

IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 033 OF 2021

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN

ELIAS TEMBO

(Suing as an Attorney for **MIKE LUNGU**)



APPELLANT

AND

IAN MALILWE MWEEMBA

1ST RESPONDENT

LUSAKA CITY COUNCIL

2ND RESPONDENT

ATTORNEY GENERAL

3RD RESPONDENT

CORAM: CHASHI, SIAVWAPA and SHARPE-PHIRI, JJA

ON: 11th October and 11th January 2023

For the Appellant : F. Mutale, F.M. Legal Practitioners

*For the 1st Respondent : I. N. Samulozela (Mrs.), Messrs Howard
and Marietta Legal Practitioners*

For the 2nd Respondent : S. Lubasi, In-house Counsel

*For the 3rd Respondent : P. Shambulo, Principal State Advocate,
Attorney General Chambers*

JUDGMENT

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. Attorney General & Others v Ireen Muhongi Lemba (2008)

Volume 1 ZR, 215

2. **Benson Munganama v Fridah Ngoma - SCZ Appeal No. 186 of 2015**
3. **Nkhata and Others v Attorney General – (1966) ZR, 147**
4. **Premesh Bhai Megan Patel v Rephidim Institute Limited (2011) ZR, 134**
5. **Wina and Others v Attorney General (1990 – 1992) ZR, 95**
6. **Josia Tembo, Henry Jawa v Peter Mukuka Chitambala (Sued as Administrator of the Estate of the late Frank Macharious Chitambala) (2009) ZR, 327**
7. **Krige and Another v Christian Council of Zambia (1975) ZR, 152**
8. **Examinations Council of Zambia Pension Trust Scheme Registered Trustees and another v Tecla Investments Limited – SCZ Appeal No. 127 of 2015**
9. **Jack Needham Belmonte v Lubambe Coppermine Limited and 2 Others-SCZ Appeal No. 111 of 2018**

Legislation referred to:

1. **The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia**
2. **The Electronic Communications and Transactions Act, No. 21 of 2009**

1.0 INTRODUCTION

1.1 This is an appeal against the Ruling of Honourable Mrs. Justice A.M Banda-Bobo delivered on 17th December, 2020. In the said Ruling, the learned Judge dismissed the matter on account of lack of *locus standi*; that is, the power of attorney was irregular, null and void for lack of registration.

2.0 BACKGROUND

2.1 The Appellant, who was the plaintiff in the court below, commenced an action against the Respondents. The amended statement of claim dated 4th September 2015, indicates that he was suing as an attorney for Mike Lungu. The reliefs being sought related to ownership of Stand No. 24475 Libala South, Lusaka. The power of attorney appears at pages 145-148 of the record of appeal. (The record)

2.2 On 7th April, 2016, the 3rd Respondent filed a notice of motion to raise a preliminary objection pursuant to Order 18/11/2 as read with Order 14A/1 and 14A/2 of the **Rules of the Supreme Court (RSC)**. The issue for determination was couched as follows:

“That the power of attorney dated 20th June 2006 filed into court on 11th November 2015 was not duly registered at the Deeds Registry in accordance with section 4 of The Lands and Deeds Registry Act, Cap 185.”

2.3 According to the attendant affidavit in support of the motion, the power of attorney contained in the plaintiff's bundle of documents was not registered with the Lands and Deeds Registry as evidenced by the printout appearing at page 53 of the record and that therefore, it was irregular, null and void and thereby deprived the Appellant of any *locus standi*, to sue on behalf of another person. The motion was seconded by the 1st Respondent.

2.4 In opposing the motion, the Appellant deposed that the power of attorney was registered as shown at page 149 of the record and that therefore, the motion was misconceived and should be dismissed.

3.0 DECISION OF THE COURT BELOW

3.1 After considering the evidence and arguments by the parties, the learned Judge formulated the main issue for determination as follows:

“Whether the power of attorney was irregular, null and void for non-registration and thereby depriving the Appellant of any *locus standi* to sue on behalf of another person.”

