

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

THE COMMISSIONER OF LANDS

1ST APPELLANT

THE ATTORNEY GENERAL

2ND APPELLANT

AND

STAR TANGANYIKA

RESPONDENT

CORAM: CHASHI, SICHINGA AND BANDA-BOBO, JJA

On: 18th June, 2021 and 3rd December, 2021

For the Appellant: Ms. M.S. Mushabati and Mr. E. Kwesa, both State Advocates from the Attorney General's Chambers

For the Respondent: Ms. C. Mwambazi of Messrs Central Chambers

JUDGMENT

BANDA-BOBO, JA, delivered the Judgment of the Court

Cases referred to:

1. *Benjamin Yorum Mwila v Victor John Bradury* (SCZ Judgment No.18 of 2013
2. *Anort Kabwe, Charity Mumba Kabwe v James Daka, The Attorney General and Albert Mbazima* (2006) ZR 12
3. *Attorney General v Marcus Achiume* (1983) ZR 1
4. *Zambia Revenue Authority and Goldman Insurance Limited* SCZ Appeal No. 84/06
5. *Netta Shimwambwa Shakumbila v Patrick Chibamba* SCZ/8/248/2014
6. *William David Carlisle Wise v E.F. Hervey Limited* (1985) Z.R.179 (S.C.)
7. *Anisminic Limited v Foreign Compensation Commission* (1969) 2 AC 147
8. *Corpus Legal Practitioners v Mwandanani Holdings Limited* SCJ Judgment No.50 of 2014

9. *Holman v Johnson* (1975) Cowp 341 (17)
10. *Sithole v Sithole* (1969) Z.R. 92.
11. *Mazoka and two others v Levy Patrick Mwanawasa and two others* (2005) Z.R. 138 (S.C.)
12. *Chimanga Changa Limited v Stephen Chipango Ngombe* (S.C.Z Judgment No. 5 of 2010).
13. *Undi Phiri v Bank of Zambia* (S.C.Z. Judgment Number 21 OF 2007)

Legislation Referred to:

1. *The Court of Appeal Rules, Statutory Instrument No 65 of 2016*
2. *The Rules of the Supreme Court White Book Edition 1999*
3. *The Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia*
4. *The Lands Act Chapter 184 of the Laws of Zambia*

Other Works Referred to:

5. *Halsbury's Laws of England (Volume 12 (1) (Reissue)*

1.0. Introduction

- 1.1. This is an appeal against a Ruling by Honourable Lady Justice, G. Milimo-Salasini, in which she found merit in all three grounds of appeal raised by the Respondent and ordered that the purported cancellation of the Certificates of Title (CoT) for the Appellant before her Court with regard to property No. Lot L/83/M and Lot F/867/XX2 be set aside.

2.0. Brief Background

- 2.1. The brief background to this matter is that by a letter dated 19th September, 2019 the Acting Commissioner of Lands, acting through the Chief Registrar, and without prior notice, invoked **section 11(1) of the Lands and Deeds Registry Act, Cap 185**

of the Laws of Zambia wherein he stated that the entries entered in the register with regard to the two properties in contention were entered in error and as such had to be corrected by way of cancellation. The Respondent, dissatisfied with the cancellations, and in accordance with **section 87 of the Lands and Deeds Registry Act**, appealed to the High Court of Zambia against the decision of the Acting Commissioner of Lands and Deeds, that cancelled the certificate of Re-entry which had been registered on Lot L/83/M and entries 1 and 2 on Lot F/867/XX2 pursuant to **section 11 (1) of the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia.**

2.2. The grounds of appeal were as follows:-

1. **That section 11 (1) of the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia does not empower the Commissioner of Lands/or Chief Registrar to cancel duly issued CoT, hence the purported cancellation of the Appellant's CoT number CT-51320 and CT-1008104 respectively is null and void ab initio;**
2. **That the decision by the Commissioner of Lands to invoke Section 11 (1) of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia to cancel the certificate of Re-entry on Lot L/83/ and entries 1 and 2 on Lot F/867/XX2 has no legal basis; and**
3. **That the Commissioner of Lands ought to have followed the procedure set out in section 34 of the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia in effecting cancellations.**

