

**IN THE COURT OF APPEAL OF ZAMBIA**

APPEAL NO.160/2020

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

**BETWEEN**

**EMMA MAINZA,**

**KELSON MAINZA MUNYUMBWE** (suing as

Administrators of the estate of

CREED MAINZA MALAWO)

**1<sup>ST</sup> APPELLANTS**

**RABSON MWALE**

**2<sup>ND</sup> APPELLANT**

**ISAAC BANDA**

**3<sup>RD</sup> APPELLANT**

**IDAH PHIRI**

**4<sup>TH</sup> APPELLANT**

**AND**

**MAGNESS GOWERA SIWALE**

**1<sup>ST</sup> RESPONDENT**

**KABWE MUNICIPAL COUNCIL**

**2<sup>ND</sup> RESPONDENT**

**CORAM: Makungu, Sichinga and Muzenga, JJA**

**On: 20<sup>th</sup> October, 2021 and 9<sup>th</sup> February, 2022**

*For the Appellants : No appearance*

*For the 1<sup>st</sup> Respondent : Mr. M. Musukwa with Mrs. C. Banda, both  
of Andrew and Company*

*For the 2<sup>nd</sup> Respondent : No appearance*

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## **J U D G M E N T**

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**Makungu JA**, delivered the Judgment of the Court.

**Cases referred to:**

1. Kureba v Goma and Attorney General SCZ Judgment No.3 of 1995
2. Kainga v Zambia Revenue Authority SCZ Appeal No. 194/2015

**Legislation referred to:**

1. The Lands Act, Chapter 184 of the Laws of Zambia
2. The Court of Appeal Act, No. 7 of 2016
3. The Lands and Deeds Registry Act Chapter 185 of the Law of Zambia

**1.0 INTRODUCTION**

1.0 This is an appeal against the judgment delivered by Limbani J. on 3<sup>rd</sup> April, 2020 in favour of the 1<sup>st</sup> respondent herein concerning a piece of land known as stand No 8985 Chowa Kabwe.

**2.0 BACKGROUND**

2.1 Initially, the late Creed Mainza Malawo instituted cause No 2008/HB/14 against C. Mpundu and Kabwe Municipal Council claiming: damages for trespass; a declaration that the purported repossession of stand No 8985 Chowa, Kabwe was illegal and therefore null and void, an injunction, any other relief, and costs.

- 2.2 Creed Mainza Malawo passed away during the course of the proceedings and was substituted by the administrators of his estate who are now collectively cited as 1<sup>st</sup> appellant.
- 2.3 The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Appellants and the 1<sup>st</sup> respondent were joined to the proceedings later.
- 2.4 The gist of the 1<sup>st</sup> appellant's case in the court below was that on 2<sup>nd</sup> March, 2007 the deceased applied to the 2<sup>nd</sup> respondent for allocation of stand number 8985 Chowa, which was subsequently offered to him to purchase by the Ministry of Lands on 13<sup>th</sup> October, 2007.
- 2.5 The deceased accepted the offer and proceeded to pay all the necessary charges.
- 2.6 On 8<sup>th</sup> January, 2008 the 2<sup>nd</sup> respondent purportedly repossessed the property on the ground that it was erroneously offered to the deceased as it was meant for a market to service Chowa Community.
- 2.7 However, the deceased proceeded to sell portions of the land to 2<sup>nd</sup> to 4<sup>th</sup> appellants.
- 2.8 The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants claimed for: possession of the portions of land bought from the late Mr. Malawo, damages for loss of use of the land, and costs.

- 2.9 The respondents both denied the appellants claims.
- 2.10 The 1<sup>st</sup> respondent claimed in her defence that in 2003 the land in issue was offered to her by ZCCM Investment Holdings PLC to be used as a playground as it was next to her privately owned Stepping Stone School.
- 2.11 She averred that in 2007, the 2<sup>nd</sup> respondent advertised all the plots in Chowa including the said plot. She applied for it and attended interviews. The 2<sup>nd</sup> respondent decided to allocate the plots to all the applicants who had offer letters from ZCCM and had re-applied for the same plots to the 2<sup>nd</sup> respondent.
- 2.12 That, she later learnt that although the plot was earmarked for a market, it was offered to the deceased. She complained to the 2<sup>nd</sup> respondent who withdrew the offer made to the 1<sup>st</sup> appellant and offered the plot to her.
- 2.13 The 1<sup>st</sup> respondent claimed that the 1<sup>st</sup> appellant had no legal authority to continue selling the plots.
- 2.14 She counterclaimed for a declaration that she is the rightful owner of the property, an injunction to restrain the 1<sup>st</sup> appellant from selling subdivisions of the plot, damages for mental stress, interest and costs.

