heads of argument, we are justified to make observations of a general nature regarding the manner in which the trial judge

proceeded as these observations will compositely addressed the appellants grievances raised in all the grounds of appeal.

As the learned trial judge plainly acknowledged in the passage from her judgment which we have already freely quoted, there was no trial in the present case; she neither heard nor saw any witnesses and, therefore, was not able to formulate any view on the credibility of the assertions or averrements made by the parties in their pleadings or in their submissions. There was not one witness called to talk to the documents in the bundles of documents before her. She relied on the evidence received and recorded by Mukulwamutiyo J, and earlier on, by the Subordinate Court. This clearly could not be a rehearing of the matter as was contemplated by the parties in the consent order by which the matter was withdrawn from the Supreme Court.

A rehearing, as we understand, it entails a repeat hearing; a resubmission of the evidence, and a reevaluation of that evidence. It presupposes that any trial judge assigned to rehear a matter is to begin to hear that matter afresh; on a clean slate, so to say. This the learned trial judge did not do. The result is

that even on such seemingly straight forward matters as the year when the appellant was separated from his employers, the learned judge failed to make an unassailable finding of fact. From the possible misapprehensions of fact on the part of the learned trial judge fingered by the appellant in his grounds of appeal it seems obvious to us that the facts and the issues were not after all, as straight forward as the learned judge had convinced herself to accept. In all fairness, the learned trial judge should have thus conducted a trial rather than proceed in the manner that she did. As a tribunal of facts, the trial judge could only make findings of fact and reach conclusions supported by credible evidence received in court and appraised by her, taking into account all relevant factors including the demeanor of witnesses. Neither the pleadings nor the parties' submissions, no matter how brilliant they may be, can take the place of evidence properly adduced.

We, of course, are fully alive to the difficulty that confronted the trial judge in this matter. Her decision not to conduct a trial was inspired by her view that the issues to be determined were straight forward. It was also animated, in her words, by the

conduct of the lawyers for the parties who did not heed her directions. The learned authors of **Halsbury Laws of England (4th ed. Vol 37 para 489 at page 170)** remind us, however, that a failure to comply with directions should not lead to postponement of a trial unless the circumstances of the case are exceptional. And we can add, that a failure to comply with directions should never, even in the worst case scenario, lead to dispensation altogether of a trial where, as in the present case, the facts are clearly contentious. And yet, it is beyond argument that a trial court is clothed with general powers to actively and effectively manage any case before it. According to **Halsbury's Laws of England (4th ed. Vol 37 para 452 at page 150)**, management of cases involves holding a hearing and receiving evidence through ways that may involve 'direct oral communication.' In the present case the court could have exercised one of the many discretionary opinions open to her. These include cautioning the parties and their lawyers, dismissing the action for want of prosecution and proceeding to hear the party present. To us, the option that she took was, from the point of view of procedural justice, the least advisable.

We cannot emphasise enough that a trial court ought to take charge of the proceedings before it and effectively direct and manage those proceedings by way of offering necessary guidance and directions. We reiterated this point in **Winnie Zaloumis (in her capacity as National Secretary for MMD) v. Felix Mutati & 3 Others**[4], where we described in our judgment the lower court's handling of the proceedings in that case, as a 'classic case of failure in case management.' In that case Mutuna JS, stated, among other things, that:

> **...the rules of court require that when matters are filed and allocated to a judge, they should be court driven by way of a judge giving appropriate directions in relation to applications before him.**

In our view, effectively driving proceedings also entails spelling out lawful sanctions for delinquent parties, and for the judge to effect those sanctions as prescribed by the law.

The need for a trial court to be in firm control of the proceedings before it is also raised by the appellant in ground five where it is alleged that the trial judge proceeded to pass judgment despite being made aware that there was another case in the High Court at Kitwe challenging the issuance of the

certificate of title to the respondent. At the hearing, we sought to clarify from the parties whether this was indeed the case. The responses we got confirmed, once again, that the facts of this case were not as clear-cut as the learned trial judge portrayed them to be. The respondent maintained that there was no such other case. Mrs. Mbaluku, for the appellant, positively stated there was another case. She stated that the case was in fact referred to by the trial court in her judgment.

