

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 223 of 2020

BETWEEN:

HORIZON PROPERTIES LIMITED

APPELLANT

AND

**ROBERT TEMBO
EDWARD TEMBO**

**1ST RESPONDENT
2ND RESPONDENT**



**CORAM: Chashi, Chishimba and Sharpe-Phiri, JJA
on 18th January and 31st January 2022**

For the Appellants: Mr. G.K Mwamba and Ms. V.N Sholande of
Messrs Gill & Seph Advocates

For the Respondents: N/A

JUDGMENT

Sharpe-Phiri, JA, delivered the Judgment of the Court

Legislation referred to:

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

Cases referred to:

1. *Harton Ndove v National Educational Publishing Limited (1980) Z.R. 184*

1.0 INTRODUCTION

- 1.1 This is an interlocutory appeal brought by the appellant against a ruling of the Honourable Justice C.C. Zulu of the High Court delivered on 4th September 2020.
- 1.2 By that ruling, the Judge granted an order of interim injunction in favour of the respondents, Robert Tembo and Edward Tembo in respect of the alleged encroached piece of land relating to Lot No. 22025/M, Kabwe.

2.0 BACKGROUND

- 2.1 The respondents (plaintiffs in lower court) are the registered proprietors of a land in extent of 5.2444 hectares known as Lot No. 22025/M situate in Central Province of the Republic of Zambia.
- 2.2 A certificate of title number 23528 was issued to the respondents on 15th July 2016 delineating and describing the property on Diagram No. SD-7471 of 2015 as approved by the Government Surveyor on 6th May 2015.
- 2.3 The appellant (defendant in the lower court) is also a registered proprietor of land in extent 22.8486 hectares adjacent to the

plaintiffs known as Lot No. 22082/M, Central Province measuring and described on Diagram No. SD_15242 of 2016.

- 2.4 A certificate of title number 26235 was issued to the appellant on 26th September 2016 after having purchased the property from one Chinyama Chinyama. The said Mr. Chinyama was granted a lease from the President of the Republic of Zambia on 17th June 2016 in respect of the said property.
- 2.5 A dispute arose between the parties in 2017 whereby the respondents allege that the appellant has encroached on their property. The parties involved the office of the Surveyor General at the Ministry of Lands over the disputed area of land.
- 2.6 Following an engagement of the parties with the Ministry of Lands, a report was issued by the Surveyor General, Mr. Joseph Minango, on 2nd February 2018. In this report, he clarified that the boundaries of Lot no. 22082/M, overlap on an earlier survey undertaken for Lot no. 22025/M in Central Province.
- 2.7 The report of the Surveyor General further states that the survey of Lot no. 22082/M does not follow the site plan and goes beyond the planned boundaries (existing road on the northern side) on the site plan and as captured on their cadastral noting sheets at the time the properties were created.

2.8 The Surveyor General further concluded by confirming his directives to the surveyor Danny Mubanga to make the necessary amendments to the respective survey diagrams of the properties in accordance with the Land Survey Act.

2.9 The respondents contended that while awaiting resolution of the matter by the Ministry of Lands, the appellant continued occupying and developing the said disputed portion of land. This prompted them to commence an action against the appellant in the High Court.

2.10 The respondents instituted proceedings in the High Court of Zambia by way of Writ of Summons and Statement of Claim seeking the following reliefs, namely:

- i. An Order declaring the plaintiffs as the rightful and registered owners of 5.2444 hectares land delineated as Lot No. 22025/M.**
- ii. An Order for injunction restraining the defendant herein whether by themselves, servants, agents or from whosoever they may employ from venturing upon the said land, namely Lot No. 22025/M and from conducting any form of domestic, commercial and/or industrial activity thereon until this matter is heard and determined, or until further order of this court.**

iii. Damages for loss of use of the said land; and

iv. Interest on amounts found due, costs of this suit and any other relief that the court may deem just.

2.11 The appellant disputed the respondents' claims alleging that its company is the rightful owner of Lot no. 22082/M, Kabwe purchased from Mr. Chinyama Chinyama, which incorporates the disputed portion of land.

2.12 The appellant also asserted that Mr. Chinyama acquired title to the said property on 17th June 2016, a month before the respondents were issued title to their property.

2.13 The appellant pleaded statutory debarment under **Section 34 of the Lands and Deeds Registry Act** (hereinafter 'the Act') which presupposes that no action for possession or recovery of land can lie or be sustained against it as a bona fide transferee as well as holder of title whose certificate in title was prior in time to that of the Respondents.

2.14 The appellant counter-claimed against the respondents for:

i. A declaration that the defendant is the lawful owner of Lot No. 22082/M which includes the portion claimed by the plaintiffs.

