

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

APPEAL NO. 135/2021

BETWEEN:

SANKISHA TRUST INTERNATIONAL
SCHOOL LIMITED

26 JUN 2023

APPELLANT

AND

SOLWEZI MUNICIPAL COUNCIL

RESPONDENT

CORAM: KONDOLO, MAKUNGU AND NGULUBE, JJA.
On June, 2023 and on 26th June, 2023
2023.

For the Appellant: Mr. F. Chalenga – *Messrs. Freddie and Company*

For the Respondent: Ms. V. Mulai, *In-House Counsel*

J U D G M E N T

NGULUBE, JA delivered the Judgment of the Court.

Cases referred to: -

1. *Nkongolo Farms Limited v Zambia National Commercial Bank Limited & 2 Others* (2005) Z.R. 78 (S.C.).
2. *Justin Chansa v Lusaka City Council* SCZ Judgment No. 29 of 2007.
3. *Anti-Corruption Commission v Barnnet Development Corporation Limited* (2008) Z.R. 69.
4. *Gondwe v Nguira* – Appeal No. 37/2015.
5. *Wilson Masauso Zulu v Avondale Housing Project Limited* (1982) Z.R. 174.

6. *Charles Kajimanga v Marmetus Chilemya* (2016) Z.R. 189
7. *Nkhata & Others v The Attorney General* (1966) Z.R. 124

Legislation referred to:

1. *The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.*

1.0 INTRODUCTION

- 1.1 This is an appeal against the High Court judgment dated 4th March 2021 delivered by Mapani-Kawimbe, J (as she then was).

2.0 BRIEF BACKGROUND TO THE APPEAL

- 2.1 The brief background to the appeal is that the appellant commenced an action by way of Writ of Summons against the respondent in the court below.
- 2.2 According to the endorsement on the Writ of Summons and accompanying Statement of Claim the appellant claimed the following reliefs:

- i. ***A declaration and order that any allocation by the respondent on Stand No. 36660/M Solwezi is illegal and therefore void ab initio;***
- ii. ***An Order for damages for trespass to property Stand No. 36660/M Solwezi;***
- iii. ***An Order for damages for deprivation of property;***

- iv. An Order for damages for mental distress, anguish and inconvenience inflicted on the Chairman and Chief Executive Officer of the appellant;*
- v. An Order of injunction to restrain the respondent from making further allocations on Stand No. 36660/M Solwezi;*
- vi. An Order for Interest and costs.*

2.3 The appellant averred that it was the sole owner of Stand No. 36660/M which was initially allocated to its Chairman and Chief Executive Officer, Arnott Chilwesa. The said Chairman applied for the allocation of the land from the respondent on 9th February 2004 after which he was called and attended interviews as evidenced by letter dated 10th March 2004. The respondent informed the Chairman that his application was successful after which he paid for survey and service charge fees in the sum of K2500,00. He was issued with Receipt No. 9892 on 16th March 2004. On 6th January 2005 the respondent approved the change of name from Arnott Chilwesa to that of the appellant by writing a letter of recommendation for a certificate of title to the Commissioner of Lands. The Commissioner of Lands issued an offer letter to the appellant for Stand No. 36660/M followed by a certificate of title. It was averred that in 2009 the respondent illegally allocated land on

the appellant's parcel of land but later stopped after the appellant made a complaint on 11th August 2009. However, the appellant's complaint to the Anti-Corruption Commission yielded no results. In 2015, the respondent continued illegally allocating land and the people who were allocated the pieces of land started construction after paying the sum of K50,000.00 to the respondent.

