

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

KALVIC BAKERY LIMITED

APPELLANT

AND

THE ATTORNEY GENERAL

1st RESPONDENT

DAR FARMS AND TRANSPORT LIMITED

2nd RESPONDENT



CORAM: Chashi, Siavwapa and Ngulube, JJA

ON: 21st February 2018 and 16th May 2018

For the Appellant: M. J. Katolo, Messrs Milner and Paul Legal Practitioners

For the 1st Respondent: D. M. Chileshe, Senior State Advocate

For the 2nd Respondent: C. L. Sianodo, Messrs Malambo and Company

J U D G M E N T

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. *The Attorney General, Ministry of Works and Supply and Rose Makano v Joseph Emmanuel Frazer (2001) ZR, 87*
2. *Christopher Lubasi Mundia v Sentor Motors Limited (1982) ZR, 66*
3. *Oduyeni and Others v Atlantic Investments Limited – SCZ Appeal No. 130 of 2000*
4. *Polythene Products Zambia Limited v Cyclone Hardware and Construction Limited and Attorney General (2012) Vol 3, ZR 396*
5. *Boniface Joseph Sakala v Zambia Telecommunication Company Limited – SCZ, Selected Judgment No. 46 of 2016*

Legislation referred to:

1. *The Lands Act, Chapter 184 of the Laws of Zambia*
2. *The Supreme Court Practice (white Book) 1999*

3. ***The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia***
4. ***The Lands Tribunal Act, No. 39 of 2010***
5. ***The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia***
6. ***The Constitution of Zambia (Amendment) Act, No. of 2016***

This is an appeal against the Judgment of the High Court, delivered on 21st April, 2017 in which the court dismissed the action for lack of jurisdiction.

The sequence of events leading to the cause of action in the court below were that, the Appellant was the beneficial owner of Stand No. LUS/718 (the Property) and held a certificate of title.

In January 1998, the Commissioner of Lands (the Commissioner) re-entered the Property and issued a new certificate of title to the 2nd Respondent.

The action by the Commissioner prompted the Appellant to commence legal proceedings in the court below against the 1st and 2nd

Respondents by way of writ of summons, seeking the following reliefs:

- (1) A declaration that the re-entry was illegal and therefore null and void.
- (2) An Order that the 1st Respondent restores the certificate of title to the Appellant or in the alternative, the Appellant be re-registered as beneficial owner and be issued with a certificate of title.

According to the Appellant, at the time of re-entry and allocating of the Property to the 2nd Respondent, there was no proper notice that was given to the Appellant, who had developed the Property to the value of K44,000.00 (rebased).

The Appellant further alleged that no lawful grounds existed for the re-entry and allocating of the Property to the 2nd Respondent.

In its defence, the 1st Respondent averred that the Property was re-entered pursuant to Section 13 (2) of **The Lands Act**¹ after the Appellant failed to show cause why it should not be re-entered as the Property was undeveloped, abandoned and was being used as a dumping site for scrap metal by the 2nd Respondent who were the Appellant's neighbors.

According to the 1st Respondent, the Appellant was served with the notice to re-enter by registered mail.

In April 2014 after the Appellant had closed its case, the 2nd Respondent's Advocates raised a preliminary issue pursuant to Order 14 A and Order 33 of **The Rules of the Supreme Court (RSC)**² questioning whether the High Court had jurisdiction to hear a challenge of re-entry process by the Commissioner in view of the provisions under Section 13 (3) and 15 of **The Lands Act**¹.

In opposing the preliminary issue, the Appellant argued that, prior to the enactment of **The Lands Tribunal Act**⁴, the Lands Tribunal had no jurisdiction in matters relating to land which was a subject of a certificate of title and neither did they have jurisdiction to Order cancellation of certificate of title as the powers to do so lay with the High Court.

The court below decided to proceed with the defence and invited the parties to address the court on the issue in their respective submissions.

