

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

ELIAS TEMBO

APPELLANT

AND

21 JAN 2022

BEAUTY MOYO

1ST RESPONDENT

THE ATTORNEY GENERAL

2ND RESPONDENT

WEBBER EDDIE SAMBWA

3RD RESPONDENT

CORAM: CHISANGA JP, MAKUNGU AND KONDOLO SC, JJA

29th November, 2018 and on 21st January, 2022

For the Appellant : Mr. R. Mainza of Messrs Mainza & Co.

For the 1st Respondent : No Appearance

For the 2nd Respondent : Mrs. K. N. Mundia - Senior State Advocate

*For the 3rd Respondent : Mr. A. Mbambara & Mrs. P. Chinyemba of Messrs A.
Mbambara Legal Practitioners*

J U D G M E N T

KONDOLO SC JA delivered the Judgment of the Court.

CASES REFERRED TO:

1. **Justin Chansa v Lusaka City Council (2007) Z.R. 256**
2. **Mulenga Kasemba V Christopher Mulenga Appeal No.235/2013**

3. **Kabika v Malambo Appeal No. 175/2008**
4. **Marcus Achiume v Attorney General (1983) Z.R. 1**
5. **Honorius Maurice Chilanga v Chrispin Haluwa Kangunda (1999) Z.R. 166**
6. **Lusaka City Council and National Airports Corporation v Grace Mwamba and Others SCZ Judgment No. 21 of 1999**
7. **Nkongolo Farms Limited v Zambia National Commercial Bank Limited, Kent Choice Limited (in Receivership) and Charles Haruperi (2005) Z.R. 78**
8. **Nkhumbwi Phiri v Sauket Hussein Dalal SCZ Appeal 83 /2011**
9. **Wesley Mulungushi v Catherine Bwale Mizi Chomba (2004) Z.R. 96**
10. **Elias Tembo v Lusaka City Council and the Attorney General CAZ Appeal No. 23 of 2017**
11. **Hildah Ngosi (suing as Administrator of the estate of Washington Ngosi) v The Attorney General and Lutheran Mission (Zambia) Registered Trustees SCZ Judgment No. 18 of 2015**
12. **Mayvijay Giri Goswami v Dr. Mohamed Anwar Essa and the Commissioner of Lands (2001) Z.R.31**
13. **Rosemary Phiri Mundaza v Award Karen Coleen SCZ Judgment No. 2 of 2008**
14. **Khalid Mohamed v the Attorney General (1982) Z.R. 49**
15. **Anti-Corruption Commission v Barnet Development Corporation Limited (2008) 1 Z.R. 69**
16. **Sithole v The State Lotteries Board (1975) Z.R. 106**
17. **Ackim Namungandu v Lusaka City Council (1978) Z.R. 358**
18. **R.R. Sambo and Lusaka Urban District Council v Paikani Mwanza (SCZ Judgment No. 16 of 2000)**
19. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172**

- 20. Julius Chilipamwawo Sinkala v Bornface Simbule, Contract Haulage Limited, Nakonde District Council and the Commissioner of Lands SCZ Appeal No. 153/2016 (May 2020)**
- 21. Smith Sawila v The Attorney General and Christine Banda SCZ Appeal No. 1/2019 (June 2020)**

LEGISLATION REFERRED TO:

- 1. The Urban and Regional Planning Act No. 3 of 2015**
- 2. Industrial & Labour Relations Act, Chapter 269, Laws of Zambia**

1. INTRODUCTION

- 1.1. When this appeal was heard, Chisanga JP, as she then was, was on the panel but she has since ascended to the Supreme Court. This Judgment is therefore a decision of the majority.
- 1.2. The Appeal involves a land dispute in which the property known as LUS/24399 seems to have been offered to two individuals, giving rise to two competing interests, the Appellant on one hand and the 1st Respondent and 3rd Respondent on the other.

2. BACKGROUND

- 2.1. The Appellant commenced his action against the 1st and 2nd Respondents claiming that one Charles Lububi was offered a piece of land by the Commissioner of Lands which offer he

accepted. He subsequently sold the land to the Appellant for K4,000.

- 2.2. The Appellant paid service charges; engaged a surveyor; paid for building plans which were approved by the Council; built a house on the property on which he spent K500,000 in building materials; and he paid property rates. The statutory payments were done under Charles Lububi's name.
- 2.3. Mr. Lububi's offer letter was never revoked or cancelled and he was never issued with a Certificate of Title despite having complied with all the procedures.
- 2.4. Upon visiting the property, the 1st and 2nd Respondents requested the Appellant to vacate and threatened to demolish his house.
- 2.5. Subsequently, the Appellant conducted a search which showed that a Certificate of Title had been issued to the 1st Respondent and 2nd Defendant in the court below, which was contrary to the law because they neither submitted an application for the land nor paid the requisite service charges before obtaining title. It was alleged that the offer letters were procured fraudulently and were not in compliance with Circular No. 1 of 1985.

