

IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 256 OF 2020

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN

REPHIDIM INSTITUTE LIMITED

APPELLANT

AND

ATTORNEY GENERAL

RESPONDENT

CORAM: SIAVWAPA JP, CHASHI AND BANDA-BOBO, JJA

ON: 11<sup>th</sup> October 2022, 18<sup>th</sup> January and 8<sup>th</sup> June 2023

*For the Appellant: W. Simutende, Messrs. TMB Advocates*

*For the Respondent: Col. H. Chidakwa, Principal State Advocate, Lt  
V. Hamusiya State Advocate and C.  
Muyakwa (Ms), State Advocate, Attorney  
General Chambers*

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## JUDGMENT

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CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. David Nzooma Lumanyendo and Goodwins Kafuko Muzumbwa v Chief Chamuka and Kabwe Rural District Council and Zambia Consolidated Copper Mines Limited (1998 – 1989) ZR, 194



2. **Zambia Telecommunications Company Limited v Valson Pharma Zambia Limited – SCZ Judgment No. 3 of 2010**
3. **Nkhata & Others v Attorney General (1966) ZR, 124**
4. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR, 172**
5. **Mwenya and Randee v Kapinga (1998) ZR, 17**
6. **Hunt v Luck (1902) 1 Ch. D**
7. **Nawakwi v Lusaka City Council and Another – SCZ Appeal No. 26 of 2001**
8. **Nora Mwaanga kayoba and Alizani Banda v Eunice Kumwenda Ngulube and Andrew Ngulube – SCZ Appeal No. 35 of 2001 (SCZ 19 of 2003)**

**Legislation referred to:**

1. **The Constitution of Zambia, Chapter 1 of the Laws of Zambia**
2. **The Lands Acquisition Act, Chapter 189 of the Laws of Zambia**

**Rules referred to:**

1. **The Supreme Court Practice (The White Book) 1999**

**Other works referred to:**

1. **Black's Law Dictionary, Eighth Edition**
2. **Howarth William, Land law (Nutshell), 1994, Third Edition, London: Sweet and Maxwell**

## **1.0 INTRODUCTION**

1.1 This is an appeal against the Judgment of Honourable Mrs Justice S. Kaunda Newa, delivered on 3<sup>rd</sup> February 2020, in which she dismissed all the claims by the Plaintiff, now the Appellant.

## **2.0 BACKGROUND**

2.1 On 15<sup>th</sup> May 2018, the Appellant commenced an action against the Respondent by way of writ of summons, claiming the following reliefs:

- (i) An Order directing the Respondent to compensate the Appellant for the current commercial value of the agreed portion of land comprising 72 hectares of Farm 690 Lusaka.
- (ii) *Mesne* profits for the period the Zambia National Service has occupied the Appellant's property.
- (iii) Special damages for the sketch plan, valuation report and survey diagrams secured by the Appellant.

2.2 According to the attendant statement of claim, the Appellant is the registered legal owner of Farm No. 690

Lusaka as evidenced by certificate of title No. 218409. That in the 1980's the Zambia National Service (ZNS) moved on to the Appellant's portion of land, approximately 66 hectares and put up a camp to maintain the country's security.

2.3 It was averred that ZNS constructed permanent structures on the land without paying any rentals nor contributing to payment of ground rates. That despite being engaged *vide* letters and meetings to discuss the possibility of ZNS purchasing that portion of land and despite the Appellant, at the request of the Appellant, obtaining site plans, survey diagrams and a valuation report for 72 hectares at the value of K1,600,000 (rebased), the Respondent has refused, despite their continued occupation.

2.4 In its defence filed on 3<sup>rd</sup> August 2018, the Respondent averred that the government acquired part of Farm 690 Lusaka West from Lendor Burton and established it as ZNS builders brigade. That they already had an established presence, at the time the Appellant acquired its certificate of title.