3.2 In determining the issue, the Judge made reference to **Section 4 of The Lands and Deeds Registry Act¹**, which deals with documents required to be registered. Reference was also made to **Section 23** of the Act, which relates to an official certificate of search. The learned Judge opined that the Power of Attorney was not duly registered as per Section 4 of the Act as no such entry appeared on the computer printout. As a result, the Judge held that the Appellant did not have *locus standi* to seek redress of the court as the power of attorney was not registered as per Section 4 of the Act. Consequently the matter was dismissed with costs to the Respondents.

4.0 THE APPEAL

4.1 Dissatisfied with the Ruling, the Appellant has appealed to this Court advancing two grounds of appeal couched as follows:

- (i) **The learned Judge misdirected herself in law and fact, when she held that the power of attorney in favour of the Appellant was not registered with the Lands and Deeds Registry, consequently robbing the Appellant the *locus standi***
- (ii) **The learned trial Judge misdirected herself in law and fact when she misapprehended a mere land register print out as a certificate of search**

5.0 ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 In support of the appeal, Mr. Mutale, Counsel for the Appellant, relied on the filed heads of argument dated 17th February, 2021 and the heads of argument in reply dated 10th October, 2022, which he augmented with brief oral submissions.

5.2 According to Counsel, the power of attorney appearing at pages 145 to 150 of the record had no capacity to alter the status of the property in question. It was argued that the

power of attorney does not affect any interest in the property in issue and what it only tries to achieve is to enable the Donee to operate in the shoes of the Donor. Thus, it does not fall within Section 4 of the **Lands and Deeds Registry Act** requiring registration. In support thereof, Counsel relied on the case of **Attorney General & Others v Ireen Muhongi Lemba**.¹

5.3 As regards ground two, Counsel referred us to the case of **Benson Munganama v Fridah Ngoma**² and submitted that a certificate of search is distinguishable from a mere land register print out. Whereas the land register print out is promulgated in **section 22 of the Lands and Deeds Registry Act**, a certificate of search is issued pursuant to section 23 and is executed and sealed by the Chief Registrar of the Lands and Deeds which is essentially a deed of search. That the two are distinct and serve different purposes and ought to be treated as such.

5.4 Consequently, the learned Judge misdirected herself by holding that the certificate envisioned under **Section 23** of the Act is a computer printout generated by the Ministry of Lands for it to be said to be conclusive evidence. Counsel

relied on the case of **Nkhata and Others v Attorney General**³ and urged us to interfere with the findings of the lower court.

6.0 1st RESPONDENT'S ARGUMENTS OPPOSING THE APPEAL

6.1 In response, Mrs. Samulozela, Counsel for the 1st Respondent relied entirely on the filed heads of argument dated 12th April 2021.

6.2 In response to ground one, it was argued that, at the core of the matter was the legal requirement for registration of any document that purports to convey an interest in land. That the Appellant commenced these proceedings in a representative capacity by virtue of a power of attorney and that a perusal of the said power of attorney, does not indicate or reveal any confirmation of it having been registered by the Registrar of Lands.

6.3 It was argued that **Section 4 of the Lands and Deeds Registry Act** makes it mandatory for a document such as the power of Attorney to be registered. As a result, the power of attorney dated 20th June, 2006 was rendered void 30 days after its execution for want of registration. That the Power of Attorney, having been executed on 20th June,

2006, the Appellant had ample time to have it registered. The case of **Premesh Bhai Megan Patel v Rephidim Institute Limited**⁴ was called in aid.

6.4 Counsel further submitted that the **Ireen Muhongi Lemba** case can be distinguished from the facts in the instant case on the grounds that, the power of attorney in the **Ireen Muhongi Lemba** case was executed for purposes of ongoing litigation and not conveying any interest in land. It was merely giving authority to the Appellant to depose to an affidavit, hence the court's decision that the Power of Attorney did not require to be registered under the **Lands and Deeds Registry Act**. That in **casu**, the Power of Attorney, given to the Appellant affects interest in land and gives wide scope of powers to the Appellant to deal with the land as if he were the registered owner when dealing with third parties.

