

IN THE COURT OF APPEAL

APPEAL No. 268/2022

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

MPOYI MBAMBU ZAMBIA LIMITED

APPELLANT

AND

JOSERINE TRADING LIMITED

RESPONDENT

CORAM: KONDOLO SC, MAJULA, CHEMBE JJA

On 19th September and 10th October, 2024

*For the Appellant : Mr. K Mwiche of Messrs Christopher &
Frighton Chambers on brief by L.M. Matibini
& Co.*

For the Respondent : Not in Attendance

J U D G M E N T

KONDOLO SC JA delivered the Judgment of the Court.

CASES REFERRED TO:

- 1. Anti-Corruption Commission v Barnnet Development Corporation Limited (2008) ZR 69**
- 2. Payne v Cave (1789) 3 TR 148**
- 3. Errington v Errington & Wood (1952) 1KB 290**

- 4. Household Fire & Carriage Accident Insurance Company v Grant (1870) 4 EX D 216**
- 5. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172,**
- 6. Susan Mwale Harman vs Bank of Zambia (Appeal 191 of 2015) ZMSC 120**
- 7. Amchile Import & Export Limited and Others v Ian Chimanga (T/A Tawana Business Ventures) and Another (Appeal 43 of 2011) ZMSC 350**
- 8. Kapansa Mwansa v Zambian Breweries PLC (Appeal 153 of 2014) ZMSC 42**
- 9. Galaunia Farms Limited v National Milling Corporation Limited (SCZ 1 of 2004) ZMSC 106**

LEGISLATION REFERRED TO:

- 1. Lands Survey Act, Chapter 188, Laws of Zambia**
- 2. Lands and Deeds and Registry Act, Chapter 185, Laws of Zambia**
- 3. Halsburys laws of England 4th Edition Volume 17**

1. INTRODUCTION

- 1.1. This is an appeal against a Ruling of the High Court delivered by Lady Justice Mwamba Chanda on 1st September, 2021 by which she cancelled the Appellant's certificate of title no. 191240.

1.2. In the High Court, the Appellant was the 1st Defendant and the Respondent was the Plaintiff and the Ndola City Council (the Council) was the 2nd Defendant. Throughout this Judgment we shall refer to the parties as Appellant, Respondent and the Council.

2. Background

2.1. The Respondent company alleged that it was offered a piece of land, F53 by the Council which was subsequently offered to the Appellant.

2.2. The Appellant stated that the Respondent's directors had actually attended interviews for Plot FS-3 and not Plot 53. That the Appellant purchased Plot No. 10959, Hillcrest Ndola from Commate Motor Liners Limited (Commate) and was issued with a certificate of title.

2.3. Respondent's (Plaintiff) Case

2.4. Unhappy with the issuance of a certificate of title to the Appellant, the Respondent commenced an action seeking the following relief;

- 1. An order that the Respondent is the legal owner of Plot F53 Hillcrest, Ndola;**

- 2. An order for an injunction to restrain the Appellant company from developing the plot;**
- 3. An order for damages for inconveniences;**
- 4. Interest; and**
- 5. Costs**

- 2.5. In its statement of claim, the Respondent company said that it had applied to purchase Plot F53 and its directors were invited for interviews on 17th March, 2010 and the Council's decision to offer the Plot to the Respondent was reflected in the minutes.
- 2.6. That the offer was made on 23rd June, 2010 but the Respondent was only given an offer letter in 2016.
- 2.7. During the Court proceedings, PW1 on behalf of the Respondent informed the Court that efforts to retrieve the letter of offer had proved futile and when it was finally released, no explanation was provided as to why it had taken so long. The offer letter and the minutes of meeting were produced in Court.
- 2.8. That the Respondent paid two instalments of K14,000 and K2,200 towards the purchase price of K25,000 and K900 to the planning department. PW1 stated that the offer to purchase the plot was never withdrawn.