- ii. An Order restraining the plaintiffs whether by themselves, servants, or agents or otherwise from interfering with the defendant's quiet enjoyment and possession of its land including the portion claimed by the plaintiff.**
- iii. Costs; and**
- iv. Any other relief the Court may deem fit.**

2.15 Before the issues in dispute could be heard, the respondents applied for an interim injunction seeking to restrain the appellant from encroaching or carrying out activities on the disputed portion of land.

2.16 In passing its ruling on the respondents' application for an interim injunction, the Judge in the lower court considered that even though the appellant was issued with a certificate of title for its property before the respondents, the land delineated to the respondents was surveyed and created earlier than the appellant's land.

2.17 The Judge was of the view that the plaintiffs had demonstrated a clear right to relief as they possessed a certificate of title that encompassed the piece of land in dispute. The Judge further opined that a serious question existed to be determined at trial

in relation to the rightful owner of the encroached portion of land.

2.18 The Judge also considered the defendant's arguments that **Section 34 of the Act** precluded the institution or sustaining of an action for possession against a registered proprietor of land holding a certificate of title. Further, that the exceptions to the general rule, particularly paragraphs (d) and (e) of **Section 34 (1) of the Act**, did not apply to the plaintiffs because the defendant is a transferee bona fide purchaser for value and whose title was prior in time.

2.19 The Judge also took into consideration the plaintiff's response that their property Lot no. 22025/M, Kabwe was surveyed before the defendant's land and thus that the defendant's title embodying the disputed land in issue was erroneously obtained.

2.20 Relying on the **Harton Ndove** case, the Judge concluded that the issues in contention could not be called into determination at that point and that she ought to decide the rights of the parties after the trial.

2.21 The court found that this was a proper case to grant an injunction with a view to maintaining status quo of the parties' pending determination of the matter, to avoid either party

carrying out any activity that would potentially favour the outcome of the matter over the other.

2.22 The Judge thus granted an interim injunction against the appellant, restraining the company from carrying out any activities on the disputed portion of the land. The Judge also ordered the respondent not to carry on any activity or deal with the property in question until determination of the matter.

3.0 APPEAL TO COURT OF APPEAL

3.1 Being dissatisfied with the judgment, the appellant appealed to this court, advancing three grounds of appeal.

The grounds of appeal are as follows:

- i) The court below erred in law and fact when it entertained and sustained the respondents action and let alone pronounced itself on the respondents' application for an interim injunction against a clear and unambiguous statutory embargo contained in Section 34 of the Lands and Deeds Registry Act which prevents the Court below from entertaining and sustaining the respondent's action as it falls outside the five exceptions under the section.**

- ii) **The court below erred both in law and fact when it ruled that the appellant's jurisdictional objection based on Section 34 of the Lands and Deeds Registry Act is a triable issue.**

- iii) **The court below erred in law and fact by ruling that there is a probability that the respondents are entitled to the reliefs they seek when Section 34 of the Lands and Deeds Registry Act precludes the respondents from bringing an action for recovery or possession of land as their claim does not come within the exceptions of Section 34 afore mentioned.**

3.2 The appeal was heard on 18th January 2022. The appellant's counsel relied on the heads of argument filed on 16th November 2020. The respondents were unrepresented at the hearing and there were no heads of argument filed on their behalf.

3.3 Counsel for the appellant argued that the grounds of appeal revolve around one overarching issue, namely whether, having regard to the import of **Section 34 of the Act**, the Judge in the court below was possessed with the requisite jurisdiction to entertain and sustain the respondent's action.

3.4 Counsel argued in the heads of argument that, **Section 34(1) of the Act** bars a person whose circumstances do not fall within

the five exceptions listed under **Section 34(1) of the Act** from instituting an action for possession or recovery of land. By the same token, the said Section severely circumscribes, restricts, or limits the jurisdiction of the court to the five exceptions listed thereunder.

- 3.5 Counsel further argued that the action in the court below did not fall within the five exceptions listed under **Section 34(1) of the Act** and therefore the court below did not have jurisdiction to entertain it.

4.0 DECISION OF THE COURT OF APPEAL

- 4.1 We have considered the record of appeal and the appellant's arguments before us. The facts preceding the granting of the injunction, which is subject of this appeal are that the appellant is a registered title holder of Lot 22082/M which it bought from the previous owner Mr. Chinyama.

- 4.2 The respondents on the other hand are the registered title holders of Lot No. 22025/M situate in Central Province of the Republic of Zambia.

- 4.3 The initial title to the land held by the appellant was issued to its predecessor in title on 17th June 2016 before the same was

transferred to appellant, while the respondent's title was issued on 15th July 2016.

