

Jc

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 108/2020

HOLDEN AT LUSAKA

(Civil Jurisdiction)

**BETWEEN:**

**KANANGU SOKONTELA NKUMBE**

**1<sup>ST</sup> APPELLANT**

**MWIKA MULENGA BERTRAND**

**2<sup>ND</sup> APPELLANT**

**AND**

**WELL FARMS LIMITED**

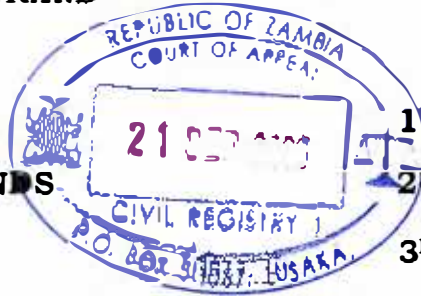
**1<sup>ST</sup> RESPONDENT**

**COMMISSIONER OF LANDS**

**2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL**

**3<sup>RD</sup> RESPONDENT**



**Coram: Siavwapa JP, Chashi and Banda-Bobo, JJA**

**On 20<sup>th</sup> January 2022 and 21<sup>st</sup> September, 2023.**

**For the Appellant**

Mr. C Chilekwa of CC Gabriel & Co

**For the 1<sup>st</sup> Respondent:**

N/A

**For the 2<sup>nd</sup> Respondent:**

N/A

**For the 3<sup>rd</sup> Respondent:**

N/A

## **JUDGMENT**

***BANDA-BOBO, JA, delivered the Judgment of the Court***

**Cases referred to:**

1. *Peter David Lloyd v J.R. Textiles Limited - SCZ Appeal No 137 of 2011*
2. *Polythene Products Zambia Limited v Cyclone Hardware and Construction Limited and the Attorney General - SCZ Appeal No 42 of 2008*

3. *Kalvic Bakery Limited v Attorney General and Anor* - CAZ Appeal No 78 A of 2017
4. *Aristogerasimos Vangelatos and Another v Metro Investments Limited and Others* - SCZ Selected Judgment No.35 of 2016
5. *Crossland Mutinta and Another v Donovan Chipanda* - SCZ Selected Judgment No 53 of 2018
6. *Anort Kabwe and Another v James Daka and Others* (2006) Z.R 12
7. *Dana Holdings Limited v Lusaka City Council and Another* 2006/HIP/0682
8. *Elias Tembo v Eleutherius Mapenzi Chimansa Nyanga and Others* - CAZ Appeal No 305 of 2021

**Legislation and Other Works referred to:**

1. *The Lands Act, Chapter 184 of the Laws of Zambia*
2. *The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia*
3. *The Interpretations and General Provisions Act, Chapter 2 of the Laws of Zambia*
4. *The English Limitations Act of 1939*
5. *Sandeep Bhalla, commentary on the General Clauses Act 1897 (India) (2008)*

**1.0 INTRODUCTION**

- 1.1 This is an appeal against the Judgment of Honorable Madam Justice Y. Chembe dated 31<sup>st</sup> December 2019, wherein, *inter alia*, she ordered the cancellation of certificates of title issued to the Appellants pertaining to

the 1<sup>st</sup> Respondent's farm after it was re-entered by the 2<sup>nd</sup> Respondent.

## **2.0 BACKGROUND**

2.1 The 1<sup>st</sup> Respondent is registered as legal owner of Lot No 3228 Luanshya (the subject property) and Property No F/2792 on Certificates of Title numbered L4528 and L2892 respectively.

2.2 On 7<sup>th</sup> December 1999, a notice to re-enter was registered on the subject property and a certificate of re-entry was registered on 22<sup>nd</sup> June 2000.

2.3 Meanwhile, the subject property was subdivided by Luanshya Municipal Council sometime in 1999 culminating in the creation of Lots L/N/586/M, L/N/587/M, L/N/588/M and L/N/589/M (Lots 586-589). Lots 586 and 587 were sold to the 1<sup>st</sup> Appellant by the first owners while Lots 588 and 589 were sold to the 2<sup>nd</sup> Appellant. The 2<sup>nd</sup> Respondent issued the Appellants certificates of title in respect of the Lots 587 - 589.