3.0 **Decision of the Lower Court**

3.1 After due consideration of the three grounds of appeal, the learned Judge determined the Appeal in her Ruling dated 16th July, 2020; and found as follows: -

- (i) In ground one, that Section 11 does not empower the Commissioner of Lands to determine disputes which have the effect of determining the rights of the parties to any land or to cancel a Certificate of Title duly issued to the registered proprietor of the land to which it relates. She based her decision on the **Corpus Legal Practitioners v. Mwandanani Holding Limited** case. That the ground succeeded.
- (ii) In ground two, she found that the purported re-entry by the Commissioner of Lands was not valid in law, based on the authority of **Arnot Kabwe and Charity Mumba Kabwe v. James Daka, The Attorney General and Albert Mbazima** which set out the conditions to be satisfied for a repossession to be valid,
- (iii) In ground three, that the Commissioner of Lands ought to have followed the procedure as set out in **Section 34 of**

the Lands and Deeds Registry Act in effecting the cancellation of the Certificate of Title.

In sum, all the three grounds set out in the appeal succeeded.

3.2 Dissatisfied with the Ruling dated 16th July, 2020 of the High Court, the Appellants have now appealed to this Court on the following four grounds:

- (1). The court below misdirected itself in law when it held that the purported cancellation of the CoT Number CT-51320 and CT-1008104 is null and void ab initio when in fact the Commissioner of Lands was merely exercising his powers under **section 11(1) of the Lands and Deeds Registry Act** and not adjudicating on disputes.
- (2). That the trial Judge erred in law when she held that there was no legal basis for the cancellation of the certificate of Re-entry on Lot L/83/M and entries 1 and 2 on Lot F/867/XX2 in view of her finding of fact that the purported re-entry of the properties when they were registered under Roan Antelope Mining Corporation of Zambia (in Receivership) (RAMCOZ) by the Commissioner of Lands and was not valid at law.

- (3). That the Court below erred in law and fact when it failed to appreciate the effect of **section 11(1) of the Lands and Deeds Registry Act**, with respect to the particulars of mistakes as adduced before the Court;
- (4). That the Court below erred in law and fact when it placed reliance on the Respondent's Affidavit in Reply despite the Parties having agreed and the Court having ordered, at the hearing, that in the interest of justice, the Affidavit in Reply would not be relied on.

4.0 Heads Of Arguments

(a) By the Appellant

- 4.1 When the matter came up for hearing, Counsel for each party relied on their heads of argument, with oral supplementation. Counsel for the Appellants, Ms. Mushabati submitted that they would be arguing grounds one and three together because both related to the same properties while ground two would be argued separately as it related to the second property being Lot L/83/M and that ground four would be argued separately as it dealt with all the properties in general.
- 4.2 In grounds one and three, Counsel conceded that **Section 11 (1) of the Lands and Deeds Registry Act** did not entitle the

Registrar to cancel a duly issued CoT, but submitted that it was the learned trial Judge's judicial duty to go the extra mile and pronounce herself on the implications of the evidence against the Respondent notwithstanding the wrong procedure used by the 1st Appellant. Counsel argued that the CoT in relation to F/867/XX2 was validly issued to RAMCOZ who legally held the CoT as evidenced by exhibit "**MCK3**" of the affidavit in opposition, while another CoT exhibited as "**AM1**" in the affidavit in support was granted to Star Tanganyika. It was Counsel's argument that the subsequent CoT that was issued to Star Tanganyika did not in any way cancel the validity of the initial CoT that was issued to RAMCOZ who validly held title on property F/867/XX2.

- 4.3 Counsel submitted that even though a wrong procedure was invoked by the 1st Appellant to correct the mistake, the court below should have taken into consideration the implication of the CoT marked as "**MKC3**", and that the only logical and inevitable outcome should have been the invalidation of the subsequent CoT marked as "**AM1**". To support this, Counsel cited the case of **Benjamin Yorum Mwila v Victor John Bradury**¹ where the Supreme Court held that:

“If a wrong procedure is followed, this should not negate/nullify the inevitable legal consequences when the Court considers all the evidence”.