- 2.6. At trial, the Appellant produced copies of Mr. Lububi's application letter, an offer letter and receipts from the Ministry of Lands. The receipts produced had the same serial numbers, time stamps and name of the Appellant but bore different property numbers.
- 2.7. The 1st Respondent did not enter appearance whilst the 2nd Respondent (the State) stated in the defence that it did not receive a recommendation in favour of Mr. Lububi from the Lusaka City Council (the "LCC"). Further, it was never directly copied in any correspondence between the Town Clerk and Mr. Lububi and as far as it was concerned, Mr. Lububi was never offered the property.
- 2.8. The 2nd Respondent averred that the Appellant was not a *bona fide* purchaser for value as he purchased the land from a person who was never the owner. According to the State, the first offer ever made was to Mr. Eddie Sambwa (3rd Respondent) after the LCC recommended him. There was no fraud or error.
- 2.9. DW1 explained that the property was repossessed from the 3rd Respondent and offered to the 1st Respondent. She was then issued with a Certificate of Title. However, Mr. Sambwa

appealed to the Commissioner of Lands and his appeal was successful. The 1st Respondent's Title was cancelled and the property reverted to Mr. Sambwa who was the only holder of a Certificate of Title.

3. HIGH COURT DECISION

3.1. The learned High Court Judge found that according to Circular No.1 of 1985, Councils can only offer land after an advert to the public. The Appellant did not produce any proof of such advertisement which advert should have been in the LCC archives.

3.2. The lower Court also noted that the Appellant did not call Mr. Lububi to come and shed more light on the offer letter which letter did not exist in the Ministry of Lands information system. She also found that the Appellant was unable to explain how the two receipts he produced, bore the same receipt number and were issued to two different people within the same minute of time and they bore different property numbers.

3.3. The trial Judge went on to find that wrong lodgment schedules were used in lodging documents at the Ministry of Lands and that there was no proof that the LCC

recommended Mr. Lububi to the Commissioner of Lands for the property.

- 3.4. Further, that the Commissioner of Lands is not bound by the recommendations of the Council and the existence or non existence of the offer letters to the 1st Respondent and Mr. Sambwa could not be determined by the simple fact that they were not produced in Court. The Appellant could have asked for the documents to be produced.
- 3.5. The trial Judge found that the Appellant was not a bona-fide purchaser for value and there being no explanation as to how the alleged fraud was transacted, the Appellant's case was dismissed.

4. THE APPEAL

- 4.1. Disgruntled by the High Court decision, the Appellant launched his appeal on eleven (11) grounds as follows:
 1. The Learned trial Judge erred in law and fact when she held *inter alia* that the Applicant for land in the Republic [sic] **"A Respondent must fill in an Application form and pay a prescribed fee"** as the holding is contrary to provisions of Circular No. 1 of 1985 and other related laws.

2. The learned trial Judge in the Court below erred in law and fact when she stated at J33 **“I observe that PW1 did not call Mr. Lububi to aid his case given that he was the original offeree and could have shed more light on how he obtained the offer letter. I also observed that PW1 produced two different receipts from the Ministry of Lands in his bundle and attempted to lay blame on the cashier at the Ministry of Lands, Mr. C.K. Banda who he did not call to explain the error,”** notwithstanding a plethora of documents the appellant produced in the course of trial which were handed to the Appellant by his vendor Mr. Charles Lububi which the court ought to have interpreted whereas the issue of the two different receipts with the same receipt Nos. bearing stand number 24594 has no consequence to the Appellant’s case, the receipt relevant to the case *in casu* is the one bearing stand number 24399 the names of Charles Lububi subject of the appeal.
3. The learned trial Judge in the Court below fell in grave error in law and fact when she held at J33 **“PW1**

insisted that he had a superior interest in stand No. LUS/24399 on the basis of an offer letter that does not exist in the Ministry of Lands information system. This is remarkable and strange”, in the absence of relevant evidence to this finding of fact, which is highly perverse, rightly so.

4. The Learned High Court Judge in the Court below fell in grave error both in fact and in law when she held inter alia at J33, **“In strange circumstances, PW1 deliberately lodged an application for presidential consent and survey diagram using the wrong lodgment schedules. He did not produce the advertisement that Mr. Lububi allegedly responded to which I dare say must be in the archives of the Lusaka City Council. The different receipts produced in his bundles bearing the same receipt numbers and details for two different properties cast further aspersion on the credibility of his evidence. The aforesaid finding of fact is against the weight of documentary and oral evidence placed on record during the course of trial.**

5. The learned trial Judge in the court below misdirected herself in law and in fact when she held inter alia at J34 **“PW1 has tried rather unsuccessfully to conjure me into taking judicial notice of the fact that it was possible to print more than one receipt in a space of a minute without an account on the efficacy of the printing machine at the Ministry of Lands. PW1 who testified to inefficiency at Ministry of Lands cannot in my view suddenly turn around to praise the printing system of the Ministry of Lands. PW1 also attempted to persuade me to believing that computer systems are liable to failure and there could have been mistakes in the duplicating of two receipts for two different properties with same information.”** Contrary to the notorious fact that even domestic computers print up to ten pages per minute and the receipt had two different names and Stand Nos. printed on it, the issue of different receipts were raised in cross examination by DW1 who is supposed to have adduced further evidence as per civil procedure and not the Appellant herein.

