

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

2017/HP/2077

BETWEEN:

SITALI NASILELE

AND

HUSTY MWACHILELE



APPELLANT

RESPONDENT

CORAM: HONORABLE MR. JUSTICE MWILA CHITABO, SC

For the Applicant: Mr. N.N Inambao of Messrs ICN Legal Practitioners

For the Respondent: Mr. G. Lungu of Messrs Muleza Mwimbu & Co.

J U D G M E N T

Cases referred to:

- (i) *Tembo v. Chitambala* (2009) ZR 329
- (ii) *Honorius Maurice Chilufya v. Chrispin Haluwa Kang'unda* (1999) ZR 166

Legislation referred to:

- 1. *Supreme Court Rules of England White Book 1999 edition Vol. 1*

2. *Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia*

3. *Lands Act Chapter 184*

Other works by Learned Authors

1. *Winfield and Jolowicz, Tort 17th Edition by WVH Rodgers, 2006, Sweet and Maxwell*

This is an application launched by the applicant by mode of originating summons anchored under Order 113 (1) of the Rules of the Supreme Court of England¹, targeted against the Respondent for the following reliefs:-

- (i) *a declaration that the Applicant is registered proprietor of Farm No. 10377 Chibombo;*
- (ii) *an order of injunction restraining the defendant from interfering with the plaintiffs quiet possession enjoyment of Farm 10377;*
- (iii) *an order for costs to be taxed in default of agreement;*
- (iv) *any other relief the Court may deem fit.*

The summons was supported by an affidavit deposed to by the applicant himself. The essence of which was that sometime in the year 2005 he purchased Farm No. 10377 from one **Dorothy Banda** as evidenced by exhibit “**SN1**” which is a copy of the agreement.

That at the time of purchasing the said farm, it was not surveyed and hence was on 14 year lease as shown and marked as exhibit “**SN2**”. That she had the Farm surveyed in the year 2008 and obtained a 99 year lease as exhibited in exhibit “**SN3**”. In 2010, the

applicant applied for planning permission which was granted as per exhibit "**SN4**". That sometime in March, 2017, the Respondent wrote to the applicant claiming that the later had encroached on his Lot No. 19607/m as evidenced by exhibit "**SN5**".

That the applicant lawyers then responded to the Respondents letter giving him the correct picture of the situation of the properties as per letter marked as exhibit "**SN6**", which letter the respondent sent back to the applicants' lawyers with a comment thereon.

That the respondent has continued claiming his land and has been insulting him and hauling him to the police who have consistently advised the respondent to keep away from the applicants land. A sample of a police call out is marked and produced as exhibit "**SN7**".

That there has since been correspondence between the lawyers for the applicant and the respondent Messrs Muleza Mwimbu and Company as shown in exhibits "**SN8**" and "**SN9**". He finally deposed that the respondent has continued to allege that the applicant has no proper title and has been writing letters to that effect to the Ministry of Lands as evidenced by exhibits "**SN10**" and "**SN11**" respectively.

The motion was opposed by the respondent. He deposed that the applicant has completely taken over the Farm No. 19607/m which belongs to him and he has even fenced it off.

He admitted that indeed the applicants' lawyers had written to him dated 10th March, 2017, but averred that the Surveyor General had on 16th August, 2007, the Surveyor Generals office had already written to **Nyamazowo Lovemore** and others including the Applicant on the boundary adjustments as evidenced by exhibit "HMM1" concerning properties F/10351, F/10377, F/19322/m and L/19607/m to verify the land dispute with a view of preparing a survey diagram the respondent engaged. The said Surveyors were however allegedly chased away by the applicant. He produced exhibit "HMM2" receipt payment to Kayo Surveyors.

That upon being chased, the surveyors reported Applicant to police and police appointed a day for the 2 partes to meet but the Applicant kept away from the proposed meeting. When the surveyors attempted to go back to the property they were chased away.

That **Lovemore Nyamazowo** died on 12th January, 2016 before the respondent completed the sale of the land numbered as Lot 19607/m and subsequently the administrator of the estate namely Zakeyo Nyamazowo completed the sale. He produced exhibits "HMM4" as evidence of appointment of Administrator and the letter of sale.

That the sad letter of offer relates to Lot 19607/m which is approximately 15 hectares as per exhibits "HMM5". He admitted reporting the Applicant to the police but denied insulting the applicant. He finally deposed that he is just fighting for his 15

hectares piece of land which is very far away from the applicant's land which is in extent of 106 hectares.

Learned Counsel for the applicant made submissions, the gravamen of which was as follows:-

- (i) That the Applicant has certificate of title which is conclusive of ownership

In support of this legal proposition, Counsel relied on Section 33, 34 and 54 of the Lands and Deeds Registry Act¹. In particular Section 33 which provides that a certificate of title is conclusive evidence against anyone in the world unless it can be demonstrated that the same was obtained by fraud or mistake. The thrust of the submission being that the Applicant has a valid certificate of Title to his land.