- 4.4 Therefore, it was Counsel’s submission that, even though the wrong section was invoked by the Registrar, justice should not be denied, as rules of procedure should be used as handmaidens of justice but not to defeat it. Counsel prayed that this Court should consider the supplementary evidence in the court below in the record of appeal and allow the Appellant’s appeal, and uphold the actions of the 1st Appellant notwithstanding that the wrong procedure was used.
- 4.5 With regard to ground two, relating to property No. Lot L/83/M, Counsel submitted that it was a misdirection by the court below to hold that there was no legal basis for the re-entry on subsequent titles that were issued in the name of Star Tanganyika given the finding of fact on re-entry on RAMCOZ.
- 4.6 Counsel argued that the court below made a correct finding of fact when it found that the certificate of re-entry dated October 2018 was made to a wrong party being China Non-Ferrous Metals Copper Mines instead of RAMCOZ. Counsel argued that the learned trial Judge having made that finding, was duty bound to go further and interpret the legal effect of this on the

subsequent allocations of properties on the land in question to the Respondent. She submitted that Star Tanganyika did not have good title. Counsel argued that the learned trial Judge should have then confirmed the actions of the 1st Appellant and directed on the options for restitution that were lawfully available to the Respondent. She further argued that the Judge should have come to the logical conclusion that, no good title had passed on to the Respondent, and that, title could not be created on an existing title. Reliance was placed on the case of **Anort Kabwe, Charity Mumba Kabwe v James Daka, The Attorney General and Albert Mbazima**². Counsel argued that the court below was duty bound to pronounce itself on the effect the re-entry had on the title purportedly passed on to the new owners of the land.

4.7 Counsel cited the case of the **Attorney General v Marcus Achiume**⁴ for the proposition that, this court being an appellate court can only reverse the findings of fact if they were perverse or made in the absence of any relevant evidence or upon misapprehension of facts. Reference was made to the case of **Zambia Revenue Authority and Goldman Insurance Limited**⁵ where the Supreme Court held that, a trial court is

expected to have a proper and well-balanced view of the whole evidence before it. Counsel argued that, the trial court below neglected to apply the finding of fact to conclusively determine the legal consequences on all parties that had interest in the properties in dispute. Further that, in the case of **Netta Shimwambwa Shakumbila v Patrick Chibamba**⁶, it was held that:-

“an unbalanced evaluation of evidence, where only flaws of one side but not of the other are considered, is a misdirection which no trial court should reasonably make and entitles the appeal court to interfere. The trial court should ensure a balanced view of the evidence before them.”

Counsel submitted that the court below completely disregarded the vital findings of fact that was key in determining actual ownership of the properties subject to the appeal. Counsel prayed that this Court should rule that the legal owner of the property No. L/83/M is not the Respondent but that the property belonged to RAMCOZ.

4.8 In ground four, Counsel argued that the Appellants were denied an opportunity to refute the allegation that the Respondent had no constructive notice of the internal procedures of the 1st Appellant in issuing the certificate of re-entry. She argued that

this was because the Respondent totally disregarded what was agreed at the hearing wherein it was brought to the court's attention that the Appellants did not have occasion to obtain instructions on the issue of constructive notice. Reliance was placed on the case of **William David Carlisle Wise v E.F. Hervey Limited**⁷ regarding the nature of pleadings which serve the useful purpose of defining the issues of fact and law to be decided. Further that pleadings allow each party distinct notice of the case intended to be set up by the other.

(b) **By the Respondents**

4.9 In arguing ground one, Counsel for the Respondent Ms. Mwambazi submitted that the court below did not misdirect itself in law and fact when it held that the purported cancellations of the CoT were null and void ab initio. Counsel argued that the Appellant had failed to appreciate the Respondent's argument because the issue that fell to be resolved was procedural in nature. She submitted that **section 11(1) of the Lands and Deeds Registry Act** was adequately addressed by the trial Judge.

4.10 Counsel argued that the Appellants' citation of the case of **Benjamin Yorum Mwila v Victor John Bradury**¹ did not apply

in *casu* and that the same can be materially distinguished as that case related to the question whether the trial court then, was right to proceed on affidavit evidence without according the parties a chance to be heard, whereas in the present case, the issue related to whether the Commissioner of Lands had a right to invoke **Section 11 (1) of the Lands and Deeds Registry Act** in the manner that he did. She submitted that the courts of law cannot aid in perpetuating illegalities that go to jurisdiction of an authority. In support of this she cited the case of **Anisminic Limited v Foreign Compensation Commission**⁸.