6. The learned trial Judge in the court below misdirected herself in law and fact when she held further at page J34 **“moreover he had no faith in the land register Computer printout which he stated had serious flaws and was not accompanied by an official search certificate. By making those assertions, I find that PW1 was precluded from relying on the documents,”** the Judge misconstrued the Appellants evidence when he stated that mere Land print out without Certificate of search has no evidential value pursuant to section 23 of the **Lands and Deeds Registry Act** and the purported land print out produced by the second appellant shows that the system at Ministry of Lands is in jeopardy and serious quagmire.
7. The finding of fact by the learned trial Judge at page J35 when she held inter alia that **“My view is that Mr. Lububi was not a bonafide offeree of stand No. LUS/24399 and did not develop an inchoate interest in the property. There is no proof that the Lusaka City Council recommended him to the Commissioner of Lands for the property. Further**

there is no proof that his offer letter exists in the Ministry of Lands Information system" is against the weight of documentary and oral evidence on record, the finding of fact is perverse as no evidence was adduced that the Offer Letter to Charles Lububi was not genuine or at all.

8. The trial Judge in the Court below misapprehended the law and fact when she misconstrued the term "fraud" alone as the only basis upon which a Certificate of Title can be successfully challenged and cancelled when in fact impropriety, mistake, error and misrepresentation in the acquisition of Certificate of Title can culminate into its cancellation.
9. The learned trial Judge misdirected herself in law and fact when she held at J37 as follows; **"the third issue to determine is whether PW1 is entitled to compensation for the demolished structures on the property. Having determined that PW1 was not a bonafide offeree of stand No. LUS/24399, it logically follows that he had no right to build structures on the property. As a result he is not entitled to**

compensation” this holding is contrary to provisions of Act 2 of 2015, decided and against the weight of documentary and oral evidence on Record.

10. The learned trial Judge misdirected herself in law and fact when she awarded costs to the 2nd Respondent notwithstanding the fact that, despite the 2nd Respondent issuing a plethora of Offer Letters for the same Stand No. among them that of Charles Lububi, the Appellant Vendor who proceeded to perform statutory imperatives thus constructing on the subject stand cannot derive collateral advantage from their own default.

11. The learned Judge erred in law and fact when she failed to evaluate evidence with a balanced approach in that she could not address the flaws of the Respondents documents but vehemently impugned those of the Appellants documents.

5. APPELLANT’S ARGUMENTS

5.1. The Appellant’s contention under ground 1 was that the procedure for land acquisition in Zambia is governed by Circular No. 1/1985 which was expounded in **Justin**

Chansa v Lusaka City Council ⁽¹⁾. It was held in that case that a person intending to acquire land in Lusaka ought to submit a written application to the LCC which has delegated powers to receive applications from members of the public or directly to the Commissioner of Lands.

- 5.2. We were directed to the application letter by Charles Lububi at page 213; the recommendation letter by the LCC to the Commissioner of Lands at page 214 and the offer letter and consideration receipt at pages 215-217. The Appellant then submitted that a cursory perusal of provisions of the circular and the case cited above did not support the holding of the trial Judge.
- 5.3. The gist of the argument in ground 2 was that power of attorney was bestowed on the Appellant by Charles Lububi to attend to any transactions pertaining to his properties, sue or be sued and to perform any other vital functions in his absence.
- 5.4. With regard to the authenticity of the receipts, it was submitted that the onus of disproving their authenticity was on the 2nd Respondent. We were also directed to the 2nd Respondent's responses in cross examination.

- 5.5. The Appellant submitted that the receipt relating to Lus/24594 was irrelevant to the matter and the only person capable of explaining the similarities in the receipts was the one who issued them. We were invited to take judicial notice of the fact that it was not impossible to print more than two receipts within a space of 1 minute and that such receipts would reflect the same date and time. Further on this point, the Appellant implored us to take judicial notice of the fact that computer systems fail and mistakes can be made.
- 5.6. We were then referred to the Land Register appearing at pages 430-431 of the Record and invited to note the flaws therein such as the absence of entry No. 3 and the discrepancy in the time when the lease and Certificate of title were issued to the 3rd Respondent and the cancellation of the same documents issued to the 1st Respondent. The cases of **Mulenga Kasemba v Christopher Mulenga** ⁽²⁾, **Kabika v Malambo** ⁽³⁾ and **Marcus Achiume v Attorney General** ⁽⁴⁾ were cited to demonstrate the lower Court's failure to evaluate the documentary evidence before it.
- 5.7. Grounds 3, 7 and 8 were argued as one. The argument was similar to that proffered under ground 1 with respect to the

procedure to be followed when acquiring land, i.e. submission of an application. That despite the 1st and 3rd Respondents having not submitted a written application or obtained a letter of recommendation, the Commissioner of Lands did generate offer letters on 15th August, 2001, 22nd October, 2004 and on 11th May, 2005 in favour of the 1st and 3rd Respondents and proceeded to issue Certificates of Title, all done contrary to Circular No. 1 of 1985. It was then submitted that the Certificates of Title issued are null and void for non-compliance with the Circular. The cases of **Honorius Maurice Chilanga v Chrispin Haluwa Kangunda** ⁽⁵⁾ and **Lusaka City Council and National Airports Corporation v Grace Mwamba and Others** ⁽⁶⁾ were called in aid.