- 2.9. That the Respondent started developing the plot but was directed to stop by the Town Clerk Mr. Sumani, who informed him that the Appellant had purchased the plot.
- 2.10. PW1 referred to documents showing that the Council offered the land to Commate on 13th September, 2011 who later sold it to the Appellant for K350,000 in 2012. That, thereafter on 17th February, 2012 the Appellant received an offer letter directly from the Ministry of Lands. PW1 pointed out that the Respondent was actually offered the plot much earlier in 2010.
- 2.11. PW1 stated that the Respondent had not finished paying the purchase price of K25,000 because of the confusion that arose after the plot was sold to somebody else in 2016
- 2.12. In cross-examination, PW1 initially stated that the Respondent received an offer for Plot Number 10959, Hillcrest, but conceded that the letter of offer was actually for plot FS-3, Hillcrest.
- 2.13. He stated that he only accepted the offer in 2016 when he was actually given the offer letter and was at that point not aware that the property had been sold to somebody else.
- 2.14. In further cross examination, PW1 informed the Court that when he attended the interviews the applications had been

made in respect of 4 plots which were located in the same area and the diagram he received from the planning department referred to Stand No. 10959. He stated that the Respondent first applied for a commercial plot in 2009 and when it accepted the offer in 2016, it was unaware that the plot had been offered to Commate.

2.15. The Respondent remained mute when asked to confirm whether the K900 he had paid was for a building permit or just a scrutiny fee. He stated that the Council did not give him an explanation for the mess it had created and also said that he had exhausted the Council's administrative processes before taking the matter to Court.

2.16. **Appellant's (1st Defendant) Case**

2.17. The Appellants defence stated that the Respondents directors were actually interviewed in relation to Plot FS-3 and not F53 and the Respondent was offered Plot FS-3 and that this was reflected in the council minutes of 23rd June, 2010.

2.18. DW1 on behalf of the Appellant stated that the Appellant company bought the plot from Commate. That prior to purchasing the plot a search was conducted and it was established that the plot had not been offered to anyone.

- 2.19. The Appellant was issued with an offer letter in February 2012, paid K350,000 for the plot, applied for the issuance of a certificate of title which was issued on 4th December, 2012.
- 2.20. He stated that he did not know the Respondent who had sent people to discuss the piece of land after 6 years had elapsed claiming ownership of the land.
- 2.21. In cross examination, DW1 agreed that the council minutes showed that the Appellant was allocated a plot in Hillcrest and it was offered to the Appellant earlier than Commate Motor Liners Limited.
- 2.22. He stated that he would not know if FS-3 Hillcrest was the provisional number for what became NDO/10959

3. HIGH COURT DECISION

3.1. After considering the evidence, the learned trial Judge made the following findings of fact;

- 1. That on 14th December, 2009 the Respondent company applied for a plot in Hillcrest and after interviews was offered Plot No. FS-3 Hillcrest by the Council.*
- 2. That Ndola City Council offered Plot No. 10959 to Commate on 13th September, 2011. Commate paid*

for the property on 16th February, 2012 but later sold it to the Appellant for the sum of K350,000.

3. *That on 17th February, 2012 the Ministry of Lands issued the Appellant with a letter of offer in respect of Plot No. 10959, Hillcrest Ndola and issued a certificate of title on 4th December, 2012*
4. *That the land offered to the Respondent as Plot No. FS-3 Hillcrest and Stand No. 10959 for which the Appellant was issued a certificate of title were one and the same piece of land.*

3.2. The learned trial Judge noted that the Council, in its defence confirmed allocating the Appellant Plot No. FS-3 and referred to a letter of offer and minutes of a full council meeting contained in its bundle of documents but categorically expressed ignorance of ever allocating the Respondent Plot No. F53.

3.3. On the basis of the documentary evidence of the letter of offer and minutes of a full Council meeting the lower Court made a finding of fact that the Appellants description of the property as Plot No. F53 in his bundle of documents was a typographical error.

