

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDENT AT LUSAKA**

APPEAL 114/2021

(Civil jurisdiction)

BETWEEN:

BOWAS KABINDA

AND



APPELLANT

KITWE CITY COUNCIL

1st RESPONDENT

CHRISTOPHER ZULU

2ND RESPONDENT

ALICK PHIRI

3RD RESPONDENT

MUSENGE BRIAN

4TH RESPONDENT

INNOCENT BWALYA

5TH RESPONDENT

JOSEPH CHUNGU

6TH RESPONDENT

DAMIANO CHIRWA

7TH RESPONDENT

MR YUMBE

8TH RESPONDENT

LEKRINE NANYANGWE

9TH RESPONDENT

BERNARD MWABA

10TH RESPONDENT

WISDOM

11TH RESPONDENT

MULENGA PAUL ESTER

12TH RESPONDENT

AGNESS SIABASIMBI

13TH RESPONDENT

***Coram: Kondolo, Makungu and Majula, JJA
On 18th May, 2023 and 22nd June, 2023***

For the Appellant : Mr. M. Mumba of Kitwe Chambers

*For the 1st Respondent : Ms. E. Mazunda with Mrs. J.N. Liwawa
both In house Counsel*

For the 2nd to 3rd Respondents: Mr. D. Mazumba of Douglas & Partners

J U D G M E N T

MAJULA JA, delivered the Judgment of the Court

Cases referred to:

1. Anti-Corruption Commission vs Barnnet Development Corporation Limited (2009) ZR 69 Vol.1 (SC).
2. Photo Bank (Z) Limited vs Shengo Holdings Limited (2008) ZR Vol 1, 108 (SC)
3. William David Carlisle Wise vs E.F Harvey Limited (1985) ZR 179;
4. Anderson Mazoka & 42 Others vs Levy Patrick Mwanawasa & 2 others (2005) ZR 138 (SC); and
5. Admark Limited vs Zambia Revenue Authority (2006) 43.
6. Zambia Revenue Authority vs Hitech Trading Company Limited (SCZ Judgment No. 40 of 2000)
7. The Attorney-General vs Kakoma (1975) ZR 212 (SC)
8. Sailas Ngowani & Others vs Flamingo Farm Limited (Selected Judgment No. 5 of 2019)
9. Zambia Revenue Authority vs Dorothy Mwanza (2010) ZR 181 Vol.2
10. Atlantic Bakery Limited vs ZESCO Limited (Selected Judgment No 10 of 2018)
11. Examination Council of Zambia vs Reliance Technology Limited (CAZ Appeal No. 194/2010)

Legislation referred to:

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

2. The Town and Country Planning Act (Repealed) Chapter 283 of the Laws of Zambia

1.0 INTRODUCTION

- 1.1 This is an appeal by Bowas Kabinda against the judgment of the High Court delivered by Judge S. M Wanjelani dated 2nd February 2021. The learned Judge ordered the cancellation of the appellant's certificate of title on account of misdescription of the size of the boundary.

2.0 FACTS OF THE CASE

- 2.1 This is a matter involving a land dispute. The facts of the case are that on 31st July 1997, the appellant purchased a tavern from Mr. Jaston Simwanza at a sum of K10,000.00. The land in issue is situated at plot F/842/L/53, Kitwe on the Copperbelt. At the time of the transaction, Mr. Jaston Simwanza had an offer letter from the Commissioner of Lands dated 7th October 1996 and had not acquired a certificate of title to the property.
- 2.2 Following the demise of Mr. Jaston Simwanza, the appellant was issued with two letters of offer, one dated 13th February 2004 with respect to property known as F/842/L/53 and another dated 7th October 2011 with respect to the aforementioned piece of land.
- 2.3 Subsequent to the transaction, the appellant engaged the services of a private person, Mr. Zuze to prepare a site lay out plan for plot No. F/842/L/53 Ndeke which was done on 4th

April, 2004. The appellant was thereafter issued with a certificate of title on 27th March, 2013 in respect of Plot F/842/Y/53.

- 2.4 On the part of the 3rd to 13th respondents their case was that they were offered various portions of land on Farm 842 Ndeke by the Kitwe City Council in accordance with the site plan that was prepared by the local authority. They asserted that the appellant's certificate of title was wrongly obtained as it included portions of land that were legitimately offered to them.

