

IN THE COURT OF APPEAL OF ZAMBIA

APP/89/2022

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

LUMWANA MINING COMPANY LIMITED

APPELLANT

AND

RICHARD KAMBOYI

BOYD CHAVUMA



1ST RESPONDENT

2ND RESPONDENT

CORAM: Mchenga DJP, Muzenga and Chembe, JJA

ON: 16th January 2024 and 19th March 2024

For the appellant: K. Phiri, Corpus Legal

Practitioners

For the Respondents: M.M. Mwachilenga, James and Doris

Legal Practitioners

J U D G M E N T

Mchenga DJP, delivered the judgment of the court.

Cases Referred to:

1. B.J. Poultry Farms Limited v. Nutri Feeds Zambia Limited, SCZ Judgment No. 3 of 2016
2. J.Z. Car Hire Limited v. Malvin Chala and Scirocco

- Enterprises Limited, SCZ Judgment No. 26 of 2002
3. Wilson Masauso Zulu v. Avondale Housing Project Limited [198] Z.R. 172
 4. Attorney General v. Ndlobvu [1968] Z.R. 12
 5. Nkhata and 4 Others v. Attorney General [1966] Z.R. 124
 6. Anderson Kambela Mazoka, Lt. General Christon Sifapi Tembo, Godfrey Kenneth Miyanda v. Levy Patrick Mwanawasa, The Electoral Commission of Zambia, The Attorney General [2005] Z.R. 138
 7. London Passenger Transport Board v. Moscrop [1942] A.C. 332.
 8. Alick Hangili v. Rose Amon Numa and Lenny Makungu, CAZ Appeal No. 214 of 2019
 9. AMG Global Trust Ltd v. The Administrator General and Another, CAZ Appeal No. 25 of 2020
 10. Smith Sawila v. Attorney General and Christine Banda, SCZ Appeal No. 1 of 2019
 11. Sithole v. The State Lotteries Board of Zambia [1975] Z.R. 106

Legislation referred to:

1. The Rules of the Supreme Court of England 1999 Edition.
2. The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.
3. The Lands Act, Chapter 184 of the Laws of Zambia

INTRODUCTION

- [1] This appeal emanates from the judgment of the High Court (Pengele, J.), delivered on 8th June 2021.
- [2] The appellant, who was defendant in the court below, has appealed against that judgment.
- [3] The respondents, who were plaintiffs in the court below, have equally filed a cross-appeal.

CASE BEFORE THE TRIAL COURT

- [4] Prior to the consolidation of their cases, the respondents, on 4th June 2018, by writ of summons, sought damages against the appellant for the demolition of their houses.
- [5] The 1st respondent also claimed for an order that the appellant pay him the sum of K250,000.00, he spent purchasing the property on which he constructed his house, while the 2nd respondent claimed for an order that the appellant pay him the sum of K225,000.00, he spent purchasing the property on which he constructed his house.

- [6] Both respondents also claimed for orders that the appellant refunds each of them monthly rentals in the sum of K2000.00, from the date of demolition of their houses, to the date of full and final payment; punitive damages; interest on all amounts found due; costs of and incidental to the action and any other relief.
- [7] In their defence, the appellant contended that both respondents built their houses on land that belonged to the appellant, without the appellant's consent.
- [8] That being the case, they were squatters and the appellant had every right to evict them and demolish the structures.
- [9] The appellant admitted demolishing the structures built by the respondents after having given them notice to vacate and ample time to find alternative accommodation.

EVIDENCE BEFORE THE TRIAL JUDGE

- [10] The respondents led evidence that they individually owned pieces of land under customary tenure, which were

situated at the T5-R5 junction, along Solwezi Mwinilunga Road.

[11] During the course of that ownership, they both built houses and occupied them with their families.

[12] The appellant also owned customary land surrounding the areas of the properties.

[13] At some point, the appellant converted its customary land to leasehold tenure and was accordingly issued with a certificate of title on 19th May 2009.

[14] Sometime in April 2012, the appellant gave the respondents notice to vacate their houses on the ground that they were in occupation of land which it owned. However, the respondents just ignored the notices and continued living in their houses.

[15] The respondents received additional notices to vacate by 9th June 2012. They were also warned that they would face criminal prosecution if they did not adhere to the notices.

[16] Following that warning, they both vacated their properties and their respective houses were demolished by the appellant.

[17] From sometime in June 2012, the respondents have individually been paying rent in the sum of K2000.00 per month.

[18] At trial, the appellant disputed having demolished the respondent's houses and endeavored to produce evidence to the effect that it was actually the respondents who had demolished their own houses.

[19] A witness called by the appellant produced Grievance Acknowledgment reports, which indicated that the respondents demolished their own houses.

FINDINGS OF FACT

[20] The trial Judge considered the evidence relating to the Grievance Acknowledgment reports. He found that they were prepared by the appellant and not the respondents.

[21] He also noted that the appellant unequivocally admitted in their defence that they had demolished the houses which were built by the respondents.

