

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 257/2021

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

SAVIOUR MASIYE PHIRI (sued in his
capacity as Administrator of the Estate
of the late Geoffrey Phiri)



APPELLANT

AND

EMILY MUKELA MUKUMBUTA LUBINDA

RESPONDENT

CORAM: MAKUNGU, NGULUBE AND SHARPE-PHIRI, JJA

On 13th October, 2022 and 6th December, 2022

For the Appellant: Mr. N. Sampa, Messrs Norman Sampa Advocates.

For the Respondent: Ms. C. Jere, National Legal Aid Clinic for Women.

J U D G M E N T

NGULUBE, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Vivienne Kaonga vs The Attorney-General, SCZ Appeal Number 79/2009*
2. *Sailos Nzowani vs Flamingo Farm Limited, SCZ Appeal No. 5 of 2019*

Legislation referred to:

1. *The Rent Act, Chapter 206 of the Laws of Zambia*

1.0 INTRODUCTION

1.1 This is an appeal against the Judgment of the High Court delivered by Y. Chembe, J in open court on 15th July, 2021. In the Court below, the appellant was the defendant while the respondent was the plaintiff. In this Judgment, we shall refer to them as appellant and respondent, respectively.

2.0 BACKGROUND

2.1 The brief background to this appeal is that the respondent commenced an action in the Ndola High Court by writ of summons seeking the following reliefs:

- (i) An Order that she was the rightful and legal owner of house number 792, Mphande Road, Riverside, Chingola.
- (ii) An Order for possession of house number 792, Mphande Road, Riverside, Chingola.
- (iii) Rentals from January, 2009 to the date of the Judgment.
- (iv) Costs incidental to the proceedings.

2.2 The writ was accompanied by a statement of claim in which the respondent averred that she applied to the Ministry of Works and Supply on 29th April, 1997, to be allocated the house in

issue and that the house was allocated to her on 10th October, 1997.

2.3 The respondent stated that she moved into the house and waited to be formally offered to buy it but later, she learnt that the house had been offered to Geoffrey Phiri, when she was the sitting tenant in occupation of the house. She lodged a complaint to the Officer-in-Charge of the Building Department at Chingola, and on 9th March, 1998, she was listed among the successful applicants for the sale of Government Pool houses.

2.4 Consequently, the offer of the house that was made to Geoffrey Phiri was withdrawn on 7th May, 1999. The respondent then completed the purchase of the house in issue and was later given Certificate of Title Number 137934. However, Geoffrey Phiri insisted that the house was his and the respondent complained to the Committee that was in charge of the sale of Government Pool houses. This led to the cancellation of the Certificate of Title which was issued to Geoffrey Phiri on 10th June, 2003.

2.5 The respondent stated that she relocated to Ndola and left the house on rent, but was informed by her tenant that Geoffrey Phiri had taken over the house and evicted the respondent's tenant. She endeavoured to take possession of the house but failed.

2.6 The appellant, in his defence stated that the house in issue was allocated to his late father on 21st December, 1996 and that the respondent was only accommodated in the house as an interim measure because she was a junior officer who did not qualify to purchase the house. According to the appellant, his late father could not occupy the house immediately after it was offered to him because it was occupied by a retired civil servant who was waiting to receive her terminal benefits.

2.7 He stated that the respondent only occupied the house temporarily as she did not qualify to be allocated the house which was an executive house, for the reason that she was a primary school teacher. The appellant contended that the house was not available for purchase as it was offered to his late father in 1996 who was unable to occupy the house as he was

on national assignment in Mazabuka. He stated that his father was issued with Certificate of Title Number L2262 as the house was offered to him in a proper manner.

- 2.8 The appellant stated that the withdrawal of the title deeds that were issued to his father was unlawful and that the respondent was issued with a certificate of title for the house irregularly. The appellant also filed a counterclaim in which he stated that the house was offered to his late father and that he would have moved into it after the retired civil servant who was in occupation thereof at the time had vacated it. When the civil servant vacated the house, his father was on national assignment in Mazabuka and could not move into the house. The respondent then moved in on a temporary basis. He stated that after his father was offered the house, the respondent refused to move out because she deemed herself as the sitting tenant and that she was eligible to purchase it.