- 3.4. The lower Court further noted that in cross-examination the Appellant stated that even though the offer letter described the property as Plot No. FS-3 the survey diagram they received from the Council's planning department referred to the plot as Stand No. 10959, Ndola.
- 3.5. The learned trial Judge referred to **section 2 of the Lands and Survey Act** which defines a diagram as a document which contains precise information and description of a piece of land. She noted that where a letter and a diagram conflict, the diagram prevails and on that basis arrived at the conclusion that even though the letter of offer to the Respondent described the land as Plot No. FS-3 the correct description of the piece of land offered to the Respondent was the one on the survey diagram they received from the Council's planning department which referred to the plot as Stand No. 10959, Ndola.
- 3.6. On the question of ownership of the property the learned trial Judge referred to the case of **Anti-Corruption Commission v Barnnet Development Corporation Limited** ⁽¹⁾ in which it was held that as per **sections 33 and 34 of the Lands and Deeds and Registry Act**, notwithstanding the fact that a certificate of title is conclusive proof of ownership of land, a

certificate of title can be challenged and cancelled for fraud or impropriety in its acquisition.

- 3.7. The lower Court observed that an offer letter was issued to the Appellant on 23rd June, 2010 but it was not given to the Appellant until much later for reasons best known to the Council. That this evidence was not rebutted by the Council in cross-examination.
- 3.8. The trial Court noted that the offer letter to the Appellant was never formally cancelled and cited the case of **Payne v Cave**⁽²⁾ which established the general rule that an offer can be revoked at any time before acceptance takes place. That the revocation must be communicated effectively directly or indirectly to the offeree before acceptance. The case of **Errington v Errington & Wood**⁽³⁾ was also cited where it was firmly settled that so long as performance requirements (such as on-going payments) are being made as agreed, an offer cannot be revoked.
- 3.9. Also cited was the case of **Household Fire and Carriage Accident Insurance Company v Grant**⁽⁴⁾ where the Defendant applied for some shares in a company and though they were allotted, he never received the letter of allotment. It was held that a valid contract existed.

- 3.10. The learned trial Judge stated that it is not legally tenable for the local authority or indeed the Ministry of Lands to assign a parcel of land to subsequent Applicants while the initial offer to another Applicant is still subsisting.
- 3.11. On the basis of the forgoing the learned trial Judge held that because the offer to the respondent was still subsisting, the subsequent offers of the property to Commate and to the Appellant were invalid and as such, no title passed from Commate to the Appellant.
- 3.12. The lower Court accordingly ordered that the certificate of title issued to the Appellant be cancelled.

4. APPEAL

- 4.1. Aggrieved with the decision of the lower Court, the Appellant has appealed on the following 4 grounds;

- 1. The Honorable Trial Judge in the Court below erred in fact and in law when she held that the Respondent was offered Stand No. 10959, Ndola by the 2nd Defendant in 2010 because the said Stand did not exist at that time.**
- 2. The Honorable Trial Judge in the Court below erred in fact and in law when she ordered the cancellation of the Appellants certificate of title**

as this matter was not pleaded by the Respondent.

3. The Honorable Trial Judge in the Court below erred in fact and in law when she awarded to the Respondent the sum of K112,000 as hiring charges regardless of the evidence that the tractor broke down just after one day.

4. The Honorable Trial Judge in the Court below erred in fact and in law when she made reference to the survey diagram which was not produced before the Court.

4.2. The Appellant commenced its appeal with ground 2 followed by ground 1 and 4 which were argued together. Ground 3 was abandoned.

4.3. In ground 2, it was submitted that the Respondent did not plead for cancellation of title and the Court thus erred in awarding a relief that was not pleaded.

4.4. It was further argued that the Respondent at no point made any allegation of fraud or impropriety against the Appellant and that neither were such allegations made against the Council. It was submitted that in the absence of impropriety

or fraud there was no basis upon which the trial Court could order cancellation of the certificate of title.