In rendering its Judgment, the court below, after considering the preliminary issue, opined that, an action to give rise to cancellation of a certificate of title can only arise in circumstances prescribed under Section 33 and 34 of **The Lands and Deeds Registry Act**³, one of which is where title is obtained by fraud. The learned Judge held that the

Appellant's grievance should have been addressed by way of an appeal to the Lands Tribunal as provided for under Section 13 (3) of **The Lands Act¹**.

Dissatisfied with the Judgment, the Appellant has appealed to this Court advancing four grounds of appeal couched as follows:

- (1) The learned trial Judge erred in law and fact when it dismissed the action on the provisions of Section 13 of the Lands Act without due regard to the fact that in 1998 when this action was commenced, the Lands Tribunal had no jurisdiction to Order cancellation of a title deed, which was one of the reliefs claimed in this action.
- (2) The learned trial Judge erred in law and fact when he held that the Lands Tribunal has power to Order the register to be rectified when the claim before court were not for rectification of the register but for restoration of the certificate of title.
- (3) The court erred in law and fact when it failed to appreciate the fact that the state of the law at the time the action was commenced in 1998 was that only the High Court of Zambia was the proper forum with jurisdiction to order cancellation of title deeds.
- (4) The court below fell into gross error when it upheld the preliminary issue without adjudicating on the whole claim on the merits without taking into effect the fact that the jurisdiction of the Lands Tribunal was only enhanced by the Lands Tribunal Amendment Act No. 39 of 2010.

In arguing the first ground of appeal, Mr. Katolo, Counsel for the Appellant, drew our attention to page 17 of the record of appeal (the record) and submitted that the action herein was commenced on 21st July, 1998 by way of writ of summons, seeking the reliefs contained therein.

Counsel referred us to page 16 of the record, line 2-5 where the learned Judge had this to say:

“The pleadings herein clearly show that the plaintiff is not seeking to have the 2nd defendant’s certificate of title cancelled under any of the circumstances prescribed in the two Sections. Instead it is clear that the plaintiff is challenging the 2nd defendant’s title through a challenge of the re-entry of the Commissioner of Lands.”

Counsel submitted that from the aforestated, it was evident that the Appellant was challenging the 2nd Respondent’s title which was obtained following re-entry. If the Appellant’s challenge was successful it would have resulted in the cancellation of the 2nd Respondents title.

The case of **The Attorney General, Ministry of Works and Supply and Rose Makano v Joseph Emmanuel Fraser**¹ was cited, which discussed the jurisdiction of the Lands Tribunal as follows:

“(1) The Lands Tribunal has no jurisdiction to Order cancellation of certificate of title in land matters. The jurisdiction to Order cancellation of title deeds lies within the High Court and not the Lands Tribunal.

(2) The power of the Lands Tribunal is limited to recommending to the Commissioner of Lands as to what to do with a certificate of title in issue and not to Order cancellation.”

It was Counsel’s submission that in the said case, the Supreme Court stated very clearly in no uncertain terms that the Lands Tribunal had no jurisdiction to Order cancellation of title deeds.

Counsel further submitted that, the Lands Tribunal was only clothed with power to Order cancellation of a title deed among other things

following the introduction of **The Lands Tribunal Act⁴** and **The Lands (Amendment) Act No. 41 of 2010**.

Our attention was drawn to the provisions of Section 14 (3) of **The Interpretation and General Provisions Act⁵** and submitted that the case at hand should not adversely be affected by the change in law.

According to Counsel, the matter was properly before the High Court. As regards the second ground of appeal, Counsel drew our attention to Section 13 (3) of **The Lands Act¹** which states as follows:

“A lessee aggrieved with the decision of the President to cause a re-entry to be entered in the register may within 30 days appeal to the Lands Tribunal for an Order that the register be rectified.”

It was Counsel's contention that the issue of rectification of the register was never pleaded in the writ of summons and statement of claim. The case of **Christopher Lubasi Mundia v Sentor Motors Limited²** was cited on the function of pleadings and submitted that the court below was precluded from raising the issue on its own motion.

Counsel beseeched us to set aside the Judgment of the court below and Order a retrial before another Judge.