- 2.5 According to the Respondent, the Appellant has since 2007 been attempting to sell government its own land, as the interest of government subsisted before the Appellant acquired the certificate of title. Further that, when the Appellant acquired the land, it knew of the existence of the military unit.
- 2.6 At the trial, the Appellant called one witness, Maxwell Mulondiwa (PW1), the majority shareholder who reiterated the averments in the statement of claim and added that the Appellant bought the Farm from Lendor Burton in 1990 which land was in excess of 1900 hectares. That at the time of buying, the Appellant was informed of the existence of a refugee camp and ZNS who were there temporarily during the state of emergence for security purposes because of the rebels' incursions. It was his testimony that ZNS did not register its interest in the land.
- 2.7 Further, that at a meeting held on 23<sup>rd</sup> July, 2015, ZNS expressed regret for the delay in concluding the transaction and were ready to proceed. A new valuation of the portion of land was carried out and valued at



K7,948,800.00. In addition, ZNS requested that the Appellant put the portion of land occupied by it on title, which was done.

- 2.8 The Respondents called two witnesses. DW1, a former Zambia Army Regional Commander, testified that the ZNS camp was established in 1975 and it had several structures on it. That was confirmed by DW2 who once served as Officer Commander at the camp.

### **3.0 DECISION OF THE COURT BELOW**

- 3.1 After considering the evidence and the submissions by the parties, the learned Judge made a finding that, it was clear from the evidence that the Appellant was aware of the presence of ZNS on the land at the time of buying the land. That it, however, did not make any enquiries from ZNS to establish whether it had any rights to the land before buying the same. That the Appellant therefore had actual notice of the presence of ZNS which affected its right to the land.
- 3.2 Further that, the memorials on the certificate of title shows that the lease was first issued to Barend Jacobus Vorster

in 1947 for 4790 acres, which translates to 1938.44 hectares. That the Appellant obtained a certificate of title to its land on 17<sup>th</sup> June 2017 for 70.85 hectares, the land having been surveyed in July 2016. That the said land is subdivision A20 of Farm 690 Lusaka, entailing that the original Farm was subdivided. That the Appellant did not therefore have title to the entire Farm 690.

3.3 Furthermore, that the Appellant had not produced a contract of sale to show the extent of land it had purchased from Lendor Burton; nor to show how much land Lendor Burton had acquired from Barend Jacobus Vorster.

3.4 The learned Judge opined that ZNS was possibly in possession of between 66.24 to 72 hectares which land may not be owned by the Appellant. That in the absence of the land register showing the transactions, it would be speculative to find that the State compulsorily acquired the land or what extent of land was sold to the Appellant by Lendor Burton.

3.5 According to the learned Judge, the Appellant may have labored under a mistaken belief that Lendor Burton sold

it the entire Farm 690, as it only has title to subdivision A20 of Farm 690. That therefore the Appellant had not proved on a balance of probabilities that it is entitled to be compensated for the land. The claim for *mesne* profits was also consequentially dismissed.

#### **4.0 THE APPEAL**

4.1 Dissatisfied with the Judgment, the Appellant has appealed to this Court advancing three grounds as follows:

- 1. The court below gravely erred both in law and fact when it made perverse findings of fact in the absence of any relevant evidence on the court record that the portion of land in extent 72 hectares illegally and arbitrary occupied by the Respondent did not belong to the Appellant or at all contrary to the unchallenged and undisputed evidence on the court record to the effect that the said portion of the land belonged to the Appellant.**
- 2. The court below gravely erred in both law and fact when it failed to find that the Respondent has**



**illegally and arbitrary occupied the Appellants portion of the land, despite overwhelming unchallenged and undisputed documentary evidence and admission to the Respondent.**

**3. The court below erred in both law and fact when it failed to award the Appellant compensation for the illegal and arbitrary occupation of the Appellants portion of the land by the Respondent.**

## **5.0 ARGUMENTS BY THE APPELLANT**

5.1 Mr. Simutende, Counsel for the Appellant relied on the filed heads of argument dated 14<sup>th</sup> December, 2020. Counsel argued grounds one and two together, attacking the findings of fact and alleging that they were perverse and not supported by evidence. Further that the evidence by the Appellant was unchallenged and not rebutted and also that there was an admission on the part of the Respondent. Counsel referred to the cases of **David Nzooma Lumanyendo and Goodwins Kafuko Muzumbwa v Chief Chamuka and Kabwe Rural District Council and Zambia Consolidated Copper Mines**

**Limited<sup>1</sup> and Zambia Telecommunications Company Limited v Valson Pharma Zambia Limited<sup>2</sup>** for the position that there can be no adverse possession of land that is subject of a certificate of title. Further that, the Respondent cannot claim an interest in land by virtue of occupancy to the detriment of the Appellant who is the rightful owner with title to the property. Relying on the cases of **Nkhata & Others v Attorney General<sup>3</sup>** and **Wilson Masauso Zulu v Avondale Housing Project Limited<sup>4</sup>**, we were urged to reverse the findings of fact by the lower court.