3.0 DECISION OF THE HIGH COURT

- 3.1 The lower court took into consideration all the evidence and arguments before it and made the following findings of fact-

- (1) That the appellant did not lead any evidence upon which the court could satisfy itself that the respondent fraudulently acquired the house in issue;
- (2) That the appellant's late father's letter of offer for the said house was withdrawn because he was not a sitting tenant;
- (3) That the house was then offered to the respondent.
- (4) That the committee on sale of government houses was on firm ground when it withdrew Geoffrey Phiri's letter of offer because he was not a sitting tenant;
- (5) The lower court went on to find that Geoffrey Phiri had a Certificate of Title issued in his names in 1999 when the purchase price for the house was not fully paid;
- (6) That there was no evidence that the respondent occupied the house on a temporary basis;

3.2 In the final analysis, the lower court found that the appellant failed to adduce sufficient evidence that would lead to the cancellation of the respondent's Certificate of Title.

3.3 The appellant's counterclaim failed because the court found that it could not reinstate the appellant's father's Certificate of Title. The court found that, on a balance of probabilities, the

respondent proved that she was the rightful owner of the house in issue and that she was entitled to the rentals of the house, which would be assessed by the Registrar from the date the appellant's father took possession of the house until it would be vacated. The court ordered that the appellant yields vacant possession of the house immediately, and awarded costs to the respondent.

4.0 GROUNDS OF APPEAL AND APPELLANT'S CONTENTIONS

4.1 The appellant was dissatisfied with the decision of the lower court and appealed to this court, advancing six grounds of appeal couched as follows:

- (1) The learned Judge in the court below erred in both law and fact and further grossly misdirected herself when she held that the respondent was the legal sitting tenant and not the appellant in total disregard of the law as it relates to sitting tenants for government pool houses by holding that a sitting tenant is basically a tenant already in occupation of premises.***
- (2) The learned Judge in the court below erred in law and in fact when she held that the Appellant's father***

failed to occupy the house for the apparent reason that he was working in Mazabuka contrary to the evidence showing that it was because the house was occupied by a retired Government employee by the name of Miss Malama at the time of allocation.

- (3) The learned Judge in the court below erred in law and in fact and grossly misdirected herself when she totally ignored the fact that the Defendant's father had been allocated and given an allocation slip for House No. 792 Mphande Road, Chingola earlier than the Plaintiff.*
- (4) The learned Judge in the court below erred in law and fact when she held that the Defendant did not plead fraud as the basis upon which the title should be cancelled which holding is contrary to the decision of the Supreme Court in the case of Sailas Nzowani and others vs Flamingo Farm Limited selected Judgment No. 5 of 2019 where it was held that it is not merely on account of fraud that cancellation of a title can be sought.*
- (5) The learned Judge below erred in law and fact when she held that "it is also unsettling how the certificate of title was issued in the Defendant's fathers name in 1999 when it was clear that the purchase price was not fully paid until 2002 after his death" which*

holding is contrary to the evidence adduced showing that the offer letter dated 26th May 1998 clause 1(a) indicated that the title deeds shall be prepared upon the receipt of the sum of K59,333.6 and not the full purchase price.

(6) The Judge in the court below erred in law and fact when she did not properly consider the evidence that the Respondent occupied the house temporally.

4.2 In arguing ground one, it was submitted that the law that relates to legal sitting tenants for government pool houses was stated in the case of ***Vivienne Kaonga vs The Attorney-General¹***, where the Supreme Court held that:

“In the context of government pool houses the legal tenant is the one allocated the house by the Government Housing Committee under the Ministry of Works and Supply evidenced by an allocation slip.”

4.3 It was submitted that the appellant led evidence in the lower court showing that his father was allocated house number 792, Mphande Road, Chingola in 1996. It was argued that the appellant produced an allocation slip dated 21st December, 1996, and that the lower court did not address its mind to the

fact that the appellant was allocated the house in issue earlier than the respondent. The court's attention was further drawn to the case of ***Vivienne Kaonga vs The Attorney-General (supra)*** where there is no mention that a sitting tenant is a tenant already in occupation of the premises, which is what the lower court found.

4.4 It was contended that the reason why the appellant did not occupy the house was that he was waiting for the retired civil servant, a Miss Malama, to vacate the house when her terminal benefits would be paid to her. This was contrary to what the lower court found, that the appellant did not occupy the house because he was working in Mazabuka. The appellant urged this court to find and hold that the appellant's father was the rightful sitting tenant as per the law on sitting tenants.

4.5 In arguing ground two, it was submitted that the appellant's father failed to occupy the house in issue because it was occupied by a retired civil servant, a Miss Malama. Reference was made to correspondence which showed that the committee on the sale of government pool houses was advised to find

alternative accommodation for the respondent. We were urged to reverse the lower court's finding of fact that the appellant's father did not occupy the house because he was working in Mazabuka as it was not supported by the evidence on record.

