

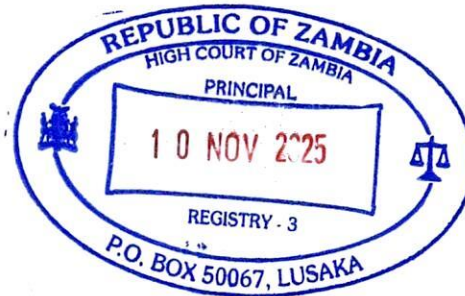
IN THE HIGH COURT FOR ZAMBIA

2024/HP/A/011

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

CHARITY MWANZA

APPELLANT

AND

UYENKHU MPANDE

RESPONDENT

BEFORE HON. JUSTICE E. P. MWIKISA

For the Appellant: Mr. A. Samabi of Messrs Joseph Chirwa and Company.

For the Respondent: In Person.

JUDGMENT

Cases referred to;

1. *Ndongo vs. Moses Mulyango and Roostico ZR P187-2011 Volume 1*
2. *Marcus Kampumba Achuime SCZ Judgment 2 of 1983*
3. *Chibonu vs. New Future Finance Company Limited 2020/HPC/0776 (Unreported)*
4. *Charles Kajimanga vs. Chilemya Appeal No. 50/2014 (2016) ZMSC 189*
5. *Anti-corruption Commission vs. Barnett SCZ Judgment No. 5 of 2008 ZR 69*
6. *Mususu Kalenga Building Limited and Another vs. Richmans Money Lenders Enterprises SCJ No. 4 of 1999*
7. *Attorney General v Marcus Kampumba Achuime (1983) ZR 1*
8. *Chumbwe vs. Mukata (SCZ Judgment No. 10 of 2015 unreported)*

9. *Zambia Telecommunications Company Limited vs. Aaron Mwene Mulwanda and Another 2012 Vol. 1 ZR 404 (SC)*

Legislation referred to;

1. *Rent Act, Chapter 206 of the Laws of Zambia*

Other works referred to;

- 1) *Learned Authors of Zambian Civil Procedure-Commentary and Cases*

1. Introduction and Background.

1.1 This is an appeal against an order from the Subordinate Court of Class I Magistrate K.M. Tembo sitting in Chongwe District, awarding the Respondent vacant possession of Lot No. 23984/M Chongwe and payment of rental arrears in monthly installments of ZWM4000.00 starting from the month end of August 2023.

1.2 The Respondent, who was the Plaintiff in the Court below, commenced an action through Originating Notice of Motion pursuant to **Rule 3 of the Rent Rules, Chapter 206 of the Laws of Zambia** against the Appellant seeking the following reliefs;

- a) An order for the recovery of possession of premises known as that Lot No. 23984/M Chongwe;**
b) An order for the recovery of rent arrears which shall be due at the date of the Court's judgment or order;

**c) Damages for inconvenience and mental anguish;
d) Costs of and incidental to these proceedings; and
e) Any other relief the Court may deem fit.**

- 1.3 The Respondent averred that in the year 2017, he purchased the property known as Lot No. 23984/M Chongwe. A copy of the certificate of title was exhibited and marked "UM2".
- 1.4 That the Respondent and the Appellant entered into a verbal tenancy agreement relating to the said property. It was agreed that the Appellant would be paying rentals at a monthly sum of ZMW3,000.00. That as of 20th March 2023, the Appellant owed the Respondent the sum of ZMW24,000.00. That a notice of eviction was written to the Appellant which was not honored. That the Appellant then made payment of ZMW4,000.00 in total towards the ZMW24,000.00 she was owing.
- 1.5 He stated that as of 1st June 2023, a final reminder was sent to the Respondent to vacate the premises and settle the accumulated arrears of ZMW32,000.00. That this has not been honored by the Appellant as she is still in possession of the said property and showed no willingness of vacating the said property.

1.6 The Appellant did not oppose the action.

2. Decision of the Court below.

2.1 The learned Magistrate held that the Appellant vacate the premises and granted the Respondent vacant possession within 30 days from the date of the Order and that the Appellant pay rental arrears in monthly installments of ZMW4,000.00 starting the month end of August 2023.