2.4 In its Defence and Counter Claim, the respondent averred that the appellant's acquisition of the land was marred with procedural impropriety and fraud because the appellant's Chief Executive Officer was never called for interviews prior to the allocation of land. The respondent also contended that it did not approve any change of ownership relating to the appellant in any of its council resolutions. The respondent particularized the fraud in the following terms:

- i. *The plaintiff acquisition of Stand No. 36660/M was fraudulent as no council procedure was followed in the purported allocation of Stand No. 36660/M.*
- ii. *The plaintiff obtained an offer letter from the Commissioner of Lands without the recommendation from the defendant.*
- iii. *The plaintiff obtained a Survey Diagram despite the presence of residents who have settled on the land since time immemorial.*

- iv. The plaintiff acquired a certificate of title without following any of the procedures for the acquisition of land.*

2.5 The respondent counter claimed for the following reliefs:

- i. A declaration that the alleged acquisition of Stand No. 36660/M Solwezi was done without following the proper procedure for acquisition of land.*
- ii. Cancellation of certificate of title No. 1004680 relating to Stand No. 36660/M Solwezi.*

3.0 FINDINGS OF FACT OF THE COURT BELOW

3.1 The learned trial judge found that it was not in dispute that sometime in January 2004, the respondent advertised commercial and educational plots for sale in Solwezi. The appellant's Chairman applied for a piece of land and was interviewed by the respondent on 9th February 2004. On 10th March 2004, the Chairman of the appellant received a letter of offer from the respondent which required him to pay the sum of K2,200,000.00 (unrebated) which he did. The Chairman applied to change the property into the appellant's name on 6th January 2005 and approval was given for the same. The appellant obtained the certificate of title on 1st August 2015 but

could not develop the land as other people had settled on it with consent of the respondent.

3.2 The Court below distilled the issues for determination as follows:

- (i) *Who is the rightful owner of the suit land between the parties? and*
- (ii) *Whether the Plaintiff fraudulently acquired its certificate of title.*

4.0 DECISION OF THE COURT BELOW

4.1 The learned judge was of the view that the appellant did not follow the proper procedure for land allocation because there was no recommendation to the Commissioner of Lands from the respondent and there was no offer letter from the Commissioner of Lands. The court below further found that the appellant failed to explain how he obtained the certificate of title without the vital letter of recommendation and offer letter.

4.2 The learned trial judge accepted the respondent's evidence that the appellant acquired title which was not available in Mushitala area as it was customary land under Chief Kapijimpanga in 2004. The court below was of the view that despite the appellant being the registered proprietor of the land,

the certificate of title could be assailed on grounds of impropriety or fraud under Section 34 of the Lands and Deeds Registry Act. Based on the foregoing procedural improprieties, the court below found that the appellant fraudulently acquired its certificate of title and ordered its cancellation.

5.0 GROUNDS OF APPEAL

5.1 Disenchanted with the judgment of the court below, the appellant has appealed to this Court advancing the following grounds:

1. *The Learned Judge in the Court below misdirected herself in law and fact when she found that there was no evidence produced by the appellant to show that it was recommended by the respondent.*
2. *The Learned Judge in the Court erred in law and fact when she held that the appellant acquired title on land that was not available in Mushitala Area, which was customary land under the charge of Chief Kapijimpanga.*
3. *The Learned Judge in the court below erred in law and fact when she found that the appellant fraudulently acquired its certificate of title in absence of evidence of fraud and procedural impropriety.*

6.0 APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL

6.1 Counsel for the appellant filed heads of argument in support of the appeal. In arguing for ground one, Counsel made reference

to the letter dated 6th January 2005 on page 172 of the record of appeal and argued that the letter shows that the respondent, through the Town Clerk, recommended to the Commissioner of Lands that the offer of Plot No. 36660/M be made to the appellant. He argued further that the lower court erred when it held that there was no evidence to prove that there was a recommendation. It was argued that the credibility of the letter of recommendation was not questioned by the respondent.

6.2 It was submitted that the lower court's finding of fact on the letter of recommendation and the appellant's alleged failure to show how the certificate of title was acquired was contrary to the evidence on record. It was contended that it was also a misdirection on the part of the lower court to disregard the survey fee and service charges paid by the appellant. To buttress the argument that the lower court's finding of fact was contrary to the evidence, we were referred to the case of ***Nkongolo Farms Limited v ZNCB Limited & 2 Others***¹

6.3 With regard to ground two, Counsel for the appellant submitted that the lower court erred when it found that the subject land was not available for allocation as it was customary land.