- 4.5. In this ground, the Appellant also noted that the learned trial Judge dismissed his counter-claim with no semblance of a hearing.
- 4.6. Grounds 1 and 4 were in relation to the lower Court's finding in relation to the description of the properties in the offer letters to the Appellant and Commate *vis-à-vis* the description of the property on the survey diagram.
- 4.7. It was submitted that the letters of offer clearly described the properties that were offered to the Respondent and Commate as FS 53, Hillcrest, Ndola and Stand No. 10959, Hillcrest Ndola respectively. The Appellant opined that the two letters of offer related to two different properties
- 4.8. The Appellant submitted that the survey diagram the learned trial Judge relied upon to conclude that the description of the property as FS 53 was a typographical error was not produced in Court by the Respondent. It was further submitted that the said diagram was in fact an excerpt from the certificate of title issued to the Appellant because if the document had in fact been availed to the Respondent, the Respondent would not

have repeatedly referred to the property as Plot FS 53 before and during the Court proceedings.

4.9. That in cross examination, PW1 on behalf of the Respondent confirmed that the relief sought was with regard to Plot No. F 53 and noted that no application was made to amend the record to reflect Stand No. 10959, Hillcrest Ndola as being the property that was offered to the Respondent.

4.10. It was submitted that parties are bound by their pleadings and the Respondent knew exactly what he was claiming in the Court below.

5. RESPONDENT'S ARGUMENTS

5.1. The Respondents heads of argument are not on record.

6. HEARING

6.1. At the hearing, Mr. Mwiche on behalf of the Appellant relied on the record of appeal and heads of argument filed by the Appellant.

6.2. Despite having been served with the summons, the Respondent was not in attendance.

6.3. We decided to proceed with the appeal and reserved our Judgment.

7. ANALYSIS & DECISION

- 7.1. We have considered the record of appeal and arguments advanced by the parties, both in their filed process and those presented *viva voce*.
- 7.2. We shall commence by considering grounds 2 and 4 together and thereafter, if need be, ground 1.
- 7.3. **Grounds 2 and 4**
- 7.4. We consider these two grounds as foundational because they involve the question regarding whether the letters from the Council offering land for purchase to the Respondent and Commate referred to the same piece of land. The learned trial Judge considered this question and made a finding of fact that the two letters did in fact refer to the same piece of land.
- 7.5. The law is quite clear that appellate Courts must interfere with findings of fact made by trial Courts very sparingly and when they must, it must be for compelling reasons such as where the trial court made findings which were perverse or did not take into account relevant evidence, or did in fact take into account evidence it ought not to, or upon a misrepresentation of facts, or that its evaluation of the evidence was wrong in principle, and on a proper view of the evidence before the Court, no trial Court properly directing its mind to it could make those findings. See **Wilson Masauso**

Zulu vs Avondale Housing Project Limited ⁽⁵⁾; Susan Mwale Harman vs Bank of Zambia ⁽⁶⁾; Amchile Import & Export Limited and Others v Ian Chimanga (T/A Tawana Business Ventures) and Another ⁽⁷⁾; Kapansa Mwansa v Zambian Breweries PLC ⁽⁸⁾.

- 7.6. It was not in dispute that both the Respondent and Commate attended interviews at the Council following their respective applications to purchase land.
- 7.7. The minutes of the Council Meeting held on 17th March 2010 show that the Respondent attended interviews and was recommended for the purchase of land (pages 93 and 94 ROA) and an offer letter was issued to the Respondent on 23rd June, 2010 in respect of Commercial Plot No. FS-3 Hillcrest (pages 94-95 ROA).
- 7.8. The minutes of the Council Meeting held on 11th March 2011 show that Commate attended interviews and was recommended for the purchase of land (page 82 ROA) and an offer letter was issued to Commate on 13th September, 2011 in respect of Commercial Plot No. 10959 Hillcrest (page 78 ROA).
- 7.9. It is important to put things in perspective by emphasizing the following points;