3. Grounds of Appeal.

3.1 Dissatisfied with the decision of the Court below, the Appellant on 11th April 2024, appealed advancing three grounds couched as follows;

- i. **The lower Court erred in law and fact when it ordered to evict the Appellant from property No. 23984 Silverest Chongwe, in that the property is owned by the Appellant herein;**
- ii. **That at the time the Appellant herein was borrowing she did not understand what she was doing by signing the contract of sale in relation to the said property on account of none representation by counsel; and**
- iii. **That the Appellant was not given chance to adequately explain herself as she was interrupted from time to time by the trial Court below.**

4. Heads of Arguments in support of the Grounds of Appeal.

4.1 The appellant filed heads of argument dated 11th April 2024. In ground one, the Appellant challenges the lower Court's

decision for evicting her from property No. 23984 Silverest Chongwe, as she believes the property is hers.

4.2 Counsel argued that the purported change of ownership of property No. 23984 Silverest Chongwe was irregular as the law was not followed with regards to assignment of land. That this is so because, there was no Deed of Assignment, state consent to assign and tax clearance certificate for property transfer tax.

4.3 Furthermore, Counsel argued that even if the contract of sale was genuinely executed, it could not transfer the ownership of the property to the buyer. To reinforce this position, counsel relied on the case of **Ndongo vs. Moses Mulyango and Roostico**¹ where it was held that;

“a contract of sale of land does not per se transfer ownership of land to the buyer and a mere payment of a deposit towards the purchase price does not transfer ownership to the buyer much more is required.”

4.4 It was counsel’s contention that the Appellant was misled into signing a contract of sale on purport that she was getting a loan and that this practice has become fashionable in the Zambian society and to which many unsuspecting members of the public have fallen victim.

4.5 Furthermore, Counsel argued that the Appellant could not adequately explain herself because she was interrupted by the trial Court from time to time. Thus, this is a proper case in which the Court should reverse findings of fact that were made by the trial Court below. To buttress this argument, Counsel relied on the case of **Marcus Kampumba Achuime²** where the Court was of the view that;

“The appeal Court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts or that they were findings which on proper view of the evidence, no trial court acting correctly can reasonably make”

4.6 Counsel argued that the trial Court misapprehended the facts of the present case when it went ahead to make an eviction order. That the Respondent is not the owner of the property and that the purported rentals were in actual sense payments towards the loan amount.

4.7 In ground two, it was Counsel’s contention that the Respondent took advantage of the absence of counsel and made the Appellant sign a contract of sale when in fact the

intentions of the Appellant was not to sale the property, but rather pledge it as collateral for purposes of obtaining a loan. Counsel argued that the Appellant did not understand what she was signing, therefore the resultant of the contract of sale should be declared illegal and null ab initio. To fortify this argument, Counsel relied on the case of **Chibonu vs. New Future Finance Company Limited**³ where the Court held that;

“The contract of sale between the borrower and the lender was illegal, null and void ab initio as the borrower did not understand what he was signing for in the contract of sale”

4.8 On the third ground, Counsel contended that the Appellant was not given chance to adequately explain herself as she was interrupted from time to time by the trial Court below. Thus, the rules of natural justice were breached. Furthermore, counsel argued that by reason of failure on the part of the trial Court to afford the Appellant an opportunity to explain herself resulted into an injustice of the worst form.

5. The Respondent’s Heads of Arguments.

5.1 The Respondent filed into Court his heads of arguments on 12th August 2024. With regards ground 1, the Respondent argued that the ground is essentially attacking a finding of fact of the lower court and the Appellant has not demonstrated sufficient grounds to warrant this Court to set aside the said findings. Furthermore, He argued that an Appellate Court can only reverse findings of fact made by the lower Court, if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon misapprehension of the facts.

5.2 The Respondent argued that as his father's Attorney, he commenced the proceedings in the lower Court to recover possession of the said property and rental arrears. Furthermore, he argued that the Appellant's position with regards her being the owner of the property, is not backed by any evidence as per the holding of the cases of **Charles Kajimanga vs. Chilemya**⁴ and **Anti-corruption Commission vs. Barnett**⁵, that a certificate of title is conclusive evidence of

ownership of land. He argued that his father is the owner of the property as the certificate of title is in his name.

5.3 Furthermore, it was argued that the Appellant is raising issues which cannot be dealt with for the first time at appeal as the Appellant did not raise those issues in the lower Court. To reinforce this position, the case of **Mususu Kalenga Building Limited and Another vs. Richmans Money Lenders Enterprises**⁶ was relied upon where the Court was of the view that;

“Matters not raised in the Court below cannot be raised for the first time on appeal because doing so would be ambushing the other party to litigation and the Court should not consider the Appellant’s submissions.”

