

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

APPEAL/083/2021
CAZ/08/375/2020

BETWEEN:

FELIX NKULULUMBWE

APPELLANT

AND

CHARLES MUSONDA & 17 OTHERS

1st RESPONDENT

ATTORNEY GENERAL

2ND RESPONDENT

24 DEC 2025

CORAM: KONDOLO SC, MAKUNGU, SHARPE-PHIRI JJA

On 22nd March, 2023 and 24th December, 2025.

For the Appellant: In Person

For the 1st Respondent: Not in attendance

For the 2nd Respondent: Not in attendance

J U D G M E N T

KONDOLO, JA delivered the Judgment of the Court.

CASES REFERRED TO:

- 1. Jane Mwenya & Jason Randee v Paul Kapinga (1998) ZR 17**
- 2. Wilson Masauso Zulu v Avondale Housing Project Ltd (1982)
ZR 172**
- 3. Gideon Mundanda v Timothy Mulwani & The Agricultural
Finance Co. Ltd & S.S.S. Mwiinga (1987) Z.R. 29 (S.C.)**

4. **Wesley Mulungushi v Catherine Bwale Muzi Chomba (2004)
ZR 96**
5. **Sablehand Zambia Limited v Zambia Revenue Authority
2005 ZR 109**
6. **Mususu Kalenga Building Limited and Another v Attorney
General 1999 ZR 27**

LEGISLATION REFERRED TO

1. **Lands and Deeds Registry Act Chapter 185, Laws of Zambia**
2. **The Rating Act 1999 Chapter 484, Laws of Zambia**
3. **Statute on Frauds 1677, England**
4. **Limitations Act, 1939**
5. **Fry on Specific Performance, 6th Edition, paragraphs 506-508,
p. 244**
6. **Cheshire and Fifoot on Contract, 10th Edition, p.499.**
7. **Blacks Law Dictionary (2nd Edition)**

1. INTRODUCTION

- 1.1. This is an Appeal against the Judgment of the High Court delivered by Justice E. Mwikisa in which she dismissed the Appellant's claims.
- 1.2. When we heard this matter, our sister Justice Nicola Sharpe-Phiri sat on this panel but she has since left the jurisdiction of this Court. This is therefore a majority Judgment of the Court.

The delay which was caused by administrative constraints in delivering this Judgment is deeply regretted.

2. BACKGROUND

2.1. The Appellant claimed to be the owner of a piece of land which he alleges was encroached upon by the 1st Respondents. After unsuccessfully trying to get them off his land he commenced an action by Writ of Summons seeking the following relief;

(a) Specific performance by the Defendants to surrender the plot/portions occupied by the Defendants to the Plaintiff, which the Defendants have encroached, settled on and occupied illegally.

(b) Any other relief the Court may deem fit.

(c) Costs.

2.2. The Writ was accompanied by a Statement of Claim averring that the Appellant was offered House No. 2, Main Mine Road Residential Area, Kabwe by ZCCM. He claimed to have occupied the house as a sitting tenant when he worked for the Ministry of Health who used it as a ward for mentally challenged children.

2.3. He averred that he was running the ward and used part of it as his residence.

- 2.4. He further averred that ZCCM established a committee to value its properties and the committee decided that the building accommodating the ward and his residence would be too expensive to maintain and they proposed that it be demolished.
- 2.5. The Appellant stated that he told the committee that he had enough money to maintain it and they told him that he would bear the cost of surveyors and of repairs to the houses on the plot.
- 2.6. He further attested that when the Mines closed down, the plot was not sold to anyone else but he had continued living there and had been there for the last 21 years and had even continued paying for the land rates and other fees to the local authority, the Kabwe Municipal Council, and he had up to date and valid receipts.
- 2.7. That the 1st Respondents were squatters who had encroached and set up their private business enterprises on the plot.
- 2.8. The 1st Respondents filed their defence denying that they were squatters and that they took occupation of the land after following laid down procedures.
- 2.9. That they had nothing to do with the house occupied by the Appellant and that his averments with regard to the ZCCM Committee were within his own exclusive knowledge.