- 2.4 After the 1<sup>st</sup> Appellant entered upon the subject property, the 1<sup>st</sup> Respondent was alerted. Inquiries made by the 1<sup>st</sup> Respondent resulted in the discovery of the certificate of re-entry registered in relation to the subject property.
- 2.5 By letters of diverse dates between March and November 2014, the 1<sup>st</sup> Respondent contested the re-entry which was cancelled by the 2<sup>nd</sup> Respondent on 5<sup>th</sup> December 2014.
- 2.6 Following cancellation of the re-entry, the Appellants still held certificates of title to Lots 587-589 resulting in rival titles in respect of the subject property. Further, the 1<sup>st</sup> Appellant refused to yield possession prompting the 1<sup>st</sup> Respondent to commence an action in the Court below.

### **3.0 MATTER IN THE COURT BELOW**

- 3.1 By an amended writ of summons dated 14<sup>th</sup> July 2016 accompanied by a statement of claim of even date, the 1<sup>st</sup> Respondent, amongst others, sought the following reliefs:-

- I. A declaration that L/N/587/M, L/N/588/M, L/N/589/M and L/N/586/M were created in what was Farm 3228
- II. A declaration that there is now an encroachment of L/N/587/M, L/N/588/M, L/N/589/M and L/N/586/M into Farm 3228, Luanshya following the cancellation of the Certificate of Re-entry by the 2<sup>nd</sup> Respondent on Farm 3228
- III. An order for cancellation of plots L/N/587/M, L/N/588/M, L/N/589/M and L/N/586/M issued to the 1<sup>st</sup> and 2<sup>nd</sup> Appellants
- IV. An order for cancellation of the certificates of title relating to plots L/N/587/M, L/N/588/M, L/N/589/M and L/N/586/M issued to the 1<sup>st</sup> and 2<sup>nd</sup> Appellants
- V. An order for the 1<sup>st</sup> Appellant to vacate the land numbered as L/N/587/M which encroaches on Farm 3228, Luanshya belonging to the 1<sup>st</sup> Respondent

- VI. An order for the 1<sup>st</sup> Appellant to vacate that part of Farm 2792, Luanshya on which he is doing some gardening activities
- VII. An order for the 1<sup>st</sup> Appellant to pay damages for trespass on the part of Farm 2792 to the Plaintiff from the time he commenced activities on Farm 2792 to date of vacation at ZMW20,000.00 per annum
- VIII. Interest on the damages in (7) above

3.2 The facts asserted by the 1<sup>st</sup> Respondent in support of its claim that the Appellants' certificates of title to Lots 586 – 589 should be cancelled were that the 2<sup>nd</sup> Respondent re-entered the subject property without serving it with a notice of intention to re-enter and the substantive certificate of re-entry rendered the re-entry illegal.

3.3 The 1<sup>st</sup> Respondent argued that the Appellants are not bonafide purchasers of the subject property without notice as they were aware of the structures on the said property which belong to the 1<sup>st</sup> Respondent.

- 3.4 In relation to Lot F/2792, the 1<sup>st</sup> Respondent avowed that the 1<sup>st</sup> Appellant's garden was encroaching on it as the Lot is situated next to the subject property.
- 3.5 In his defence, the 1<sup>st</sup> Appellant contested that the notice of re-entry was valid, as it was served on the 1<sup>st</sup> Respondent on 7<sup>th</sup> December 1999, but the 1<sup>st</sup> Respondent failed to make the requisite representations to the 2<sup>nd</sup> Respondent which resulted in the subject property being re-entered.
- 3.6 The 1<sup>st</sup> Appellant contended that he is the registered owner of Lot 587 as he was issued with Certificate of Title No. 15588 relating to the said property. He further asserted that he was in the process of acquiring title to Lot 586. It was the 1<sup>st</sup> Appellant's position that the 1<sup>st</sup> Respondent ceased to own the subject property when the certificate of re-entry was registered on the land register.
- 3.7 Impugning the 2<sup>nd</sup> Respondent's cancellation of the certificate of re-entry, the 1<sup>st</sup> Appellant argued that the 2<sup>nd</sup> Respondent has no power to entertain an appeal against

its decision to re-enter property, as such, the 1<sup>st</sup> Respondent should have appealed to the Lands Tribunal.