[22] He found that the respondents had proved that it was the appellant who demolished their houses.

[23] As regards the issue of whether or not the said demolition was wrongful, the trial Judge found that the respondents owned the pieces of land in dispute under customary land tenure.

[24] He found that the respondents were in occupation of the said land, even before the appellant started the process of converting their customary land tenure into leasehold tenure.

[25] The trial Judge also found that appellant failed to comply with **Section 3 (4) (c) of the Lands Act**, prior to converting their customary tenure to leasehold. This is because they did not consult the respondents whose rights were likely to be affected by the decision to convert.

[26] Consequently, he found that the demolition of the respondents' houses was wrongful and that they were entitled to damages.

[27] Additionally, he found that they were entitled to a refund of the money they expended to construct their houses. Since there was no evidence before him to enable him properly determine the values of the demolished houses, he referred the issue for assessment.

[28] The trial Judge also found that the respondents were entitled to be refunded the monthly rentals incurred after their houses were demolished. He equally referred the issue to assessment.

[29] He also awarded the respondents interest on the amounts which were payable.

[30] Finally, the trial Judge noted that the respondents did not claim for the restoration of their respective pieces of land. Consequently, he restricted his awards to only the reliefs that were sought in the writ.

APPELLANT'S GROUNDS OF APPEAL

[31] Dissatisfied with the outcome of the trial, the appellant has advanced two grounds in support of their appeal.

[32] The first ground of appeal is that the trial Judge erred when he found that the respondents had, on a balance of probabilities, proved that the appellant had demolished their houses despite there being evidence that the respondents had in fact, demolished their own houses.

[33] The second ground of appeal is that the trial Judge erred when he found that the respondents were entitled to money expended in constructing their houses and reimbursement of monthly rentals, despite there being no evidence that the respondents constructed the said houses and there being evidence that the respondents demolished their own houses.

APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL

[34] The core argument in support of both grounds of appeal are that the respondents failed to prove their claims on a balance of probabilities.

[35] Reference was made to the cases including **B.J. Poultry Farms Limited v. Nutri Feeds Zambia Limited¹** and **J.Z. Car Hire Limited v. Malvin Chala and Scirocco Enterprises Limited²**, and it was submitted that the respondents failed to lead evidence proving that the appellant demolished their houses. The only evidence on the issue were statements produced by the appellant that proved that the respondents demolished their own houses.

[36] Our attention was also brought to the elusive nature of the 1st appellant's testimony. It was then argued that properly assessed, the trial Judge should have found that it affected the credibility of his evidence.

[37] On the basis of the decision in **Wilson Masauso Zulu v. Avondale Housing Project Limited³**, we were urged to set aside the finding by the trial Judge that it was

the appellant who demolished the respondents' houses because it was perverse, as it was not supported by the evidence.

RESPONDENTS' ARGUMENTS IN RESPONSE

[38] It was submitted on behalf of the respondents that on the evidence before him, the trial Judge was entitled to come to the conclusion that it was the appellant who demolished the respondents' houses.

[39] Reference was also made to **Order 27 rules 1, 2 and 3, and Order 19 rule 13 sub-rule 3 of the Rules of the Supreme Court of England**, and it was submitted that where there are express admissions by a party, that issue is no longer in controversy.

[40] It was submitted that the appellant having admitted to demolishing the respondents' houses in their defence, there was no need for the respondents to lead evidence on the issue.

[41] It was also submitted that the appellant has not established any grounds upon which this court can upset the trial Judge's finding of fact. It was pointed out

that the threshold for such a decision, as was set out in cases including the **Attorney General v. Ndlobvu⁴** and **Nkhata and 4 Others v Attorney General⁵**, have not been met.

COURT'S CONSIDERATION AND DECISION ON THE APPEAL

[42] Order 18 Rule 7 (3) of the Rules of the Supreme Court of England, provides that:

"...Pleadings play an essential part in civil actions, and their primary purpose is to define the issues and thereby to inform the parties in advance of the case which they have to meet, enabling them to take steps to deal with it; and such primary purpose remains and can still prove of vital importance, and therefore it is bad law and bad practice to shrug off a criticism as a "mere pleading point."

[43] In the case of **Anderson Kambela Mazoka, Lt. General Christon Sifapi Tembo, Godfrey Kenneth Miyanda v. Levy Patrick Mwanawasa, The Electoral Commission of Zambia, The Attorney General⁶**, it was held that:

"The function of pleadings, is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties are

bound by their pleadings and the court has to take them as such."

[44] Additionally, in the case of **London Passenger Transport Board v. Moscrop**⁷, it was stated that:

"...Any departure from the cause of action alleged, or the relief claimed in the pleadings should be preceded, or at all events, accompanied, by the relevant amendments, so that the exact cause of action alleged and relief claimed shall form part of the Court's record, and be capable of being referred to thereafter should necessity arise. Pleadings should not be 'deemed to be amended' or 'treated as amended.' They should be amended in fact."

[45] The appellant, in their defence, explicitly admitted to have demolished the houses which were built by the respondents. That position was not changed or revisited by any amendment to the defence prior to the commencement of the trial.