1. *The Appellant received a letter of offer directly from the Ministry of Lands on 17th February 2012 in respect of Property No. NDO/10959 (See pages 69-70 ROA) having purchased the property from Commate after Commate was offered the property by the Council.*
2. *The Appellant was thereafter issued with an offer in respect of Property No. NDO/10959, Ndola on 4th December, 2012 and issued with a certificate of title.*
3. *In the proceedings before the High Court the Respondent claim did not specifically ask the trial Court to order cancellation of the Appellants certificate of title in respect of Property No. NDO/10959 but simply asked that it be declared the legal owner of plot F53 Hillcrest, Ndola.*

7.10. As earlier stated, the learned trial Judge made a finding of fact that Plot FS-3 and Property No. NDO/10959 were one and the same property. The basis of the learned trial Judge's finding is at page J11, page 17 of record of appeal (ROA) where she referred to the evidence of the Respondent in cross examination where he confirmed that the letter of offer referred to Plot No. FS-3 and added that the Respondent

received a survey diagram from the Council's survey department which referred to the plot as Stand No. 10959. It was this finding of fact that steered the remainder of Judgment leading to the learned trial Judge ordering that the Appellant's certificate of title be cancelled.

- 7.11. We note that there was no mention of any survey diagram nor any reference to stand No. 10959 in the Respondents statement of claim (page 24-25 ROA).
- 7.12. In its filed defence (page 27 ROA) the Appellant denied any knowledge of Plot No. FS-3, Hillcrest Ndola and stated that it was offered and later issued with a certificate of title in respect of Stand No. 10959, Hillcrest Ndola.
- 7.13. The description (identity) of the property being a central issue, it is notable and in fact shocking that the Respondent did not file a reply stating that Plot No. FS-3 and Stand No. 10959 were one and the same property.
- 7.14. It is further notable that when the Respondent applied for an injunction against the Appellant there was no reference to any survey diagram and in fact no reference at all to Stand No. 10959, Hillcrest Ndola. As per paragraph 12 of the affidavit in support of the application (page 36 RAO), the relief sought was as follows;

12. That the 1st Defendant [Appellant] must be restrained and/or occupying the same as the plot [Plot No. FS3 according to the Respondent] was not legally given to it [Appellant]. (p.35 ROA)

- 7.15. Despite the Appellant's affidavit in opposition emphasizing that the Appellant was offered and purchased Stand No. 10959 and that it had no knowledge of Plot F-S3 Hillcrest Ndola (also described as F53 by the Respondent), the Respondent did not file an affidavit in reply showing that Plot F-S3 and F53 and Stand No. 10959 were one and the same piece of land.
- 7.16. During the proceedings, Counsel for the Respondent, Mr. Shamakamba confirmed that the plot allocated to the Respondent was Plot No. FS-3 Ndola. He made no reference to any survey diagram nor any other document indicating that Plot No. FS-3 and Stand No. 10959 were one and the same piece of land. He in fact submitted that the Respondent didn't know how the numbers changed.
- 7.17. Quite unsurprisingly, the learned trial Judge who had dealt with this matter earlier, Madam Chembe J declined the application for an injunction on the basis that the

Respondent had not brought any evidence that showed that the land it was offered was the same piece of land offered to the Appellant.

7.18. We further note that the Respondent and his learned counsel did not heed the hint by the honorable Justice Chembe, as in his entire evidence in chief, PW1 the only witness called by the Respondent, apart from simply stating that in 2016 he was told that the Respondents land had been sold to somebody else made no effort to show that Plot No. FS-3 and Stand No. 10959 referred to the same piece of land.

7.19. In cross-examination, PW1 initially stated that the Respondent was offered plot No. 10959 Hillcrest but later conceded that his letter of offer was for Plot No. FS-3 and Commate was offered Plot No. 10959. He stated that he knew the location of the plot when he went for interviews and that was the same plot which was given to the Appellant.

7.20. The last two sentences of the Respondents cross examination at page 111 ROA read as follows;

“ - Commate Liners was allocated plot 10959 and they sold to the 1st Defendant.