- 2.10. The 1st Respondents disputed the Appellant's averment that ZCCM did not offer land to anyone because they did in fact sell a lot of land in the Mine area including along the road.
- 2.11. The 1st Respondent's averred that in any event they had been in occupation of the land for over 15 years and any action by the Appellant over the said land was time barred.
- 2.12. The 2nd Respondent was joined to the action and filed a defence on 6th March, 2017.
- 2.13. The 2nd Respondent admitted that the Appellant had settled on the disputed property as a sitting tenant by virtue of being an employee of the Ministry of Health.
- 2.14. The 2nd Respondent denied that the disputed property was ever offered to the Appellant who would be put to strict proof thereof.

3. HIGH COURT PROCEEDINGS

3.1. Appellant's Case

- 3.2. The Appellant was PW1 and he called two other witnesses in support of his case.
- 3.3. The Appellant (PW1) testified that the 1st Respondents were squatters who had erected illegal structures on the land. That ZCCM had denied selling them the land and the Council stopped them from developing the land.

- 3.4. He repeated the averments in his Statement of Claim emphasising that he had been on the plot since 1994 and was paying owner's rates to the Council.
- 3.5. He testified that there was a dispute on the boundaries with the hospital and at the end of it all ZCCM wanted to demolish the house but they recanted and allowed him to continue maintaining it and paying rates.
- 3.6. He wanted the Court to help him establish specific performance for the Respondents to surrender the said plots from ZCCM since they were encroaching on his land, costs and any other relief.
- 3.7. In cross-examination the Appellant conceded that he had no offer letter from ZCCM and he also agreed that various people had made claims for his house.
- 3.8. He stated that there was no peace as people were encroaching and it had made it difficult for him to get Title Deeds.
- 3.9. He was shown the 1st Respondent's Title Deeds and he said there was a complaint against the 1st Respondents to the Council dated 10th July, 2014 and appearing on page 147 of the Record of Appeal, and the Council wrote to the police advising that it had not allocated plots to anyone.

- 3.10. He said he had diagrams that showed the size of his plot and wondered how the 1st Respondents were issued with Title Deeds.
- 3.11. PW2, Vincent Ngulube testified that he was the Union Chairman of ZCCM, Kabwe and after the closure of ZCCM, he was appointed to lead the committee responsible for selling ZCCM houses.
- 3.12. That it was decided to allow the occupants of dilapidated structures to continue living in them and their details were given to the Council to enable them pay Council rates.
- 3.13. That the Appellant moved into Plot No. 2, Main Mine Road in 1993 and around that time, the 1st Respondent started cutting trees on the land. The Appellant told him that the 1st Respondent was claiming ownership of the place.
- 3.14. He accompanied the Appellant to the police station where it was established that the 1st Respondent had a letter of offer which turned out to be forged.
- 3.15. PW2 was cross examined and he stated that he had been told the 1st Respondent had Title Deeds to the property.
- 3.16. He said he was not aware that the land was sold to the Appellant by Mr. Stanley Tembo.

- 3.17. PW3 was Seneriano Lungu, a former ZCCM employee and member of the union. He testified that he was a member of the committee responsible for selling ZCCM assets. That the houses were offered to employees and sitting tenants and actual offer letters were issued. It was decided that bare land would be surrendered to the government.
- 3.18. He testified that despite the Appellant being a sitting tenant, he was not offered House No. 2, Main Mine Road, Kabwe.
- 3.19. PW3 observed a house being built on the side plot and the police launched investigations and a man by the name of Steve Chama was arrested for fraud.
- 3.20. He told the Court that the Appellant has not received an offer letter to date.
- 3.21. In cross-examination PW3 stated that the Appellant was the owner of the house because he lived there before the Mine closed and ZCCM asked him to do a kaleidoscope survey at his own cost.

4.0. 1st & 2nd Respondent's Case

- 4.1. DW1 was the 1st Respondent Charles Musonda who testified that he bought his plot from Stanley Tembo who had showed him an offer letter from the Mines and a receipt for payment.