5.2 As regards ground three, it was argued that being the owner of the land which was illegally and arbitrarily occupied by the Respondent, the Appellant is by law entitled to compensation. The Appellant relied on Article 16 of **The Constitution** and Sections 5 and 10 of **The Land Acquisition Act**.

## **6.0 ARGUMENTS IN RESPONSE**

6.1 Col. Chidakwa, Counsel for the Respondent relied on the filed heads of argument which he augmented with brief

oral submissions. In responding to grounds one and two, it was submitted that the findings of fact by the court cannot be faulted. That there was nothing more to support the Appellants testimony; for example, a tenancy agreement or a contract of sale to prove that the Appellant was a bona fide purchaser for value without notice of the entire land. That the evidence available on record proved that the Appellant had actual notice of the government's presence when it bought the land from Lendor Burton, thus the title obtained is subject to the interest of the Respondent. In support thereof the cases of **Mwenya and Randee v Kapinga<sup>5</sup>**, **Hunt v Luck<sup>6</sup>** and **Nawakwi v Lusaka City Council and Another<sup>7</sup>** were cited.

- 6.2 As regards the third ground, it was argued that having not proved ownership, it would not be logical for the court to order compensation. That this is not an appropriate case justifying the interference with the findings of the lower court.

## **7.0 ANALYSIS AND DECISION OF THE COURT**

7.1 We have considered the evidence on record, submissions by Counsel for both Parties and the impugned Judgment. In our view, the issue falling for determination is whether the portion of land that is currently occupied by ZNS belongs to the Appellant. If the answer is in the affirmative, whether the said land was purchased subject to the interest of ZNS.

7.2 The learned Judge in the court below found that the Appellant failed to prove its case on a balance of probability that the portion of land which ZNS was occupying belonged to it. This finding was based on the fact that the Appellant failed to adduce evidence on how the land was acquired from Lendor Burton and the extent of the said land. The Appellant also did not produce a land register to show how the land devolved and also failed to show that the entire Farm 690 belonged to it.

7.3 According to the learned Judge, the only evidence shown was a certificate of title which relates to subdivision A20 of Farm No. 690 Lusaka in extent 70.85 hectares. That all



this proved was that the original farm was subdivided and that in the absence of a certificate of title for the whole land, the Appellant may have labored under the mistaken belief that Lendor Burton sold it the whole land as it only had title to the subdivision A20 of Farm 690.

7.4 When we first heard this appeal in October, 2022, we observed that the land in issue had a complex history and in order for us to have a clearer perspective of the issues surrounding it, we felt it prudent to allow the parties to produce fresh evidence pursuant to Order 59/10/11 of **The Rules of the Supreme Court<sup>1</sup> (RSC)**. We therefore, directed the Appellant to file into court the following documents:

**(a) Certificate of title No. 218409 relating to Farm No. 690 Lusaka.**

**(b) Certificate of title relating to the remaining extent of Farm 690 Lusaka**

And the Respondent to file into court the following documents:

**(a) Lands Register relating to Farm No. 690 Lusaka**



(b) Lands Register relating to the remaining extent of Farm 690 Lusaka

(c) A report from the Surveyor General, to confirm whether certificate of title. 33865 relating to subdivision A20 of Farm 690 Lusaka relates specifically to the portion of the Farm occupied by Zambia National Service.

7.5 The above mentioned documents were duly filed into Court and upon examining the said documents, we observed that the court below was deprived of critical evidence, which if it had been made available, would not have decided the matter in the manner it did.

7.6 Among the documents produced was certificate of title No. L3216 in the name of the Appellant which relates to the entire Farm 690 obtained on 28<sup>th</sup> October 1997 in extent of 1,938 hectares. This lends credence to the Appellant's argument in the court below that it purchased the entire Farm 690 from Lendor Burton.