6.5 In support of ground two, it was submitted that, the lower court only made reference to the certificate of search because the Appellant raised an issue to the effect that the court cannot make a finding that the Power of Attorney

was not registered based on a mere search printout in the absence of a certificate of search.

- 6.6 It was argued that the shortcomings demonstrated by the power of attorney were not only revealed by the Lands Register printout but also via the plaintiff's bundle of documents filed in Court on 11th November, 2015. Thus, the Appellant's argument that the Court dismissed the entire action based on a mere search printout is devoid of merit. We were urged to dismiss the Appeal.

7.0 2ND RESPONDENT'S ARGUMENTS OPPOSING THE APPEAL

- 7.1 Mr. Lubasi, Counsel for the 2nd Respondent, relied entirely on the filed heads of argument dated 17th June, 2021.
- 7.2 In response to ground one, Counsel referred us to the case of **Wina and Others v Attorney General**⁵ and submitted that the Appellant had no *locus standi* to deal with the property in question as the Power of Attorney is irregular for want of registration contrary to **Sections 4, 5 and 6 of the Lands and Deeds Registry Act**. In support thereof, Counsel relied on the case of **Josia Tembo, Henry Jawa v Peter Mukuka Chitambala (Sued as Administrator of**

the Estate of the late Frank Macharious Chitambala)⁶
and Krige and Another v Christian Council of Zambia⁷.

7.3 In response to ground two, it was argued that a land register print out is sufficient evidence except in cases where one is dealing with the verification of ownership of property. That in the present case, the Court was not called upon to verify ownership of land but to determine whether the power of attorney was duly registered.

7.4 Counsel further submitted that a distinction ought to be drawn between a general search under section 22 and an official search under section 23 of the **Lands and Deeds Registry Act**. An official search document is relied upon for verification of ownership of property while a land print out refers to general searches of the land register. The lands register print out can be relied upon for verification of other entries such as the registration of a power of attorney. In support thereof, Counsel relied on the **Benson Munganama case**. We were urged to dismiss the appeal.

8.0 3RD RESPONDENT'S ARGUMENTS OPPOSING THE APPEAL

8.1 Mr. Shambulo, Counsel for the 3rd Respondent, relied on the filed heads of argument dated 3rd May, 2021. It was

submitted that the lower Court was on firm ground when it held that the Appellant had no *locus standi* to seek redress for the reason that the Power of Attorney was not registered at the Lands and Deeds Registry as per section 4 of the Act.

8.2 It was submitted that contrary to the argument by the Appellant, the Power of Attorney did in fact affect interest in property. That by virtue of the Power of Attorney the Appellant assumed the legal ability to produce change in legal relations and standing in the place of the donor in the conveyance or transfer of land or any interest in the land. Thus, the Power of Attorney falls within the scope of section 4 and requires registration. We were referred to the case of **Examinations Council of Zambia Pension Trust Scheme Registered Trustees and another v Tecla Investments Limited**⁸.

8.3 In support of ground two, it was submitted that the learned trial Judge was on firm ground when she held that a land register printout is a certificate of search. Counsel relied on the **Benson Munganama** Case and submitted that in the case at hand, what was being sought was not

the verification of ownership of land but whether or not the Appellant's Power of Attorney had been registered, that therefore, section 22 dealing with the general search applied.

- 8.4 In addition, it was argued that based on Section 4 of the **Electronic Communications and Transactions Act²**, the lands printout is a document that can be relied upon by courts of competent jurisdiction. We were urged to dismiss the appeal.

9.0 APPELLANT'S ARGUMENTS IN REPLY

- 9.1 In reply, Counsel for the Appellant contended that the relationship that exists between donor and donee is that of principal and surrogate and that contrary to the 1st Respondent's argument, it is not the aim of a Power of Attorney to convey, assign or transfer the rights of the principal in assets to the donee. That the arguments by the 1st Respondent were not supported by any law but were mere moral arguments. Counsel relied on the case of **Jack Needham Belmonte v Lubambe Coppermine Limited and 2 Others⁹**.