2.15 The 2<sup>nd</sup> respondent merely claimed that according to the approved development plan, plot 8985 was meant for a modern market.

### 3.0 **DECISION OF THE COURT BELOW**

3.1 After a trial, the learned trial Judge phrased the question for determination as follows; who was the owner of the property?

3.2 He found that the 1<sup>st</sup> appellant lost rights to plot 8985 when it was repossessed by the 2<sup>nd</sup> respondent. For this reason the 1<sup>st</sup> appellant was condemned for apportioning the land and selling it to the 2<sup>nd</sup> to 3<sup>rd</sup> appellants.

3.3 Ultimately the court declared the 1<sup>st</sup> respondent as the legitimate owner of the property.

3.4 The 1<sup>st</sup> respondent was also awarded damages for mental stress and anguish she suffered as a result of the 1<sup>st</sup> appellant's actions.

### 4.0 **GROUNDS OF APPEAL**

4.1 The appeal is based on five grounds couched as follows;

**(i) *The learned trial Judge erred in law and fact by upholding the irregular repossession of the land namely Plot No. 8985 Chowa Township Kabwe***

*from the 1<sup>st</sup> appellant after full compliance with the conditions of the offer.*

- (ii) The learned trial Judge erred in law and fact by not observing that the 2<sup>nd</sup> respondent did not contest the case against the 1<sup>st</sup> appellant whose evidence should have been accepted as undisputed.*
- (iii) The learned trial Judge erred in law and fact by ignoring the evidence of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants that they made all the necessary inquiries concerning plot No. 8985 which they bought portions of.*
- (iv) The learned trial Judge erred in law by offering plot 8985 to the 1<sup>st</sup> respondent after the same had been offered to the 1<sup>st</sup> appellant through the 1<sup>st</sup> respondent's letter of complaint instead of an application.*
- (v) The learned trial Judge erred in law and fact by failing to observe that the 1<sup>st</sup> respondent did not*

*comply with the conditions that normally go with the offer of land.*

*(vi) The learned trial Judge erred in law in awarding damages when the 2<sup>nd</sup> respondent did not contest the allegation of the 1<sup>st</sup> appellant.*

## **5.0 APPELLANTS' ARGUMENTS**

5.1 In brief, the appellants arguments contained in the heads of argument filed on 27<sup>th</sup> August, 2020 were as follows:

5.2 On ground one that, the lower court erred when it upheld the irregular repossession of land from the deceased when he had accepted and complied with the conditions of the offer made to him by the ministry of lands.

5.3 Counsel highlighted the fact that the conditions the deceased complied with included payment of annual rent, consideration fee, registration fee and preparation fee.

5.4 That the repossession did not comply with **Section 13(1) and (2)** of the **Lands Act**<sup>1</sup>, hence it was illegal and ought not to have been upheld.

5.5 In support of ground two; that the failure by the 2<sup>nd</sup> respondent to call any witness at trial, entailed that the



evidence of the 1<sup>st</sup> appellant went unchallenged so judgment should have been passed in the 1<sup>st</sup> appellant's favour.

5.6 On the third ground of appeal, learned Counsel argued that the trial court misdirected itself when it ignored the evidence of the 2<sup>nd</sup> to 4<sup>th</sup> appellants whom he described as innocent purchasers for value without notice.

5.7 Pertaining to ground four, the submissions were that despite the 1<sup>st</sup> respondent coming into the picture, the interest of the 1<sup>st</sup> Appellant remained valid as there was full compliance with the conditions of the offer.