5.8. On the issue of fraud, the Appellant, relying on the case of **Nkongolo Farms Limited v Zambia National Commercial Bank Limited, Kent Choice Limited (in Receivership) and Charles Haruperi** ⁽⁷⁾ and **Nkhumbwi Phiri v Sauket Hussein Dalal** ⁽⁸⁾, submitted that fraud encompasses acts and circumstances of imposition, statements supporting falsehoods or suppressing the truth.

- 5.9. He contended that the 1st and 3rd Respondents acted fraudulently when they obtained offer letters from the Commissioner of Lands and Certificates of Title from the Registrar of Lands and Deeds without submitting an application and obtaining a recommendation letter from the LCC while the Commissioner of Lands and the Registrar of Lands and Deeds breached the law or committed a mistake and/or an error by not satisfying themselves that the 1st and 3rd Respondents had complied with Circular No. 1 of 1985.
- 5.10. We were invited to nullify the Certificates of Title issued to the two Respondents and find that the contract between the Commissioner of Lands and the Appellant of 14th August, 2001, takes priority over any offer letters that may have been erroneously procured. It was argued that there was no evidence to warrant the cancellation of the contract between the Commissioner of Lands and Charles Lububi and the case of **Wesley Mulungushi v Catherine Bwale Mizi Chomba** ⁽⁹⁾ was relied on to show that the lack of a Certificate of Title to land cannot be a bar to the conclusion of a legally binding contract.

5.11. It was submitted that the Appellant's offer letter cannot be declared none existent simply because the 1st and 3rd Respondents are in possession of Certificates of Title and yet their acquisition was not properly accounted for. He cited the case of **Elias Tembo v Lusaka City Council and the Attorney General** ⁽¹⁰⁾ in which we stated that the withdrawal of an offer letter is governed by the principles of contract and parties must abide by the contract.

5.12. In arguing ground 4, the Appellant referred us to the Lodgment Schedules at pages 320 and 322 of the record and submitted that though headed Registry Lands and Deeds, they were received by the Lands Department as evidenced by the date stamp affixed thereto.

5.13. With regard to the Appellant's failure to produce the advertisement run by the LCC in 2000, the Appellant stated that the letter given to him by the vendor unequivocally referred to the advert and the application letter was proof enough that it existed prior to the application being submitted.

5.14. Under ground 6, the Appellant's contention was that the Lands Register is otiose in light of section 23 of cap 185 of

the laws of Zambia and the holding in the case of **Hildah Ngosi (suing as Administrator of the estate of Washington Ngosi) v The Attorney General and Lutheran Mission (Zambia) Registered Trustees** ⁽¹¹⁾. It was therefore submitted that the only document that is conclusive proof of any matter concerning property is a genuine Certificate of Title and not a mere printout and or mere lease and questionable Certificates of Title such as the one produced by the Respondents. It was posited that, the fact, that no official certificate of search issued and executed by the Registrar of Lands and Deeds was produced the Respondents failed to prove ownership of the property.

5.15. In ground 9, the Appellant contended that the improvements on the land were done lawfully and cannot be taken away without recourse. We were referred to page 255 of the record which shows approved building plans and to pages 327-363 showing construction receipts to the tune of K500,000.00. The cases of **Mayvijay Giri Goswami v Dr. Mohamed Anwar Essa and the Commissioner of Lands** ⁽¹²⁾ and **Rosemary Phiri Mundaza v Award Karen Coleen SCZ Judgment No. 2 of 2008** ⁽¹³⁾ were cited in this regard. The

Appellant also placed reliance on Sections 49(1), 50(4) and 55(a) of the **Urban and Regional Planning Act No. 3 of 2015**.

5.16. In support of the last and final ground, it was submitted that given the confusion and delinquencies in the office of the Commissioner of Lands, it was a misdirection on the part of the Court to award costs to the 2nd Respondent. Ground 5 was not argued.

5.17. In his *viva voce* arguments, Mr. Mainza the Appellants counsel submitted that the record shows that the 1st Respondent did not adduce any evidence in the Court below, neither did she file a defence to the statement of claim and the same applies to the 3rd Respondent who was not part of the trial. He contended that the only evidence on record was that of the Appellant and the 2nd Respondent.

5.18. He argued that the Appellant demonstrated by way of documentary evidence that he had complied with circular No. 1 of 1985 which the Court below acknowledged constitutes the procedure for acquiring land in Zambia.

5.19. Mr. Mainza pointed out that the procedure as outlined in the said Circular is that the LCC (agent of Commissioner of

Lands) must place an advert in the Newspaper inviting members of the public to submit applications to the Council to be allocated parcels of land and that the Council will in turn make a recommendation to the Commissioner of Lands for the successful Applicant to be allocated a piece of land.