3.8 The 1<sup>st</sup> Appellant averred that he was a bonafide purchaser of land who did not have a duty to make an inquiry on the unexhausted improvements on the land in question at the time of acquiring Lot 587.

3.9 The 2<sup>nd</sup> Appellant's assertions on the legality of the re-entry and the illegality of its cancellation echoed those of the 1<sup>st</sup> Appellant. The 2<sup>nd</sup> Appellant also asserted that he was a bonafide purchaser of Lots 588 and 589 without notice of an adverse claim as the Lots were vacant and undeveloped at the time of purchase.

3.10 The 2<sup>nd</sup> Appellant averred that he was the legal owner of Lots 588 and 589 under certificates of title numbered 36795 and 33139 respectively.

3.11 The Appellants counterclaimed as follows:-



- I. A declaration that they are bonafide purchasers for value without notice of the Appellant's right over Farm No.3228, Luanshya.
- II. A declaration that the 2<sup>nd</sup> Respondent exceeded jurisdiction when he purported to cancel the certificate of re-entry appearing on Entry No 17 dated 5<sup>th</sup> December 2014 of the Lands Register
- III. A declaration that only the Lands Tribunal is mandated by law to hear appeals by persons aggrieved with the decision of the Commissioner of Lands to cause a certificate of re-entry to be entered in the register
- IV. A declaration that they are the legal owners of their respective Lots
- V. A declaration that the 1<sup>st</sup> Respondent having waited for approximately Fourteen(14) Years to challenge the re-entry is estopped from asserting its rights over Farm No 3228 Luanshya.
- VI. Costs of the proceedings

#### 4.0 DECISION OF THE COURT BELOW

- 4.1 The learned trial Judge in the Court below opined that the issue for determination was who has good title to the subject land.
- 4.2 After interrogating the legitimacy of the re-entry, the learned trial Judge found that it was illegal because the 1<sup>st</sup> Respondent was not served with a notice to re-enter. Having found the subsequent allocation of the subject property to the Appellants unlawful, the learned trial Judge cancelled the certificates of title to Lots 586-589.
- 4.3 In relation to the argument that the 1<sup>st</sup> Respondent's claim was statute barred, the learned trial Judge found that time only started running when the 1<sup>st</sup> Respondent discovered that the subject property had been re- entered in 2012. Further, the learned trial Judge relied on the case of **Peter David Lloyd v J.R. Textiles Limited**<sup>1</sup> to find that it was immaterial that the 1<sup>st</sup> Respondent failed to commence proceedings within the prescribed 12 years because a title

holder, by virtue of **Section 35 of the Lands and Deeds Registry Act**<sup>2</sup>, is protected from adverse possession.

4.4 Under the claim for trespass, the learned trial Judge accepted the evidence that the 1<sup>st</sup> Appellant trespassed on Farm 2792 and awarded the 1<sup>st</sup> Respondent minimal damages in the sum of ZMW 1,000 per annum for the period of encroachment because the 1<sup>st</sup> Respondent failed to adduce any evidence as to the extent of the encroachment.

4.5 Moving on to the counterclaims, the learned trial Judge analysed **Section 13(3) of the Lands Act**<sup>1</sup> and **Section 26 of the Interpretations and General Provisions Act**<sup>2</sup> and concluded that the 2<sup>nd</sup> Respondent has implied power to correct his decisions and that he can deal with a re-entry registered in error administratively.

4.6 As regards the claim that the Appellants are bonafide purchasers for value without notice, the learned trial Judge found that by reason of her holding that the re-entry

was a nullity, the Appellants did not acquire good title to the land.

4.7 The learned trial Judge found that the 2<sup>nd</sup> Appellant, who claimed he bought his Lots from a person offered the same by the Council, had failed to explain why his documents show that he was offered the Lots directly by the Council. The learned trial Judge found that he had notice of the encumbrance as a search on the Lands register would have revealed that the subject property belonged to the 1<sup>st</sup> Respondent.

4.8 Similarly, the learned trial Judge found that the 1<sup>st</sup> Appellant would have discovered that at the time the vendor of his Lot was offered the same, there was a registered lessee over the subject property.

4.9 For the foregoing reasons, the learned trial Judge found that the defence of bona fide purchaser was not available to the Appellants.

