

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2023/HP/1378

**IN THE MATTER OF: SECTIONS 81 OF THE LANDS AND
DEED REGISTRY ACT CHAPTER 185
OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: ORDER 30 RULE 11(b) OF THE HIGH
COURT RULES CHAPTER 27 OF THE
LAWS OF ZAMBIA**

AND

**IN THE MATTER OF: CAVEAT PLACED ON STAND NO.2173,
LIVINGSTONE**

AND

**IN THE MATTER OF: THE ESTATE OF THE LATE JOSEPH
NANA MHLANGA**

BETWEEN:

ADMINISTRATOR GENERAL
(suing as Administrator of the estate
of the late JOSEPH NANA MHLANGA)
AND

TOM HAMBWAULA
(suing as Administrator of the estate of the late
AMOS HAMBWAULA)

APPLICANT

RESPONDENT

BEFORE THE HONOURABLE MRS. JUSTICE M. C. KOMBE

For the Applicant:
For the Respondent:

Mrs. V. Msoni - Senior Legal Officer
Mr. H. Munsanje - Messrs. H.M.
Munsanje & Co.

J U D G M E N T

Cases referred to:

- 1. Construction and Investment Holding Limited v. William
Jacks and Company (Zambia) Limited (1972) Z.R 66.**



2. **Lenton Holdings Limited v. Airforce Moyo (1984) Z.R 55.**
3. **Sobek Lodges Limited v. Zambia Wildlife Authority-2008/HP/668.**
4. **Anti-Corruption Commission v. Barnett Development Corporation Limited (2008) Z.R 69.**

Legislation and other material referred to:

1. **The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia as amended by Act No. 40 of 2010.**
2. **The Law of Real Property, 2nd Edition.**

1. INTRODUCTION

1.1 On 15th August, 2023, the Applicant commenced this action by way of originating summons accompanied by an affidavit seeking the following reliefs:

- (i) *An order that the caveat placed on Stand No.2173, Livingstone by the Respondent be removed; and*
- (ii) *Costs.*

2. APPLICANT'S AFFIDAVIT EVIDENCE

2.1 The affidavit in support of the originating process was deposed to by **NAKAMBOWA MUBIANA**, the Examiner & Estates Officer in the employ of the Applicant.

2.2 He deposed that the office of the Administrator General was on 31st October, 2022, appointed by the High Court for Zambia as Administrator of the estate of the Late Joseph Nana Mhlanga, who died intestate on 9th May, 1994 at

Batoka Hospital in Livingstone. A copy of the letters of administration issued in the High Court of Zambia was exhibited and marked **“NM1.”**

2.3 That the deceased left behind two immovable properties, namely Farm No.2172 and Farm No.2173 both in Livingstone. A copy of the inventory of the deceased's estate was exhibited and marked **“NM2.”**

2.4 On 17th July, 2023, he conducted a search with the Ministry of Lands, Lands and Deeds Registry, on property No.2173, Livingstone and discovered that there was a caveat on the property. A copy of the caveat was exhibited and marked **“NM3.”** He contacted the Respondent and called for a meeting so as to have him remove the caveat on the property, but all efforts proved futile.

2.5 He further conducted a physical search on the file, and it was discovered that there was a contract of sale between the late Joseph Nana Mhlanga and Amos Hambwaula dated 1st November, 1980. A copy of the contract of sale was exhibited and marked **“NM4.”** However, there was nothing suggesting that the sale between Mr. Joseph Nana Mhlanga and Mr. Amos Hambwaula was concluded, as the Certificate of Title was still in the name of Mr. Joseph Mhlanga. A copy of the Certificate of Title was exhibited and marked **“NM5.”**

2.6 Efforts had been made to have the Respondent remove the caveat but to no avail and that there was no justifiable reason to keep the caveat on the said property.

3. RESPONDENT'S AFFIDAVIT EVIDENCE

3.1 The Respondent and Administrator of the estate of the late Amos Hambwalula, **TOM HAMBWALULA**, filed an affidavit in opposition on 7th November, 2023.