- 4.2. He engaged lawyers and bought the plot for K15, 000 (rebased).
He thereafter paid development fees of K800 to the Council and he proceeded to cut trees at the plot and started building the boundary wall.
- 4.3. He stated that when he started building in 2009, the Appellant was already there. He further stated that at one time the Council issued a stop order stopping him from building. He showed them the receipts he paid to the Council and he continued building.
- 4.4. Neither the Council nor ZCCM stopped him from building and it was only the Appellant who was complaining.
- 4.5. He wondered why the Appellant had sued him because he had never encroached or trespassed on his land. That he had never seen any document indicating the Appellant's ownership of the land.
- 4.6. DW1 was cross examined and he stated that he had an offer letter and contract of sale.
- 4.7. When asked about the alleged forged documents, he denied that they were forged. He agreed that he had testified at the Subordinate Court where he stated that he got his papers from Mr. Stanley Tembo who had got his from Mr. Chama a former employee of ZCCM.

- 4.8. He stated that he never went back to Court after his testimony and he was still relying on his documents because Mr. Chama worked at ZCCM, and had authority to issue those documents.
- 4.9. In re-examination he said that the Court did not say the documents were forged.
- 4.10. DW2 was the 14th Respondent Francis Kapembwa, who testified that he applied for land from the Ministry of Lands from whom he received a positive response by offering him land. He accepted the offer, paid and was issued with Title Deeds. He referred to copies of the said documents in the Defendants Bundle.
- 4.11. He stated that despite the Appellant accusing him of encroaching on his land, the Appellant had not shown him any Title to the said land.
- 4.12. In cross examination, he denied that his documents were tainted with illegality. He agreed that he was a witness in the Subordinate Court but stated that the police never summoned him for forgery.
- 4.13. DW3 was Christopher Situna an employee of Kabwe Mine Hospital. He testified on behalf of the 2nd Respondent and stated that the land where the Appellant's house is located was handed

over to the hospital which had been taken over by the Ministry of Health.

4.14. The Mental Health Association of Zambia (Association) requested to use the building on the land. The hospital denied the request but the Central Board of Health allowed them and they started using it.

4.15. That the Appellant was a member of the Association and he was one of the staff operating at the building, and he was also using it as his residence.

4.16. That the Association stopped using the building but the Appellant remained there. That the hospital had requested that the house be handed back to it as it had plans to use it as a mother's shelter and as an isolation ward. The Association started rehabilitating the building but the Appellant stopped them.

4.17. DW3 stated that the property belongs to the hospital, therefore the issue of encroachment on the Appellant's alleged property does not arise.

4.18. Under cross examination, DW3 stated that paying rates was not proof of ownership. That the building occupied by the Appellant

was within the hospital premises and the Appellant was on the hospital premises by virtue of being a member of the Association.

4.19. All the Parties filed written submissions.

5. HIGH COURT DECISION

- 5.1.** The learned trial Judge noted that even though the Appellant was seeking the remedy of specific performance, there was no evidence that that ZCCM offered him the house. That he could not rely on this remedy as there was no contract of sale offering him the said land. She cited the learned authors of **Fry on Specific Performance, 6th Edition, paragraphs 506-508, p. 244** and **Cheshire and Fifoot on Contract, 10th Edition, p.499.**
- 5.2. She further found that the kaleidoscope diagrams referred to by the Appellant were never officially filed with the Lands and Deeds Registry and as such were neither official nor valid documents.
- 5.3. The trial Court cited the case of **Jane Mwenya & Jason Randee v Paul Kapinga⁽¹⁾** which emphasised that a valid transaction involving land must be in writing.
- 5.4. The trial Court held that the 1st Respondent's Certificate of Title was valid because the Appellant had failed to show that it was fraudulently obtained.

- 5.5. The trial Judge found that the Appellant's claim for specific performance was misplaced and without merit and accordingly dismissed it. She cited **Section 33 of the Lands and Deeds Registry Act** which states that a Certificate of Title is conclusive evidence of ownership.
- 5.6. The learned trial Judge did not address the question of the matter being statute barred which was raised by the Appellant.

6. THE APPEAL

6.1. Dissatisfied with the Judgment, the Appellant has appealed fronting five grounds as follows;

- 1. The Judge erred in both law and fact when she held that the Appellant was not entitled to the claim because there was no contract of sale in existence between the Appellant and ZCCM.**
- 2. The Judge erred in both law and fact when she held that the kaleidoscope diagrams that the appellant referred to the Court were never officially filed with the Lands and Deeds Registry.**
- 3. The Judge erred in both law and fact when she held that the 1st Respondent, Charles Musonda's Certificate of Title was valid.**
- 4. The Judge erred in both law and fact when she stated that the Appellant commenced a Court action**

against the Respondents by serving them a Writ on 15th January 2018.