According to Counsel, the essence of seeking a retrial is to ensure that justice prevails for both parties where the matter is heard and determined on the merits in accordance with the spirit in Article 118 of **The Constitution of Zambia⁶** as the court relied on procedural technicalities to dismiss the case.

The third and fourth grounds of appeal were not argued, as in Counsel's view, the grounds were covered in the argument in respect to the first and second grounds of appeal.

In response to the first ground of appeal, Mr. Chileshe, Counsel for the 1st Respondent, submitted that the learned trial Judge was on firm ground when he dismissed the action pursuant to Section 13 (3) of **The Lands Act**¹. That a perusal of the statement of claim shows that the claim was for a declaration that the re-entry was illegal and null and void; the claim shows that the Appellant intended to challenge the steps taken by the Commissioner in the re-entry of the Property. The procedure to challenge the decision is specifically provided for under Section 13 (3) of **The Lands Act**¹.

In responding to the second ground of appeal, Counsel was of the view that the power to Order the register to be rectified, lies with the Lands Tribunal.

Counsel further submitted that after the Commissioner decides to re-enter a piece of land and the person from whom such land is re-entered decides to appeal, the cumulative effect of such a process may result in the rectification of the land register. Therefore, the Appellant strictly sought to order the rectification of the land register, even though it did not specifically plead that, because all the reliefs sought had an effect of rectifying the register.

Counsel equally did not argue the third and fourth grounds as the same were covered in the arguments in response to the first and second grounds of appeal.

Counsel for the 2nd Respondent, Mr. Sianondo in responding to the first ground of appeal submitted that a perusal of the reliefs which were being sought, in particular the first and second, the second relief is a consequence of the first. It is only after the re-entry has been declared illegal that other activities as envisaged under the second relief can follow. Therefore, the Appellant was challenging the re-

entry, which can only be done under the provisions of Section 13 (3) of **The Lands Act**¹.

It was Counsel's contention that the issue of cancellation of the certificate of title cannot arise before attending to the challenge of re-entry.

Counsel referred us to the case of **Attorney General, Ministry of Works and Supply and Rose Makano v Joseph Emmanuel Fraser**¹ where the Supreme Court cited the case of **Oduyeni and Another v Atlantic Investments Limited**³ where it was held that:

*"The question of the Lands Tribunal's jurisdiction to cancel certificates of title for any reason has already been settled by this court in a number of cases emanating from the Lands Tribunal. One of the recent cases is that of **Oduyeni and Another v Atlantic Investments Limited**. The appeal in that case was against the decision of the Lands Tribunal ordering that a certificate of title be cancelled. We said in that case:*

*"Our short answer to that, is that the Lands Tribunal has no jurisdiction to Order cancellation of certificate of title in land matters. In terms of the Lands and Deeds Registry Act, Cap 185, the jurisdiction lies with the High Court and not with the Lands Tribunal. The Lands Tribunal can only recommend cancellation. This is what in effect we said in **Mwangela v Nsokoshi and Ndola City Council**. Although the Lands Tribunal was correct in doing substantial justice, their power is limited to recommending to the Commissioner of Lands as to what to do with a certificate of title in issue and not to Order cancellation. That position has not changed."*

According to Counsel, it follows that the court was right to discount the action on the point of law as the recommendation from the Lands Tribunal would have attended to the certificate of title.

In responding to the second ground of appeal, Counsel argued that the Appellant omitted the consideration of the settled position in the case of **Polythene Products Zambia Limited v Cyclone Hardware and Construction Limited and Attorney General**⁴ which explained the position that the re-entry can only be challenged through the Lands Tribunal. The Supreme Court opined at page 404 as follows:

“We have considered ground two and the submissions by Counsel. New Plast Industries v Commissioner of Lands, was decided under Section 87 of the Lands and Deeds Registry Act, 185 of the Laws of Zambia. That Section provides that a person aggrieved by the decision of the Registrar of Lands and deeds, may appeal to the High Court (following the procedure in appeals from the High Court).