3.0 FINDINGS AND DECISION OF THE HIGH COURT

- 3.1 After examining the evidence that was before her, the learned trial Judge identified the issue for determination as being the extent of the appellant's land and determining which site plan was applicable to resolve the issue. She was of the view that this would then determine whether the respondents have trespassed on the appellant's land. The Judge found that the contract entered into by the appellant and the late Mr. Jaston Simwanza for the purchase of the property did not specify the exact size of the plot. She further found that the location plan prepared by Mr. Zulu did not have approval from the local authority.
- 3.2 The trial Judge was of the considered view that the appellant is the rightful owner of plot F/842/Y/53 with the exception of the size which was only correctly captured in the 1995 site plan. She ultimately ordered the cancellation of the title on account of misdescription of the size.

4.0 THE APPEAL

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

- “1. The learned trial Court erred in law and fact when it failed, neglected or refused to consider the effect of the issuance of the plaintiff’s certificate of title in respect of the plaintiff’s claims on property F/842/Y/53.*
- 2. The learned trial Court erred in law and fact when it held that the plaintiff has failed to prove his claims when the plaintiff holds a certificate of title in respect of property F/842/Y/53.*
- 3. The learned trial Court erred in law and fact when it ordered the cancellation of the plaintiff’s certificate of title in respect of F/842/Y/53 for misdescription when the defendants did not plead fraud, impropriety or transgression of the law in the acquisition of the plaintiff’s said property.*
- 4. The learned trial Court erred in law and fact when it abandoned its role in an adversarial legal system by joining the litigation of the defendants.*
- 5. The learned trial court erred in law and fact when it held that the diagram from the plaintiff was improperly done as it lacked the necessary input from the local planning authority after quoting section 4(1) of the Town and Country Planning Act, Cap 283 of the Laws of Zambia (Repealed) when the said provision of the law was not applicable to the plaintiff and was not pleaded or raised at trial in the court below.”*

5.0 APPELLANT'S ARGUMENTS

5.1 The appellant filed into Court heads of argument on 25th May 2021, while the 1st respondent filed its heads of argument on 15th July 2021. The 2nd to 13th respondents equally filed their heads of argument on 29th June 2021.

5.2 The thrust of the appellant's submissions in respect of ground one was that the lower court misdirected itself when it failed or neglected to consider the effect of the issuance of a certificate of title to the appellant in respect of the disputed land. Counsel argued that according to **section 33** of the **Lands and Deeds Registry Act**, a certificate of title is conclusive evidence of ownership of land by a holder. To reinforce this point, Counsel called in aid the case of ***Anti-Corruption Commission vs Barnnet Development Corporation Limited***¹.

5.3 In respect of ground 2, Counsel contended that the trial court erred when it held that the appellant had failed to prove his claims when in fact the appellant holds a certificate of title in respect of the property.

5.4 Our attention was drawn to the case of ***Photo Bank (Z) Limited vs Shengo Holdings Limited***² where it was held:

"The counterclaim is a set off and has to be proved"

5.5 Counsel asserted that none of the 3rd to 13th respondents produced before the court below evidence that they were offered portions of the land on farm 842 Ndeke by the 1st respondent and that the appellant's certificate of title was

encroaching on other existing plots. He pointed out that the 3rd to 13th respondents did not have any letters of recommendation from the 1st respondent or letters of offer from the Commissioner of Lands in respect of the pieces of land they are occupying.

- 5.6 Counsel for the appellant submitted that the 2nd respondent failed to prove the location of his plot on the certificate of title or property F/842/Y/53 as it only has road reserves unlike the one for the appellant.
- 5.7 It was further argued that the appellant followed all the necessary procedures required in the acquisition of the certificate of title in respect of property F/842/Y/53.
- 5.8 Pertaining to ground 3, Counsel for the appellant submitted that the learned trial Judge erred when it ordered the cancellation of the plaintiff's certificate of title in respect of F/842/Y/53 for misdescription when the respondents did not plead fraud, impropriety or transgression of the law in the acquisition of the appellant's property. He stoutly argued that the respondents did not challenge the certificate of title and it was therefore wrong for the trial court to venture into matters that were not pleaded. To emphasize his point, Counsel called in aid a few cases which speak to the purpose of pleadings, namely:

- (i) ***William David Carlisle Wise vs E.F Harvey Limited*³;**
- (ii) ***Anderson Mazoka & 42 Others vs Levy Patrick Mwanawasa & 2 others*⁴; and**
- (iii) ***Admark Limited vs Zambia Revenue Authority*⁵.**

- 5.9 Turning to ground four, Counsel submitted that the learned trial court erred when it abandoned its role in an adversarial legal system by joining the litigation of the respondents. The gist of his submission was that the lower court went on an adventure to analyse and assess whether the site plan attached to the certificate of title was a correct one or not. It was further contended that the court below did not give adequate notice and opportunity to the appellant to be heard on the issue of the misdescription which is against the rules of natural justice. By this approach, it was contended that the trial Judge joined the litigation of the respondents. We were therefore called upon to allow the appeal.
- 5.10 Moving on to ground 5, the kernel of the arguments proffered were that the trial Judge erred when it held that the diagram attached to the certificate of title for the appellant did not have an input from the local planning authority after quoting **section 4** of the **Town and County Planning Act** (repealed) when the said provision was not applicable to the appellant. It was contended that the issue was neither pleaded nor raised at trial in the court below. Counsel noted that the issue of **section 4** of the repealed Act was only canvassed in the submission by the 1st respondent.
- 5.11 Counsel fervently argued that arguments and submissions at the bar, spirited as they may be, cannot be a substitute for sworn evidence. Reliance was placed on the case of ***Zambia Revenue Authority vs Hitech Trading Company Limited***⁶.

6.1 1ST RESPONDENTS HEADS OF ARGUMENTS

- 6.2 The 1st respondent argued grounds one and two together and the main point submitted was that the issue of the certificate of title was adequately considered and decided upon by the lower Court. Counsel referred us to page J25 of the judgment on which the learned trial Judge found that the appellant was the rightful owner of the property with the exception of the size of the property. That it was in this vein that the court below ordered for the cancellation of the title in line with the provision of the law which provides for an exception to conclusiveness of title.
- 6.3 Counsel further argued that **section 34(1)(d)** of the **Lands and Deeds Registry Act** provides for correction of any misdescriptions in title and in this case the cancellation was for the purpose of correction of the survey diagram in respect of the plaintiff's property.
- 6.4 Turning to ground three, Counsel observed that the issue of boundaries was pleaded by the respondent in their respective defences. In this regard we were referred to paragraphs 2, 3 and 4 of the 3rd to 13th respondents' defence which is on the record and paragraph 4 of the 1st respondent's defence appearing at page 172 of the record. Counsel submitted that the lower court was therefore entitled to adjudicate on this aspect. It was further contended that the lower court's findings were supported by evidence on record and the court was on firm ground in assessing and evaluating the evidence that was before her.

- 6.5 In respect of ground 4, Counsel argued that the respondents did not lead evidence on fraud because they did not plead on it. However, they led evidence on the right site plan which shows the correct extent of plot No. F/842/Y/53. He asserted that the High Court is clothed with jurisdiction to cancel a certificate of title which is erroneous for inclusion of any portion of land by misdescriptions. This power is in accordance with **Section 34 (1) (d) of the Lands and Deeds Registry Act**. Counsel observed that the trial Judge was guided by the case of *The Attorney-General vs Kakoma*⁷ after encountering conflicting evidence of misdescription to arrive at its findings based on the evidence that was before her.
- 6.6 Counsel dismissed the assertion that the Judge joined the respondents to the litigation, that she was entitled to analyse all the four site plans that were before her in the interest of justice. He further pointed out that the only proper site plan the Surveyor General could have relied on was the 1995 site plan which was approved by Kitwe City Council.
- 6.7 It was further contended that the issue of the right to be heard does not arise as the appellant was heard when he gave testimony in the court below in support of his case.
- 6.8 As regards ground five, the 1st respondent's Counsel submitted that the lower court was at liberty to refer to **Section 4 (1) of the Town and County Planning Act (Repealed)** which was applicable at the time in resolving the dispute in this case. Counsel contended that it was therefore

inconsequential that a provision of the law was neither pleaded nor brought up at trial. It was vehemently submitted that courts take judicial notice of public documents and it is not necessary for a litigant to prove them. For this proposition, Counsel found solace in **Section 6 (1) of the Interpretation and General Provisions Act Cap 2** which provides:

“Every Act, Applied Act or British Act shall be a public Act and shall be judicially noticed as such.”