7.7 The Appellant also produced several certificates of title relating to the remaining extent of Farm 690 registered in

the name of the Appellant, indicating that Farm 690 had undergone several subdivisions. The Appellant also produced a land register which clearly highlights how Farm 690 devolved from Lendor Burton to the Appellant and also details successive transactions with the land over the course of time.

7.8 In addition, the Respondent filed into court a Property Assessment Report dated 5<sup>th</sup> December, 2022. The report revealed that subdivision A20 of Farm 690 is sitting in the same geographical location as ZNS.

7.9 Based on the above mentioned documents, there can be no doubt that the Appellant purchased the entire Farm 690 from Lendor Burton, which includes the portion occupied by ZNS. It can safely be said that the decision of the learned Judge to the effect that the Appellant did not purchase the entire Farm 690 was made in the absence of relevant evidence.

7.10 Based on the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**<sup>4</sup>, where it was held that an appellate court will only reverse findings of fact made by a

trial court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts, we find this to be an appropriate case in which we can disturb the lower court's finding that the Appellant did not own the entire Farm 690 including the portion occupied by ZNS.

7.11 Having found that the Appellant is the registered owner of the portion of land occupied by ZNS, the next issue to consider is whether the Appellant purchased the land subject to the interest of ZNS.

7.12 It is the primary contention of the Appellant that when it purchased the property, it was informed of the presence of ZNS on the property, but that they were there only on a temporary basis. The Appellant insisted that the Respondent had no registered interest in the land. The Respondent on the other hand, argues that ZNS had moved on the property sometime before the Appellant purchased the property and when the Appellant subsequently acquired the property, it had actual notice of the presence of ZNS on the land. That therefore, the

Appellant was not a *bona fide* purchaser for value without notice.

7.13 We have perused the evidence adduced in the court below and the Appellant through its witness, Maxwell Mulondiwa, in his evidence in chief at page 238 stated as follows:

*"...When we were buying the property, we were told ZNS had come to maintain law and order. There was a refugee camp in the neighbourhood. In those days in the state of emergency, the rebel aero planes used to bomb the refugee camp.*

*Over a period of time they put up structures within the place. It was difficult to contest that because of the state of emergency, ZNS did not legally acquire portion of the land. ZNS did not register their interest on the property. I did a search at Ministry of Lands I did not find anything as can be seen at page 23 of the Plaintiffs bundle of documents. Commissioner of lands on issuing title to us did not issue any conditions as regards ZNS..."*

Further in cross examination, the witness stated as follows:

*"...I bought an existing farm. There were people living there, being some squatters who had encroached. I found out what their interest in the land was including ZNS*

*I asked their presence on the land when we were finalizing the agreement. They were not specific. A company used to operate there called builders brigade. We spoke initially. Ownership of land is proved through title. I was told that the squatters would move out soon. I spoke to ZNS after we had concluded the sale."*

7.14 From the Appellant's own evidence, it is not in dispute that when the Appellant was acquiring the land, he had actual notice of the presence of ZNS on the land. It is also not in dispute that the Appellant did not enquire from ZNS what interest it had not until the sale was finalized. The question that can be posed here is whether the Appellant was a *bona fide* purchaser for value without notice?



7.15 **Black's law Dictionary, 8<sup>th</sup> Edition** defines "*bona fide* purchaser" as:

**"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."**

7.16 Further, in the case of **Mwenya and Randee v Kapinga**<sup>5</sup> the Supreme Court upheld the principle in the case of **Hunt v Luck**<sup>6</sup> that:

**"...the occupation of land by a tenant affects a purchaser of land with constructive notice of all that tenant's rights including an agreement for sale to him by the vendor...A tenant's occupation is notice of all the tenant's rights. It means that if a purchaser has notice that the vendor is not in possession of the property, he must make inquiries of the person in possession and find out**

**from him what his rights are and if he does not choose to do that, then whatever title he acquires as purchaser will be subject to the title or rights of the tenant in possession.”**

7.17 We do note that the above case was dealing with a tenant in possession of a house. However, we believe the principle equally applies to the present case as the Appellant knew at an early stage of the transaction that ZNS had established a presence on the land. Even at the point that ZNS began erecting structures on the land, the Appellant claimed that he did not contest it on account of the state of emergency. The Appellant further stated that when it later enquired from ZNS about its interest, they were not specific. In our view, this ought to have put the Appellant on high alert and triggered a serious inquiry for any encumbrances or red flags before proceeding with the sale.