5.8 In support of ground five, the learned Counsel observed that there was no cogent evidence of how plot 5173A which was offered to the 1<sup>st</sup> Respondent was translated to plot 8985. There is further no evidence to show that the 1<sup>st</sup> Respondent paid the K600.00 referred to in the offer letter for plot 5173A Chowa Township from ZCCM Investment Holdings PLC dated 4<sup>th</sup> May, 2013.

5.9 The prayer was that the appeal be allowed with costs.



## 6.0 1<sup>ST</sup> RESPONDENT'S ARGUMENTS

- 6.1 In opposing the appeal, Mr. Musukwa, learned Counsel for the 1<sup>st</sup> Respondent relied on the arguments filed on 8<sup>th</sup> October, 2020. He argued that there was nothing irregular or illegal about the revocation of the offer to the 1<sup>st</sup> appellant by the 2<sup>nd</sup> respondent as the 2<sup>nd</sup> respondent is an agent of the Ministry of Lands. Reliance was placed on the case of **Kureba v Goma and Attorney General**<sup>1</sup>, where the Supreme Court held inter alia that even a Certificate of Title can be cancelled if it is proved that it was issued in error.
- 6.2 It was further submitted that **Section 13(1) and (2)** of the **Lands Act** relied on by the Appellant does not support their case in view of the fact that the section deals with a situation where a leasee breaches a term or condition of a covenant in the Act. It does not restrict the repossession of allocated land.

## 7.0 ORAL SUBMISSIONS

- 7.1 During the hearing of the appeal Mr. Musukwa made brief oral submissions as follows; that the appellants did not prove their case to the required standard for them to be entitled to a judgment despite what can be said of the

respondent's case. The case of **Wilson Masauso Zulu** was relied on as authority for this proposition.

7.2 He further argued that there are clear instances when an appellate court can set aside findings of fact made by the lower court as guided in the case of **Kainga v Zambia Revenue Authority**<sup>2</sup>. The appellants in this case have not given reasons why the findings of fact should be reversed.

7.3 We were urged to dismiss the appeal.

## **8.0 DECISION OF THE COURT**

8.1 We have looked at the record of appeal and the arguments by counsel on both sides.

8.2 From the six grounds of appeal the issue as we see it is whether determination by the lower court that the 1<sup>st</sup> respondent is the legitimate owner of plot 8985 and that she is entitled to damages for mental distress from the 1<sup>st</sup> appellant was justified.

8.3 The grounds of appeal are related and therefore we shall deal with them together.

8.4 It is clear that the late Creed Mainza Malawo applied for the plot in issue in 2007 following an advertisement in the

national press by the 2<sup>nd</sup> respondent inviting applications. On 13<sup>th</sup> October, 2007 the Ministry of lands offered the plot to him in writing as the 2<sup>nd</sup> respondent had made a recommendation to the Commissioner of lands that he be offered the plot.

8.5 He therefore went ahead and accepted the offer by paying all the prescribed charges.

8.6 On 8<sup>th</sup> January, 2008, the 2<sup>nd</sup> respondent purportedly repossessed the plot stating that according to their development plan the plot was earmarked for the creation of a modern market and therefore the offer to the 1<sup>st</sup> appellant was erroneous.

8.7 In the same letter of repossession it was stated that under the circumstances the council was considering giving the deceased an alternative stand in the same area.

8.8 At page 22 of the judgment, the lower court found the repossession rightful.

8.9 It is imperative for us to examine the repossession; in view of section 13 (1) of the Lands Act which provides as follows;

***“13 (1) Where a lease breaches a term or condition of a covenant in the Act the president shall give the lessee three (3) months’ notice of his intention to cause a certificate of re – entry to be entered in the register in respect of the land held by the lessee and requesting him to make a representation to him why a certificate of re – entry should not be entered in the register.”***

8.10 We accept the respondent’s argument that this provision does not apply to the facts of this case as the reason stated in the letter of repossession was that the plot was erroneously offered and not that the 1<sup>st</sup> appellant had breached a term of the covenant in the Lands Act.