## **5.0 GROUND OF APPEAL**

5.1 Displeased with the Judgment of the Court below, the Appellants have appealed to this Court on four grounds as follows:

1. The Court below lacked jurisdiction to hear and determine the 1<sup>st</sup> Respondent's case which relates to the re-entry of Farm No 3228 Luanshya by the Commissioner of Lands pursuant to powers vested in him by Section 13(1) of the Lands Act, Chapter 184 of the Laws of Zambia.
2. The Court Below misdirected itself in law and fact when it held that there was no impropriety in the Commissioner of Lands dealing with the appeal against the re-entry by the 1<sup>st</sup> Respondent administratively.
3. The Court below misdirected itself in law and in fact when it declared that the Certificates of Title issued over Lots L/N/586/M, L/N/587/M, L/N/588/M and L/N/589/M by the Registrar of Lands following the re-

entry of Farm No 3228 Luanshya by the Commissioner of Lands are null and void and ordered immediate cancellation thereof.

4. The Court below misdirected itself in law and in fact when it held that the 1<sup>st</sup> Respondent's action which commenced Fourteen (14) Years after the cause of action arose was not statute barred.

## **6.0 APPELLANTS' ARGUMENTS IN SUPPORT**

6.1 Counsel for the Appellants elected to argue grounds one and two together.

6.2 Under these grounds, Counsel referred us to **Section 13(3) of the Lands Act**<sup>1</sup> and submitted that it sets out the procedure that a lessee who is aggrieved with a decision to enter a certificate of re-entry on their property ought to follow.

6.3 Counsel submitted that in accordance with **Section 13(3)**, the correct procedure was for the 1<sup>st</sup> Respondent to appeal to the Lands Tribunal. The cases of **Polythene Products Zambia Limited v Cyclone Hardware and Construction**

**Limited and Attorney General<sup>2</sup> and Kalvic Bakery Limited v Attorney General and Another<sup>3</sup>** were relied on in this respect.

6.4 ●ur attention was drawn to the inspection report appearing at page 262 of the record. According to Counsel, the conclusion in that report, that the subject property was not under any form of utilization by the 1<sup>st</sup> Respondent discloses that the re-entry was not illegal.

6.5 Counsel for the Appellants submitted that the learned trial Judge misapprehended **Section 26 of the Interpretation and General Provisions Act<sup>3</sup>** as it envisages a different situation than that in **Section 13(3) of the Lands Act<sup>1</sup>**.

6.6 In support of Ground three, Counsel argues that the 1<sup>st</sup> Respondent having breached **Section 13(3) of the Lands Act<sup>1</sup>**, the Registrar of Lands rightly issued certificates of title to Lots 586-589 as the re-entry of the subject property was legal.

6.7 Under Ground four, Counsel for the Appellants submitted that the learned trial Judge misdirected herself when she

relied on the **Peter David Lloyd case** *supra* in holding that the 1<sup>st</sup> Respondent's action is not statute barred.

6.8 In distinguishing the present case from the **Lloyd case**, Counsel argues that unlike the 2<sup>nd</sup> Respondent in that case who was a trespasser, they were lawfully allocated their parcels of land by the Commissioner of Lands.

6.9 We were urged to uphold the appeal in its entirety with costs to the Appellants.

## 7.0 **ARGUMENTS IN OPPOSITION**

### **(a) By the 1<sup>st</sup> Respondent**

7.1 In response to Ground one, Counsel for the 1<sup>st</sup> Respondent argued that **Section 13(3) of the Lands Act<sup>1</sup>** and the **Polythene Products case** *supra* are inapplicable in this matter. This is because the Court below was not called upon to annul any certificate of re-entry, the said certificate having been cancelled administratively by the 2<sup>nd</sup> Respondent.