3.2 He deposed that on his appointment as Administrator of the estate of the late Amos Hambwalula he learnt that there was a contract of sale relating to leasehold property being 2.328 hectares (7 acres) of Stand No. 2173 situate in Livingstone in the Southern Province of the Republic of Zambia executed on 1st November, 1980 between the late Joseph Nana Mhlanga as vendor and his late father as the purchaser at a consideration of ZMW15,000.00

3.3 The parties to the transaction were both represented by the legal firm Messrs. Lisulo and Company.

3.4 He deposed that special condition No.3 of the said contract of sale stipulated that the date fixed for completion would be within six weeks upon receipt of state's consent to assign by the vendor.

3.5 Further that following the discovery he conducted a search at the Lands and Deeds Registry which revealed that though

the property was still registered in the name of the Joseph Nana Mhlanga there was a caveat lodged against it by the late Amos Hambwalula on 17th February, 1981 and witnessed by the Firm of Messrs. Lisulo & Company. A copy of the print-out of the Lands and Register was exhibited and marked **"TH."**

3.6 That the caveat referred to and marked **"NM3"** by the Applicant was lawfully placed by the purchaser against the property on account of the vendor's default and the Applicant had not demonstrated that the vendor did perform his obligation in terms of special condition No.3 and neither had the Applicant shown that there was default by the purchaser to perform his part of the contract.

3.7 That the caveat was lodged 14 weeks and 3 days after execution of the contract of sale which the Applicant did not dispute the validity thereof.

3.8 Upon execution of the contract of sale, the purchaser became the equitable owner of the property thereby creating an interest therein and the vendor was a trustee in respect thereof.

3.9 Therefore, the late Amos Hambwalula could not have placed the caveat Stand No.2173 without the full knowledge and consent late Joseph Nana Mhlanga from 1981 to 1994 and

his interest in the subject land was unquestionable. Hence he was entitled to the continued placement of the caveat over the subject property until performance.

4. HEARING

4.1 At the hearing, learned counsel for the Applicant, Mrs V. Msoni referred to section 81(1) of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia which provides that:

“Such Registered Proprietor or other interested person may, if he thinks fit, summon the caveator, or the person on whose behalf such caveat has been lodged, to attend before the Court or a Judge thereof to show cause why such caveat should not be removed.”

4.2 She also submitted that sections 76 to 83 refers to the law relating to the administration of caveats. She referred to section 76 of the Act which provides that:

“Any person;

- a) Claiming to be entitled to or to be beneficially interested in any land or any estate or interest therein by virtue of any unregistered agreement or other instrument or transmission; or of any trust expressed or implied, or otherwise howsoever, or**
- b) Transferring any estate or interest in land to any other person to be held in trust; or**
- c) Being an intending purchaser or mortgagee of any land;**

may at any time lodge with the Registrar a caveat in Form 8 in the Schedule.”

- 4.3 It was argued that it was well established law that an administrator of a deceased estate stepped into the shoes of the deceased person to not only distribute the assets but also such a one was entitled to the rights of the deceased as well as to meet any obligations left behind by the deceased. That the Respondent being the administrator was the rightful person to withdraw the caveat that was placed by the caveator and he refused to do so without justifiable cause.
- 4.4 It was her argument that upon conducting a physical search at the Lands and Deeds Registry, the Applicant found no assignment executed by the parties to effect the transfer of ownership. That the caveat on the property was entered on 17th February 1981 pertaining to a contract of sale dated 1st November, 1980 and had been on the property for the past forty-two (42) years. It was submitted that there being no evidence of an assignment being executed on the property and the caveator being deceased, there was no reason for the caveat to not be withdrawn by the Respondent without justifiable cause.

4.5 The case of **Construction and Investment Holding Limited v. William Jacks and Company (Zambia) Limited** ⁽¹⁾ was referred to wherein the Court held that:

“Only if a person has or purports to have an enforceable interest in land, may be justified on interfering with the rights of the registered proprietor by lodging a caveat. The caveators cause for lodging a caveat is dependent upon the claim to be entitled to an interest in land and that reasonable in this sense means justifiable.”