- (ii) Letter alluding to readjusting of boundaries by Surveyor General

The crisp submission under this head was that the readjustment was indeed done in 2007 after which the Applicant obtained his certificate of title.

- (iii) Letter of offer / agreement of sale made over 12 years after deceased died by Administrator appointment so appointed after 12 years

It was submitted that on the doctrine of "Nemo dat" rule at the time of signing the sale agreement, **Zakeyo Nyamazawo** had no

authority; had no legal rights in connection to the aforesaid property.

It was Counsel's submission therefore that the purported order of appointment of **Zakeyo Nyamazawo** was obtained with intent to pervert the course of justice as it was obtained on 14th February, 2018 long after the matter was already under way and as such that constituted fraud on the part of the defendant.

I will summarily deal with this submission. I have to agree with Learned Counsel for the plaintiff that the defendant purported to obtain an instrument of appointment of administrator on 14th February, 2018 in the name of **Zikeyo Namazawo**. This monouvre is an abuse of Court process calculated to mislead the Court. I hold and rule that the said letters of administration are null and void abinitio and have absolutely no effect in respect of the proceedings herein and in respect of any matter for all intents and purposes.

It must be pointed out that the bonafide owner of the property **Love Nyamazawo** died on 12th January, 2006. No explanation has been fostered as to why it had to take over 12 years before such appointment could be effected.

I have therefore not the slightest difficulty in upholding the Applicants submission that the offeree having died on 12th January, 2006 and the respondent having featured a letter of sale dated 6th May, 2013 and the respondent having shown that the administrator of the estate was only appointed on 14th February, 2018 more than

12 years after the property owner had died, the doctrine or principle nemo dat aptly applies to the case at hand.

The legal maxim "Nemo dat quod non habet" simply means that the transferor of goods cannot pass better title than he possesses".

There is a lot of force in this submission and I fully endorse it and uphold it.

(iv) Non registration of sale agreement or assignment

Under this limb Counsel for the Applicant called in aid Section 4, 5 and 6 of the Lands and Deeds Registry Act for the statutory provision that:

"every document purporting to grant, convey or transfer land or an interest in the land or to be a lease or permit occupation of land for a longer term of one year must be registered within the time hereafter specified in the registry....."

Counsel then referred to Section 5 of the said Act which provides as follows:-

(1) All bills of sale must be registered within three months of the execution of the same.

Learned Counsel then called in aid Section 6 of the Act which states as follows:-

".....Any document required to be registered as aforesaid and not registered within the last preceding paragraph shall be null and void".

He concluded his submission by placing before the Court the case of **Tembo v. Chitambala (2009) ZR 327** where Mutuna, J (as he then was) followed the decision of **Sundi v. Ravalia NRLR (1949 – 54) 345** where it was held that any document purporting to grant an interest in land for a period of more than 1 year must be registered with the Lands and Deeds Registry. Failing such registration shall be null and void.

There again, I will summarily deal with this limb of submission.

The provisions of Section 4, 5 and 6 of the Lands and Deeds Registry Act need no further interrogation or investigation. A document purporting to transfer any interest in the land ought to be registered at the designated registry within 3 months from date of signing – the effect of non registration is that such a document is null and void.

The pronouncement by Mutuna, J (as he then was) in the case of **Tembo v. Chitambala** is good law and I adopt and follow it. I accordingly hold and rule that the agreement dated 6th may, 2013 is null and void for non registration.

The Respondent countered the Plaintiff's submissions. It was submitted that:-

- (1) That since it is common cause between the parties that Lot 10377 is owned by the Respondent whilst Lot 19607/m Chibombo, then the Surveyor should be let to move on the ground to verify the boundaries

I will also summarily deal with this submission.

The evidence on record is that on 16th august, 2007 the Surveyor General wrote to a Mr. J. Chungu and others and the Applicant and Respondent in respect of alleged overlapping of plots which letter was copied to the Commissioner of Lands that is exhibit "**HMM1**".

On 20th July, 2009 a certificate of title exhibit "**SN3**" was issued to the Applicant. The said certificate of title has never been challenged. The law as regards the effect of a holder of a certificate of title is very clear. This is clearly espoused in Section 33 of the Lands Act which provides that

"A certificate of title shall be conclusive as from date of issue and upon and after the issue thereof notwithstanding the existence in any other person of any estate....."

(a) except the estate or interest of a proprietor claiming the same land under a current prior certificate of title issued under the provisions of parts III to VII; and

(b) except so far as regards the omission or mis-description of any right of way or other easement created in or existing upon any land; and

(c) except so far as regards any portion of land that may be erroneously included in the certificate of title, evidencing the title of such registered proprietor by wrong description of parcels of boundaries.