- *The diagram on page 10 is the one I received from the Planning Department and shows that it was stand 10959.”*

- 7.21. The learned trial Judge interpreted the last sentence as meaning that the Respondent had received a survey diagram showing the plot that he was allocated and its number was Stand 10959.
- 7.22. We observe that the sentence is quite unclear as PW1 could, as a follow-up to the earlier sentence, have been referring to the document as showing the number of the plot offered to the Appellant.
- 7.23. PW1 did not state when the survey diagram was received and the document itself does not show that it was addressed to the Respondent and no cover letter to the document was exhibited.
- 7.24. *In casu*, the legal burden of proof rested on the Respondent to firstly prove that Plot No. FS-3 and Stand 10959 were actually one and the same piece of land and thereafter proceed to prove that it was the legal owner of the property.
- 7.25. The learned authors of **Halsburys laws of England 4th Edition Volume 17** state as follows on the question of proving ones' case;

“To succeed on any issue, the party bearing the legal burden of proof must

(1) satisfy a Judge or jury of the likelihood of the truth of his case by adducing a greater weight of evidence than his opponent, and

(2) adduce evidence sufficient of proof.....”.

7.26. In the case of **Wilson Masauso Zulu v Avondale Housing Project Limited** *supra* the Supreme Court stated that a Plaintiff who has not proved his case cannot be entitled to Judgment and went even further in **Galaunia Farms Limited v National Milling Corporation Limited** ⁽⁹⁾ where it was held that, *a Plaintiff must prove his case and if he fails to do so, the mere failure of the opponents defence does not entitle him to Judgment.*

7.27. The Respondent asserted that No. FS-3 and Stand 10959 referred to the same piece of land and therefore bore the burden to prove it.


7.28. After carefully analyzing the evidence, it is apparent to us that the learned trial Judge found that the properties offered to the Appellant and the Respondent referred to the same piece of land with too much haste. Other than the


unsubstantiated statement by the Respondent that the Councils planning department gave him a survey diagram describing the plot offered to the Respondent as Plot No. 10959 there was nothing that indicated that No. FS-3 and Stand 10959 were one and the same piece of land.

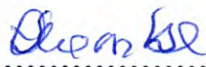
- 7.29. The Respondent had every opportunity to call or *subpoena* witnesses in order to prove this point. DW1 did not even explain how and where the Respondent was given the survey document he referred to and we note that the said document made no reference to the offer letter or to the fact that the land it referred to was also known as Plot No. FS-5 or F53.
- 7.30. It is our finding that the learned trial Judge's evaluation of the evidence was wrong in principle and on a proper view of the evidence before it, no trial Court properly directing its mind to it could make the finding that Plot FS-3, Hillcrest, Ndola and Stand No 10959, Hillcrest Ndola were one and the same piece of land. In the premises, we have no difficulty in setting aside the lower Courts finding of fact on this point.
- 7.31. The Appellant takes no issue with the fact that the Respondent was offered Plot FS-3 by the Council but objected to the learned trial Judge ordering cancellation of

the certificate of title number 191240 issued to the Appellant.

- 7.32. In the premises, we find that the Respondent failed to prove that Plot FS-3, Hillcrest, Ndola and Stand No 10959, Hillcrest Ndola were one and the same piece of land.
- 7.33. Having found as we have, ground 1 has been rendered otiose and considering its merits shall serve no purpose.
- 7.34. We consequently set aside the lower Courts order cancelling the Appellant's certificate of title number 191240 and that if the cancellation has already been effected, we order that the certificate of title be immediately restored or a new certificate of title be re-issued for Stand No 10959, Hillcrest Ndola.
- 7.35. This appeal succeeds with costs to the Appellant both in this Court and the Court below.


.....
M.M. KONDOLO SC
COURT OF APPEAL JUDGE


.....
B.M. MAJULA
COURT OF APPEAL JUDGE


.....
Y. CHEMBE
COURT OF APPEAL JUDGE