

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

APPEAL NO. 262/2020

**AFDUB SAID FARAH (T/A AS AFDUB
TRANSPORT)**

1ST APPELLANT

LUSAKA CITY COUNCIL

2ND APPELLANT

AND

ROBERT SICHAMBA

RESPONDENT



CORAM: CHASHI, SIAVWAPA AND BANDA-BOBO JJA

On 11th October and 6th December, 2022

FOR THE 1ST APPELLANT: MR. E KALUBA OF MESSRS MUNKANTA
MULENGA LEGAL PRACTITIONERS

FOR THE 2ND APPELLANT: MR. SITWALA LUBASI, IN-HOUSE
COUNSEL

FOR THE RESPONDENT: MR. K.M. LOKOSA OF MESSRS GANJE
M'HANGO & CO

J U D G M E N T

SIAVWAPA JA delivered the Judgment of the Court

Cases referred to:

1. *Anti-Corruption Commission v Barnett Development Corporation Limited (2008) ZR 69*
2. *Gibson Tembo v Acizwani SCZ Judgement No. 6 of 1996*

3. *Shadrick Wamusula Simumba v Juma Banda and Lusaka City Council SCZ Judgement No. 12 of 2013.*
4. *Nkhata and 4 others v Attorney-General (1966) ZR 124*

Legislation referred to:

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

1.0 INTRODUCTION

1.1 This appeal is against the Judgment of the Honourable Mr. Justice M. L. Zulu delivered on 14th May 2020. The learned Judge declared the Respondent as the rightful owner of Stand B4IW/8632 Emmasdale, Lusaka. He consequently ordered the cancellation of the Certificate of Title issued to the 1st Appellant in respect of Plot B5IE/8632 Emmasdale for the reason that it was issued fraudulently.

2.0 BACKGROUND

2.1 The facts in brief are that, the Respondent was offered Stand B4IW/8632 in Emmasdale in 2006 while the 1st Appellant was offered Stand B5IE/8632 Emmasdale in 2005.

2.2 The 1st Appellant was subsequently issued with a Certificate of Title relating to the Plot after making the requisite payments while no Certificate of Title was issued to the Respondent.

2.3 In 2011, the Respondent purchased Stand B3IK from a Mr. Saeli Kalaluka. The Respondent constructed some structures

on the Plots which aroused the attention of the 1st Appellant who reported the matter to Emmasdale police.

2.4 Later, discussions were held among the three parties as they sought an ex-curia settlement which failed.

3.0 **ACTION IN THE HIGH COURT**

3.1 On 7th February 2012, the Respondent caused to be issued and filed into Court a writ of summons and a statement of claim. The statement of claim was amended with leave of the Court on 25th February 2016.

3.2 The Respondent sought the following remedies;

(i) *A declaration that he is the rightful owner of Stand No. B4IW/8632 Emmasdale, Lusaka Province Zambia which was duly allocated to him by the 2nd Defendant.*

(ii) *An injunction restraining the Defendants whether by themselves, their agents, their servants or whosoever from demolishing the structure put up by the Plaintiff, or in any way interfering with the Plaintiff's activities and construction on Stand No. B4IW/8632, Emmasdale, Lusaka until further order or until the final determination of this matter.*

(iii) *Damages for inconvenience*

(iv) *Costs.*

4.0 **HIGH COURT DECISION**

4.1 After considering the evidence and submissions the learned Judge formulated the issues for determination as being;

- (i) *Whether Stand B5IE and B4IW were on the same piece of land and*
- (ii) *If they were, who between the 1st Appellant and the Respondent was the rightful owner.*

4.2 After making findings of fact as set out in the background to this Judgment, the learned Judge observed that a Certificate of Title in respect of Plot B5IE was issued in the name of the 1st Appellant on 17th March 2005, while the offer was made on 31st March, 2005.

4.3 The learned Judge then went on to analyze the survey documents relating to Plots B4IW, B5IE and BK13 to determine how they are positioned in relation to each other on the ground.

4.4 The learned Judge came to the conclusion that Plot B5IE sat in the same place marked as B4IW claimed by the Respondent. His view was informed by the boundaries on the Certificates of Title, site plans and location plans.

4.5 Having established that the two Plots sat in the same space on the ground, the learned Judge found that the layout plans

produced by the 1st Appellant presented visible alterations to the B4 series of Plots up to the plot just before plot B4IW.

4.6 The learned Judge also faulted the 2nd Appellant for failing to adduce evidence to prove that the plans produced by the Respondent had alterations as alleged.

4.7 After affirming that the 1st Appellant was offered Plot B5IE earlier than the Respondent was offered Plot B4IW, which the learned Judge found to be geographically located in the same place, and having also confirmed that the 1st Appellant was issued with a Certificate of Title while the Respondent was not, the learned Judge considered the law on the effect of a Certificate of Title.