Counsel argued that issuance of certificates of title is a preserve of the Commissioner of Lands on behalf of the President, which can only be issued on state land. To fortify this argument, we were referred to the case of *Justin Chansa v Lusaka City Council*.² Counsel submitted that the fact that the respondent wrote a recommendation letter shows that the subject land was state land at the time it was issued because the property was already allocated a number. He submitted that the minutes shown on pages 325 to 327 of the record of appeal do not show that the appellant's land was part of the customary land. He submitted further that the appellant could not have acquired a certificate of title for land which was not available for allocation because of the procedure set out in Sections 44 and 45 of the Lands and Deeds Registry Act which should have satisfied the Registrar.

- 6.4 The gist of the arguments with respect to ground three are that there was no evidence presented to the lower court to support the view that the appellant's certificate of title was marred with fraud and procedural impropriety. Reference was made to Section 33 of the Lands and Deeds Registry Act which provides

that a certificate of title is conclusive as from the date of issue. He argued that the lower court was in error when it failed to recognize that a certificate of title is *prima facie* evidence of ownership by requiring more than the certificate itself to prove authenticity of its issuance. To fortify this argument, we were referred to the case of ***Anti-Corruption Commission v Barnett Development Corporation Limited***³

- 6.5 It was argued that the respondent failed to demonstrate fraud on the part of the appellant or mistake on the part of the Commissioner of Lands.
- 6.6 In relying on the cases of ***Gondwe v Ngwira***⁴ and ***Nkongolo Farms Limited v Zambia National Commercial Bank Limited and 2 Others*** cited above, counsel argued that fraud must be strictly proved and there can be no presumption of fraud.
- 6.7 It was counsel's submission that the lower courts finding that the lease was signed a year after the appellant obtained the certificate of title, was also an error. He argued that the evidence on record shows that the certificate of title is dated 13th December 2016 whereas the lease is dated 15th December 2015.

That therefore the finding of the lower court should have been that the lease was signed a year earlier. It was argued that even though that may be so, it is not unusual for a lease to be dated earlier than the certificate of title.

6.8 Counsel for the appellant also found fault with the lower court's finding that the fact that the appellant obtained a certificate of title in a built up area which was traditional land was not challenged. He argued that this was an error because there is evidence of a recommendation letter from the respondent. That in any event, there was no evidence to show that the land in issue was customary land. Reference was made to the case of ***Wilson Masauso Zulu v Avondale Housing Project Limited***.⁵

6.9 In conclusion, this court was urged to allow the appeal with costs.

7.0 THE RESPONDENT'S ARGUMENTS IN OPPOSITION TO THE APPEAL

7.1 Heads of argument were filed into court on behalf of the respondent.

7.2 In response to ground one, it was submitted that the lower court did not err when it held that there was no evidence produced by

the appellant to show that the respondent made a recommendation to the Commissioner of Lands. It was submitted further that the letter of recommendation was fraudulently obtained because the respondent's extract of the minutes for change of ownership on pages 309 to 324 do not show the appellant's name or that of its Chief Executive Officer Arnott Chilwesa.

7.3 It was argued that the appellant did not produce any document to show that its Chief Executive Officer applied for the land in issue or that he attended interviews with the respondent. Counsel found fault with the appellant's witness in the court below, who stated that he applied for the land on 10th March 2004 and attended interviews on 9th February 2004 because it was not logical to attend interviews before making the application for a plot.

7.4 He submitted that the respondent would not have allocated the subject land because it can only allocate land which is available in accordance with Circular No. 1 of 1985.

7.5 In response to ground two, it was submitted that the evidence of the respondent as shown on pages 325 and 391 to 392 was

that the subject land was customary land and at the meeting held in 2005 with Chief Kapiji Mpanga, it was resolved that the respondent would demarcate the plots for the settlers before allocating them to other people.

- 7.6 With regard to the procedure set out in Sections 44 and 45 of the Lands and Deeds Registry Act, counsel argued that the appellant could not rely on these provisions without proof that the procedure set out therein was followed.
- 7.7 In response to ground three, we were referred to the case of ***Nkongolo Farm Limited***¹ cited above where it was held that fraud must be precisely alleged and strictly proved. It was counsel's submission that the respondent had pleaded fraud in its Defence and Counter Claim. Counsel submitted that the allegation of fraud was supported by the extracts of the respondent's council minutes showing the names of the successful applicants. To fortify this argument, we were referred to the case of ***Anti-Corruption Commission v Barnet Development Corporation***³ cited above. It was accordingly submitted that the respondent had proved its allegation of fraud. We were urged to dismiss the appeal.