4.6 Turning to ground three, counsel reiterated that the appellant's father was allocated the house in issue on 21st December, 1996 and the appellant produced an allocation slip indicating when the house was allocated to him. It was contended that the respondent was erroneously offered the house on 10th October, 1997 and that the lower court should have found that the house was offered to the appellant's father earlier and that he was the bonafide sitting tenant for the property.

4.7 In arguing ground four, we were referred to the case of **Sailos Nzowani vs Flamingo Farm Limited²**, where the Supreme Court held that:

"....it is not only on account of fraud that the cancellation of the certificate of title can be sought . . . the appellant did not need to plead and prove fraud for them to succeed in an action premised on failure to follow procedure which

would render the whole land acquisition process null and void.”

4.8 It was submitted that the lower court erred in law and fact when it held that the appellant did not plead fraud as the basis upon which title would be cancelled. We were urged to reverse the lower court’s finding for the aforestated reasons.

4.9 In relation ground five, it was submitted that the appellant’s father had a letter of offer dated 26th May, 1998 which stated that:

“You are required to accept the offer by paying within ninety days from the date of this offer the sum of K59,333.36.

On receipt of the above amount, the title deeds will be prepared.”

4.10 It was contended that there was no impropriety in the manner in which the title deeds were issued to the appellant’s father. According to the appellant, his father paid for the house on a receipt dated 24th May, 1998 and the balance of the purchase price was paid through the payroll.

4.11 Under ground six it was submitted that, the respondent did not occupy house number 792, Mphande Road, as a sitting tenant,

as she was only allowed to occupy the house temporarily since the government wanted to allocate her an alternative house. It was contended that the house was not available for allocation as clarified in the letters dated 19th and 27th November, 1997 respectively. We were urged to allow the appeal for the aforestated reasons.

5.0 THE HEARING

5.1 At the hearing of the appeal, Mr Sampa sought an adjournment on behalf of the respondent's counsel for the reason that Mr Sichone who had conduct of the matter on behalf of the respondent and was based in Ndola, passed away in a road traffic accident a few weeks earlier than the hearing date. Mr Sampa further informed the court that the respondent's Advocates were served with the notice of appeal and memorandum of appeal in 2021. The heads of argument were served in October 2021.

5.2 We considered the application and were of the view that the respondent and her advocates were way out of time and were

disqualified from responding to the appellant's heads of argument.

- 5.3 Mr Sampa proceeded to inform the court that he would rely on the memorandum of appeal and heads of argument that were filed.

6.0 CONSIDERATION AND DECISION OF THIS COURT

- 6.1 We have considered the record of appeal, the arguments by the appellant and the authorities cited.

- 6.2 In our view the cardinal issue that calls for determination in the first and sixth grounds of appeal is who the sitting tenant was and who was entitled to purchase the house in issue. Regarding the criteria set for the sale of government houses, there are a number of authorities that have guided that being a sitting tenant is not the sole criterion and that there are other considerations in addition to being a sitting tenant, such as proof of an offer and acceptance of the said offer prior to purchase.

6.3 Clause 2.0 of the Handbook on the ***Sale of Government Pool Houses*** provides for the issue of eligibility to purchase a government house.

It provides that-

2.1 Eligibility

In the process of identifying civil servants who are bona fide sitting tenants, the following criteria shall be used-

1. ***A confirmed civil servant who is in service and is a legal tenant;***
2. ***A civil servant who retired or was retrenched, but was not paid terminal benefits and is a legal tenant.***
3. ***A civil servant who retired, but was re-appointed on contract/gratuity terms and conditions of service;***
4. ***A spouse or children of a civil servant who paid terminal benefits and was a legal tenant; and***
5. ***A civil servant who qualifies to own land under the provision of section 3 (2) and (3) of the Land Act Number 29 of 1995.***

6.4 Further, section 2 of the ***Rent Act*** defines a tenant as follows-

“Tenant” in relation to the premises, means the person entitled, whether exclusively or in common with others, to possession thereof, and shall include:

1. Any person deemed to be a tenant by virtue of the meaning ascribed in this subsection to the express on "lease".

6.5 The evidence on record is that the appellant's father was allocated house number 792, Mphande Road, Chingola in 1996. There is also evidence that the respondent was allocated the house on a temporary basis as at the time, the appellant's father was working on national assignment out of town.

6.6 We are therefore of the view that the respondent was not the sitting tenant as she occupied the house on a temporarily basis. Further, the appellant's father was offered the house in issue earlier than the respondent. There are also minutes of the Chingola District Housing Committee dated 25th March, 1999, which indicate that the committee heard the appellant's father and the respondent to ascertain who had the rightful claim for the house. The committee then resolved that the house in issue was correctly allocated to the appellant's father and that it should remain his property. The committee further decided that the respondent would be on the waiting list and if a house fell vacant, it would be allocated to her.