4.6 It was submitted that the caveator at the time the caveat was lodged had an enforceable interest but there was no evidence to support that any consideration was made or any assignment executed and therefore had no justifiable cause to refuse to withdraw the caveat.

4.7 In her oral submissions, Mrs. Msoni reiterated her arguments.

4.8 In opposing the application Mr. H.M Munsanje, submitted that the issues for determination were:

1) Whether, pursuant to the said contract of sale, the Respondent did disclose an enforceable interest to maintain the caveat that was entered on the subject property;

2) *Whether the Respondent has shown cause why the caveat on Stand No. 2173 Livingstone should not be removed.*

3) *Whether the court should order the removal of the caveat on Stand No.2173 Livingstone.*

4.9 Learned counsel relied on section 76 of the Lands and Deeds Registry Act already referred to by the Applicant.

4.10 Further reliance was placed on the case of ***Construction and Investment Holding Limited v William Jacks and Company*** also referred to by the Applicant.

4.11 It was submitted that it was not in contention that on 1st November, 1980, the late Joseph Nana Mhlanga and the late Amos Hambwalula executed a contract of sale for the sale and purchase respectively of Stand No. 2173 Livingstone. Special Condition No. 3 of the said contract specified the date fixed for completion to be within six weeks upon receipt of state's consent to assign by the vendor. That is to say, completion was to take place not later than Saturday 13th December, 1980.

4.12 On 17th February, 1981 a caveat was prepared by the parties' common Advocates Messrs. Lisulo and Company, and signed by the purchaser and subsequently lodged with the Lands and Deeds Registry.

4.13 He submitted that in the absence of any record or evidence to the contrary, the only reasonable inference to be drawn with regards what triggered the placement of the caveat is that the vendor did not deliver State's Consent to Assign within the period prescribed in Special Condition No.3 of the contract.

4.14 Counsel also referred to the learned authors of the Law of Real Property who state at page 567 as follows:

“If the purchaser is potentially entitled to the equitable remedy of specific performance he obtains an immediate equitable interest in the property contracted to be sold: for he is or soon will be in a position to call it specifically. It does not matter that the date for completion, when the purchaser may pay his money and take possession, has not yet arrived: equity looks upon that as done which ought to be done, and from the date of the contract the purchaser becomes owner in the eyes of equity (he cannot, of course become owner at law until the land is conveyed to him by deed. This equitable ownership is, as has been seen, a proprietary interest, enforceable against third parties.

As between the parties to the contract it creates a relationship of trustee and beneficiary: the vendor is said to be trustee for the purchaser, and the purchaser to be beneficial owner. The vendor must therefore manage and preserve the property with the same care as is required of any other trustee, until it is finally handed over to the purchaser.”

4.15 It was argued that the Applicant had not shown that the vendor terminated or rescinded the contract or issued a notice to complete.

4.16 Further, reference was made to the case of **Lenton Holdings Limited v. Moyo** ⁽²⁾ where the Supreme Court had occasion to explain the nature and effect of a caveat as enacted in section 76 and 77 and Lands Deeds Registry Act and Ngulube DCJ, as he then was, observed as follows:

“Although the terms of section 76(a) would appear to be very wide indeed, as can be seen, yet they would not, in our considered opinion, go so far as to cover rights other than those which are otherwise recognisable as being lawfully claimed or held. However, section 77(1) which we have set out would appear to require that the caveat should disclose the interest claimed.”

4.17 It was submitted that the cases referred to that one could only enter a caveat on land if he demonstrated a justifiable interest. Quite clearly, Amos Hambwalula lodged the caveat in the recognizable right of an intending purchaser as evidenced by the uncontroverted contract of sale.