The aggrieved party in that case commenced proceedings by way of judicial review. In dismissing the appeal, this court held that the mode of commencement of any action is provided by the relevant statute. Thus, where a statute provides for the procedure of commencing an action, a party has no option but to abide by that procedure.

*That the matter having been brought to the High Court by way of judicial review, when it should have been commenced by way of an appeal, the court had no jurisdiction to make the relief sought. The court followed its earlier decision in **Chikuta v Chipata Rural Council**.*

In the instant case, Section 13 (3) of the Lands Act specifically provides that a party aggrieved by:

“A certificate of re-entry entered in the register may within thirty days appeal to the Lands Tribunal for an Order that the register be rectified”

Following our decision in the two cases referred to above, we hold that the 1st Defendant, being aggrieved by the certificate of re-enty on Stand No. 12094, Lusaka, had no option but to appeal to the Lands Tribunal, in its challenge of the certificate of re-entry.

The 1st Defendant did not do so. On the facts of this case, we hold that the learned trial Judge had no jurisdiction to entertain the 1st Respondents counter claim on fraud and negligence in this action which was commenced by way of writ of summons.”

At page 405, the Supreme Court further reasoned that:

“We have considered the submission on ground three. The short answer, as we said in ground two is that the learned trial Judge had no jurisdiction to hear the 1st defendants challenge of the re-entry process by the Commissioner of Lands. Therefore, he should not have even ruled on the impropriety or otherwise of the re-entry process.”

Counsel further submitted that the law does not support the matter to be heard by the High Court. The lack of jurisdiction by the High Court goes to the root of the matter and as such the Court should dismiss the whole appeal.

According to Counsel, it is clear from the statement of claim that one of the reliefs being sought is re-registration of the Appellant and that

it be issued with a certificate of title after the re-entry has been annulled, which involves rectification of the register.

It was Counsels contention that the court below could not be faulted for holding that the Lands Tribunal has power to rectify the register, particularly that the Appellant is seeking its re-registration on the record.

Counsel further submitted that the breach by the Appellant was fatal and there subsists no reason to have the matter retried.

In responding to the third and fourth grounds of appeal, Counsel cited the case of **Boniface Joseph Sakala v Zambia Telecommunications Company Limited**⁵ and submitted that the procedure which was adopted by the court below, to only write one Judgment on the preliminary issue was proper as the preliminary issue resolved all the issues.

Counsel urged us to dismiss the whole appeal as it is devoid of any merit.

We have considered the submissions by Counsel on behalf of their respective parties and the Judgment of the court below.

We shall address all the four grounds of appeal as they only raise one issue; that is whether the court below was correct in holding that the Appellant's grievance should have been addressed by way of an appeal to the Lands Tribunal as provided for under Section 13(3) of **The Lands Act**¹.

Our perusal of the endorsement on the statement of claim appearing at pages 19-20, of the record of appeal shows that what gave rise to the Appellant's cause of action was the Commissioner's decision to re-enter the Property. It is that decision which the Appellant was impugning in the court below.

Therefore, in our view, the learned trial Judge was on firm ground when he opined that the Appellant was not seeking to have the 2nd Appellant's title cancelled but challenging the title through a challenge of the re-entry by the Commissioner.

