

(Civil Jurisdiction)

BETWEEN:

C OF
1 OF APP

**CHRISTIAN COMMUNITY CHURCH IN
ZAMBIA REGISTERED TRUSTEES**

29 JAN 2023
GISTRY 1

AND

\; 50067,

**CHRISTIAN BRETHREN CHURCH (CMML)
CHIWEMPALA CHINGOLA REGISTERED TRUSTEES**

1ST RESPONDENT

ZCCM INVESTMENT HOLDING PLC

2ND RESPONDENT

COMMISSIONER OF LANDS

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

CORAM: Chashi, Siavwapa and Banda-Bobo, JJA

ON: 11th October 2022 and 11th January 2023

For the Appellant:

*P. G. Katupisha and K. Tembo (Mrs),
Messrs Milner & Paul Legal Practitioners*

For the 1st Respondent:

L. Chipeta (Ms), Messrs Ituna Partners

For the 2nd Respondent:

N/A

For the 3rd and 4th Respondents:

*M.K. Chongo (Mrs), Assistant Senior State
Advocate, Attorney Generals Chambers*

J U D G M E N T

CHASHI, JA, delivered the Judgment of the Court.

Cases referred to:

- 1. Sithole v State Lotteries Board (19 75) ZR 106**
- 2. Trevor Limpic v Raphael Mawere and Others - S.C.Z Selected Judgment No. 30 of 2018**
- 3. General Nursing Council of Zambia v Mbangweta (2008) Z.R 108**

**4. *Joyce Ndavuka Gondwe v Christine Ziwolile Ngwira - S.C.Z*
*Judgment No. 37 of 2015***

**5. *YB and F Transport Limited v Supersonic Motors Limited - S.C.Z*
*Judgment No. 3 of 2000***

Works referred to:

1. *Halsbury's Laws of England 4th Edition, Volume 16 Paragraph 1219*

1.0 INTRODUCTION

1.1 This is an appeal against the Judgment of Honorable Mrs.

Justice N.A Sharpe-Phiri, delivered on 10th January 2020. In the said Judgment, the learned Judge ordered cancellation of the certificate of title which had been issued to the Appellant on account of it having been obtained fraudulently. The Judge consequently ordered that the property be transferred to the 1st Respondent.

2.0 BACKGROUND

2.1 The 1st Respondent, as the plaintiff in the court below, commenced proceedings on 20th August 2013, by way of writ of summons, claiming the following reliefs:

(1) A declaration that the certificate of title No.

89153 dated 3rd September 2009 in the name of the

Appellant ^{(1st} Defendant in the court below)

was null and void and of no effect on account of fraud by the Appellant.

(ii) An Order that the 3rd Respondent (*3rd defendant in the court below*) should immediately cancel the said certificate of title.

(iii) An Order that the 3rd Respondent should issue a new certificate of title to subdivision B of Lot 681/M Kalilo/Shimulala Area, Chingola in the name of the 1st Respondent.

(iv) An Order to stop the Appellant from using the premises until the case is disposed of.

2.2 According to the attendant statement of claim, the 2nd Respondent was at all material times the owner of Plot 681/M (*the Farm*). In the 1970's, the 1st Respondent was looking for a piece of land for holding church conferences and the Farm was identified as suitable. The 2nd Respondent was approached, and it gave permission for use of the land for church activities.

2.3 On 21st November 1981, the 2nd Respondent entered into an agreement with Christian Church of Zambia, Registered Trustees (CCZ), an organization registered by Reverend Jim Hess, (Hess), to hold the property of the 1st

Respondent. The agreement related only to a portion of the Farm on which the 1st Respondent requested Hess to run a camp on its behalf.

2.4 Between 1982-1983, Hess and other members were expelled from the 1st Respondent, and they subsequently formed a church called Christian Fellowship of Zambia (CFZ). However, Hess continued to run the Farm without authority from the 1st Respondent. The 1st Respondent asserted that the inaction to remove him was due to the prevailing bad atmosphere and tension created by the division.

2.5 At the time of Hess's death in October 1994, CFZ had been deregistered and in its place, the Appellant and New Covenant Church were formed. Hess belonged to the Appellant. It is averred that the Appellant took advantage of Hess's death and occupied the Farm despite the lease agreement being between the 1st and 2nd Respondents.

2.6 It was further averred that whilst discussions were going on and correspondence exchanged between the 1st Respondent and Chingola Municipal Council (CMC) for the

transfer of the Farm, CMC approved and supported the

transfer of the Farm; the Appellant fraudulently gave false information to the 2nd Respondent that the 1st Respondent had changed its name to Christian Community Church (CCC), when no such change had occurred.