5.20. He submitted that the circular was interpreted by the Supreme Court in **Justin Chansa v Lusaka City Council** ⁽¹⁾ and that was the only procedure that one had to comply with if they were to be allocated a piece of land. Counsel then directed us to the Appellant's bundle of documents appearing at pages 306-397 of the record of appeal and submitted that based on the record, the only party who complied with the highlighted procedure was the Appellant.

5.21. Counsel argued that the 1st and 3rd Respondents failed to adduce evidence that they had complied with the said procedure when acquiring the Title Deeds from the Ministry of Lands. We were therefore invited to set aside the holding of the Court below suggesting that Charles Lububi's offer letter did not exist at the Ministry of Lands as the only witness called by the 2nd Respondent stated that he had no evidence that the letter existed.

5.22. It was Mr. Mainza's contention that contrary to the holding that the Appellant failed to prove fraud against the Defendants, it is trite law that where one flouts procedure governing allocation of land, that in itself is proof enough that the Certificate of Title was acquired fraudulently. He implored us to allow the appeal and condemn the Respondent in costs.

6. 2ND RESPONDENT'S ARGUMENTS

6.1. The 2nd Respondent filed his arguments which Mr. Mundia relied on in their entirety. In response to Grounds 1 and 2, it was submitted that the Court below was on firm ground when it held as it did because the holding was based on the evidence and the best interpretation of facts. The 2nd Respondent sought solace in the maxim "*he who alleges must prove*" and cited **Khalid Mohamed v the Attorney General** ⁽¹⁴⁾ in this regard.

6.2. Grounds 3, 4, 7 and 8 were tackled together. It was argued that the receipts coupled with the failure to produce the advert reduced the weight of the Appellant's evidence. The 2nd Respondent submitted that **Section 33 of the Lands and Deeds Registry Act** establishes that a Certificate of

Title is conclusive evidence of ownership of the property. This position is also supported by the case of **Anti Corruption Commission v Barnet Development Corporation Limited**.⁽¹⁵⁾

- 6.3. In the absence of fraud, the Certificate of Title remains good in respect of the subject property. In line with the case of **Sithole v The State Lotteries Board** ⁽¹⁶⁾, it was submitted that fraud must be specifically alleged and strictly proved, a burden which the Appellant has not discharged.
- 6.4. In response to grounds 6 and 9, the 2nd Respondent submitted that the Appellant had no authority at law to build on the subject land and was thus a squatter. The case of **Ackim Namungandu v Lusaka City Council** ⁽¹⁷⁾ was cited to show that no one is under an obligation to compensate the Appellant for the demolished structures as he built them at his own risk.
- 6.5. In ground 10, the 2nd Respondent simply stated that costs are awarded at the discretion of the Court.

7. 3RD RESPONDENT'S ARGUMENTS

- 7.1. In opposing the appeal, the 3rd Respondent also relied on the filed arguments. In responding to ground 1, it was submitted

that the lower Court recognized that filling in an application form and paying a fee were part of the procedure used to obtain land in Zambia. The 3rd Respondent contended that the onus of proof was always on the Appellant and he too relied on the case of **Khalid Mohamed v The Attorney General**.

- 7.2. In ground 2, it was submitted that the two different receipts were submitted by the Appellant to aid his case, therefore he cannot blame the Court for making reference to them.
- 7.3. Further the 3rd Respondent attacked the validity of the Power of Attorney and agreed with the trial Judge's expression towards the absence of Charles Lububi. It was therefore posited that the said Charles Lububi was fictitious.
- 7.4. The response to ground 3, 7 and 8 was that the letter of offer does not convey an interest in land and is not evidence of ownership of land. **Section 33 of the Lands and Deeds Registry Act** and **Anti-Corruption Commission v Barnet Development Corporation Limited** were cited to show that a Certificate of Title is conclusive evidence of ownership.
- 7.5. As regards the allegation of fraud, the case of **Sithole v The State Lotteries Board (supra)** was relied on to reinforce the

position that the onus on a party alleging fraud is greater than a simple balance of probabilities. The allegation has not been substantiated and the record shows that the 3rd Respondent has a superior interest in the property. It was therefore contended that the Certificate of Title had not been legally challenged for reasons of fraud or impropriety in the Court below.

7.6. In response to ground 4, it was argued that a ground of appeal should attack a finding of a mixture of law and fact or of law only and not a statement of fact alone. The brief response to ground 6 was that the lower Court could not be faulted for pointing out that the Appellant was playing double standards by relying on the Lands Register whose flaws he had earlier pointed out. It was also pointed out, under this ground, that the Appellant failed to prove his superior interest whereas the Respondent had a clear one.

7.7. The arguments in ground 9 centered on the status of the Appellant on the property, as a squatter. It was argued that he had no title to support his claims and he commenced construction without authorization of the Respondent who was the legal owner of the property. **Ackim Namungandu v**

Lusaka City Council (supra) was cited in aid of this argument.