10.0 ANALYSIS AND DECISION OF THE COURT

10.1 We have considered the evidence on record and the arguments advanced by Counsel for the Appellant and the Respondents. We have also considered the Ruling of the court below.

10.2 The learned Judge in the court below rightly identified the issue for determination, which is quite simple; whether or not the Power of Attorney was rendered void for want of registration in terms of Section 4 of **the Lands and Deeds Registry Act**.

10.3 **Black's law dictionary** at page 1209 defines a power of attorney as follows:

“An instrument granting someone authority to act as an agent or attorney-in-fact for the grantor.”

10.4 Upon a perusal of the Power of Attorney appearing at pages 145 – 148 of the record, it appears that the Power of Attorney is of a general nature, which authorises a designated person to transact for the principal, thereby creating a principal agent relationship.

10.5 **Section 4 of the Lands and Deeds Registry Act** dealing with documents required to be registered with the Lands and Deeds Registry provides as follows:

“4. (1) Every document purporting to grant, convey or transfer land or any interest in land, or to be a lease or agreement for lease or permit of occupation of land for a longer term than one year, or to create any charge upon land, whether by way of mortgage or otherwise, or which evidences the satisfaction of any mortgage or charge, and all bills of sale of personal property whereof the grantor remains in apparent possession, unless already registered pursuant to the provisions of "The North-Eastern Rhodesia Lands and Deeds Registration Regulations, 1905" or "The North-Western Rhodesia Lands and Deeds Registry Proclamation, 1910", must be registered within the times hereinafter specified in the Registry or in a District Registry if eligible for registration in such District Registry...”

10.6 In our view, considering the nature and effect of a Power of Attorney, it is not intended to purport to grant, convey or transfer land or any interest in land or to be a lease or agreement for occupation of land or create a charge, so as to bring it under the realm of **Section 4** of the Act. It is simply an instrument used to delegate legal authority to another person.

10.7 It is clear from a reading of section 4 that there is no requirement for a Power of Attorney to be registered. However, in the event that a Power of Attorney is required to be registered, which is not the case herein, it would be registered under the Miscellaneous Register pursuant to section 9 (c) of the Act and not under the Lands Register.

10.8 In the **Ireen Muhongi Lemba** case cited by the Appellant, the Supreme Court had this to say at page 219:

“We shall deal with the last issue because it does not involve much. A power of attorney is an instrument of authority whereby one is set in the stead or place of another to act for him. It is generally made in writing in this country and may be unsealed, it does not require authentication if

it is made in Zambia. We have examined the power of attorney, exhibit "AMH1" that is attached to the affidavit of Amina Masood Hussain and we are satisfied that it was executed within Zambia and before a Zambian Commissioner for Oaths. It is unsealed and not subject to registration under the lands and deeds registry act for it to be valid for use in Zambia."

10.9 In view of the aforestated, we are of the opinion that the learned Judge erred by holding that the Power of Attorney was irregular, null and void for want of registration. The dismissal of the action on that basis was wrong at law and is hereby set aside. The matter is hereby remitted back to the High Court for trial.

10.10 Having remitted the matter back, the argument in respect to the second ground will not have any effect on our decision save to mention that the searches under Section 22 are distinct from those under Section 23 of the Act. Under Section 22, one can conduct a search on the Land Register and obtain certified copies if required. Under Section 23, one has to lodge a requisition and the search

is conducted by the Registrar who shall issue a certificate setting forth the result thereof, which certificate shall be conclusive, affirmatively or negatively as the case may be. It would appear that this certificate is restricted to purchasers or intending purchaser.

10.11 It is also worth mentioning that if at all the Power of Attorney was registered as was claimed by the Appellant, then it was registered in the miscellaneous Registry and would not therefore, appear on a computer printout from the Land Registry.

11.0 CONCLUSION

11.1 In sum, the appeal has merit and the matter is remitted back to the High Court. Costs to abide the outcome of the matter in the court below.



J. CHASHI
COURT OF APPEAL JUDGE



M.J. SIAVWAPA
COURT OF APPEAL JUDGE



N.A. SHARPE-PHIRI
COURT OF APPEAL JUDGE