4.8 The learned Judge then considered the law on the circumstances upon which a Certificate of Title may be challenged namely, fraud and impropriety in its acquisition. The learned Judge found that the Respondent had pleaded fraud with particulars as required and went on to note discrepancies in the dates of issuance of the Certificate of Title and the preparation, approval of the survey diagram for Plot B5IE and the offer of the Plot to the 1st Appellant.

4.9 In the learned Judge's view the discrepancies or anomalies were a pointer to fraud or failure to follow procedure in issuing the Certificate of Title.

410 The learned Judge thereafter declared the Respondent as the lawful owner of Stand B4IW/8632 Emmasdale and dismissed the 1st Appellant's counterclaim that it was the rightful owner of Stand B5IE Emmasdale. The learned Judge further ordered the cancellation of the Certificate of Title in the name of the 1st Appellant for the reason that it was issued fraudulently.

5.0 **THIS APPEAL**

5.1 Two grounds of appeal have been fronted as follows;

1. *The learned trial Judge erred and misdirected himself at law by holding that the 1st Appellant is not rightful owner of Plot B51E/8632, Emmasdale, Lusaka.*
2. *The learned trial Judge erred and misdirected himself at law and fact when he held that the Respondent is the rightful owner of Plot B4IW/8632.*

5.2 At the hearing of the Appeal, Counsel for the 2nd Appellant informed us that the 2nd Appellant did not file heads of argument because it had reached an agreement with the Respondent. This Judgment is therefore, between the 1st Appellant and the Respondent only.

6.0 ARGUMENTS IN SUPPORT

- 6.1 In the filed heads of argument, the Appellant's argument in ground one is essentially that having established that the Appellant has a Certificate of Title following a valid offer, the learned Judge was wrong to hold that the Appellant was not the rightful owner of Plot B5IE/8636.
- 6.2 The Appellant anchored its argument on section 33 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia, which holds a Certificate of Title as conclusive evidence of land ownership. The Appellant also called into aid the case of Anti-Corruption Commission v Barnett Development Corporation Limited¹.
- 6.3 With regard to the cancellation of the Certificate of Title, the Appellant argues that the alleged fraud was not proved to the requisite standard.
- 6.4. On the perpetrator of the alleged fraud, the Appellant has cited the case of Gibson Tembo v Acizwani² in which the Supreme Court stated that; "*only the fraud of the purchaser and not the vendor can vitiate a Certificate of Title*".
- 6.5 In that regard, the Appellant has argued that the Respondent did not prove that the alleged fraud was perpetrated by the

Appellant to justify an order for the cancellation of the Certificate of Title.

- 6.6 In ground two, the Appellant has advanced two points namely; whether the offer to the Respondent was valid since the Court established that the Respondent was only offered the plot one year after it was offered to the Appellant.
- 6.7 This is in view of the fact that by the time the Respondent was offered the plot, the Appellant had already settled the requisite fees while the Respondent only did so in 2011.
- 6.8 The second point is that the Respondent had breached the terms of the offer by failing to settle the charges within thirty days. In that regard the Appellant relied on the case of Shadrick Wamusula Simumba v Juma Banda and Lusaka City Council³.

7.0 **RESPONDENT'S ARGUMENTS**

- 7.1 The Respondent filed his heads of argument on 25th January 2021 in which the main contention is that the Appellate Court is not at liberty to reverse the trial Court's findings of fact. This argument is anchored on the case of Nkhata and 4 others v Attorney-General⁴ which laid down the following principles; "A Judge sitting alone without a jury can only be reversed on fact when it is positively demonstrated to the appellate court that;

- (a) By reason of some non-direction or mis-direction or otherwise the Judge erred in accepting the evidence which he did accept;
- (b) In assessing and evaluating the evidence, the Judge had taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account
- (c) It unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the Judge for accepting it that he cannot have taken proper advantage of his having seen and heard the witnesses or
- (d) In so far as the judge has relied on manner and demeanor, there are other circumstances which indicate that the evidence of the witness which he accepted was not credible as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.”

8.0 OUR ANALYSIS AND DECISION

8.1 In our considered opinion, there is only one issue to be resolved in this appeal; the issue being whether the Certificate of Title in issue was fraudulently issued to the 1st Appellant to fall liable to an order for its cancellation.

8.2 This is so because when we look at the two grounds of appeal, which can in fact be described as two sides of the same coin, we note that the issue is about who the rightful owner of the

property in dispute is. In the Appellant's view, the learned Judge was wrong to declare the Respondent as the rightful owner of the property, and that by necessary implication; the Appellant is the rightful owner of the property.