2.7 With such information, the 2nd Respondent proceeded to execute an assignment to transfer the Farm to the Appellant. The 2nd Respondent later admitted having done the transfer in error and that it was done based on falsehood provided by the Appellant.

2.8 The 2nd Respondent settled its defence on 28th October 2013 denying the claims. The Appellant settled its defence on 24th January 2014 and alleged that the 1st Respondent was not in existence in the 1970's and that it had never owned the farm. The Appellant contended that it had entered the lease agreement dated 21st November 1981 with the 2nd Respondent and that at the time of Hess's death it was already in possession of the Farm.

2.9 The Appellant denied ever having changed its name and averred that it acquired the certificate of title because of the lease agreement it executed with the 2nd Respondent.

3.0 DECISION OF THE COURT BELOW

3.1 After considering the evidence by the witnesses and the parties' submissions, the learned Judge opined that, the main contention surrounds the certificate of title which was issued in favour of the Appellant, as the 1st Respondent alleged that it was procured via a deed of assignment executed by the 2nd Respondent by fraudulent misrepresentation. On the other end, the Appellant claimed that it was entitled to be assigned the Farm as a sitting tenant under the lease agreement

3.2 The learned Judge then took the following facts as settled:

that the 1st Respondent settled on the farm in the 1970s.

That the Farm was on title under the name of the

forerunner to the 2nd Respondent. That Hess was the main

pioneer and representative of the 1st Respondent at the time

and spearheaded discussions for its settlement on the Farm

thereby establishing Kabalange Centre.

3.3 That the 1st Respondent, through Hess, used an entity

CCZ, to hold property in trust and on its behalf and

that CCZ entered into a lease agreement with the

Respondent for the benefit of the 1st Respondent. That

Hess and some other members were expelled from the 1st Respondent between 1982-1983 but continued occupying the Farm under the newly formed CFZ. That Hess died in October 1994 and soon after his death, CFZ was dissolved by the High Court in Kitwe leading to the formation of two churches: the Appellant and the New Covenant Church.

3.4 That following the death of Hess, his widow handed over land documents and other papers to church members of the Appellant, who subsequently managed to secure an assignment to the Farm from the 2nd Respondent under the guise that it was the initial tenant under the lease agreement and eventually obtained the certificate of title in issue.

3.5 The learned Judge then formulated the following four issues for determination:

- (i) For whose benefit was the 1981 tenancy agreement entered with the 2nd Respondent or its forerunner.**
- (ii) Who was legally entitled and intended to be assigned the Farm by the 2nd Respondent.**

(iii) Was there fraudulent misrepresentation in the acquisition of the certificate of title by the Appellant.

(iv) Was the certificate of title to the Farm susceptible to cancellation for fraudulent misrepresentation and entitled to be re-issued correctly.

3.6 From the evidence, the learned Judge found that in accordance with the facts earlier established, the lease agreement between CCZ and the 2nd Respondent was for the benefit of the 1st Respondent.

3.7 As regards the second issue, as to who was legally entitled and intended to be assigned the Farm by the 2nd Respondent, the Judge noted that the evidence clearly shows that at the time, both the 1st Respondent and the Appellant had a presence on the Farm. That in relation to the 1st Respondent, it was clearly by virtue of the lease executed as far back as 1981.

3.8 The learned Judge then had recourse to clause 4 (g) of the agreement and opined that it entailed that the tenant, CCZ or its principal, the 1st Respondent could not sublet, share,

or assign the Farm or any part of it during the subsistence of the agreement.

3.9 Furthermore, the Judge took note of the 2nd Respondent's letters authored by the Senior Legal Officer, Mr. Chimutangi and written between April 2006 and March 2007, stating that the 2nd Respondent's record showed that the Farm was leased to the 1st Respondent whom the 2nd Respondent thought had changed its name to the Appellant at some point. That the letter at page 186 of the record of appeal (*the record*) shows that the 2nd Respondent was under the impression that the 1st Respondent had changed its name to the Appellant and that explained the basis on which it assigned the Farm to the Appellant. That this was corroborated by the letter from CMC dated 15th May 2007 confirming that the original owner of the Farm, the 2nd Respondent had given it to the 1st Respondent.

3.10 According to the Judge, the evidence showed that the 2nd Respondent's intention was to assign the Farm to a party which it had entered into an agreement with. That party

was clearly not the Appellant but the Ist Respondent, to whose benefit the said agreement was executed.

3.11 As regards the third issue of whether there was fraudulent misrepresentation in the acquisition of the certificate of title, the learned Judge analyzed the letter dated 30 March 1995 from the Committee Secretary, Kabalange Training Centre to the 2nd Respondent and opined that the letter suggested that the 1st Respondent transformed to be called CFZ and was at the time of the letter further transformed to become the Appellant.