- 7.2 Counsel argued that the learned trial Judge merely referred to the facts surrounding the re-entry as obiter dicta which did not go to the root of the Judgment appealed against.
- 7.3 In support of Ground two, Counsel submitted that the 2<sup>nd</sup> Respondent cannot be faulted for cancelling the re-entry as there was impropriety surrounding the parcelling out of the subject property before re-entry.
- 7.4 Counsel distinguished the **Polythene Products case** from the instant case by submitting that the **Polythene case** relates to the correct mode of commencement when impugning a re-entry while *in casu* the issue is whether the 2<sup>nd</sup> Respondent has power to reverse his decision to re-enter a piece of land.
- 7.5 In relation to **Section 13**, Counsel argued that nothing in this Section stops a lessee from making representations to the president complaining about an impugned re-entry even after the same is registered. Counsel further argued that a lessee who discovers a certificate of re-entry has

been entered on their property years later cannot appeal to the Lands Tribunal within the prescribed 30 days.

7.6 Referring us to **Sections 3(1) and (5) of the Lands Act<sup>1</sup>**, Counsel submitted that the 2<sup>nd</sup> Respondent is vested with power to administer and control land matters. Counsel buttressed this argument by referring us to **Section 25 of the Interpretations and General Provisions Act<sup>3</sup>**, arguing that this section demonstrates that administrative bodies are vested with implied power. The works of **Sandeep Bhalla, commentary on the General Clauses Act 1897 (India) (2008)<sup>5</sup>** was also relied on in this respect.

7.7 It was submitted that an appeal process being an external adversarial dispute settlement avenue, an aggrieved party should make representations to the decision-making authority before he resorts to an appeal to the Courts.

7.8 In ground three, Counsel's response is that as provided in **Section 34 of the Lands and Deeds Registry Act<sup>2</sup>**, a certificate of title can be cancelled in cases that involve fraud, illegality, impropriety, or encroachment.

7.9 Considering that the learned trial Judge found that there was impropriety in the present case attributed to the illegal re-entry of the subject property, Counsel submitted that this was a fit and proper case for the annulment of the certificates of title granted to the Appellants.

7.10 In response to ground four, Counsel 's argument was that given the backdrop of the Appellants' acquisition of title from the 2<sup>nd</sup> Respondent, they cannot argue that they were lawfully allocated the subject property. It was further submitted that the cancellation of the certificate of re-entry vitiated the Appellants' title to Lots 586-589, thus turning them into trespassers.

7.11 In relation to the period of limitation, Counsel argued that by virtue of **Section 10(1) of the Limitation Act<sup>4</sup>**, time started to run in 2008 when the Appellants took possession of the subject property.

7.12 In addition, Counsel argued that in accordance with **Section 26 of the Limitation Act<sup>4</sup>**, time started to run in

2008, when it discovered that the subject property had been re-entered and the cause of action accrued.

7.13 The 1<sup>st</sup> Respondent 's prayer was that all the grounds of appeal raised must fail and that costs be borne by the Appellants.

**(b) By the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents**

7.14 The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents opted to respond to Grounds one, two and three together and to argue ground four separately.

7.15 In the first three grounds, the argument is that the Court erred when it held that there was no impropriety in the Commissioner of Lands dealing with the appeal against re-entry administratively.

7.16 The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents opined that the law has expressly provided the procedure that ought to be followed where a certificate of re-entry is entered against a lessee in **Section 13 of the Lands Act**<sup>1</sup> and the **Polythene Case**. It

was submitted that the correct procedure was for the 1<sup>st</sup> Respondent to appeal to the Lands Tribunal.

7.17 The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents drew our attention to the cases of **Aristogerasimos Vangelatos and Another v Metro Investments Limited and 3 Others**<sup>4</sup> and **Crossland Mutinta and Another v Chipanda**<sup>5</sup> to support the argument that the absence of jurisdiction nullifies whatever decision follows from such proceedings.

7.18 In Ground four, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the assertion that the 3<sup>rd</sup> Respondent could only have had the subject property re-entered and subdivided and assigned to the Appellant by means of fraud brings the action within the purview of **Section 26 of the Limitation Act**<sup>4</sup>. It was therefore their submission that the action commenced by the 1<sup>st</sup> Respondent was not statute barred.

7.19 The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents prayed that grounds one, two and three of the appeal be allowed and that ground four be dismissed. It was further prayed that each party bear its own costs.