4.11 She further argued that the Appellants had conceded that the use of the procedure by the Commissioner was an error and that the facts of this case were in consonance with the Supreme Court's holding in the case of **Corpus Legal Practitioners v Mwandanani Holdings Limited**⁹ where the court warned against correcting the register under **section 11 of the Lands and Deeds Registry Act**, under the pretense of merely exercising his power, should not have the effect of resolving a dispute in favour of one party over the other and should not cancel a duly issued CoT. Counsel submitted that this ground lacked merit.

4.12 With respect to ground three, Counsel submitted that the lower court did not fail to appreciate the effect of **section 11(1) of the Lands and Deeds Registry Act** with respect to the particulars of mistake. She argued that it was immaterial that the Appellants alleged an error or omission on account of mistake, because the position of the law as expounded in the **Corpus Legal Practitioners case**, is that if such error or omission, sought to be rectified under **section 11(1) of the Lands and Deeds Registry Act** ends up resolving a dispute in favour of one party against the other, and ultimately results in cancellation of a duly issued CoT, then such an action by the Commission of Lands would be illegal.

4.13 Counsel argued that, in casu, the 1st Appellant admitted that the effect of the corrections was that the duly issued CoT were cancelled and given to another party RAMCOZ which effectively resolved the dispute between the two parties. She contended that the Supreme Court of Zambia condemned and labeled such an act as an illegality. She submitted that ground three lacked merit.

4.14 In ground two, Counsel sought to identify the question that was up for determination in the lower court. She submitted that the

parametres of pleadings were not challenging how the certificate of re-entry was issued but whether the actions of the Commissioner of Lands were in line with **section 11(1) of the Lands and Deeds Act**. She argued that the trial Judge's finding that the cancellations under **section 11(1) of the Lands and Deeds Registry Act** had no legal basis was on firm ground. She said that this was in light of the fact that the cancellation had the effect of resolving the dispute in favour of one party over the other and ultimately cancelled a duly issued title.

4.15 Additionally, Counsel argued that in the supplementary record of appeal there was no documentary evidence led by the Appellants to show that the re-entry was wrongly entered or served on the wrong party. She argued that the trial judge's finding that the re-entry was not valid was perverse and not backed by the evidence on record. She submitted that this Court ought to reverse these finding of facts as per the case of **The Attorney General v Achiume**⁴. Further, Counsel submitted that the Appellants submission that the trial judge was duty bound to go further to interpret the fact that the Respondent did not obtain title was false in principle and in law

because the underlying principle of illegality as per the case of **Holman v Johnson**¹⁰ was that:

“the Court will not lend its aid to someone who founds his case of action upon an immoral or illegal act”

and that, in this case, the 1st Appellant was attempting to justify an illegal act.

4.16 Counsel also submitted that the case of **Anort Kabwe, Charity Mumba Kabwe v James Daka, the Attorney General and Albert Mbazima**² was inapplicable in casu because in that case, the Commissioner of Lands did not cause a certificate of re-entry in the lands register, while in this case, the notice of re-entry and subsequent certificate of re-entry were entered in the Lands and Deeds Register by the 1st Appellant. She submitted that the trial judge could not delve into the merits of the case when the issue presented was on the error in law relating to the jurisdiction of the 1st Appellant. Counsel submitted on the Appellant’s reliance on the cases of **Zambia Revenue Authority and Goldman Insurance Limited and Netta Shinumbwa Shakumbila v. Patrick Chibamba** and said these could materially be distinguished as the issue before Court was

cancelling of titles under **section 11 of the Lands and Deeds Act**, while the cited cases dealt with a failure to discharge judicial functions which was not the case here. That **section 11(i) Lands and Deeds Act** deals only with corrections in the register, but its net effect is not settling of dispute nor cancelling duly issued CoT.

4.17 Regarding ground four, Counsel for the Respondent conceded that the parties agreed not to place reliance on the Respondent's Affidavit in Reply. However, she argued that the same did not have an impact on the question to be determined by the lower Court. That even if the Reply was not relied upon, counsel for the Respondent had adequately augmented the position in the Affidavit in Reply, which the learned trial Court took note of on page 120 and 121 of the Record of Appeal.