8.0 ANALYSIS AND DECISION OF THIS COURT

- 8.1 We have considered the evidence on record, the grounds of appeal, the parties' respective arguments and the judgment appealed against.
- 8.2 Having considered the grounds of appeal and arguments advanced for and against the appeal, we opine that the issues raised for determination relate to the allegations of procedural impropriety and fraud. This is whether there was procedural impropriety and fraud in the manner in which the appellant acquired the subject property.
- 8.3 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 of ***Anti-Corruption Commission v Barnet Development Corporation Limited*** and ***Charles Kajimanga v Marmetus Chilemya***⁶ support this position.
- 8.4 It is also trite law that for an allegation of fraud to succeed, it must be specifically pleaded and proved to the required standard of proof which is slightly higher than the balance of

probability. In the case of ***Nkongolo Farm Limited v Zambia National Commercial Bank Limited & Others*** cited above, it was held that:

“Where a party relies on any misrepresentation, fraud, breach of trust, willful default or undue influence by another party, he must supply the necessary particulars of the allegation in the pleadings. Fraud must be precisely alleged and strictly proved. There is no presumption of fraud.”

8.5 A perusal of the amended Defence and Counter-claim at page 277 of the record of appeal filed by the respondent, shows that four particulars of fraud were alleged, as set out therein:

- i. That the plaintiff alleged acquisition of Stand No. 36660/M was fraudulent as no council procedure was followed in the purported allocation.***
- ii. The plaintiff obtained an offer letter from the Commissioner of Lands without the recommendation from the defendant.***
- iii. The plaintiff obtained a survey diagram despite the presence of residents who have settled on the land since time immemorial.***
- iv. The plaintiff acquired a certificate of title without following any of the procedures for the acquisition of land.***

8.6 The lower court found that it was not in dispute that the defendant advertised commercial/educational plots for sale in Solwezi, the appellant’s Chief Executive Officer, Mr. Arnott

Chilwesa applied for a plot and was interviewed on 9th February 2004 at the council chamber. He received an offer letter from the defendant wherein he was required to pay for service charges and survey fees. The lower court also found that it was not in dispute that Mr. Chilwesa applied to the defendant to change the property into the appellant's names on 6th January 2005 and approval was given and the appellant subsequently obtained a certificate of title on 1st August 2015.

8.7 We do not find fault with the above findings of the lower court because the issues not in dispute were in tandem with the evidence on record, save to state that the certificate of title was not issued to the appellant on 1st August 2015 as it was dated 13th December 2016 as shown on page 50 of the record of appeal. This issue will be canvassed later in this judgment.

8.8 On whether it can be said that the appellant fraudulently obtained its certificate of title, the lower court stated as follows on pages J24 to J25 of the judgment:

- i. There is no record/evidence that the plaintiff was recommended by the defendant to the Commissioner of Lands for allocation of the suit land;***

- ii. ***Nothing was produced to show that the Commissioner of Lands offered the plaintiff the land before it obtained a certificate of title;***
- iii. ***The lease between the Republican President and the plaintiff shows that it was signed on 13th December 2016, a year after the plaintiff obtained the certificate of title on 1st August 2015; and***
- iv. ***The evidence of DW that the plaintiff obtained a certificate of title on a built-up area (traditional land formerly under the charge of Chief Kapijimpanga) was not challenged and dispelled the appellant's assertion.***

8.9 The question is whether it was proper for the lower court to have made the above findings. We are guided by the case of ***Nkhata & Others v The Attorney General***⁷ where it was held that findings of fact by a trial court can only be reversed if they are perverse, not supported by evidence or the evidence was wrongly assessed or evaluated.

8.10 With regard to the first finding of fact that there is no evidence that the appellant was recommended by the respondent, the appellant drew our attention to a letter dated 6th January 2005 addressed to the Commissioner of Lands from the Town Clerk of the respondent, on page 172 of the record of appeal which reads as follows:

"We wish to confirm that we have no objection to Mr. Arnott Simon Chilwesa's appeal to the Council to change the name of the school plot from Arnott Simon Chilwesa School as submitted to the Commissioner of Lands to SANKISHA TRUST INTERNATIONAL SCHOOLS LIMITED.