Without, of course, appearing to make any judgment on this factual issue, our view is that the general power of a trial court to manage cases before it includes also the power of the court under Order 3, Rule 5 of the Rules of the High Court, to consolidate proceedings before it with other similar proceedings in a court of coordinate jurisdiction. From the judgment appealed against, it appears the trial judge in this case did not consider, even remotely, the necessity of ordering a consolidation of the action before her and the other one also pending in the High Court if that was indeed the position. We think, with respect to the trial judge, that this was an issue to which she ought to have

given some serious reflection and upon which she should have revealed her mind through the judgment. It was not sufficient for her to merely record, as she did in her judgment, that she had taken it upon herself to locate the file to no avail.

More pertinent perhaps is the question whether the trial judge could rely on the record before her and write a judgment based on notes recorded by a different judge.

The English Court of Appeal observed in **Bolton v. Bolton**[1], that in cases where evidence is in contest, it is essential that the judge hears and observes the witnesses' demeanor. And we are in full agreement with that observation.

In **Chongo Stanely Mukuma v. David Kangwa Nkonde**[2], we dealt with a situation where a trial judge, without hearing the matter *de novo*, proceeded to write a judgment on the basis of notes taken by a judge who had since passed away. We held in that case that where a judicial officer is unable to complete a case due to supervening circumstances such as death, illness, resignation or some other form of incapacity, his or her successor or fellow judge has to commence the trial involving disputed facts *de novo*,

notwithstanding that to do so would involve recalling witnesses who have already testified, to adduce their evidence afresh. The reason for this holding was that the second judicial officer cannot make findings of credibility. He or she would have missed out on the atmosphere of the trial involving disputed facts, making it very difficult to make a proper determination.

In the **Chongo Stanely Mukuma v. David Kangwa Nkonde**[2] case, we made the following observation which is pertinent, not only to situations where a judge dies or resigns, but also where for any reason that judge is unable to continue handling the matter:

> **It is palpably wrong to write a judgment on the evidence recorded by another judge where the facts are evidently contested. A trial is a judicial examination of evidence according to the law of the land, given before a court hearing parties and their witnesses. A trial must be conducted by the judge himself or herself and at the end of the hearing he or she will write a judgment which is the authentic decision based on the evidence received and recorded. It is a mistrial for one judge to receive contradictory evidence, and for another to write a judgment on it. Here we have to ask the question: could the learned judge who did not see the witnesses testify, and hear the witnesses testify, really, as a trial court, rely on the silent, cold and printed or handwritten record to believe or disbelieve any witness?**

We are of the considered view that the observation we made in that case applies with equal force to a situation such as confronts the parties to the present appeal where the first judge to hear the matter neither died nor left judicial service, but the case was nonetheless allocated to an entirely different judge - the trial judge.

In **Zambia Revenue Authority v. Barclays Bank**[3], we stated, *obiter*, that reliance on a record of proceedings compiled by a different judge in a matter which is not contentious and where the parties agree to proceed solely by way of submission of rival arguments, may be acceptable, and thus constitute an exception to the general position we explained in the **Chongo Stanley Mukuma v. David Kangwa Nkonde**[2] case.

The conclusion we make is that the absence of a trial in this matter was equivalent to a mistrial. The learned trial judge was wrong to dispense with the trial of such contentious factual issues as were presented before her. It was a blatant misdirection to have written a judgment on judges' notes taken by a different

judge on highly contentious facts. The appeal must succeed. The matter is accordingly remitted to the High Court for a retrial.

Costs shall abide the outcome of the retrial.

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A. M. Wood
SUPREME COURT JUDGE

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Dr M. Malila SC
SUPREME COURT JUDGE

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N. K. Mutuna
SUPREME COURT JUDGE