5.4 With regards to grounds two and three, the Respondent argued that the Appellant has raised new issues which were not adjudicated upon by the lower Court thus, this Court should not entertain such. Furthermore, it was argued that the Appellant was never interrupted in the lower Court, thus, she should provide proof to substantiate her claims.

5.5 In conclusion, the Respondent urged this Court to dismiss the appeal with costs as it lacks merit.

6. The Hearing

6.1 The matter was called for hearing on 13th August 2024. Counsel for the Appellant was present while the Respondent was in person.

6.2 Both parties said they would rely on the documents filed into Court.

7. Consideration and Determination.

7.1 I have considered the appeal, heads of argument advanced and authorities cited. The following fact is not in dispute, that the Respondent is acting in his capacity as an attorney for his father Jackson Suzyo Mphande as a perusal of the record of appeal shows the power of attorney.

7.2 The issue in dispute is that the Appellant is claiming to be the owner of the property in question and that she engaged the Respondent solely for the purposes of obtaining a loan and that she did not know what she was signing as she was unrepresented. On the other hand, the Respondent alleges that what existed between the two was a verbal tenancy agreement to which the Appellant agreed to pay monthly rentals of ZWM3,000.00 for the property in question. The

question that now needs to be answered is whether the Magistrate was correct to grant the Respondent herein vacant possession of the said property.

7.3 It is trite that a trial Court's findings of fact should not be reversed or disturbed in the absence of sound reasons such as those stated in the case of **Attorney General v Marcus K Achiume**⁷. That as an appellate Court, the threshold for intervention is high, unless the findings are wrong or are manifestly against the weight of evidence. I have reviewed the pleadings in the lower Court.

7.4 A perusal of the record of appeal shows that the action in question was a chamber action as it was commenced by way of an Originating Notice of Motion as per the requirement of the law which is the Rent Act. However, during the proceedings dated 8th August 2023, the Appellant informed the lower Court that she had not vacated the premises because the property in question was hers although she did not have a certificate of title.

7.5 Premised on the foregoing, the lower Court should have gone to trial so as to allow more evidence to be adduced as I am of the view that the issue raised by the Appellant was contentious. To reinforce this position, reference is made to the case of **Chumbwe vs. Mukata**⁸ where the Supreme Court stated that;

“In our considered view, there was neither assessment nor evaluation of the evidence on the allegation of donation of 555 bags of cement in paragraph 5(i) of the petition. All the learned trial judge did was simply review the evidence on the issue and then believe the 1st Respondent’s evidence and reject that of the appellant. She gave no reasons for doing so”.

7.6 Furthermore, I have noticed how the judgment from the lower Court is not in compliance with the law on judgment writing. To reinforce this position reliance is placed on the **learned authors of *Zambian civil procedure-commentary and cases* at page 1119**, where it was stated as follows;

“The style of writing judgments varies from one judge or magistrate to another. But there is still need for judgments to meet or satisfy a certain threshold, for instance, every judgment must obviously have a beginning, middle and ending.”

7.7 The Supreme Court has on diverse occasions addressed the subject of judgment writing in a lot of cases amongst them is the case of **Zambia Telecommunications Company Limited vs. Aaron Mwene Mulwanda and Another**⁹. The Court pointed out the essential elements as;

- a) **An introduction setting forth the nature of a case;**
- b) **An outline of the essential facts;**
- c) **A discussion of the relevant law applicable to the case to be resolved;**
- d) **Actual application of the relevant law to the facts of the case;**
- e) **The remedy or remedies sought in the case; and**
- f) **Ultimately the order of the court.**

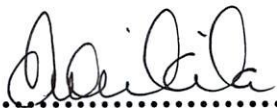
7.8 The Supreme Court went on to guide that before delivering a judgment, a trial court is advised to check it, to ensure that all the issues raised in the matter and claims are completely determined. On that basis, the magistrate in the lower Court ought to have adhered to the guidance on judgment writing as laid down by the Supreme Court and should have ensured that the issue raised by the Appellant herein was completely determined.

8. Conclusion.

8.1 Premised on the foregoing, I accordingly order that the matter be remitted to the Subordinate Court for a retrial before a different Magistrate.

8.2 I make no order as to costs.

Dated at Lusaka this.....^{10th}.....day of.....November.....2025

.....
.....
ELITA P. MWIKISA
HIGH COURT JUDGE