4.18 She submitted that the sum total of their argument in ground four was that even if the affidavit in reply was not relied upon the trial judge would have still come to the same conclusion based on the augmented submissions appearing at page 136 and 137 of the Record of Appeal, lines 15 onwards. Lastly, Counsel submitted that what ought to be taken into account without relying on the affidavit in reply is that the

Commissioner of Lands is not empowered to make corrections to the register under **section 11(1) of the Lands and Deeds Registry Act** and therefore ground four must equally be dismissed.

4.19 Mr. Kwesa, Counsel for the Appellants, augmented orally that the Appellants held the view that the court below misdirected itself when it held that the purported cancelation of the two CoT were void ab initio, when the properties were already on title and held by RAMCOZ. He added that the CoT were created on a sub division of an already existing property. He submitted that because of the above, it was necessary to cancel the title because it was created on an already existing title and therefore the action by the Ministry of Lands on Lot 83/M to correct the mistake was not erroneous and that there was evidence on record that spoke to the mistake.

5.0 Decision of this Court

5.1 We have perused the Record of Appeal and considered the Ruling of the Court below and the submissions filed by learned Counsel for the parties.

- 5.2 In this appeal, we will consider ground two first and then grounds one and three separately, despite the Appellants arguing them together. We are of the view that the issues raised though may appear interrelated, for clarity they should be dealt with individually, while ground four will be considered at the end.
- 5.3 As regards ground two, the contention is that it was a misdirection by the court below to hold that there was no legal basis for cancellation of the certificate of re-entry on L/83/M and entries 1 and 2 on Lot F/897/XX2 given the finding of fact that the purported re-entry on RAMCOZ property, especially, when the trial Judge found that the re-entry was not valid at law.
- 5.4 Counsel for the Appellants' argument was that the court, having correctly determined that the notice of re-entry was invalid as it did not meet the threshold, she should not have arrived at her conclusion of cancelling RAMCOZ's CoT. Counsel for the Appellants' argument is that the Judge having found as aforestated should have gone further to interpret the legal effect of her findings, these being the subsequent allocation of properties in question to the Respondent.

5.5 The Respondent on the other hand argues that the learned trial Judge was on firm footing when she cancelled the CoT and found that **section 11(1) of the Lands and Deeds Registry Act** had no legal basis on account that the said cancellations had the effect of resolving a dispute in favour of one party over the other. The Respondent vehemently disagrees that the trial Judge was duty bound to go further in interpreting the law. She argued that the fact that the Respondent did not get good title was false in principle and in law.

5.6 The provisions of the law found in **section 13 (1) of the Lands Act** and the case of **Anort Kabwe, Charity Mumba Kabwe v James Daka²** are instructive on the procedure regarding re-entry. Specifically, **section 13 (1) of the Lands Act**, provides as follows:

“Where a lessee breaches a term or condition of covenant under the Act, the President shall give the lessee three months’ notice of his intention to cause a Certificate of re-entry to be entered in the register in respect of the land held by the lessee and request him to make representations as to why a Certificate of re-entry should not be entered in the register.”

5.7 We agree with the trial Judge that the purported re-entry was not valid because the procedure under **section 13 of the Lands Act** was not followed. It is clear from the record that the notice

of re-entry was served on China Non-Ferrous Metal Copper Mines and not RAMCOZ, who are the original owners of the property in contention. Consequently, the holder of the CoT at that time, RAMCOZ was not given an opportunity to make representation against the notice of re-entry because the notice was served on a wrong party. We agree with the court below, that since the notice of re-entry was not served on the property owner, the notice of re-entry was invalid at law. There was thus no valid repossession of the land in issue. There was therefore a legal basis for the cancellation of the certificate of title held by the Respondent herein on the properties in contention, since the Judge found that the notice of re-entry was not in conformity with the Law.

- 5.8 We also agree that having found thus, the trial Judge should have gone a step further and pronounced herself on the effect of her finding that the re-entry was invalid at law. The trial Judge erred in finding that the subsequent re-allocation of the land to a new owner being the Respondent was valid contrary to her findings. We are of the view that the trial Judge should have intervened by making a pronouncement that since the notice of re-entry was served on the wrong party, and therefore

not in conformity with the law, the CoT subsequently issued to the Respondent was invalid and the properties be reinstated to RAMCOZ being the original owner. Our view is that since the procedure used to effect re-entry was defective, the CoT for Star Tanganyika cannot be valid. Based on the case of **Marcus Achiume**³ we upset the finding of fact by the learned trial Judge that held that there was no legal basis for the cancellation of the certificate of re-entry on lot L183/M and entries 1 and 2 on lot F/867/XX2. We order that the properties revert to RAMCOZ the original owners. This ground succeeds.

