

file copy

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

Appeal No. 96/2019

BETWEEN:

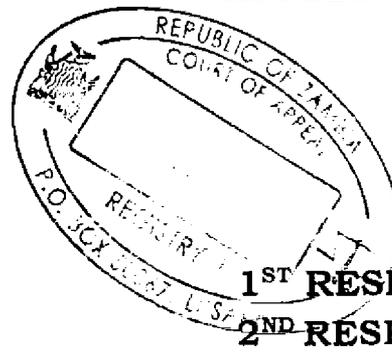
PHILLIP MUSONDA

(Suing in his capacity as Administrator
of the Estate of the late Abel Musonda)

APPELLANT

AND

**LAWRENCE CHUNGU
ATTORNEY GENERAL
ZAMBIA FORESTRY AND FOREST
INDUSTRIES CORPORATION LIMITED**



1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

Coram: Kondolo, Makungu and Siavwapa J.J.A
On the 22nd day of May, 2019 and on the 2nd September, 2020

For the Appellant: In person

For the 1st Respondent: No appearance

For the 2nd Respondent: No appearance

For the 3rd Respondent: Mr. C.K. Sikazwe - Corporation Secretary for ZAFFICO

JUDGMENT

MAKUNGU JA, delivered the Judgment of the Court.

Cases referred to:

1. *Sablehand Zambia Limited v. Zambia Revenue Authority* (2005) Z.R 109
2. *Kunda v. Konkola Copper Mines PLC*, Appeal No. 48 of 2005-
3. *Beatrice Muimui v. Sylvia Chunda SCZ*, Appeal No. 50 of 2000
4. *Frank Malichipa and others v. Tanzania - Zambia Railway Authority* (2008)

1.0 INTRODUCTION

1.1 The appellant, who was the plaintiff in the court below, commenced an action against the three defendants, now respondents respectively by way of a writ of summons accompanied by a statement of claim. He claimed for possession of House No. SD41 Dola Hill, Ndola, an order of eviction of the tenant, mesne profits, house repairs, damages and costs. The Hon. Madam Justice Y. Chembe dismissed his case in a Judgment dated 12th February, 2019. It's against that Judgment that his appeal lies.

2.0 EVIDENCE BEFORE THE LOWER COURT

2.1 The plaintiff's case rested on the evidence of three witnesses including the appellant. Their combined evidence was as follows: The plaintiff is the administrator of the estate of his late brother Abel Musonda who died on 10th October, 2013. In the year 2000, the late Abel Musonda was employed on contract as a Bar Manager and Cashier by Forest Rangers Football Club under Zambia Forestry and Forest Industries Corporation Limited (ZAFFICO). His contract of employment was terminated sometime in 2004 or 2005. Abel Musonda was married to

Joana Musole a Teacher at Dola Hill Basic School. Upon termination of his employment, he and his wife moved into House No. SD41 Dola Hill, Ndola which was allocated to his wife by virtue of her employment as the Ministry of Education was renting it from ZAFFICO. Joana Musole passed away on 10th July, 2006 without being offered the house to purchase and Abel Musonda continued occupying the house.

2.2 On 18th August, 2001 the Government of the Republic of Zambia decided to sell ZAFFICO houses to sitting tenants. Abel Musonda was requested to vacate the house as Dola Hill Primary School Management had decided to allocate it to a serving teacher. He moved out of the house in March, 2010. On 1st May, 2011, Lawrence Chungu, the 1st defendant who was a teacher at the school, took occupation of the house which was sold to him on 16th April, 2011.

2.3 The plaintiff claimed that there was foul play in the manner that the house was sold to the 1st defendant because Lovemore Wilombe a Head Teacher at Dola Hill Basic School and the 1st defendant fraudulently modified the Tenants Register by

omitting the name of Abel Musonda in order to facilitate the sale of the house to the 1st defendant.

2.4 Mr. Wilombe was removed from the proceedings for misjoinder on 9th December, 2015. The plaintiff did not produce in evidence the Tenants Register which was purportedly forged.

2.5 The 2nd and 3rd defendants did not adduce any evidence.

3.0 DECISION OF THE LOWER COURT

3.1 Justice Chembe deduced from the pleadings and the evidence on record that the basis of the plaintiff's claim was that the late Abel Musonda was a sitting tenant of House No. SD41 Dola Hill, Ndola.

3.2 She found no evidence that the late Abel Musonda's wife qualified to purchase the house at the time of her death. She also found no proof that the late Abel Musonda was eligible to purchase the house.

3.3 The Judge went on to state that although the government policy of selling the houses was publicized in 2001, ZAFFICO only started selling the houses in 2011 according to the plaintiff's evidence.

3.4 The Judge further found that the plaintiff's allegation of fraud in the manner that the 1st defendant was offered the house was not proved. She relied on the case of **Sablehand Zambia Limited v. Zambia Revenue Authority** ⁽¹⁾ where the Supreme Court held:

“Allegations of fraud must, once pleaded, be proved on a higher standard of proof, than on a mere balance of probabilities, because they are criminal in nature.”

3.5 Accordingly, she dismissed the case with costs.

4.0 GROUNDS OF APPEAL

4.1 The appellant has advanced three grounds of appeal:

1. *The lower court erred in law and fact when it held that the plaintiff did not adduce any evidence to prove that there was fraud in the manner that the 1st respondent was offered to purchase the house, when the statement of claim revealed the method used to deprive his late brother of the opportunity to purchase the house.*

2. *The lower court erred in law and fact by removing Mr. Oswell Zulu, Mr. Lubinda Manginda and Mr. Lovemore Wilombe from the proceedings before trial.*
3. *The lower court erred in law and fact by not looking at why the respondents' changed the ownership of House No. SD41 after the presidential announcement of selling ZAFFICO houses to sitting tenants.*

5.0 APPELLANT'S ARGUMENTS

- 5.1 The appellant relied on the heads of argument filed on 4th June, 2019; In support of ground one, the appellant submitted that the 1st respondent was not a sitting tenant by 16th April, 2011 when the official announcement to sell ZAFFICO houses was made by the former Republican President Rupiah Banda on 16th April, 2011.
- 5.2 He contended that he had adduced evidence to prove the fraudulent manner in which the 1st respondent was offered to purchase the house. That he made efforts to report the matter to police Anti-Fraud Unit as shown in the letters appearing on pages 61 and 62 of the record of appeal. However, the

defendants' failed to appear before the police for further investigations which could have exposed them.

5.3 On the second ground of appeal, the appellant argued that the defendants' whose names were struck out from the action were key witnesses. For instance, Oswald Zulu, a member of the Sitting Tenant's Committee would have produced the Register of Tenants and answered questions with regard to the alleged fraud.

5.4 With regard to the third ground of appeal, the appellant claimed that Oswald Zulu, Lubinda Manginda and Lovemore deleted the deceased's name from the Register of Sitting Tenants and instead added the 1st defendant's name and yet he was not a sitting tenant at the time of the Presidential pronouncements in 2011. The appellant stated that at the time of the offer, the 1st defendant was staying in Twapia as evidenced by the letter dated 12th July, 2011 at page 94 and 95 of the record.

5.5 The appellant went on to submit that when the former President F.T.J Chiluba visited Dola Hill residents, he directed ZAFFICO to register the sitting tenants of ZAFFICO houses and the register appearing on pages 40 as exhibit 'PM11' was compiled,

where the house in issue was registered under the names of J. Musole Musonda as shown on item No. 191. The 1st respondent's name does not appear on that list.

6.0 1ST AND 2ND RESPONDENT'S ARGUMENTS

6.1 The 1st and 2nd respondents did not file heads of argument.

7.0 3RD RESPONDENT'S ARGUMENTS

7.1 The 3rd respondent filed Heads of Argument on 5th June, 2020 which were entirely relied upon by counsel: In opposing ground one, it was submitted that the Judgment of the lower court is sound. The appellant placed reliance on his statement of claim which by its very nature is not evidence but rather a detailed indication of his claims.

7.2 It was submitted that the appellant's second ground of appeal has no merit as the misjoined defendants were possible witnesses who were not supposed to be parties to the suit. The appellant was free to call them as witnesses.

7.3 To counter the third ground of appeal, it was contended that the appellant misunderstood the role of the court in civil matters, as he blames the lower court, for not calling for evidence and

yet it was his duty to call witnesses. Reference was made to the case of **Kunda v. Konkola Copper Mines PLC** ⁽²⁾ on the principle that he who alleges must prove. We were urged to dismiss the appeal with costs.

8.0 APPELLANT'S REPLY TO 3RD RESPONDENTS HEADS OF ARGUMENT

8.1 In reply, the appellant repeated what he had stated in his heads of argument. He also irregularly raised issues which were unrelated to the respondent's heads of argument and requested for an order that the respondent calls certain witnesses to adduce further evidence.

9.0 DECISION OF THIS COURT

9.1 We have considered the record of appeal and the submissions made by the appellant and 3rd respondent's advocate. We shall deal with grounds one and three together as they are connected. Ground two will be tackled separately.

9.2 It is not in dispute that the late Abel Musonda was employed as a Bar Manager and Cashier by ZAFFICO under Forest Rangers Football Club on contract basis. At the time of moving into the

said house, he was already out of employment. He moved into the house with his late wife to whom the house was allocated by virtue of her employment. There was no evidence that at the time of her death, she had been offered the house to purchase. What is clear from the record is that when Abel Musonda's wife passed away, Abel Musonda continued residing in the house.

9.3 We take judicial notice that ZAFFICO is a State Owned Enterprise (SOE) and a subsidiary of the Industrial Development Corporation (IDC) incorporated under the Companies Act Chapter 388 of the Laws of Zambia.

9.4 The Supreme Court has in a number of cases laid down the criterion for purchasing government houses. We shall only refer to a few of them in this Judgment. In the case of **Beatrice Muimui v. Sylvia Chunda**,⁽³⁾ the Supreme Court established that:

“Being a sitting tenant is not the sole criterion in purchasing of a government house in the current policy of empowering employees by government. The other important criterion is that the

potential purchaser has to be an employee of the government/quasi government organization.”

9.5 In the case of **Frank Malichipa and others v. Tanzania – Zambia Railway Authority** ⁽⁴⁾ the Supreme Court held *inter alia* that:

“1. The law is settled that for somebody to be eligible to purchase a house from the government of the Republic of Zambia and or a parastatal body, that somebody has to be:

(a) A sitting tenant and at the same time either he or she is an employee or former employee not yet paid his or her terminal benefits.

(b) Widow or child of the deceased employee of the government of the Republic of Zambia or parastatal, who has not yet been paid his or her terminal benefits at the time the scheme was put in place;

(c)

(d)

(e)

(f)

2. There is no law, constitutional or general law, which compels an unwilling, person to sell his property to a sitting tenant.

9.6 In the present case, there was no evidence that Abel Musonda's wife worked for ZAFFICO although she was the rightful sitting tenant before her death.

9.7 Following the cases of **Beatrice Muimui** ⁽³⁾ and **Frank Malichipa**, ⁽⁷⁾ we hold that the 3rd respondent was under no legal obligation to sell the house in question to the late Abel Musonda or to his estate as it was not offered to him, neither was it offered to his wife and they were both not eligible to purchase it as they were not employed by ZAFFICO.

9.8 From the evidence on record, it appears that Abel Musonda willingly vacated the house and never laid a claim to it. Under the circumstances, there is no basis for the appellant's claim purportedly on behalf of the estate and the claim is misconceived.

9.9 In view of the foregoing determination, the claim that the 3rd respondent fraudulently removed the late Joana Musole from the Register of Sitting Tenants and replaced her with the 1st respondent, has become otiose.

9.10 Coming to the second ground of appeal, we opine that the appellant should have appealed against the ruling to remove some of the defendants from the proceedings if he was aggrieved by the order. It is too late to bring issues of misjoinder. This ground of appeal also has no merit and cannot stand.

10.0 CONCLUSION

10.1 All in all, the entire appeal fails and it is dismissed with costs to the 3rd respondent to be taxed if not agreed upon between the parties.


.....
M.M. KONDOLO
COURT OF APPEAL JUDGE


.....
C.K. MAKUNGU
COURT OF APPEAL JUDGE


.....
M.J. SIAVWAPA
COURT OF APPEAL JUDGE