[46] This being the case, the appellant was bound by its defence from the moment that the pleadings were closed.

[47] The appellant having admitted demolishing the respondents' houses, that issue was no longer in controversy and there was no need for the respondents to lead evidence proving it.

[48] We note that despite the admission, the appellant led evidence in the form of Grievance Acknowledgment reports, that suggested that the respondents may have demolished their own houses.

[49] The trial Judge considered that evidence and found that the reports did not prove that the respondents demolished their own houses because the reports were prepared by the appellant's own agents.

[50] In the circumstances of this case, we find that the trial Judge was perfectly entitled to come to that conclusion.

[51] We find no reason for reversing that finding as it hinged on the credibility of that evidence, and in our view was not perverse.

[52] However, as pointed out earlier on, the appellant having admitted demolishing the respondents' houses in their defence, the issue was in the circumstances not in dispute.

[53] Consequently, we find no merit in the appeal and we dismiss it.

RESPONDENTS CROSS APPEAL

[54] The respondents' cross-appeal has two grounds.

[55] The first ground is that having found that the appellant failed to comply with **Section 3(4)(c) of the Lands Act**, when obtaining the certificate of title, the trial Judge erred when he failed to order the cancellation of that certificate of title.

[56] The second ground of appeal is that the trial Judge erred when he failed to order that the appellant's certificate of title be rectified to remove the portions of land owned by the respondents.

ARGUMENTS IN SUPPORT OF THE CROSS APPEAL

[57] In support of their appeal, it was argued that the trial Judge having found that the respondents were not consulted as required by **Section 3(4)(c) of the Lands Act**, he ought to have ordered the cancellation of the appellant's certificate of title because it was illegally or improperly acquired.

[58] The cases of **Alick Hangili v. Rose Amon Numa and Lenny Makungu⁸** and **AMG Global Trust Ltd v. The Administrator**

General and Another⁹, were referred to in support of the proposition.

ARGUMENTS IN RESPONSE TO THE CROSS APPEAL

[59] In response to the two grounds of the cross appeal, the appellant argued that according to **Section 34 of the Lands and Deeds Registry Act**, a certificate of title can only be cancelled where a party specifically pleads cancellation and proves that it was fraudulently or improperly acquired.

[60] In this case, fraud was not pleaded and neither was evidence of fraud or impropriety, warranting the cancellation of the certificate of title, led.

[61] Cases including **Smith Sawila v. Attorney General and Christine Banda**¹⁰ and **Sithole v. The State Lotteries Board of Zambia**¹¹, were referred to in support of the proposition.

CONSIDERATIONS OF AND DECISION ON CROSS APPEAL

[62] The issues raised in the two grounds of appeal are interrelated and we will therefore consider them at the same time.

[63] From the pleadings, it is apparent that the respondents did not seek that the High Court cancels the appellant's certificate of title on the grounds of impropriety in the manner it was obtained.

[64] Further, neither did the respondents seek an order from the High Court that their respective pieces of land be ceded from the appellant's land.

[65] **Order 18 Rule 8 (1) of The Rules of the Supreme Court,** provides as follows:

"(1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, the expiry of any relevant period of limitation, fraud or any fact showing illegality—

(a) which he alleges makes any claim or defence of the opposite party not maintainable; or

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading."

[66] Having considered the decisions in the cases of **Alick Hangili v. Rose Amon Numa and Lenny Makungu⁸** and **AMG Global Trust Ltd. v. The Administrator General and Another⁹**, it is our view that the respondents cannot at this point begin to canvass new reliefs.

[67] If these reliefs were sought, it ought to have been clear from the beginning and they would accordingly have been adjudicated upon.

[68] After everything has been considered, the trial Judge cannot be faulted for restricting his awards to the specific claims that were made by the respondents.

[69] In his judgment, the trial Judge made the following observation:

"The Plaintiffs have not made any claims for the respective pieces of land to be restored to them. It appears from their claims that their main interests are compensation for the demolished houses, damages for the wrongful demolitions and reimbursement of rentals expended after demolition. Having awarded the foregoing claims to the Plaintiffs, I hold that sufficient justice has been done to the Plaintiffs."

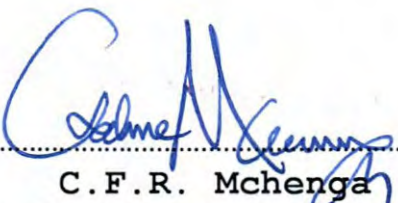
[70] We find no basis on which this decision can be assailed.

[71] It follows, that we equally find that the cross appeal is devoid of merit and we dismiss it.


VERDICT

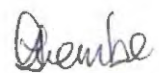
[72] We find no merits in both the appeal and the cross appeal and we dismiss them.

[73] Both the appeal and the cross appeal having failed, we make no order as to costs before this court.


C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT




K. Muzenga
COURT OF APPEAL JUDGE


Y. Chembe
COURT OF APPEAL JUDGE