- 4.4 The dispute arises out of the fact that the two certificates of title purport to cover a portion of the same land. The Surveyor General of Zambia issued a report in relation thereto, resulting in the respondents commencing an action seeking pronouncements of the High Court on the rights of the parties by way of declaration over the land in dispute.
- 4.5 The respondents also sought an interim relief from the court to prevent the appellant from developing or carrying out any activities on the disputed portion of land until the rights of the parties are determined by the court.
- 4.6 In considering the evidence in support of the application for an injunction, the court was of the view that the respondents had a clear right to relief as they were also registered owners of Lot no. 22025/M which according to the report of the Surveyor General, the appellant has encroached upon.
- 4.7 The court went further to refrain the respondents from carrying out any activities on the said portion of land to maintain the status quo until the case is determined by the court and in doing so ensuring that no one party's rights are unduly prejudiced over the other.

4.8 Being dissatisfied with the ruling of the lower court granting an injunction, the appellant raised the grounds of appeal contending that by virtue of the provisions of **Section 34 of the Act**, the lower court had no jurisdiction to entertain proceedings for recovery and possession of land to which it holds title.

4.9 The appellant filed three grounds of appeal as afore stated. For convenience, we will deal with the grounds of appeal simultaneously as they all touch on the interpretation of **Section 34 of the Act**. The said section provides that:

‘(1) No action for possession, or other action for the recovery of any land, shall lie or be sustained against the Registered Proprietor holding a Certificate of Title for the estate or interest in respect to which he is registered, except in any of the following cases, that is to say:

- (a) the case of a mortgage as against a mortgagor in default.**
- (b) the case of the President as against the holder of a State Lease in default.**
- (c) the case of a person deprived of any land by fraud, as against the person registered as proprietor of such land through fraud, or against a person**

deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud.

- (d) the case of a person deprived of or claiming any land included in any Certificate of Title of other land by misdescription of such other land, or of its boundaries, as against the Registered Proprietor of such other land, not being a transferee, or deriving from or through a transferee, thereof bona fide for value.**

 - (e) the case of a Registered Proprietor claiming under a Certificate of Title prior in date in any case in which two or more Certificates of Title have been issued under the provisions of Parts III to VII in respect to the same land.**
- (2) In any case other than as aforesaid, the production of the Register or of a copy of an extract therefrom, certified under the hand and seal of the Registrar, shall be held in every court of law or equity to be an absolute bar and estoppel to any such action against the Registered Proprietor of land the subject of such action, and in respect of which a Certificate of Title has been**

issued, any rule of law or equity to the contrary notwithstanding.

4.10 The import of the foregoing provision is that a person is precluded from bringing an action for possession or recovery of land against a registered proprietor of the said land, if their circumstances do not fall within the exceptions specified under **Section 34(1) (a) to (e) of the Act.**

4.11 Paragraph (d) of section 34 (1) of the Act does make exception to the general rule that an action could be brought against a title holder where among other things listed, there is misdescription of portions of land subject of two or more certificates of title or where two or more certificate of title have been issued to different persons in respect of the same or a portion of the same land.

4.12 That notwithstanding, upon reviewing the facts of the case and the nature of the reliefs claimed by both parties in the lower court, it does emerge that the case instituted in the lower court is not an action for possession or recovery of land. The respondents' claim, and the appellant's counterclaim seek pronouncements of the court by way of declaration on the rightful owner of the disputed portion of land either under Lot no. 22025/M or Lot no. 22082/M.

4.13 Given the foregoing, we are of the view that the arguments pertaining to the provisions of **Section 34(1) of the Act** are inapplicable and therefore misconceived.

4.14 Furthermore, the pleadings show that there are contentious issues to be determined at trial to establish how the survey diagrams attached to two separate certificates of title relate to portions of the same land partly overlapping each other.

4.15 It is evident that there is a serious question to be determined between the parties which relates to the discrepancies on the survey diagrams of certificates of title numbers 23528 and 26235 issued in respect of the afore stated properties, which both encompass a certain portion of land, which issue needs to be determined on the merits.

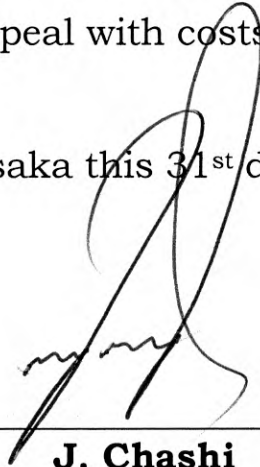
4.16 A court cannot be barred from considering a dispute relating to two separate certificates of title encompassing the same portion of land, arising possibly from misdescription or boundary errors.

5.0 CONCLUSION

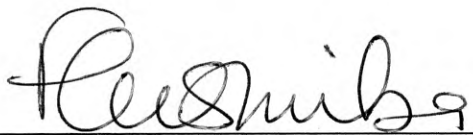
5.1 Based on the foregoing, we find that the Judge in the court below was on firm ground in allowing the injunction to preserve the status quo until the matter is determined.

5.2 We find no merit in all the appellant's grounds of appeal and dismiss the entire appeal with costs to the respondents.

Dated at Lusaka this 31st day of January 2022.



J. Chashi
COURT OF APPEAL JUDGE



F.M. Chishimba
COURT OF APPEAL JUDGE



N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE