

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

APPEAL No 231/2020

BETWEEN:

**MEHMORD SULEMAN MOHAMED
SADIK PATEL MOHAMED SAKIL**

**1ST APPELLANT
2ND APPELLANT**

AND

**MIDLANDS BREWERIES (PVT) LIMITED
COMMISSIONER OF LANDS
LUSAKA CITY COUNCIL**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

CORAM: CHASHI, CHISHIMBA AND SIAVWAPA JJA
On 23rd August and 4th November 2022

For the Appellants: Mr. P. Songolo of Philsong and Partners

*For the 1st Respondent: Mr. Besa of Besa and Co with Mr. G.
Lungu of Muleza Mwiimbu and Co*

For the 2nd Respondent: Mr. N. Mwiya, Senior State Advocates

For the 3rd Respondent: Not in Attendance

J U D G M E N T

SIAVWAPA JA delivered the Judgment of the Court.

Cases referred to:

- 1 *Sailas Nzowami and Others v Flamingo Farm Limited Selected
Judgment No. 5 of 2019*

2. *Anti-Corruption Commission v Barnett Development Corporation Limited* (2008) 1 ZR 69
3. *Savenda Management Services v Stanbic Bank Zambia Limited* Selected Judgment No. 10 of 2018
4. *Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others* (2005) ZR 138

Legislation referred to:

The Lands and Deeds Registry Act, Chapter 285

1.0 INTRODUCTION

1.1 This appeal is against the Judgment of the High Court dated 17th April, 2020 delivered by the Honourable Mrs. Justice M. Mapani-Kawimbe.

1.2 By the said Judgment, the learned Judge ordered the cancellation of the Certificates of Title issued to the 1st and 2nd Appellants in respect of Plot Numbers LUSAK/LN-2804/1 and LUSAK/LN-2804/2 respectively.

1.3 The cancellation order was made upon the learned Judge's finding that there was impropriety in the manner the two plots were allocated to the Appellants.

2.0 BACKGROUND

2.1 Sometime in 2014, the Chief Executive Officer for the 1st Respondent identified a piece of land in the Chinika Light

Industrial Area and informed the 3rd Respondent about it and expressed interest in acquiring the piece of land.

2.2 Officers from the 3rd Respondent were tasked to go and ascertain the availability of the said piece of land in the company of the 1st Respondent's Chief Executive Officer.

2.3 Later, the 1st Respondent's Chief Executive Officer was advised to submit a formal application which he did by letter dated 15th March, 2014.

2.4 The 3rd Respondent then created two plots from the said piece of land and subsequently made a recommendation to the Commissioner of Lands, the 2nd Respondent herein, that the two newly created plots be allocated to the 1st Respondent.

2.5 Not having received any response to his application, the 1st Respondent's Chief Executive Officer was surprised to discover that someone was erecting a perimeter wall around the two plots.

2.6 This prompted the 1st Respondent's Chief Executive Officer to conduct a search on the Lands Register which revealed that the two plots had been allocated to the two Appellants.

2.7 Further investigations revealed that the Appellants were allocated the plots without submitting applications and that the files for the two plots had gone missing.

3.0 IN THE HIGH COURT

3.1 The above discoveries unsettled the 1st Respondent's Chief Executive Officer causing the 1st Respondent to commence an action in the High Court against the 2nd and 3rd Respondents and the Appellants.

3.2 In the amended statement of claim, the 1st Respondent claimed for the following:

1. *An order to compel the 1st Respondent to allocate the two commercial plots numbers LUSAK/LN-2804/1 and LUSAK/LN-2804/2, Lusaka to the Plaintiff as the initiator of the creation and the only applicant.*
2. *An order for cancellation of any Certificates of Title illegally obtained by reason of fraud in favour of the 2nd and 3rd Defendants for plots LUSAK/LN-2804/1 and LUSAK/LN-2804/2 respectively.*
3. *An order of interim injunction restraining the 2nd and 3rd Defendants either by themselves, agents, servants or employees from continuing with construction of their boundary wall fences or to have any dealing with the said land until determination of the matter.*

4. *An order to compel the 4th Defendant to demolish all illegal structures constructed by the 2nd and 3rd Defendants on the two (2) plots in dispute.*
5. *An order for vacant possession.*
6. *Damages for inconvenience and loss of use of the land*
7. *Any other relief the Court may deem fit*
8. *Interest*
- 9 *Costs*

4.0 **DECISION OF THE HIGH COURT**

4.1 In her Judgment, the learned Judge found that the recommendation by the Council to the Commissioner of Lands is not binding, that fraud was not proved but that procedural impropriety had been proved.

4.2 On the basis of the above findings of fact, the learned Judge dismissed the claims and ordered the cancellation of the Certificates of Title.

5.0 **THE APPEAL**

5.1 The Appellants expressed their displeasure with the Judgment of the Court below by filing a Notice and Memorandum of Appeal on 23rd September, 2020.

5.2 The Memorandum of Appeal contains the following grounds of Appeal;

4. *An order to compel the 4th Defendant to demolish all illegal structures constructed by the 2nd and 3rd Defendants on the two (2) plots in dispute.*
5. *An order for vacant possession.*
6. *Damages for inconvenience and loss of use of the land*
7. *Any other relief the Court may deem fit*
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earlier lost on account of the Commissioner of Lands' failure to follow the laid down procedure in effecting repossessions and confirming availability of land to the 1st Appellant and given that the Appellants had already developed the properties, by the time this action was being commenced and the Court below refused to halt the Appellant's construction activities.

4. The learned trial Judge erred in both law and fact when she cancelled the Certificates of Title for the Appellants after dismissing the Plaintiff's case in its entirety that sought cancellation of the Certificate of Title on account of fraud.
5. The learned trial Judge in the Court below misdirected herself in law and fact in that the finding of fact that there was procedural impropriety despite overwhelming evidence that proved that the Commissioner of Lands moved himself to compensate the Appellants and begged them not to sue his office and further that the Commissioner of Lands clearly played a key role in the failed land transaction for the 1st Appellant that led to the loss of the 1st Appellant's land and that the Commissioner of Lands also failed to follow procedure in repossessing the 2nd Appellant's property that led to loss of the 2nd Appellant's land is perverse as it was made in the absence of any relevant evidence properly before the Court to that

effect and was clearly made upon a misapprehension of the facts and it is a finding which, on a proper view of the evidence, no trial court acting correctly, can reasonably make.

6.0 **ARGUMENTS IN SUPPORT**

6.1 In their Heads of Argument filed into Court on 20th November, 2020, the Appellants argued grounds one and three together and the other grounds separately.

6.2 The gist of the arguments in grounds one and three is that the learned Judge in the Court below ought not to have ordered the cancellation of the Certificates of Title after dismissing all the claims by the 1st Respondent based on alleged fraud which the learned Judge found not to have been proved.

6.3 The Appellants also criticise the learned Judge for not declaring the lawful owners of the Plots in dispute when the evidence before the Judge clearly pointed to the Appellants as the owners.

6.4 The Appellants further argue that having dismissed the fraud allegation, the learned Judge was wrong to order the cancellation of the Certificates of Title on procedural impropriety which was not pleaded thereby depriving the Appellants of an opportunity to defend themselves.

6.5 In ground two the arguments are largely a repetition of the arguments in grounds one and three to the effect that procedural impropriety was not pleaded and neither was it argued by the 1st Respondent. They also argue that they were both offered the two pieces of land at the Commissioner of Lands' volition after he misled them as to the availability of the properties they had bought from private citizens and for breach of the re-entry procedure.

6.6 They further argue that given the wide discretionary powers enjoyed by the Commissioner of Lands in land alienation, he could not be faulted for offering them the plots in dispute.

6.7 The arguments in ground four are another attack on the learned Judge for ordering the cancellation of the Certificates of Title despite dismissing the 1st Respondent's claims and finding that fraud was not proved.

6.8 In ground five, the arguments on procedural impropriety are repeated as well as those expressing the Commissioner of Land's discretionary power to offer land.

7.0 ARGUMENTS IN OPPOSITION

7.1 The 1st and the 2nd Respondents filed their Heads of Argument on 22nd and 24th December 2020 respectively while the 3rd Respondent did not file Heads of Argument.

- 7.2 The 1st Respondent's arguments in grounds one and three can be summed up as firstly that the claims in the Court below did not include declaring the owner of the Plots but included an order for cancellation of the Certificates of Title.
- 7.3 Secondly that having found that the Commissioner of Lands offered the plots to the Appellants without them applying, the learned Judge was right to find procedural impropriety in the allocation and ordering cancellation on that basis.
- 7.4 In ground two the 1st Respondent argued that the Commissioner of Lands allocated the plots to the Appellants in breach of Circular No. 1 of 1985 without citing the law under which he made the allocations.
- 7.5 In ground four, the 1st Respondent has argued that procedural impropriety was part of the evidence in the Court below and that cancellation on account of procedural impropriety is supported by the Supreme Court Judgments in Sailas Nzowami and Others v Flamingo Farm Limited¹, on the basis of section 34 of the Lands and Deeds Registry Act.
- 7.6 With regard to ground five, the 1st Respondent was of the view that the same was a repetition of the arguments in other grounds.

7.7 The 2nd Respondent argued with reference to grounds one and three that the learned Judge did not need to declare ownership of the properties because section 34 of the Lands and Deeds Registry Act provides for cancellation of a Certificate of Title upon proof of impropriety in the allocation process.

7.8 The 2nd Respondent further argued that the learned Judge did not just pluck procedural impropriety from the air but that she picked it from the overwhelming evidence before her.

7.9 The 2nd Respondent argued grounds two, four and five together disputing the Appellants' argument that the 1st Respondent's claim was dismissed in its entirety because the claim for cancellation of the Certificates of Title was granted.

7.10 The further argument is that even if the argument for fraud was dismissed, the learned Judge ordered the cancellation on the basis of procedural impropriety based on the Supreme Court decision in Anti-Corruption Commission v Barnett Development Corporation Limited².

7.11 The 2nd Respondent also refuted the suggestion by the Appellants that the learned Judge granted a remedy outside the pleadings and evidence which would be contrary to the guidance by the Supreme Court in the case of Savenda

Management Services v Stanbic Bank Zambia Limited³ couched as follows;

“The power which section 13 of the High Court Act creates is limited to that of the court investigating if alternative remedies and reliefs are available from the pleadings and evidence deployed before it as opposed to suggesting, from a vacuum, fresh remedies or reliefs. The actions by the learned High Court Judge effectively amounted to his stepping into the arena of the dispute, which we find to be a misdirection on his part deserving of intervention by the Court of Appeal. Ours is adversarial court system which shackles the Judge to the pleadings and evidence presented before him. He is at large and by virtue of section 13 to grant any relief and remedies coming out of such pleadings and evidence, whether they are specifically asked for or not, but he is not permitted to introduce a remedy or relief from facts and circumstances of his own creation and outside the pleadings and evidence.”

7.12 It is the 2nd Respondent’s view that the learned Judge below did investigate alternative remedies based on the pleadings and evidence and settled for the procedural impropriety based cancellation of the Certificates of Title.

7.13 The 2nd Respondent argued that on the basis of DW3's testimony to the effect that an application to the Commissioner of Lands was required even in case of replacement of Land, and whereas the Appellants did not apply, the Appellants had the opportunity to defend themselves by rebutting that evidence which they did not.

8.0 **OUR ANALYSIS AND DECISION**

8.1 We have applied our minds to the dispute as presented and argued in the Court below, the decision of the Court below and the appeal before us. Five grounds of appeal have been fronted and argued by the parties.

8.2 In our view, there are only two issues that we need to deal with based on the five grounds of appeal namely; whether there was evidence upon which the learned Judge established procedural impropriety and whether, having ordered the cancellation of the Certificates of Title, the learned Judge ought to have declared who the owner of the plots was.

8.3 Based on our identification of the two issues in 8.2 above, we have divided the five grounds of appeal into two groups namely one comprising grounds two, four and five all of which speak to procedural impropriety and two comprising grounds one and three both of which speak to the issue of ownership of the plots.

- 8.4 We will begin by considering the arguments around procedural impropriety on which the Appellants have decried the decision or finding by the learned Judge that the offer of the two plots to the Appellants by the Commissioner of Lands was marred by the failure to follow procedure.
- 8.5 The Appellants also strongly argued that a finding of procedural impropriety was untenable because it was not pleaded thereby depriving them of the opportunity to defend themselves against the allegation.
- 8.6 It is not in dispute that the amended statement of claim appearing at page 61 of the Record of Appeal does not include a claim based on procedural impropriety.
- 8.7 Paragraph 14(2) of the Statement of Claim calls for the cancellation of the Certificates of Title relies on the ground of illegality by reason of fraud in the manner the Appellants obtained the plots. This is in addition to paragraph 13 which details particulars of fraud.
- 8.8 In view of the celebrated cases of Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others⁴ and Savenda Management Services v Stanbic Bank Zambia Limited in which the Supreme Court guided on the importance of pleadings and how the trial Courts are shackled by pleadings

and evidence, we need to determine whether there was evidence deployed at the hearing upon which the learned Judge made the finding of procedural impropriety.

- 8.9 In his testimony running from page 718 to 724 in volume 2 of the Record of Appeal, Mr. Bates Namuyamba, who was the Chairman and Chief Executive Officer of the 1st Respondent, specifically at page 721, lines 11 to 19, stated as follows;

“I went to see the Commissioner of Lands to ask how the Plots were given to the 2nd and 3rd Defendants. The Commissioner of Lands asked for the files of the suit properties to verify what happened in the physical files. The Commissioner of Lands was Mr. Muma and when he perused the files they were empty shells and had no application letters from the 2nd and 3rd Defendants.” (underlining ours for emphasis).

- 8.10 The witness then continued from line 23 as follows;

“When I went back the two files that were in the Commissioner of Land’s office had also been missing and I decided to sue the Defendants. I suspect that there was fraud because the Commissioner of Lands could not have given people land who did not apply for it.

8.11 From the above portions of the 1st Respondent's testimony, it is clear that the 1st Respondent's suspicion of fraud in the allocation of the same plots to the Appellants was based on the absence of application letters by the Appellants to the Commissioner of Lands.

8.12 In response to the suspicion of fraud for alleged failure to apply for the plots, the 1st Appellant stated as follows in cross-examination at page 728 lines 20 to 24;

"I never applied for the replacement of the land. The Lusaka City Council did not recommend me for the piece of land that I own....."

8.13 As for the 2nd Appellant, he said nothing about applying for the land in dispute which was allocated to him as a replacement of the re-possessioned piece of land.

8.14 Most important is the fact that even though the 1st Respondent led viva voce evidence of non-compliance with the procedure in the acquisition of the disputed pieces of land, the Appellants did not object to that evidence on account that procedural impropriety, to which the evidence spoke, was not pleaded.

8.15 The Appellants were however, accorded the opportunity to rebut the evidence of failure to follow procedure in the acquisition of the plots. Their mainstay argument is that the Commissioner

of Lands, of his own volition, decided to offer them the pieces of land to replace the ones they had lost by way of repossession and re-entry respectively.

8.16 In light of what we have said above, the argument that the learned Judge plucked the allegation of procedural impropriety from the air fails as it was informed by the evidence adduced by the 1st Respondent.

8.17 According to the evidence of DW3, who testified as Senior Lands Officer, at page 738 lines 12 to 16 volume 2 of the Record of Appeal, a person seeking replacement of land should apply but that there were no applications from the Appellants.

8.18 He further said that the Commissioner of Lands had no business in private land transactions as was the case with the Appellants and as such, the Commissioner of Lands should not have replaced land in a private transaction.