## 8.0 ANALYSIS AND DECISION

- 8.1 We have carefully considered the record of appeal and the arguments advanced by the parties.
- 8.2 The gravamen of the first two grounds of appeal is that the Court below lacked jurisdiction to determine the 1<sup>st</sup> Respondent's claims as they relate to the re-entry of the subject property.
- 8.3 The Appellants, 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondent have found solace in the **Polythene case** and argued that the Court below was devoid of jurisdiction because an appeal against a re-entry lies to the Lands Tribunal.
- 8.4 In our view, the **Polythene Case** is distinguishable from the present case because that case relates to the mode of commencement where a party is aggrieved by the 2<sup>nd</sup> Respondent's decision to re-enter land. In the instant case, we perused the 1<sup>st</sup> Respondent's writ of summons and the claims therein, as listed in 3.1 above, and they do not include a claim for cancellation of a certificate of re-entry. This argument is therefore misconceived.

- 8.5 Moving on to the argument that the learned trial Judge erred when she held that there was no impropriety in the Commissioner of Lands cancelling the certificate of re-entry, the Appellants contend that the only route available to a lessee aggrieved by the entry of a certificate of re-entry is an appeal to the Lands Tribunal.
- 8.6 This argument, which is supported by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, is that the Lands Act does not leave room for the Commissioner of Lands to deal with appeals against re-entry administratively.
- 8.7 The learned trial Judge's position on this issue was that **section 13(3) of the Lands Act**<sup>1</sup> does not state that an administrative appeal does not lie to the Commissioner of Lands neither does it state that the Commissioner of Lands becomes functus official after a certificate of re-entry has been entered in the Register.
- 8.8 According to the learned trial Judge, to suggest that the Commissioner cannot review his decision would result in an absurdity as even cases where the re entry was done in

error would have to go to the Lands Tribunal. The learned trial Judge found that the **Interpretation and General Provisions Act**<sup>3</sup> provides that the Commissioner of Lands has implied power to correct his decisions.

8.9 We are inclined to agree with the learned trial Judge's position. The Commissioner of Lands' implied power to correct a re-entry administratively is patent in **Section 13(2) of the Lands Act**<sup>1</sup> which gives power to the Commissioner of Lands to correct errors pertaining to re-entry.

8.10 **Section 13 of the Lands Act**<sup>1</sup> is couched in the following terms:

**"(1) Where a lessee breaches a term or a condition of a covenant under this Act the President shall give the lessee three months notice of his intention to cause a certificate of re-entry to be entered in the register in respect of the land held by the lessee and requesting him to make representations as to why a certificate of re-entry should not be entered in the register.**



**(2) If the lessee does not within three months make the representations required under subsection (1), or if after making representations the President is not satisfied that a breach of a term or a condition of a covenant by the lessee was not intentional or was beyond the control of the lessee, he may cause the certificate of re-entry to be entered in the register.**

**(3) A lessee aggrieved with the decision of the President to cause a certificate of re-entry to be entered in the register may within thirty days appeal to the Lands Tribunal for an order that the register be rectified.”**

8.11 The implication of this section is that the Commissioner of Lands can administratively correct a certificate of re-entry registered by fraud or mistake following an allegation of the same being satisfactorily proved if the correction does not have the effect of determining the rights of the parties to any land.

8.12 As regards **Section 25 of the Interpretation and General Provisions Act**<sup>3</sup>, we opine that it is this section and not **Section 26** that is applicable to this case. **Section 25** stipulates as follows:

**“Where any written law confers a power on any person to do or enforce the doing of an act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.”**

8.13 This section when read with **Section 13(2) of the Lands Act**<sup>1</sup> discloses that the Commissioner of Lands has implied power to cancel a re-entry as this would enable him to exercise his powers to correct any error that would have occurred during the re-entry process.

8.14 Grounds one and two therefore fail.

8.15 In ground three, the Appellants, stemming from their argument that the re-entry was legal, submit that the Registrar of Lands was justified to issue the Certificates of

Title relating to Lots 586 – 589. On the other hand, the 1<sup>st</sup> Respondent maintains that the re-entry was illegal.

8.16 In determining this issue, the learned trial Judge found that no evidence had been adduced to show that the notice of intention to re-enter the subject property was served on the 1<sup>st</sup> Respondent. Fortified by the case of **Anort Kabwe and Another v James Daka and Another**<sup>6</sup>, she found that the effect of this was that the certificate of re-entry was a nullity.