- 6.7 There are also letters that were written by the Deputy Permanent Secretary, a Mr Chilanga and Mr A. P. Musonda, the Secretary of the Housing Committee Chingola, which show that the respondent was allocated the house in issue on a temporal basis. Additionally, since the appellant's father was offered the house much earlier than the respondent, we are of the view that he was the sitting tenant of the said property.
- 6.8 We are of the view that the lower court accordingly misdirected itself when it held that the respondent was the legal sitting tenant of the said house. We find merit in the first and sixth grounds of appeal and they succeed.
- 6.9 The second ground of appeal attacks the lower court for finding that the appellant's father failed to occupy the house because he was working in Mazabuka. We have perused the letter dated 27th November, 1997, authored by the Secretary of the Housing Committee Chingola, a Mr Musonda, who stated that after the appellant's father was allocated the house, he was waiting for the retired civil servant who was in occupation, a Miss Malama, to move out of the house so that he could take possession of it.

We therefore take the view that the lower court erred when it found that the appellant's father did not move into the house because he was away as he was working in Mazabuka. We find merit in the second ground of appeal and it succeeds.

6.10 Turning to ground three, which is that the lower court misdirected itself when it ignored the fact that the appellant's father was allocated the house in issue earlier than the respondent, we note that the appellant's father was allocated the house in 1996, which was much earlier than the respondent, who was allocated the house on 10th October, 1997. It was therefore a misdirection for the lower court to have ignored this fact when it adjudicated upon the matter. We find merit in the third ground of appeal and it succeeds.

6.11 The fourth ground of appeal faults the lower court for having found that the respondent did not plead fraud as the basis upon which the respondent's title should be cancelled. We have considered the evidence on record and we are of the view that there was impropriety in the manner in which the respondent obtained the title deed for the said property. This is because a

number of letters from the housing committee and the Provincial Administration indicate that the respondent was occupying the house on a temporal basis. However, as soon as the sale of government pool houses commenced, the respondent obtained a letter of offer and processed the same until she purchased the house in issue.

6.12 This was after the appellant's father's letter of offer had been withdrawn, on the basis that he was not the sitting tenant. We are of the view that there was irregularity in the manner in which the respondent was offered the house and went on to purchase it. For the aforesaid reasons, we find that the respondent's Certificate of Title should have been cancelled as it was obtained irregularly. We accordingly find merit in the fourth ground of appeal and it succeeds.

6.13 Turning to ground five, which is that the lower court erred when it found that the appellant's father had the certificate of title issued in 1999 before the house was fully paid for. We refer to the appellant's father's letter of offer, dated 26th May, 1998. This letter provided as follows-

"You are required to accept the offer by paying within ninety (90) days from the date of this offer the sum of K59,333.36 as shown below:

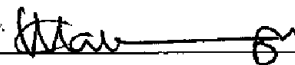
<i>Consideration</i>	<i>K25,000.00</i>
<i>Registration</i>	<i>K16,000.00</i>
<i>Preparation fees</i>	<i>K 5,000.00</i>
<i>Stamp Duty fees</i>	<i>K0.00</i>
<i>Rent up to 30th September, 1999</i>	<i>K13,333.19</i>


On receipt of the above amount, title deeds will be prepared. If no payment is received within the ninety days period, the offer will be considered not accepted and the house made open to other applicants."

6.14 We have perused the record of appeal and we note that the appellants' father's letter of offer indicated that he could pay for the house by initially paying for consideration, registration, preparation fee and that thereafter, the title deeds would be prepared. This therefore indicates that the full purchase price for the house would be recovered through the government payroll. Consequently, we find merit in the fifth ground of appeal and it succeeds.

7.0 CONCLUSION

- 7.1 All the six grounds of appeal having succeeded, the net result is that the appeal succeeds. We order that the Certificate of Title that was issued to the appellant's father and was subsequently cancelled, be re-issued as the appellant's father was the rightful owner of the house in issue. The appellant's father shall, consequently take possession of the property for the aforesaid reasons.
- 7.2 The Registrar of Lands and Deeds is ordered to cancel the Certificate of Title that was issued to the respondent as it was irregularly issued. Costs are awarded to the appellant, to be taxed in default of agreement.


C. K. MAKUNGU
COURT OF APPEAL JUDGE


P. C. M. NGULUBE
COURT OF APPEAL JUDGE


N. A. SHARPE-PHIRI
COURT OF APPEAL JUDGE