8.11 The 1<sup>st</sup> respondent’s counsel in his submissions referred us to **Section 11 (1) of the Lands and Deeds Registry Act Cap 185 of the Laws of Zambia** which provides as follows;

***“Where any person alleges that an error or omission has been made in a Register or that any entry or omission therein has been made or procured by fraud or mistake, the Registrar shall***

***if he considers such allegation satisfactorily proved, correct such error, omission or entry as aforesaid”***

8.12 The 1<sup>st</sup> respondent's contention is that the error was accordingly corrected following the complaint by the 1<sup>st</sup> respondent which was satisfactorily proved.

8.13 We reject this argument and hold that the issue of an error in the Register did not arise in the lower court and it should not be brought up at this stage of the proceedings.

8.14 We note that when the 1<sup>st</sup> respondent applied for the plot in March, 2007, the 2<sup>nd</sup> respondent only recommended to the commissioner of lands that she be offered the plot on 30<sup>th</sup> March, 2011 as shown at page 182 of the record. The same letter indicates that the decision to recommend her was reached by the full council at meeting held on 7<sup>th</sup> September, 2010.

8.15 We have perused through the record of appeal and have not found any letter of offer from the commissioner of lands to the 1<sup>st</sup> respondent or Stepping Stone Private School but the

recommendation letter from the 2<sup>nd</sup> respondent to the commissioner of lands dated 30<sup>th</sup> March, 2011.

8.16 We have observed that there were anomalies in this matter which the lower court did not address; firstly, the appellant was offered the plot by the commissioner of lands and he paid annual rent, consideration fees, registration fees development charges, survey and marking fees and received a demand notice for service charges on 25<sup>th</sup> October, 2007. On the other hand, the 1<sup>st</sup> respondent had not produced her offer letter from the commissioner of lands or any receipt for the necessary payments which she ought to have paid if an offer had been made to her and accepted.

8.17 Secondly, the reason given by the council for repossessing the plot from the 1<sup>st</sup> appellant was not genuine as no development plan to that effect was produced in evidence and the plot was later offered to the 1<sup>st</sup> respondent.

8.18 Further, the evidence on record shows that the 2<sup>nd</sup> to 4<sup>th</sup> appellants bought the pieces of land in March, 2010 and they did sufficient due diligence.

8.19 The above factors indicate that the lower court misdirected itself when it dismissed all the appellants' claims as the letter of repossession of the plot dated 8<sup>th</sup> January, 2008 was not made in good faith and it is hereby nullified.

8.20 It follows that the court below erred to find that the 1<sup>st</sup> appellant had no right to sell portions of that land to the 2<sup>nd</sup> to 4<sup>th</sup> appellants. The 1<sup>st</sup> appellant had an interest in the land albeit inchoate and, he sold the land legally to the 2<sup>nd</sup> to 4<sup>th</sup> appellants.

8.21 The 1<sup>st</sup> respondent's claim that she was rightly recommended by the council to be offered the plot as it was earlier offered to her by ZCCM Investments Holdings PLC should not have been upheld by the lower court as ZCCM was clearly out of the picture when the council advertised the plot. The offer by ZCCM was ineffective.

8.22 For the foregoing reasons the fifth ground of appeal becomes otiose.

## **9.0 CONCLUSION**

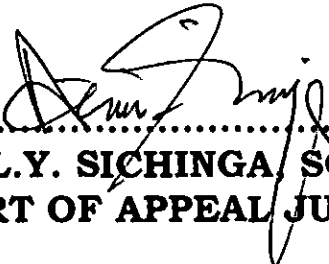
9.1 In sum, the judgment appealed against cannot stand. We hold that Plot 8995, Chowa Kabwe rightfully belongs to the




estate of the late Creed Mainza Malawo. The 2<sup>nd</sup> to 4<sup>th</sup> appellants are bonafide purchasers for value of certain portions of the same, without notice of any competing interest.

9.2 Costs are awarded to the appellants, the same may be taxed if not agreed upon by the parties.

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**C.K. MAKUNGU**  
**COURT OF APPEAL JUDGE**

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**D.L.Y. SICHINGA, SC**  
**COURT OF APPEAL JUDGE**

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**K.MUZENGA**  
**COURT OF APPEAL JUDGE**