6.9 We were therefore implored to dismiss the appeal for lack of merit.

7.0 2ND TO 13TH RESPONDENT’S HEADS OF ARGUMENTS

7.1 In relation to ground one, Counsel for the 2nd to 13th respondents submitted that the court below was on firm ground when it ordered cancellation of the appellant’s certificate of title as it had a misdescription of the size of the property as well as a wrong diagram attached. As authority for this submission, our attention was drawn to the cases of ***Anti-Corruption Commission vs Barnnet Development Corporation Limited*¹** and the case of ***Sailas Ngowani & Others vs Flamingo Farm Limited*⁸** where it was held:

“Fraud as specified in section 33 of the Lands and Deeds Registry Act, does not provide the only pathway by which a Certificate of Title may be cancelled. Other transgressions of law such as circumvention of the procedure prescribed in the law which would render null and void the allocation of the land would be just as fatal.”

- 7.2 Pertaining to ground 2, Counsel contended that the court below was on firm ground when it held that the 1995 site plan is the only one applicable on the extent of the appellant's land based on the fact that his diagram is erroneous as the boundaries have been extended to encompass the land which was not originally in the approved 1995 site plan. It was argued that this Court cannot therefore interfere with this finding of fact as it was supported by the evidence.
- 7.3 In relation to ground 3, Counsel forcefully submitted that the issue of misdescription and cancellation of title were pleaded in the respondents' respective defences that were filed. The court was therefore entitled to pronounce itself on this aspect.
- 7.4 As regards ground 4, it was spiritedly submitted that the court below identified the issue for determination as being the extent of the appellant's land. The trial court thereafter determined the issue based on the evidence that was before it.
- 7.5 Finally, on ground 5, Counsel submitted that the lower court was on the firm ground when it held that the appellant's diagram was improperly done as it lacked the necessary input from the local planning authority. He pointed out that the 1995 site plan is the one that was applicable to the appellant and should have been the one attached to the offer letter.
- 7.6 We were accordingly urged to dismiss the appeal.

8.0 HEARING OF THE APPEAL

8.1 The matter came up for hearing of the appeal on 18th May 2023. The parties relied entirely on the heads of argument that were filed herein.

8.0 CONSIDERATION AND DETERMINATION OF THE APPEAL

8.1 We have carefully considered the record of appeal and the submissions by Counsel. As earlier indicated, the appellant has advanced 5 grounds of appeal. In our view grounds 1 and 2 are attacking the lower court's decision for allegedly neglecting to consider the fact that the appellant holds a certificate of title as well as the effect of holding a title. We propose to deal with these two grounds together.

8.2 The grievance in grounds 3, 4 and 5, which are inter-related, is that the Judge decided on issues which were neither pleaded nor raised at trial. In a nutshell in these grounds, the appellant seeks to impugn the judgment of the lower court for allegedly deciding on un-pleaded matters.

8.3 Starting with grounds 1 and 2, the law is settled that a certificate of title is conclusive evidence of ownership of land by a holder thereof as provided for in **Section 33 of the Lands and Deeds Registry Act Cap 185**. However, the said Act does provide for exceptions and instances when a certificate of title can be challenged. These include reasons of fraud, impropriety in its acquisition or misdescription of land or its boundaries. The cases of ***Anti-Corruption Commission vs Barnnet Development Corporation***

Limited¹ and **Sailas Ngowani and others vs Flamingo Farm Limited⁸** provides authority for this position of the law.