3.12 That the 2nd Respondent was in fact swayed into believing that the 1 Respondent had transformed into the Appellant as evidenced from the 2nd Respondents concession of that fact in its correspondence to CMC. According to the learned Judge, the claim in the letter that the initial CCZ had transformed into the Appellant was incorrect. That the 2nd Respondent relied on such falsehood to assign the Farm to the Appellant. That this was confirmed by the 2nd Respondent in its letters of 12th January 2010 and 19th October 2010 that it assigned the Farm to the Appellant in error. In that respect, the learned

Judge found that there was fraudulent misrepresentation in the acquisition of the certificate of title.

3.13 Consequently, the learned Judge declared the certificate of title null and void and ordered for its cancellation and further ordered that the Farm be transferred to the 1st Respondent.

4.0 THE APPEAL

4.1 Dissatisfied with the Judgment, the appellant has appealed to this Court advancing six grounds of appeal couched as follows:

- (i) The learned trial Judge erred in law and fact when she held that the Appellant acted fraudulently in purchasing Lot 681/M when fraud had not been strictly proved as against the Appellant.**
- (ii) The learned trial Judge erred in law and fact when she held that the certificate of title over Lot 681/M be cancelled for fraudulent misrepresentation when fraud by the Appellant was never proved.**
- (iii) The court below erred in law and fact when it held that the 1st Respondent was the sitting tenant of Lot 681/M when there was undisputed evidence to the effect that it was not the sitting tenant at the time**

the 2nd Respondent made the decision to sell the property in issue.

- (iv) The learned trial court erred in law and fact when it did not hold that the Appellant be refunded the purchase price paid to the 2nd Respondent for the purchase of Lot 681/M, in ordering the cancellation of the certificate of title no. 89153 as the 1st Respondent is unjust enriched.**
- (v) The learned trial Judge erred in law and fact when she failed to address the issue of compensating the Appellant for all the improvements and developments made by the Appellant on Lot 681/M, which shall also have to be transferred to the 1st and 2^d Respondent as the two are unjustly enriched**
- (vi) The learned trial Judge erred in law and fact when she held that the Appellant be condemned in costs for the entire action when the alleged fraud as against the Appellant was never strictly proved when in fact the Appellant had properly acquired Lot 681/M.**

5.0 ARGUMENTS IN SUPPORT

- 5.1 Mr. Katupisha, Counsel for the Appellant, argued grounds one and two together which basically attack the learned**

Judge's holding that fraud had been proved to the required standard. In this respect, the case of **Sithole v State Lotteries Board** was cited where it was held that:

"If a party alleges fraud the extent of the onus is greater than simple balance of probabilities."

5.2 Counsel for the Appellant drew our attention to letters exchanged with the 2nd Respondent from 1995 to 1997 to argue that in its correspondence with the 2nd Respondent, the Appellant did not disguise itself as the 1st Respondent but merely gave a brief history on how it was formed. To explain its assertion that CCC was born of CCZ in the letter dated 30th March 1997 at page 314 of the record, it was argued that, it is a fact that CFZ, as it was previously known, originated from the CCZ which was a group of many churches.

5.3 As regards the letter authored by Mr. Chimutangi, it was argued that it should not have been relied on by the learned Judge as he was not called to testify to the contents of the letter and that the failure to investigate or summon the Appellant even after the allegations in the said letter, showed that the 2nd Respondent was convinced

that there was no fraud on the part of the Appellant. We were urged to reverse the decision of the court below.

5.4 The third ground attacks the holding that the 1st Respondent was the sitting tenant at the Farm, when according to the Appellant there was undisputed evidence to the effect that it was not the sitting tenant at the time the 2nd Respondent made the decision to sell the Farm. Counsel highlighted PW1's testimony at pages 413 and 414 of the record to support the argument that the 1st Respondent was not in possession of the land for over 20 years before it started pursuing title to the property. We were urged to reverse the finding and hold that it was in fact the Appellant who was the sitting tenant at the time of sale.

5.5 The fourth and fifth grounds attack the learned Judge for not ordering that the Appellant be refunded the purchase price paid by the Appellant to the 2nd Respondent as well as the fees related to the transfer of title from the 2nd Respondent to the Appellant as the 1st Respondent would be unjustly enriched. Counsel further argued that compensation for the developments and improvements on

the Farm should have been awarded by the learned Judge. To fortify this argument, Counsel relied on pictures of structures appearing at page 322 to 325 of the record. The case of **Trevor Limpic v Raphael Mawere and Others'** was also relied on to argue that compensation can be granted for improvements made on Land.

5.6 The sixth ground attacks the Order of the Court condemning the Appellant to costs considering the Appellant's argument that the ^{1st} Respondent failed to prove the allegation of fraud to the required standard. The Appellant found solace in the case of **General Nursing Council of Zambia v Mbangweta**³ wherein it was held that a winner in litigation should not be deprived of costs.