5. The Judge erred in both law and fact when she held that the Appellant did not have an idea on how big his land was.

5.2. The Appellant's Case

5.3. In ground 1, the Appellant agreed that an agreement involving the sale of land must be represented by a contract in writing.

He then relied on the definition of contract in the **Blacks Law Dictionary (2nd Edition)** which defines a contract as follows; "*an agreement, upon sufficient consideration to do or not to do a particular thing.*"

5.4. The Appellant submitted that when ZCCM was surveying its properties, the former ZCCM surveyor went to survey the Appellants plot and the Appellant was requested to pay all survey and other fees as told by ZCCM management in Lusaka.

5.5. That the Appellant was given a written note to take to the Property Manager at ZCCM headquarters in Lusaka. The Manager responded by stamping and signing the note which read that the plot needed to be resurveyed. According to the Appellant, this acted as consideration for the agreement and it met the definition of consideration in **Blacks Law Dictionary** (*supra*).

- 5.6. The Appellant further noted that in the year 2010 the ZCCM Property Manager wrote a letter to the Mine hospital to visit the Appellant so as to ascertain the boundary between the Appellant's portion of the property and the hospital. The letter also stated that the dilapidated structure on the land was occupied by the Appellant who had been paying owners rates.
- 5.7. It was submitted that the detailed information submitted to the Council on each of the rate payers was further proof of an agreement regarding the property. He cited **Section 19 (1) and (2) of the Rating Act 1999** which states that only the owner of the property pays the Owner's Rates.
- 5.8. The Appellant proceeded to advance irrelevant arguments in relation to ZCCM and the Council advising him to sue the Respondents for trespass.
- 5.9. The Appellant concluded this ground by wondering why the trial Judge aimed at establishing the contract between the parties when the issue was not about the validity of the contract between the parties.

5.10. Grounds 2, 3, 4 and 5

- 5.11. In our view it is not necessary to refer to any of the arguments in grounds 2, 3, 4 and 5 for reasons that shall become clear.

6. RESPONDENTS ARGUMENTS

6.1. The Respondents did not file any arguments in opposition.

7. THE HEARING

- 7.1. At the hearing, the Appellant appeared in person but none of the Respondents appeared.
- 7.2. After establishing that the Respondents were served with the Record of Appeal and the notice of hearing, we decided to proceed with hearing the Appeal.
- 7.3. The Appellant indicated that he would rely on the amended Record of Appeal and Supplementary Record of Appeal both filed on 6th August, 2021 and the Amended Heads of Argument filed on 16th August, 2021.
- 7.4. The Appellant told us that he wished to emphasize the document at page 4 of the Supplementary Bundle of Documents which was a letter from Zambia Police Service to the Assistant Registrar of the High Court at Kabwe dated 5th April, 2019 (the Letter).
- 7.5. According to the Appellant, the Letter showed that the documents submitted by the Respondents in the lower Court and upon which the lower Court determined its Judgment were false. That the person who had forged the said documents which eventually led

to the illegal sale of the disputed land was convicted and jailed for so doing.

- 7.6. We informed the Appellant that the Letter is self-explanatory.
- 7.7. We further asked him whether the owner of the property (ZCCM) had ever given him a letter of offer and he agreed. We asked him to show us the offer letter and he recanted and said he had no actual offer letter but that the sequence of events he had lined out before the lower Court amounted to an offer.
- 7.8. The Appellant informed us that even though the Attorney General appears as the 2nd Respondent, he was never joined to the action.
- 7.9. We asked the Appellant if there was any reason why he did not sue ZCCM and the Commissioner of Lands (Attorney General) who respectively issued the offer letters to the Respondents and issued them with Title Deeds to their properties the Appellant claimed was encroaching on his land. He was basically unable to provide a clear answer to our question.

8. ANALYSIS AND DETERMINATION

- 8.1. We note from the onset that the Respondents neither filed Heads of Argument in opposition nor appeared at the hearing.
- 8.2. However, that in itself, is insufficient to result in this Court overturning the lower Court's Judgment as the Appellant is still

obliged to prove his case by arguing the Appeal. In the case of **Wilson Masauso Zulu v Avondale Housing Project Ltd** ⁽²⁾ it was held that regardless of what can be said of the Defendant's case, the Plaintiff must prove his case before he can be entitled to any relief from the Court.