The reason for change is that the Registrar of Companies and Patents has accepted the name of SANKISHA TRUST INTERNATIONAL SCHOOLS LIMITED as evidenced by the registration of company documents.

We therefore recommend that the offer FOR STAND 3666/M be made in the name of SANKISHA TRUST INTERNATIONAL SCHOOLS LIMITED.

8.11 The learned trial judge made no reference to this letter in her judgment. However, this letter confirms that the respondent had no objection to change of name to the appellant's names and requested the Commissioner of Lands to issue an offer in the appellant's names. This was a letter of recommendation and shows that the respondent did not have any issues with the

appellant's ownership of this land. We are therefore of the considered view that the learned trial judge did not properly evaluate the evidence on record.

8.12 The second finding by the lower court was that there was no evidence of an offer letter from the Commissioner of Lands. A perusal of the record of appeal does not show that there is such an offer letter on record. However, the appellant's failure to produce an offer letter cannot of itself be said to be enough to satisfy an allegation of procedural impropriety looking at the fact that the appellant was issued with a certificate of title by the very institution which was supposed to issue the offer letter. It was therefore an error for the lower court to conclude that there was procedural impropriety in the manner the appellant acquired the land because of the absence of an offer letter from the Commissioner of Lands. As earlier stated, the standard required to prove fraud is more than a mere balance of probability and the absence of an offer letter from the Commissioner of Lands is not enough to prove fraud.

8.13 The third finding of the lower court was that the fact that the lease was dated a year after the issuance of the certificate of title

was highly irregular. We have perused the certificate of title and the lease agreement. The lease is dated 13th December 2016 and so is the certificate of title. The lease is expressed to run for the unexpired residue of a term of 99 years from 1st August 2015 as shown at page 50 of the record of appeal. We concur with counsel for the appellant that the lower court misdirected itself when it found that the lease was signed a year after the plaintiff obtained its certificate of title. There is no documentary evidence on record to support the finding that the appellant obtained the certificate of title on 1st August 2015 before signing the lease. The documentary evidence, that is, the certificate of title supports the view that the certificate of title was dated 13th December 2016 and that is the date when it was issued.

8.14 Lastly, the lower court found that the appellant obtained land in a built up area which was traditional land under Chief Kapijimpanga at the time. To support this finding, counsel for the respondent drew our attention to the minutes of the meeting held by the respondent and other stakeholders at Chief Kapijimpanga's palace dated 27th November 2005 on page 325 of the record of appeal. However, it is worth noting that by the

time this meeting occurred, the respondent had already allocated plots to successful applicants on 9th February 2004 as shown in the minutes on page 294 of the record of appeal. The submission that the land in issue was traditional land and not available for allocation cannot therefore stand.

8.15 Further, the minutes dated 9th February 2004 was the basis upon which the respondent asserted that the offer letter issued to the appellant's Chief executive Officer, shown on page 46 of the record of appeal, was a forgery. A perusal of this letter shows that it was signed by the respondent's Town Clerk. Apart from the submission that the appellant did not appear in the minutes, there was no evidence to support the allegation that the offer letter was a forgery. The fact that the appellant or its Chief Executive Officer did not appear in the minutes is not conclusive to support the allegation of forgery. In any event the respondent did not call the Town Clerk who supposedly signed the offer letter to support the allegation of forgery. Therefore, the argument that the appellant had a forged letter of offer cannot stand.

9.0 CONCLUSION

9.1 In view of the foregoing, the lower court's order to cancel the appellant's certificate of title no. 1004680 in relation to Stand No. 36660/M Solwezi is hereby set aside. In the premises, we find merit in the appeal and it is accordingly allowed. Costs to the appellant, to be taxed in default of agreement.


M. M. KONDOLO, SC
COURT OF APPEAL JUDGE


C. K. MAKUNGU
COURT OF APPEAL JUDGE


P. C. M. NGULUBE
COURT OF APPEAL JUDGE