- 8.4 In relation to the matter before us, the learned Judge was alive to the fact that the appellant is a holder of a certificate of title whose effect is that it is conclusive evidence of ownership (refer to page J25 or page 33 of the record of appeal). She categorically stated that the certificate of title could only be cancelled on the grounds provided for **in section 33 or 34 (1) (d) of the Lands and Deeds Registry Act**. She found as a fact that the diagram attached to the certificate of title for the appellant had bigger dimensions contrary to the original site plan of 1995 which captured the correct size of the appellant's plot F/842/Y/53. It was on this basis that the lower court ordered the cancellation of the certificate of title so that the appellant could pursue the issue of rectification.
- 8.5 As an appellate court, we are loath to interfere with findings of fact unless they are either perverse or made in the absence of the relevant evidence or they are based on a misapprehension of the facts. See **Zambia Revenue Authority vs Dorothy Mwanza⁹**.
- 8.6 We thus hold the view that the position taken by the lower court was supported by the evidence and the trial Judge cannot be faulted. Thus grounds 1 and 2 have no merit and are dismissed.
- 8.7 Pertaining to grounds 3, 4 and 5 where the discontent emanates from the assertion that the court decided on

unpleaded matters, we have critically analysed the record as well as the law. We are alive to the case of ***Atlantic Bakery Limited vs ZESCO Limited***¹⁰, wherein the Supreme Court held:

“A court is not to decide on an issue which has not been pleaded. Put differently, a court should confine its decision to the questions raised in pleadings. It can thus not grant relief which is not claimed.”

- 8.8 It is therefore trite law that a court should decide matters based on what has been pleaded. The appellant in the present case is disconsolate with the decision of the lower court when it ordered cancellation of the certificate of title when the respondents did not plead fraud, impropriety or transgression of the law in the acquisition of the certificate of title. Our scrutiny of the judgment of the lower court is that the court below ordered cancellation of the title based on misdescription in the size and boundaries in line with **Section 34(1)(4) of the Lands and Deeds Act** and not based on fraud or impropriety as contended by the appellant.
- 8.9 Further the issues concerning boundary size were pleaded in paragraphs 2, 3 and 4 of the 3rd to 13th respondents’ defence (pages 273 and 274 of the record). The 1st respondent also pleaded on this issue in paragraph 5 of the defence which is at page 172 of the record of appeal.
- 8.10 Regarding the grievance by the appellant on the Judge having referred to **section 4 of the Town and Country Planning Act (Repealed)**, the view we take is that the learned trial

Judge was at liberty to refer to a provision of the law that was applicable at the time of the appellant's transaction to give guidance on the correct procedure. The appellant purchased the property in 1997 and the **Town and Country Planning Act** was only repealed in 2015. This therefore entails that the law that was applicable at the time was the **Town and Country Planning Act** albeit it has been repealed.

8.11 That notwithstanding, the decision of the lower court to cancel the certificate of title was anchored on the provisions of **section 34(1)(d) of the Lands and Deeds Registry Act** which is good law. We are therefore, of the view that the trial Judge was on firm ground when deciding on the boundary size and also on referring to the **section 4 of the Town and Country Planning Act (Repealed)**.

8.12 In ground four, the unhappiness stems from the Court allegedly joining the litigation of the respondents. The issue that the court identified was determining the extent of the appellant's land. It was therefore paramount to get all the necessary evidence that was available, evaluate the conflicting positions and make a decision. We made ourselves clear in the case of **Examination Council of Zambia vs Reliance Technology Limited**¹¹ when we stated that:

"It is apparent that the Learned Judge in the court below did not apply himself to the question of evaluating the conflicting evidence before him and making findings of fact on that evidence. This was a misdirection and we would on this score alone, be inclined to agree with the

appellant's counsel that this is a proper case for the court to interfere with the finding of the lower court and review the facts and the evidence."

8.13 We thus hold that the criticism of the trial Judge, in this case, alleging that she joined the litigation was unjustifiable in light of what we have articulated above. She was perfectly entitled to evaluate the evidence and make a decision based on the evidence that was before her.

8.14 The lower court was therefore on *terra firma* when it decided on the issue as it was rightly pleaded and supported by the law. Thus grounds 3, 4 and 5 are devoid of merit. We dismiss them accordingly.

9.0 Conclusion

9.1 In light of the foregoing, we have come to the inescapable conclusion that the five (5) grounds of appeal are devoid of merit and we accordingly dismiss the appeal in its entirety.

9.2 Costs follow the event to be taxed in default of agreement.

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M.M. Kondolo
COURT OF APPEAL JUDGE

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C.K. Makungu
COURT OF APPEAL JUDGE

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B.M. Majula
COURT OF APPEAL JUDGE