8.19 In her Judgment at page 50 paragraph 5.29 of the Record of Appeal, the learned Judge stated as follows;

“The question that follows is whether the Plaintiff’s claim of fraud has been founded. From the evidence adduced, it is crystal clear that the allegation of fraud has not been proved. My finding is fortified by the fact that the test set out above on fraud has not

been met. However, the issue of procedural impropriety in the manner that the 2nd and 3rd Defendant acquired the land has been established by the following omissions;

- (i) There is no record of their applications on the Ministry of Lands files as required by the Lands Circular of 1985.*
- (ii) The 2nd Defendant's purported replacement arose from failed land sale transaction with Mr. Silombwana and the Commissioner of Lands had no role to intervene in his matter.*
- (iii) The Commissioner of Lands validly re-entered the property of the 3rd defendant and there is no evidence of challenge of the re-entry.*
- (iv) The evidence of DW3 revealed that the purported replacements were not supported by the Commissioner of Lands."*

8.20 The learned Judge then relied on Section 34 of the Lands and Deeds Registry Act to order the cancellation of the Certificates of Title for procedural impropriety in their acquisition as interpreted by the Supreme Court in the case of Anti-Corruption Commission v Barnett (Supra).

been met. However, the issue of procedural impropriety in the manner that the 2nd and 3rd Defendant acquired the land has been established by the following omissions;

- (i) There is no record of their applications on the Ministry of Lands files as required by the Lands Circular of 1985.*
- (ii) The 2nd Defendant's purported replacement arose from failed land sale transaction with Mr. Silombwana and the Commissioner of Lands had no role to intervene in his matter.*
- (iii) The Commissioner of Lands validly re-entered the property of the 3rd defendant and there is no evidence of challenge of the re-entry.*
- (iv) The evidence of DW3 revealed that the purported replacements were not supported by the Commissioner of Lands."*

8.20 The learned Judge then relied on Section 34 of the Lands and Deeds Registry Act to order the cancellation of the Certificates of Title for procedural impropriety in their acquisition as interpreted by the Supreme Court in the case of Anti-Corruption Commission v Barnett (Supra).

8.26 The other issue is the contention by the Appellants that the learned Judge failed to deal with the real issue before her by not determining the owner of the two plots.

8.27 We start by stating that the amended statement of claim at pages 61 to 63 of the Record of Appeal does not contain a claim for the declaration of the owner of the plots. The closest is claim 1 which sought an order compelling the 2nd Respondent to allocate the two plots to the 1st Respondent.

8.28 It is a well established position of the law that a Court shall not give a remedy not asked for and as such the Court below had no obligation to declare anyone as the owner.

8.29 We are however, quick to state that an order for the cancellation of the Certificate of Title automatically reverts ownership of the land in dispute to the title holder immediately before the issuance of the cancelled Certificate of Title.

8.30 In this case, the pieces of land in issue belonged to the state and the order of cancellation reverted the two plots to the state under the custody and control of the Commissioner of Lands.

8.31 The other argument touted by the Appellants is that it was improper for the learned Judge to make an order for the cancellation of the Certificates of Title after dismissing the 1st

Respondent's claims entirely. This is clearly not the correct position as argued by the 1st and 2nd Respondents. The correct position is that the claim of the cancellation of the Certificates of Title succeeded as its success was not dependent on the success of the other claims.

8.32 Granted that the claim to order the cancellation of the Certificates of Title based on illegality and fraud failed, it succeeded on account of procedural impropriety in the acquisition of the plots.

8.33 We therefore find the first and the third grounds equally without merit and dismiss them accordingly.

9.0 **CONCLUSION**

9.1 The end result is that the appeal fails on all the grounds and we dismiss it in its entirety for lack of merit with costs to the Respondent to be taxed in default of agreement.

J. CHASHI
COURT OF APPEAL JUDGE

F. M. CHISHIMBA
COURT OF APPEAL JUDGE

M. J. SIAVWAPA
COURT OF APPEAL JUDGE