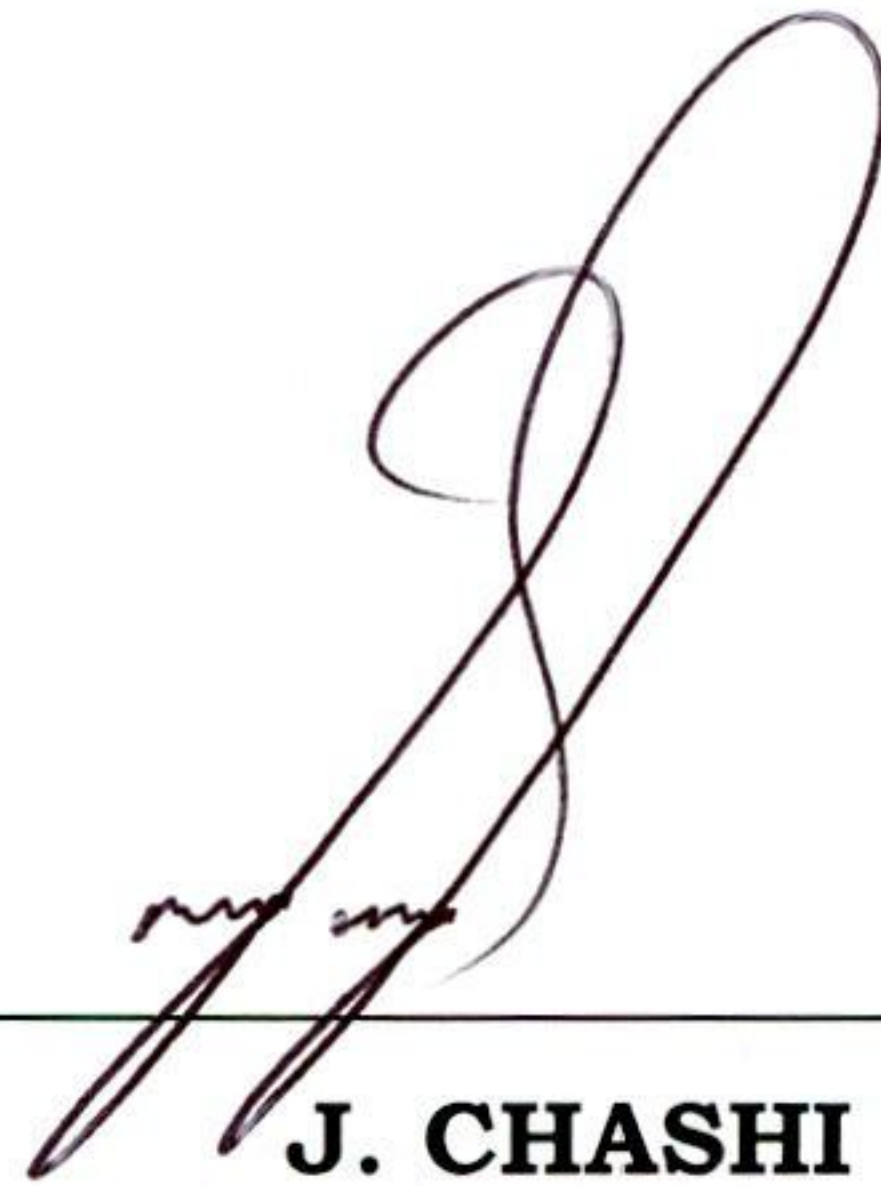
In light of the Supreme Court decision in the **Polythene Products Zambia Limited**⁴ case, we need not belabor the point as enunciated therein that a party aggrieved by the certificate of re-entry has no option but to appeal to the Lands Tribunal in accordance with Section 13 (3) of **The Lands Act**¹ which has power to give effect to any challenge that might succeed.

In the view we have taken, we are in agreement with the court below that it had no jurisdiction to determine the action before it and, in that respect, could not have adjudicated on the merits of the case.

We agree, with Mr. Sianondo that the lack of jurisdiction by the court below goes to the root of the matter. It is in that respect that the Appellants plea to have the matter sent back to the High Court for retrial is misplaced.

The Appellant cannot find refuge under the provisions of Article 118 (2) (e) of **The Constitution of Zambia**⁶. Although the Article provides categorically that justice should be administered without undue regard to procedural technicalities, our interpretation of the Article is that it is in the interest of justice that procedural lapses should not be invoked to defeat applications or matters before courts of law unless the lapse went to the jurisdiction of the court or is likely to cause substantial injustice or prejudice to the opposite party. In casu, the lapse went to the jurisdiction of the court.

In the view that we have taken, the court below cannot be faulted.
The appeal is bereft of merit and is accordingly dismissed with costs
to the Respondents. Same to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



M. J. SIAVWAPA
COURT OF APPEAL JUDGE



P. C. M. NGULUBE
COURT OF APPEAL JUDGE