4.18 He urged the Court to dismiss the application with costs.

4.19 In his oral submissions, Mr. Munsanje also reiterated his arguments and added that even presuming there was no consideration paid by the intending purchaser the only logical inference that could be made was that the intending

vendor was going to rescind the contract which in this case was not done such that 14 weeks and 3 days after execution of the contract the purchaser placed a caveat on the property which caveat was not contested by vendor during his lifetime until now.

4.20 He submitted that the Respondent still had an enforceable interest based on the contract of sale which sale was the subject of these proceedings.

4.21 In reply, Mrs. Msoni argued that none of the parties had information whether the vendor had obtained consent to assign and that making assumptions would not do any justice.

5. CONSIDERATION AND DECISION OF THE COURT

5.1 I am indebted to counsel for their submissions which I have considered in arriving at this decision.

5.2 The issue for determination is whether the Applicant is entitled to an order for the removal of the caveat lodged by the Respondent on Stand No. 2173, Livingstone.

5.3 Part VI of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia sets out the law regarding the administration of caveats in sections 76 to 83.

5.4 A caveat against dealing with land may be lodged by any person who discloses an enforceable interest in the property

according to section 76. For the avoidance of doubt, section 76 provides as follows:

“Any person-

(a) claiming to be entitled to or to be beneficially interested in any land or any estate or interest therein by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied, or otherwise howsoever; or

(b) transferring any estate or interest in land to any other person to be held in trust; or

(c) being an intending purchaser or mortgagee of any land; may at any time lodge with the Registrar a caveat in Form 8 in the Schedule”.

5.5 Further, Section 77 (1) provides for the particulars that must be indicated in the caveat. It reads as follows:

“(1) Every caveat shall be signed by the caveator or by his attorney or agent, and shall state with sufficient certainty the nature of the estate or interest claimed by the caveator, with such other information and evidence as may be required by any regulations under this Act, and shall appoint a place or give an address within 4.83 kilometers of the Registry at or to which notices and proceedings relating to such caveat may be served or addressed.”

It is clear from the foregoing provision that before a caveat is lodged with the Registrar, the caveator must establish that

he is entitled to the land or beneficially interested in it by virtue of an unregistered agreement or instrument or that he is in the process of transferring his interest to be held in trust or that he is an intending purchaser or mortgagee of the property. In other words, it is a requirement for the caveator to disclose the interest claimed in the property.

5.6 Once a caveat has been duly lodged, the Registrar according to Section 79 cannot make any entry on the register having the effect of charging or transferring or otherwise affecting the estate or interest protected by such caveat.

5.7 In considering section 76, Dr. Matibini J, as he then was held in the case **Sobek Lodges Limited v. Zambia Wildlife Authority**⁽³⁾ that:

“In deciding whether or not a caveat should be removed, a Court should bear in mind the provisions of section 76 of the Lands and Deeds Registry Act. That is the person intending to register a caveat must be entitled to the land; beneficially interested in the land; in the process of transferring some interest in land to some other person; or should be an intending purchaser, or mortgagee of the land in issue.”

5.8 What is prominent from the authorities cited is that only a person purporting to have an enforceable interest or who is beneficially interested in the land may be justified in

interfering with the rights of the registered proprietor by lodging a caveat.

5.9 Section 81 of the Lands and Deeds Registry Act on which the application is anchored provides as follows:

“(1) Such Registered Proprietor or other interested person may, if he thinks fit, summon the caveator, or the person on whose behalf such caveat has been lodged, to attend before the Lands Tribunal, Court or Judge thereof to show cause why such caveat should not be removed.

“(2) Such Court or Judge upon proof that such a person has been summoned, may make such order in the premises, either ex parte or otherwise, as to such Court or Judge seems meet.”

5.10 Given the foregoing, can it be said that the Respondent has an enforceable interest in the subject property and therefore justified in maintaining the caveat in issue?

5.11 I must hasten to mention that the burden of proof in civil matters rests on the Plaintiff. It is however clear from section 81 of the Lands and Deeds Registry Act that the burden to show cause why the caveat should not be removed shifts to the person who placed the caveat; the Respondent in this case.