6.0 RESPONDENTS ARGUMENTS IN OPPOSING THE APPEAL

6.1 The ^{1st} Respondent did not file any arguments in response to the appeal and even though Ms Chipeta, Counsel for the 1st Respondent was before court, they were still precluded from participating in the proceedings.

6.2 The ^{2nd} Respondent equally did not file its arguments and was not before court at the hearing. As regards the ^{3rd} and 4th Respondents, Mrs Chongo, their Counsel informed the

court that no arguments were filed as the appeal was between the Appellant and the 1st Respondent and as such, they will abide by the decision of the court.

7.0 ANALYSIS AND DECISION OF THE COURT

7.1 We have considered the evidence on record and the arguments advanced by Counsel for the Appellant, together with the Judgment of the Court below.

7.2 Grounds one and two assail the learned Judge's finding of fraud in the acquisition of title to the Farm by the Appellant. The footing of the learned Judge's finding of fraud is the letter at page 314, from the Appellant to the 2nd Respondent stating that it was the successor to CCZ.

7.3 As regards its origins, we agree with the learned Judge that the Appellant cannot argue that it originated from CCZ as it is clear from the evidence proffered by the 1st Respondent's sole witness that CCZ did not transform but that members of the 1st Respondent broke away to form an independent church separate from the 1st Respondent. This was also evident in the 2^d Respondent's lawyers' letters

which showed that there was fraudulent

misrepresentation on the transformation of the 1st Respondent from CCZ to CFZ and eventually to the Appellant. This misrepresentation was acknowledged by the 2nd Respondent.

7.4 The Appellant objected to the evidence in the letter authored by Mr. Chimutangi on the basis that he should have testified on its contents. Our view is that, the 1st Respondent correctly relied on this letter as it was evidence of the response they received from the 2nd Respondent upon inquiring on how the assignment to the Appellant was processed.

7.5 We also note that in the Court below, the 2nd Appellant neither objected to nor cross-examined the 1st Respondent's witness on the averments in the said letter.

7.6 Even if we were to do away with the evidence in the letters authored by Mr. Chimutangi, the learned Judge's finding of fraud is fortified by the evidence adduced by the Appellant's witness, DW4, who confirmed in his testimony at page 518 of the record that the Appellant did present a document stating that CCZ converted into the Appellant. In the case

of Joyce Ndavuka Gondwe v Christine

Ziwolile Ngwira³, the Supreme Court, in accordance with Haisbury's Laws of England, 4th Edition, Volume 16 paragraph 1219, stated that fraud usually takes the form of a statement that is false or suppression of what is true. It is clear that the statement that CCZ had transformed into the Appellant induced the 2nd Respondent into assigning the Farm, which eventually it acknowledged was in error. In our view, the 1st Respondent proved its case to the expected standard of proof and the learned Judge cannot be faulted to that effect.

7.7 As regards the third ground of appeal, our perusal of the Judgment of the Court below reveals that the learned Judge did not make any holding that the 1st Respondent was the sitting tenant at the time the 2nd Respondent made its decision to sell the Farm. The decision by the learned Judge that the certificate of title be re-issued to the 1st Respondent was based on the learned Judge's determination of the issues she had formulated, that the tenancy agreement which was entered into in 1981 was for the benefit of the 1st Respondent and that it was the 1st Respondent therefore, based on the evidence, who was

legally entitled and intended to be assigned the Farm and not the Appellant. There is therefore no basis on which to fault the learned Judge.

7.8 Turning to grounds four and five, on the issue of the refund and compensation for developments and improvements, there was no counter claim, and no evidence was laid in the court below to the effect that a purchase price was paid by the Appellant. Further, there was no evidence that the structures at pages 322 to 325 of the record were made by the Appellant, as PW1's testimony was that the camp on the Farm was established before Hess was expelled from the 1st Respondent. There is, therefore, no evidence of what developments and improvements (if any) were made by the Appellant and the quantum. Grounds four and five accordingly fail.

7.9 As regards the issue of costs, that is in the discretion of the Court. The general principle as espoused in the case of YB and F Transport Limited v Supersonic Motors Limited' is that costs follow the event and the Appellant

having lost the case, the learned Judge was in order in condemning them to costs.

8.0 CONCLUSION

8.1 In sum, the appeal has no merit. It is accordingly dismissed with costs to the Respondents. Same to be taxed



J. CHASHI
COURT OF APPEAL JUDGE

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M. J. SIAVWAPA
COURT OF APPEAL JUDGE

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A.M. BANDA-BOBO
COURT OF APPEAL JUDGE