The subject matter was conclusively dealt with in the case of ***Honorius Maurice Chilufya v. Chrispin Haluwa Kang'unda***², where after considering the provisions of Section 54 of the Lands and Deeds Registry which provides that:

“Every provisional certificate of title or certificate of title or any entry thereon.....be conclusive evidence of ownership of that piece of land.....”

Ngulube, CJ (as he then was) after considering the provisions of Section 33 of the Lands and Deeds Registry authoritatively held at page 170 line 14 that

“The law contemplates that fraud will vitiate the certificate of title”

In the case in casu, there is no evidence of any allegation of fraud by the respondent which in any event must be particularly pleaded and proved on a standard which is higher than that of on the balance of probability.

Nor has the Respondent who has been at all material times way back in 2007 been aware of the strong presence of the Petitioner on Farm 10377 launched any proceedings to challenge the validity of the Applicants certificate of title.

There is no merit in the Defendants argument under this limb and I reject it.

(2) Applicant chasing Respondents self appointed surveyors

It was canvassed by the Respondents Advocates that it was unfair for the Applicant to chase away KAYO Surveyors to conduct a survey exercise on the applicants land.

There is no evidence on that the arbitrarily appointed Land Surveyors hired by the Respondent had authorization and approval from the Applicant who is the registered owner of the farm he occupies.

The Applicant has a legitimate right to quiet and peaceable possession and enjoyment of farm 10377 and any attempt by any uninvited visitor would certainly be viewed as unwelcome trespassing and the Applicant cannot be faulted from protecting his land from unwanted and authorised surveyors.

I will go further and observe obiter dicta the conduct by the defendant and his self appointed surveyors amounted to private nuisance. They are guilty of invading the plaintiffs' peaceable and quiet enjoyment of their property.

I draw further inspiration from the **Learned Authors Winfield and Jolowicz on Tort**¹ who at page 646 stated as follows in respect of nuisance:-

“Unlawful interference with a persons’ use of enjoyment of land, or some right over or in connection with it. It has been said that the tort takes three forms or interference with the enjoyment of land”

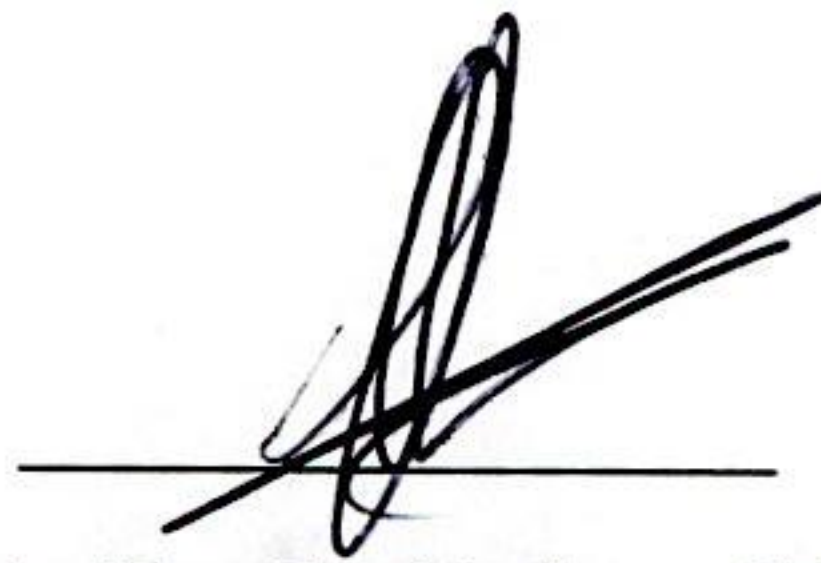
Having thus navigated, traversed and analysed the affidavit evidence and supporting documents disclosed by the parties, I have no hesitation to hold that the Applicant has an impeachable title to the land as conclusively evidenced by the Applicants certificate of title number 41293 issued on twentieth July, 2009 being Plaintiffs' exhibit **SM3**.

The Plaintiff has proved his case on the balance of probabilities and I make the following declaration and orders:

- (1)The Applicant is the registered proprietor of Farm 10377, Chibombo;
- (2)I confirm the interim injunction granted on 6th December, 2017 restraining the Respondent whether by himself, agents or servants or otherwise whomsoever from continuing to deal with or interfering with the Plaintiffs quiet enjoyment of the subject property known as Farm 10377, Chibombo;
- (3)I further order that the said injunction is to remain permanent under the relief of any other relief the Court may deem fit;
- (4)There does not exist any justifiable nor indeed any reason to deny the successful litigant of the fruits of the Judgment and that of the wasted costs of litigation. The costs are for the Applicant which costs are to be taxed in default of agreement.

(5) The facts and evidence of the case do not justify to grant leave to appeal to the superior Court of Appeal. Leave to appeal is denied.

Delivered under my hand and seal this 29th day of May, 2018

A handwritten signature in black ink, consisting of a large, stylized 'M' followed by a series of loops and a long horizontal stroke extending to the right.

Mwila Chitabo, SC
Judge