- 8.3. With regard to the Appellants assertion that the 2nd Respondent was never joined to the action, we refer to page J9 of the lower Court's Judgment (page 9 ROA) where the trial Judge stated that the 2nd Respondent was joined to the action and filed a defence (see defence at p. 59 ROA). We also note that in his final submissions before the lower Court the Appellant referred to the Attorney General as an Interested Party. We therefore have no difficulty in finding that the Attorney General was joined to the proceedings.
- 8.4. We note that at pages J3 and J4 of the lower Courts Judgment, the learned trial Judge noted that the 1st Respondent had pleaded that the Appellants claim was statute barred but she did not pronounce herself on the issue.
- 8.5. A defendant is at liberty to raise the defence of a matter being statute barred where it offends the time periods within which specific matters can be commenced as prescribed by the **Limitation Act, 1939 of England**.

8.6. It is available as a defence which must be raised and proved by the Defendant and only thereafter can the Plaintiff be prevented from prosecuting his matter for failing to comply with the time limitations prescribed by the Act.

8.7. The record does not show that the Respondents attempted to prosecute the defence they had raised in their pleadings in relation to the Appellants claim being statute barred. We assume that is perhaps why the learned trial Judge felt no need to pronounce herself on the question and we too on that basis see no need to make any further comments on the issue.

8.8. We shall now proceed to consider the grounds of appeal.

8.9. **Ground 1**

8.10. In relation to ground 1, it is important to consider that other than claims for “*any other relief the Court may deem fit*” and “*costs*”, the Appellant was pursuing only one claim in the Writ of Summons he filed against the Respondents as follows;

(a) Specific performance by the Defendants to surrender the plot/portions occupied by the Defendants to the Plaintiff, which the Defendants have encroached, settled on and occupied illegally.

8.11. It is settled law that in matters involving land, the existence of breach of contract is a pre-condition to the availability of the relief of specific performance which is an alternative remedy where the payment of damages is inadequate.

8.12. In the case of **Gideon Mundanda v Timothy Mulwani & The Agricultural Finance Co. Ltd & S.S.S. Mwiinga** ⁽³⁾ the Supreme Court held that a Judge's discretion to award damages for breach of contract involving land is severely limited and said as follows;

“The law takes the view that damages cannot adequately compensate a party for breach of contract for the sale of an interest in a particular piece of land or of a particular house (however ordinary) This authority is supported in countless other cases.....

In a case of this nature it is proper for a plaintiff to claim specific performance and damages in the alternative, and it is the duty of the Court to consider whether, on such pleading, specific performance should be granted before considering the possibility of damages, which should only be

awarded where, for some valid reason, specific performance would be an inappropriate remedy.”

- 8.13. Despite appearing to feign ignorance, the Appellant appeared to understand the importance of establishing that there was a contract between himself and ZCCM for the purchase of land as he argued at great length to try and establish the existence of a contract between himself and ZCCM.
- 8.14. Even if it be true that the ZCCM Property Manager asked him to pay for the rates, that hardly equates to an agreement for the purchase of land as there could be several reasons for such a request. An example is that he could have been asked to pay the rates because he was not paying rent.
- 8.15. The import of the Sections of law cited by the Appellant from the Rating Act in relation to the payment of owner's rates is that the owner is responsible and liable for the payment of rates. These can, of course be paid by anybody, it is merely a question of whose duty it is to pay them. For example, if the Appellant *in casu* failed to pay the rates he would not have been liable. The liability would lie with the Certificate of Title holder.

- 8.16. Struggle as he did, the Appellant failed to show us on the record a single written note that indicated an agreement between himself and ZCCM for the purchase of land.
- 8.17. His own witness PW3 confirmed that ZCCM never gave the Appellant an offer letter for the land. PW3 also confirmed that several other people received offer letters. We hold the view that if ZCCM intended to sell the land to the Appellant, it would have given him an offer letter the way it did to others.
- 8.18. Without a written offer of sale, none of the Appellant's efforts to show that he had indeed been offered the land by ZCCM can succeed. As correctly referred to in the Judgment of the lower Court on pages J12 and J13 (pages 17 and 18 ROA), **Section 4 of the Statute on Frauds 1677** states that an agreement for the sale of land can only be enforced if it is in writing and the principle was reiterated in the case of **Wesley Mulungushi v Catherine Bwale Muzi Chomba** ⁽⁴⁾ where it was held that it need not be a written agreement, as even a note or memorandum containing all the material terms of contract, names of the parties, adequate identification of the subject matter and the nature of consideration can suffice to satisfy compliance with **Section 4 of the Statute of Frauds**. *In casu* there was no agreement, note or memorandum of

any kind indicating that the disputed land was offered to the Appellant.