8.17 Further persuaded by the reasoning in the case of **Dana Holdings Limited v Lusaka City Council and Another**<sup>7</sup> where it was held that the *nemo dat* rule applied to the holder of a certificate over land which was acquired from a person who did not have good title to the land, the learned trial Judge found that the Appellants did not acquire good title as those first allocated the Lots did not acquire good title by reason of impropriety. Further, all successors in title (the Appellants) to the questionable land did not acquire good title.

8.18 The Appellants have placed reliance on the inspection report appearing at page 262 of the record that concluded that the subject property was not being utilised by the 1<sup>st</sup> Respondent to argue that the re-entry was legal. We find the argument to be misplaced. This is because the issue as we see it is whether the procedure regarding re-entry as stipulated in **Section 13(1) of the Lands Act<sup>1</sup>** and the **Anort Kabwe case** was followed. The Appellants cannot rely on a report that was authored years after the re-entry was registered to argue that it was legitimate.

8.19 In the case of **Anort Kabwe supra**, the Supreme Court stated thus,

***“A repossession effected in the circumstances where a lessee is not afforded an opportunity to dialogue with the Commissioner of Lands, with a view to having an extension of period in which to develop the land, cannot be said to be a valid repossession. In our view, the Commissioner of Lands cannot be justified in making the Land available to another developer”.***

- 8.20 Given what we have stated in relation to the re-entry, we find that the learned trial Judge was on firm footing to hold that it was illegal. Since there was no valid repossession of the subject land, the learned trial Judge's application of the *nemo dat* rule was apt.
- 8.21 In the premises, we find no reason to disturb the learned trial Judge's order that the certificates of title issued over Lots L/N/586/M, L/N/587/M, L/N/588/M and L/N/589/M be cancelled. Ground three accordingly fails.
- 8.22 We now turn to ground four, the Appellant has argued that the **Peter David Lloyd case** relied on by the learned trial Judge does not apply to the present case because the Appellants are not trespassers but title holders.
- 8.23 We note that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are aligned with the 1<sup>st</sup> Respondent as all three parties are of the view that the period of limitation was extended by virtue of Section **26 of the Limitations Act**<sup>4</sup>.
- 8.24 The 1<sup>st</sup> Respondent further argued, with reference to **Section 10(1) of the Limitations Act**<sup>4</sup>, that the period of

limitation begun to run when the Appellants took possession of the subject property.

8.25 **Section 10 of the Limitations Act<sup>4</sup>** provides as follows:

***“No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as adverse possession”) and where under the foregoing provisions of this Act any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land.”***

8.26 We opine that by arguing that they were not in adverse possession, the Appellants have shot themselves in the foot as the effect is that the period of limitation cannot be deemed to have accrued.

8.27 Our understanding of the limitation of actions to recover land is that there must be a person, that has adverse possession, in whose favour the period of limitation can run. Given that **Section 35** gives a title holder protection from adverse possession, it follows that **Section 4(3) Limitation Act** cannot be used as a defence against a person with a Certificate of title.

8.28 In the case of **Elias Tembo v Eleutherius Mapenzi Chimansa Nyanga and Others**<sup>8</sup>, we stated as follows:

*“Section 34 of the Lands and Deeds Act ousts any provision of the rule of law or equity in relation to the rights of a registered title holder to advance his right to such land in a court action.*

.....

*It is our firm view that such registered proprietor can also defend his ownership of the subject land from any purported threats to his subsisting title, and this he can do at any time without any limitations as to time. For these foregoing reasons, we agree with the lower court that a Certificate of title is an exception*

*to the provision of Section 4(3) of the English statute of limitation.”*

8.29 The 1<sup>st</sup> Respondent’s certificate of title exempts it from the limitation under **Section 4(3) of the Limitation Act**<sup>4</sup>. Without belabouring the point, we find no merit in ground four.

**9.0 CONCLUSION**

9.1 The upshot is that the appeal is unmeritorious and is dismissed in its entirety, with costs to the 1<sup>st</sup> Respondent to be taxed in default of agreement.

.....  
**M. J. SIAVWAPA**  
**JUDGE PRESIDENT**

.....  
**J. CHASHI**  
**COURT OF APPEAL JUDGE**

.....  
**A. M. BANDA-BOBO**  
**COURT OF APPEAL JUDGE**