5.9 In ground one, Counsel for the Appellants conceded that the use of **section 11 (1) of the Lands and Deeds Registry Act** in cancelling the title by the Commissioner was wrong. However, Counsel contended that the court should have gone further to pronounce itself on the evidence against the Respondent notwithstanding the wrong procedure used by the 1st Appellant. Their argument was that the subsequent CoT issued to the Respondent did not cancel the validity of the original CoT held by RAMCOZ and that the only logical and inevitable outcome should have been the invalidation of the subsequent CoT to the Respondent.

5.10 The Respondent on the other hand contends that the lower court did not misdirect itself in law and fact when it held that the purported cancellations of the CoT was null and void ab initio when the Commissioner of Lands used **section 11(1) of the Lands and Deeds Registry Act** to cancel the said title.

5.11 **Section 11 (1) of the Lands and Deeds Registry Act** is couched as follows:

“Where any person alleges that any error or omission has been made in a Register or that any entry or omission therein has been made or procured by fraud or mistake, the Registrar shall, if he shall consider such allegation satisfactorily proved, correct such error, omission or entry as aforesaid.”

Further in the case of **Corpus Legal Practitioners v Mwandanani Holdings Limited**⁸ it was held that:

“In our view, Section 11 of the Lands and Deeds Registry Act is concerned with the process of correcting errors and omissions to entries made in the lands register by the Registrar of Lands and Deeds. It does not empower him to determine disputes which have the effect of determining the rights of the parties to any land or to cancel a Certificate of Title duly issued to the registered proprietor of the land to which it relates. In Anti- Corruption Commission v Barnnet Development Corporation Limited⁴, we held that, under Section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of land by the holder thereof although it can be challenged and cancelled, for fraud or other reasons relating to impropriety, in its acquisition.

We further take the view that a person alleging fraud or any other impropriety, with regard to the issuance of a

Certificate of Title, must challenge the same through a Court action and prove the allegations of fraud or other impropriety, as the case may be, to obtain a Court order for the cancellation of the affected Certificate of Title by the Registrar of Lands and Deeds.” (emphasis by the court)

5.12 A perusal of the cited section reveals that the Registrar is not empowered to determine disputes which have the net effect of determining the rights of the parties to any land, or to cancel a CoT that was duly issued. Further as per the **Corpus Legal Practitioners case**, where a person alleges some form of impropriety or fraud regarding the issuance of the CoT, one must challenge the same through a court action to prove the said fraud or impropriety or obtain a court order for the cancellation of the affected CoT. A perusal of page 62 of the Record of Appeal reveals that the learned trial Judge in the court below based her holding on the above cited case. She agreed that **section 11(1) of the Lands and Deeds Registry Act** does not give the Registrar power to determine the rights of the parties to any land or to cancel it. This limb of the appeal succeeds.

5.13 The Appellants also argue that although a wrong procedure was invoked by the 1st Appellant to correct a mistake, the Court

should not nullify the inevitable legal consequence based on all the evidence before it. We have read the case of **Benjamin Yorum Mwila v Victor John Bradbury**¹ and in our view, that case is distinguishable from the present case as rightly pointed out by Counsel for the Respondent. That case was based on the fact that having filed summons, the learned Judge should have accorded the parties an opportunity to be heard and that the court was of the view that had the learned Judge heard the parties he would still have arrived at the same decision. That is not what is in contention in *casu*. The courts can never condone an illegal act just because the outcome is correct.

5.14 In our view, the effect of the learned trial Judge's finding was that she was reinstating the CoT to the Appellants. Further, it is patent that the Commissioner of Lands was merely exercising his powers under **Section 11 (1) of the Lands and Deeds Registry Act** and not adjudicating on disputes. The net effect of the purported cancellation done under the said Section was that the Commissioner of Lands effectively resolved the issue of ownership of the land between the parties. In this case, the Commissioner determined, without following due process, that RAMCOZ owned the land. We agree with the Respondent that

the Commissioner went beyond the powers of merely correcting errors and mistakes and that he had no authority to determine ownership. The Judge therefore cannot be faulted. There is no merit in ground one and it is dismissed.