7.8. Lastly, the response to ground 10 was simply that normally, costs follow the event and the case of **R.R. Sambo and Lusaka Urban District Council v Paikani Mwanza** ⁽¹⁸⁾ was relied on in this regard.

8. APPELLANTS ARGUMENTS IN REPLY

8.1. In reply to the 2nd Respondent's arguments with regard to the receipts, the Appellant held the view that the endorsed disclaimer on the receipt is sufficient proof that the date, serial number and receipt number at page 315 of the record constitutes errors acknowledged in the said disclaimer.

8.2. An alternative argument was proffered in reaction to grounds 3, 4, 7 and 8 that if the offer letter does not exist in the system as alleged by DW1, there is overwhelming documentary evidence to suggest that an offer letter existed. We were directed to pages 311, 312, 315, 316, 323, 368-379, 373, 374, 375, 390, 391 and 394-395 of the record of appeal.

8.3. It was also argued that even though the 2nd and 3rd Respondents obtained purported Certificates of Title, their

interest was created later than that of the Appellant's vendor.

- 8.4. With regard to the allegation of fraud, the Appellant submitted that the record shows that the he adduced evidence to demonstrate how the 1st and 3rd Respondent acquired their respective Certificates of Title without submitting application letters to the LCC and without complying with Circular No. 1 of 1985.
- 8.5. The gist of the Appellant's reaction to the 3rd Respondent's submissions in ground 1 was that the absence of the application letter and recommendation required by Circular No. 1 was fatal.
- 8.6. In response to ground 2, the Appellant contended that the validity of the Power of Attorney was not canvassed in the Court below.
- 8.7. With regard to calling the officer that issued the receipts, the Appellant placed reliance on **Section 24 of the Lands and Deeds Registry Act** indemnifies officers working at the Lands and Deed Registry.
- 8.8. In response to grounds 3, 7 and 8 the Appellant submitted that the offer letter constituted a contract between the

Commissioner of Lands and the offeree and it created an equitable interest. Repeating his arguments on the cancellation of title, the Appellant submitted that a Certificate of Title may be cancelled where they are compelling factors notwithstanding that fraud was not pleaded.

8.9. Mr. Mbambara the 3rd Respondents counsel also supplemented his filed heads of argument *viva voce*. He started by expressing displeasure with the sequence and manner in which the grounds were framed and argued by the Appellant and he submitted that the Appellant has not raised any real grounds of appeal but has merely attacked specific cherry picked statements and analysis of facts together with observations made by the trial Judge.

8.10. He submitted that the law was clear that grounds of appeal must speak to the law or facts mixed with law and not mere statements and observations made by the Court. He referred us to **Section 97** of the **Industrial and Labour Relations Act** which explained why appellate Courts will very rarely impugn or reverse findings of fact by the Court below. With this submission, Counsel opined that the Appellant has filed

no grounds of appeal. Counsel nonetheless reacted to the Appellants arguments.

8.11. With regard to Circular No. 1 of 1985, he submitted that clause 3 provided for the processing of applications and the Court below made reference to payment and application and it cannot be faulted.

8.12. Counsel pointed out that there had been reference to the **Urban and Regional Planning Act of 2015**¹ which provides for compensation by the local authority where it has cancelled an offer after approving diagrams. His response was that the Appellant has not demonstrated that he lodged any claim for compensation to the LCC but seeks compensation from the 3rd Respondent whilst quoting **section 70 of that Act.**

8.13. He stated that the 3rd Respondent rejoined these proceedings at appeal stage and that is why the record does not contain testimony by the 3rd Respondent. This also explains why there are no documents which prove the 3rd Respondent's compliance with Circular No. 1 of 1985. Be that as it may, Mr. Mbabara submitted that this cannot be

¹ Urban and Regional Planning Act No. 3 of 2015,n

interpreted to mean that the 3rd Respondent failed to comply with the Circular.

8.14. In closing, he submitted that the title is held by the 3rd Respondent and that is not the issue before the Court.

9. APPELLANT'S ARGUMENTS IN REPLY

9.1. In his brief reaction, Mr. Mainza submitted that the Record will show that the Court made several findings of fact and the Appellant is entitled to attack findings of facts made by a trial Court and this Court is entitled to interfere with the said findings which are at variance with the evidence.

9.2. Regarding the issue of compensation, he argued that it is evident before the Court that the 3rd Respondent demolished a structure constructed by the Appellant without any lawful order to demolish it. That the said structure was approved by the planning authority, therefore the 3rd Respondent is liable to compensate the Appellant.

9.3. In concluding his submissions, Counsel contended that the fact that the 3rd Respondent has not produced any documents to prove that he complied with the procedure is evidence enough to prove that he did not comply with the procedure.

9.4. The rest of the submissions in reply rehashed those made in the Appellant's heads of argument which we shall not reproduce.

10. OUR DECISION

10.1. We thank the parties for their spirited arguments which we have duly noted and considered. We shall consider grounds 1 and 2 separately; grounds 3, 4 and 7 shall be considered as one followed by grounds 6, 8, 9 and 10. Ground 5 was not argued, we therefore assume that it was abandoned.