5.12 The gist of the Respondent's argument is that on 1st November, 1980, the late Joseph Nana Mhlanga and the late

Amos Hambwalula executed a contract of sale for the sale and purchase respectively of Stand No. 2173 Livingstone. Special Condition No. 3 of the said contract specified the date fixed for completion to be within six weeks upon receipt of state's consent to assign by the vendor.

5.13 He contends that in the absence of any record or evidence that the vendor rescinded the contract or issued a notice to complete, the only reasonable inference to be drawn with regards what triggered the placement of the caveat is that the vendor did not deliver State's Consent to Assign within the period prescribed in Special Condition No.3 of the contract.

5.14 It is his argument that his interest in the subject land was therefore unquestionable and justifiable entitling him to the continued placement of the caveat over the subject property until performance.

5.15 The Applicant on the other hand argues that there was no assignment executed by the parties to effect the transfer of ownership and the caveat had been on the property since 1st November, 1980 and thus no reason for the caveat to not be withdrawn by the Respondent without justifiable cause as it was making it impossible for the Applicant to distribute the estate to the rightful owners.

- 5.16 It is clear from section 81 of the Lands and Deeds Registry Act that the registered proprietor or interested person may summon a caveator, on whose behalf the caveat has been lodged to show cause why the caveat should not be removed.
- 5.17 According to Section 2 of the Act, a registered proprietor means a person to whom a Certificate of Title or Provisional Certificate of Title has been issued. Simply put, it is the owner of a particular land or property.
- 5.18 It is therefore important for this Court to consider the rights that the Applicant has in the property to ascertain whether he is entitled to the relief that he seeks.
- 5.19 Section 33 of the Lands and Deeds Registry Act provides that a certificate of title is conclusive evidence of the ownership of land. This principle was espoused by the Supreme Court in the case of **Anti-Corruption Commission v. Barnett Development Corporation Limited**⁽⁴⁾ when it held:

“Under section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of land by a holder of a certificate of title. However, under section 34 of the same Act, a certificate of title can be challenged and cancelled for fraud or reason of impropriety in its acquisition”.

5.20 The Applicant in this case is a holder of a certificate of title relating to the land in question. The Respondent on the other hand contends that the contract of sale relating to Stand No. 2173, Livingstone, between the late Joseph Nana Mhlanga as vendor and the late Amos Hambwalula which has been exhibited made the purchaser equitable owner of the property thereby creating an interest in the land. There is no evidence that an assignment was executed to effect transfer of the property to the purchaser and that consideration in the amount of K15,000.00 was paid by the purchaser.

5.21 In addition, there is no evidence that the purchaser paid K3,000.00 in accordance with Special Condition No. 7 to entitle him to exercise his rights to use, possess or benefit from the title as an equitable owner.

5.22 In the view that I hold therefore, if the purchaser had fulfilled his part of the contract and the vendor had not as contended the Respondent, the purchaser would have sought an order for specific performance of the contract a long time ago. However, there is no evidence that such steps were taken by the purchaser to enforce his rights.

5.23 Therefore, I cannot accept so bold an inference by the Respondent that the vendor failed to obtain the State

Consent to assign within the prescribed period and that was the reason why the caveat was placed. If I were to do that, I would be delving into the realm of conjecture. However, that is not the role of the Court as there is no cogent evidence before me that the vendor failed to fulfil his obligation.

5.24 For the reasons I have highlighted above, I find that there is no justification for the Respondent to maintain the caveat on the property in question.

5.25 All in all, I hold that the Applicant has proved the case on a balance of probabilities against the Respondent that he has failed to show cause why the caveat should be maintained. I therefore Order that the caveat lodged on Stand No.2173, Livingstone, by the Respondent be removed forthwith.

5.26 I make no order as to costs.

5.27 Leave to appeal is granted.

DELIVERED AT LUSAKA THIS 06TH DAY OF JUNE, 2024.



M.C. KOMBE
JUDGE