8.19. In any event, establishing a contract between himself and ZCCM does not help the Appellant because if he succeeded in so doing, the relief of specific performance would not lie against the Respondents with whom he had no contractual relationship. The Respondents were the wrong party to sue for the relief of specific performance.

8.20. The Statement of Claim filed by the Appellant did not plead that the 1st Respondents had obtained their Certificates of Title by fraud. In the case of **Sablehand Zambia Limited v Zambia Revenue Authority** ⁽⁵⁾ it was held that where a party seeks to rely on evidence of fraud, it must be specifically and distinctly pleaded.

8.21. The Appellant requested us to pay particular attention to the Letter at page 4 of the Supplementary Record of Appeal. We have perused the document which is a letter from the Zambia Police Service dated 5th April, 2019 to the Assistant Registrar of the High Court at Kabwe informing her of the following;

1. *Some of the Respondents in this matter, namely Charles Musonda, Edward Mukuka, Francis Kapembwa and*

Teddy Sinkala knowingly produced forged documents in the bundles of documents they filed in the lower Court.

- 2. The Subordinate Court had in Case No. 2B1/111/021 found that the “ZCCM-IH offer letter for plot No. 2 Main Mine Road dated 09/11/2004 and ZCCM-IH payment for purchase dated 17/04/2005 for the sale of plot 2 Main mine Road Kabwe” one Steven Chama who was convicted of forgery and uttering the said documents.*
- 3. That the police had been informed by Felix Nkululumbwe that Charles Musonda (DW1) and Edward Mukuka had presented the said documents before the lower Court in casu, despite knowing them to be forged.*
- 4. That the police had since instituted investigations into the matter.*

8.22. According to the Appellant this Court should consider the contents of the letter from the police to enable us determine this Appeal in the interest of justice.

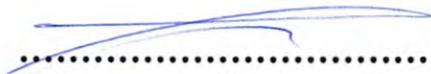
8.23. We have considered the letter and note that PW1 and PW2 referred to allegations of fraud in relation to the property offered to Charles Musonda (DW1) by ZCCM.

- 8.24. DW1 was cross-examined by the Appellant alleging that he had produced forged documents but he denied the allegation.
- 8.25. Even though the allegation was made by the Appellant's witnesses the Letter was never produced and led in evidence before the lower Court and neither did any witness from the police appear to authoritatively speak to any allegation of fraud.
- 8.26. We note that at page 151 of the ROA there is a copy of a Judgment by the Magistrates Court at Kabwe delivered by M.M. Simpungwe which validates the evidence of PW1 and PW2 that a person by the name of Steven Chama was convicted for forging a letter of sale of Plot No. PO/F 386A. The copy of the Judgment is however unsigned and was not produced in the lower Court.
- 8.27. Evidence and documents not considered by the Court during trial cannot be brought up for the first time on appeal without leave of Court. See the case of **Mususu Kalenga Building Limited and Another v Attorney General** ⁽⁶⁾.
- 8.28. The Appellant did not seek cancellation of the Certificates of Title issued to the 1st Respondents for any alleged fraud. However and in any event, regardless of the foregoing, even if the Letter were to be considered, it would still not help the Appellant succeed in

obtaining the relief he sought of specific performance against the Respondents with whom he has no contractual relationship/s.

8.29. On account of the fact that the claim for specific performance cannot succeed, the remaining grounds of appeal are rendered otiose.

8.30. The trial Judge was on firm ground when she observed that the relief sought by the Appellant was misconceived. This Appeal is consequently dismissed with costs to the Respondents.


.....

M.M. KONDOLO, SC
COURT OF APPEAL JUDGE


.....

C.K. MAKUNGU
COURT OF APPEAL JUDGE