10.2. In considering the first ground, we had occasion to peruse the contents of Circular No. 1 of 1985, particularly clause B (ii) and (vii) which read as follows:

“ii) Before stands are recommended, the District Council concerned may advertise them in the national press inviting prospective developers to make applications to the District Council in the form appended hereto and numbered as Annexure A.”

10.3. A reading of the above excerpt clearly shows that after an advert is run in the national press, prospective developers must apply to the District Council. There is no mention of prescribed fees. The statement by the trial Judge that '*a respondent must fill an application form and pay a prescribed fee*' was therefore a misdirection. We note from the impugned Judgment that the trial Judge did not use the absence of fees payable to the Council prior to obtaining land as a basis on which the Appellant's claims were dismissed.

10.4. The Judgment from pages J32 onwards contains the reasoning of the Court and the only reference to the procedure, at the Council level, was the absence of an advertisement.

10.5. We hasten to state that the Judge was correct when she stated that persons responding to an offer from the Council must apply in writing. However, she inaccurately stated the procedure under the Circular in terms of fees payable at application stage. To this extent alone, ground 1 succeeds.

10.6. Ground 2 was two-fold. Firstly, that Mr. C.K. Banda, the cashier at Ministry of Lands, should have been called to

explain the discrepancies with respect to the two receipts issued. Secondly, it attacked the Court's finding that Charles Lububi's presence at trial could have shed more light.

10.7. Our response to the first limb of ground 2 is that the trial Court was entitled to question the occurrence of the two receipts produced by PW1 bearing the same receipt numbers and the same time stamps but different plot numbers. This is because the Appellant could have introduced them onto the Record without realizing that he had actually done so and in the court's mind, cast doubt on the credibility of PW1's receipts.

10.8. At pages J33-J36, the lower Court considered the possibility of that happening and found as a fact that it was not possible to issue two receipts for two separate transactions within the space of one minute. In any event the receipts had the same account number and this was an anomaly.

10.9. We hold the view that there was nothing for the 2nd Respondent to prove in this regard because the two receipts were produced by the Appellant. The cases cited by the

Appellant in relation to the maxim '*he who alleges must prove*' are not applicable because the burden of proof was always on the Appellant no matter how weak the defence may be said to have been.

10.10. The Appellant made every effort to convince this Court and undeniably the lower Court, that the receipt bearing a different plot number, though in his name, was neither here nor there for the simple reason that the appeal and the entire cause was only bordering on the ownership of Stand LUS24399. On the same point, he presented the same arguments as those in the lower Court on the likelihood of computer systems failing.

10.11. He went further to rely on the flaws in the Lands Register appearing at page 430 of the Record and submitted that the Register suggests that the lease and Certificate of Title were issued to the 3rd Respondent before the Lease and Certificate of Title issued to the 1st Respondent were cancelled. This, according to him, proved that the system could have malfunctioned.

10.12. We have looked at the evidence of DW1 who categorically stated that it was impossible for the system to have

generated receipts firstly, to an offeree not on the system and secondly, receipts bearing the same receipt and serial number and same date and time stamp for two different properties. The anomaly as it stood, is one that the Appellant has failed to explain and has simply invited us to ignore the receipt referring to a different property. we can only ignore the said receipt with good reason, which unfortunately, has not been provided.

10.13. The fact that these receipts graced the record, they had an impact on the Appellant's evidence and required that the necessary weight be attached to them. The lower Court analysed the facts on record as a whole and arrived at the conclusion that it was a rather an odd coincidence that the two receipts were exhibited.

10.14. Therefore, the Appellant cannot now simply turn around and suggest that the receipt is irrelevant to the cause. To the contrary, it taints his evidence. The Appellant has overlooked the fact that the trial judges concern with the two receipts being concluded in one minute was not just the printing but actually having to finish with one client and print and then attend and conclude with another client and

then print another receipt. The Court found that this can't be done within a minute and it cannot be faulted in that regard. The learned trial Judge was therefore right to have considered the evidence surrounding both receipts.

10.15. The cases of **Khalid Mohammed v The Attorney General** ⁽¹⁴⁾ and **Wilson Masauso Zulu v Avondale Housing Project Limited** ⁽¹⁹⁾ are instructive in this regard as they reinforce the principle that a plaintiff who fails to prove his case cannot be entitled to judgment whatever maybe said of the opponent's case.

10.16. With regard to the second limb of ground 1, an individual empowered by a Power of Attorney can produce documents but cannot testify to things that were personally done or personally performed by his principal. This would only amount to hearsay. The Court was entitled to wonder why the person at the centre of it all, Charles Lububi, was not called as a witness and no reason was given for his absence. We see no reason to fault the trial Court's finding on these two issues. Ground 2 therefore fails.