7.18 In addition, the correspondence between the parties regarding the sale of the land produced by the Appellant dates back to only 2008, which is many years after the state of emergency and after ZNS had settled on the land.

The evidence seems to suggest that the Appellant acquiesced to the presence of ZNS on the property.

7.19 It is trite law that land as valuable property calls for thorough investigations before purchase. Howarth William in his book, Land Law (Nutshells), 1994<sup>1</sup>, observed as follows:

***“A purchaser is under obligation to undertake full investigation of title before completing his purchase. He can only plead absence of notice if he made all usual and proper enquiries. If he does not do so, or is careless or negligent, he is deemed to have “constructive notice” of all matters he would have discovered. A person has constructive notice of all facts of which he would have acquired actual notice had he made those inquiries and inspections which he ought reasonably to have made, the standard of prudence, being that of a man of business under similar circumstances. The purchaser should inspect the land and make inquiries as to***

***anything which appears inconsistent with the title, offered by the vendor”***

7.20 Further in the case of **Nora Mwaanga Kayoba and Alizani Banda v Eunice Kumwenda Ngulube and Andrew Ngulube**<sup>9</sup> the Supreme Court held that:

**“In purchasing real properties, parties are expected to approach such transactions with much more serious inquiries to establish whether or not the property in question has encumbrances. Buying real property is not as casual as buying household goods or other personal property.”**

7.21 In the present case, the Appellant did not approach this transaction with the seriousness that it deserved. It is evident on record that the Appellant failed to conduct a thorough investigation to establish the status of ZNS on the land it was buying. Had it done so, it would have discovered whether the land was subject to vested rights in other persons other than the vendor. Failure to do so simply means that the equitable doctrine of notice will

come into play which states that a purchaser is bound by any right which he would have discovered had he made ordinary investigations.

7.22 The Appellant failed to make inquiries of third persons who happened to be in possession of the land, as such, it is affected by all equitable interests held by them. The Appellant attempted to excuse his failure by alleging that it could not inquire because it was during a state of emergency. In our view, the fact that this transaction occurred during a state of emergency, is more reason why the Appellant should have been very diligent due to the uncertainty that characterizes a state of emergency. Based on the foregoing, the Appellant cannot be said to have been a *bona fide* purchaser for value without notice.

7.23 Our conclusion therefore, is that from the evidence adduced, the Appellant has failed to establish that the Respondent had no legal right to remain on the property. All three grounds of appeal fail.

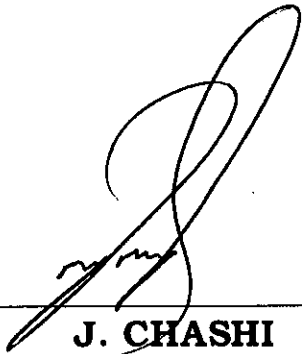

7.24 We are aware that the Appellant obtained a certificate of title for the portion of land occupied by ZNS which appears



at page 120 – 129 of the record on 16<sup>th</sup> June, 2017 for a total of 70.8588 hectares. However, in our view, there was impropriety on the part of the Appellant in the manner in which the certificate of title was obtained, in light of the fact that the land was still a contentious issue at the time the Appellant applied for the issuance of the same. We, therefore, Order the cancellation of the Appellant's Certificate of Title N<sup>o</sup>. 33865 by the Commissioner of Lands.

## **8.0 CONCLUSION**

8.1 The appeal being unmeritorious, it is accordingly dismissed. Costs in this appeal and in the court below to be borne by the Appellant and to be restricted to out of pocket expenses. Same to be taxed in default of agreement.

  
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**J. CHASHI**  
**COURT OF APPEAL JUDGE**  
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**M.J. SIAVWAPA**  
**JUDGE PRESIDENT**  
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**A.M. BANDA-BOBO**  
**COURT OF APPEAL JUDGE**