- 8.3 All the parties alleged that the other parties had acted fraudulently in the acquisition of the properties in dispute and the learned Judge below found fraud and ordered the cancellation of the Certificate of Title issued to the Appellant.
- 8.4 The starting point is that the sequence in which the two plots; namely B5IE/8632 and B4IW/8632, Emmasdale, were issued to the Appellant and the Respondent respectively is not in dispute.
- 8.5 There is also accord on the fact that a Certificate of Title was issued in respect of Plot B5IE/8632 while none was issued in respect of Plot B4IW/8632.
- 8.6 The learned Judge below adjudged that the two plots geographically sat in one space with the city Council alleging that the Respondent altered the numbering on the site plan while the Respondent alleged fraud in the acquisition of the Certificate of Title by the Appellant.

- 8.7 Having confirmed alterations to the layout plans and the survey diagrams, the learned Judge affirmed the allegation of fraud in the acquisition of the Certificate of Title by the Appellant.
- 8.8 What is to be noted is that the Certificate of Title to Plot 8632/IE-B5/2 was issued to the Appellant by the Lusaka City Council on 17th March, 2005, way before the Respondent applied for Plot B4-IW/8632 on 5th October, 2005.
- 8.9 At the time the Respondent applied for the plot, the plot was held by one Victor Chibaya and barely two days following the Respondent's application, on 7th October, 2005, the Lusaka City Council issued a Notice of Intention to Re-enter Stand No. B4-IW/8632, Emmasdale.
- 8.10 The Certificate of Re-entry was issued after the expiry of the three month mandatory notice period on 17th January, 2006. Three months later, on 18th April, 2006, the City Council offered the plot to the Respondent.
- 8.11 Clearly, Plots B51E/8632 and B4IW/8632 stood as separate plots and based on the findings of the learned judge below, it is clear that the site-plans and survey diagrams were altered at some point to make the two plots sit in the same physical space. It is however, not clear when and by whom the alterations were made.

8.12 In dealing with the issue of fraud, the learned Judge did not name the fraudster but merely adjudged the fraud as having affected the credibility of the issuance of the Certificate of Title to the Appellant.

8.13 The question then is, at what point were the documents altered and in whose interest seeing that the Appellant had already been issued with a Certificate of Title at the time the Respondent commenced the process of acquiring Plot B4IW/8632?

8.14 In our considered opinion, it would not be in the interest of the Appellant, whose Title was already fixed and the boundaries of Plot B51E/8632 already enshrined in the Certificate of Title to effect the alterations to the documents.

8.15 The Respondent's plea of fraud is based on the citing of the plot number on the Certificate of Title (see pages 129 & 130 record) in three places as showing two plots. At page 129, it is recorded as B5-1E of 8632. At page 130 in the top part it is stated as 8632/1E B5/2 and at the bottom as B5-IE/8632.

8.16 We find it highly uncomfortable to consider the playing around with the same figures and letters in the way the Plot/Stand number is cited in the Certificate of Title as an act of fraud. We are also not aware, from the evidence, of any other plot bearing

any of the different combinations of the letters and figures on the Appellant's Certificate of Title.

8.17 But even assuming there was fraud, the same would not be attributed to the Appellant as the offeree of the plot, which would not be sufficient to vitiate a Certificate of Title in terms of the case of *Gibson Tembo (supra)*.

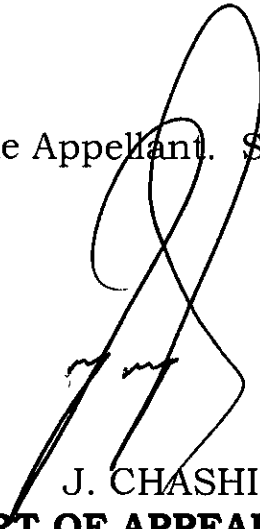
9.0 **CONCLUSION**

9.1 Ultimately, we do not think that on the evidence before the learned Judge below, and from what is on the record, fraud was proved to the requisite standard.

9.2 The fact that the Appellant was offered first in time and obtained a Certificate of Title ahead of the Respondent is sufficient to protect its beneficial interest in the property in dispute under section 33 of the Lands and Deeds Registry Act.

9.3 We therefore find merit in the appeal and set aside the Judgment of the Court below. The order of cancellation of Certificate of Title No. 17258 is hereby set aside and if the order has already been executed, any new Certificate of Title issued in respect of Plot B5-1E of 8632 shall be cancelled forthwith and re-issued in the name of the 1st Appellant.

9.4 Costs shall be for the Appellant. Same to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



M.J. SIAVWAPA
COURT OF APPEAL JUDGE



A.M. BANDA-BOBO
COURT OF APPEAL JUDGE