5.15 In considering ground three the Appellant's argument is that the court below failed to appreciate the effect of **section 11(1) of the Lands and Deeds Registry Act** in relation to the particulars of mistake as adduced before the court. We agree with the Appellants that the issuance of the CoT to Star Tanganyika while RAMCOZ was still the valid owner of the property was illegal. A perusal of the record of appeal in particular at page 2 of the Supplementary bundle of documents reveals in paragraph eight (8) and nine (9) that particulars of mistake were presented before the trial court. Further, despite the Respondent's contending that they followed due procedure regarding the allocation of land by the Commissioner of Lands the effect is that RAMCOZ's CoT was not cancelled by the subsequent issuance of the CoT to the Respondent. The onus is greater on the party that alleges as per the **Sithole v Sithole Case** ¹⁰. Therefore, the court below failed to consider the impact of the evidence regarding the 1st Appellant in relation to mistake

and thus failed to conclusively determine the legal consequences on all parties that had interest in the property in dispute. Therefore, our holding is that RAMCOZ is still the valid owner of the CoT over the properties in contention. Ground three has merit.

5.16 In ground four the Appellants argue that the court erred by placing reliance on the affidavit in reply when it was agreed by the parties at the hearing that that would not be the case. They argue that they were denied an opportunity to refute the allegation that the Respondent had no constructive notice of the internal procedures of the 1st Appellant issuing the certificate of re-entry. The Respondent on the other hand, argue that even if the affidavit in reply was not relied upon the trial court would have still come to the same conclusion based on the arguments submitted.

5.17 The issue of pleadings has been determined in a plethora of cases such as Mazoka and two others v Levy Patrick Mwanawasa and two others¹¹, Chimanga Changa Limited v Stephen Chipango Ngombe¹² and Undi Phiri v Bank of Zambia¹³. All emphasised the importance of pleading all

material facts so that matters a party wishes to rely upon in proving or resisting a claim are clearly set out.

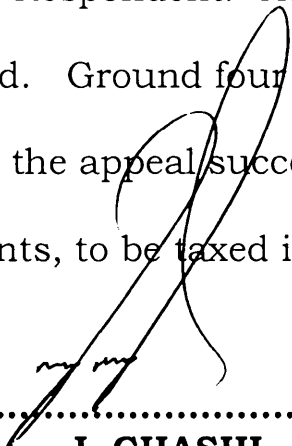
5.18 Further these cases advance the point that parties should not be allowed to use an affidavit in reply to negate the existence of a genuine issue of material fact because the opposing party has no explicit right to respond to the plaintiff's affidavit in reply. The point is that the opposing party should have an opportunity to respond to the new evidence if any, in order to ensure that it has been afforded the procedural rights to which it is entitled under **Order 5 of the High Court Rules and Order 28 of the Rules of the Supreme Court**.

5.19 In our view, the learned trial Judge erred in law and in fact by placing reliance on the Respondent's affidavit in reply, in the summary of the party's arguments in her Ruling. We reject the Respondent's argument that despite the Judge placing reliance on the affidavit in reply she still would have arrived at the same conclusion as she did. It is our view that when pleadings are placed before a Judge, they help form the basis of the case before them. Therefore, pleadings play an important role in the analysis of the issues in contention. Consequently, having agreed with the parties at the hearing of the trial, not to place

reliance on the affidavit in Reply, the Judge's mind should not have been cast to that particular document. It is our view that the Appellants were prejudiced because they were not afforded an opportunity to respond to issues relating to constructive notice raised by the Respondent. Therefore, their procedural rights were prejudiced. Ground four therefore has merit.

5.20 The net result is that the appeal succeeds.

5.21 Costs for the Appellants, to be taxed in default of agreement.



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J. CHASHI
COURT OF APPEAL JUDGE



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D. L. Y. SICHINGA, SC
COURT OF APPEAL JUDGE



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A. M. BANDA-BOBO
COURT OF APPEAL JUDGE