- 10.17. In grounds 3, 4 and 7, we find that the Court did not fall into grave error because DW1 testified that the Appellant or Charles Lububi was never offered the property and there was no copy of the offer letter in the Ministry of Lands information system. The Appellant traced his title to the property from the LLC documentation while 1st and 3rd Respondents' traced theirs from the Ministry of Lands.
- 10.18. DW1 unequivocally stated that there was no evidence that the property was ever issued to any person other than the Respondents. He further testified that an application for consent to assign must be made by filing a form for consent completed by the vendor to which is attached copies of both the vendors and buyer's National Registration Cards (NRC). The lodgment schedule exhibited at page 320 belonged to the Registry of Lands and Deeds which registry was not responsible for receiving or granting consent.
- 10.19. Over and above, the evidence of DW1, the lower Court's finding was also in the context of its overall view of the authenticity of PW1's documents i.e. the two questionable receipts and the lodgment schedules with questionable

date stamps. The Court believed DW1's testimony and was justified in doing so. Our own observations of the lodgment schedule with respect to consent are that it was stamped on 12th June, 2002 as the date on which the documents were lodged but the contract of sale and the application for consent are both dated 18th June, 2002. It is rather odd that the lodgment schedule is dated earlier than the documents being lodged.

10.20. In view of the general weakness of PW1's documents, there was nothing wrong with the Court commenting on the fact that PW1 did not prove that there was ever an advert. The letter allegedly written to Mr. Lububi by the Council makes no mention of the advert or the area where land was being offered. Neither Mr. Lububi nor anyone from the Council was called to validate that assertion.

10.21. On the basis of the forgoing, the trial judge was on firm ground when she found that Mr. Lububi was not a *bona fide* purchaser and did not develop an inchoate interest in the land. The evidence supporting Mr. Lububi was quite thin.

10.22. It is trite law that a certificate of title is conclusive proof of ownership. In the absence of fraud or any form of impropriety in its acquisition it cannot be challenged or cancelled. **Sections 33 and 34 of the Lands and Deeds Registry Act** and the cases **Julius Chilipamwawo Sinkala v Bornface Simbule, Contract Haulage Limited, Nakonde District council and the Commissioner of Lands** ⁽²⁰⁾ and **Smith Sawila v The Attorney General and Christine Banda** ⁽²¹⁾ give credence to this position. We see no merit in grounds 3, 4 and 7 and they are consequently dismissed.

10.23. The Appellant's arguments in ground 6 were simply assailing the use of the Lands Register Print out to show proof of ownership. The Appellant spiritedly argued, that the register was not preceded by a search certificate as required by **Section 23 of the Lands and Deeds Registry Act**. He further submitted that a mere Lands Register computer printout was not conclusive proof of any matter concerning a property and as such, the 3rd Respondent failed to prove ownership of the property in contention.

10.24. We are astounded by this line of argument especially given the fact that throughout his arguments, the Appellant has alleged fraud and has implored us to cancel the Certificate of Title issued in favour of the 3rd Respondent. Given the evidential weight attached to a Certificate of Title as highlighted in paragraph 10.21 and the failure by the Appellant to strictly prove fraud or any form of impropriety, we find that the 3rd Respondent's title to the property was sufficiently proven. The trial Court did not misinterpret the facts and was right to comment on the Appellant's reliance on 'flawed' documents for his own benefit. This ground fails.

10.25. Ground 8 mainly attacks the 1st and 3rd Respondent's documentation. We have note that the 3rd Respondent was not a party to the proceedings at the time of the trial and did not give any evidence. The Appellant heavily relied on the absence of an application letter to the Ministry of Lands before an offer letter could be generated.

10.26. However, DW1 testified that according to their records, the only offerees were the Respondents. He further stated, in cross examination, the despite the absence of

documentation before the Court, the offer letter in respect of the 3rd Respondent satisfied all the conditions and that was why he was issued with title.

- 10.27. On the whole, it was still for the Appellant to prove his case even in the absence of a defence. We find no merit in this ground of appeal and accordingly dismiss it.
- 10.28. The Appellant's arguments in support of ground 9 were lengthy and elaborate. However, the law still remains that building on somebody else's property is a risk for which one must bear the consequence of losing what he or she has built on the said land. The case of **Rapahel Ackim Namangandu v Lusaka City Council** ⁽¹⁷⁾ is instructive on the status of a person who illegally builds on land which he does not own.
- 10.29. The Appellant, in the circumstances had no authority to build on land to which he had no title. Therefore the lower Court did not err when it held that he was not entitled to compensation for the demolished structures. We hold the view that there can be no liability imputed on the 2nd Respondent on account of Mr. Sambwa demolishing the structures on the property.

10.30. Lastly, it is trite that's costs are at the discretion of the Court and generally follow the event unless the Court orders otherwise and in doing so must give reasons for exercising its discretion against the successful litigant. *In casu*, having found as we have, we see no reason to interfere with the order for costs awarded by the trial Court. We have stated in this Judgment that the 2nd Respondent was within the province of the law governing administration of land and did nothing wrong therefore there was no reason to deny him Costs.

10.31. In the premises, the appeal is dismissed with costs to the Respondents both in this Court and the Court below.

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F.M. CHISANGA
JUDGE PRESIDENT

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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M.M. KONDOLO, SC
COURT OF APPEAL JUDGE