

IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 306 OF 2021**

HOLDEN AT KABWE

(Civil Jurisdiction)



B E T W E E N:

ZELU FREDERICK NYIRENDA and TEMWANI NYIRENDA **1ST APPELLANT**
(as Administrators of the estate of the late Chandiwira Nyirenda)

SIAVONGA DISTRICT LIMITED **2ND APPELLANT**
AND

DEEP SIX COMPANY LIMITED **1ST RESPONDENT**

GOMES HAULAGE COMPANY LIMITED **2ND RESPONDENT**

CORAM: Chashi, Muzenga and Patel, JJA

ON: 13th October and 22nd December 2023

For the 1st Appellant: Dr H.B Mbushi, SC, Messrs HBM Advocates

For the 2nd Appellant: N/A

For the 1st and 2nd Respondents: C. Sianondo, Messrs Malambo & Company

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

- 1. Saidi Chibwana & Others v Marian Mutiata Chitauka (Suing as Administrator of the estate of the late Hachabwa Chitauka) - SCZ Selected Judgment No. 49 of 2017***
- 2. Honourous Maurice Chilufya v Chrispin Haluwa Kangunda (1999) ZR, 166***

3. *Husty Moffat Mwachilele v Lusaka City Council - SCZ Appeal No. 33 of 2016*

Legislation referred to:

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

Rules referred to:

- 1. *The Court of Appeal Rules, Statutory Instrument No. 65 of 2016***

1.0 INTRODUCTION

1.1 This is an appeal from the Judgment of Honourable Mr Justice Mwila Chitabo, SC delivered on 19th February 2021. In the said Judgment, the learned Judge extensively ruled in favour of the Respondents who were the 1st and 2nd plaintiffs in the court below.

1.2 The learned Judge then went on to dismiss the counterclaim by the 1st Appellants herein, who were the 1st defendant in the court below.

2.0 BACKGROUND

2.1 The background to this matter can be deduced from a glean of the pleadings, the evidence by the witnesses and the Judgment of the court below.

- 2.2 The 1st Respondent previously owned Stand no. 465 Siavonga, which was on title dated 20th January 1985. Oliver Creig Burton (Burton) was then one of the shareholders in the 1st Respondent Company.
- 2.3 In Order to expand its operations, the 1st Respondent made an application to the 2nd Appellant for extension of Stand 465 in 1991, consideration of which protracted, but was eventually approved and it was recommended that instead of the extension, there be one separate title in the name of Burton, to encompass Stand 465 and the extension, which culminated in the creation of Stand 2118 Siavonga, totaling 11.1698 hectares.
- 2.4 At page 134 of the record of appeal (record) is a letter from the Lands Department dated 27th February 1997, advising the 2nd Appellant on how Burton was to proceed in respect to the procuring of title. This was followed by a letter dated 13th January 1998, from the 2nd Appellant to Burton, indicating that the 2nd Appellant had approved the application.

2.10 There is evidence on record, by PW2, Leroy Gabriel Gomes, the Managing Director in the 2nd Respondent, that sometime in 2016, Chandiwira Nyirenda, approached his father, alleging that he had encroached on his land. It was as a result that they engaged a surveyor for verification. The surveyor verified that Lot 12561/M is engulfed by Stand 2118, as it was inside Stand 2118.

2.11 On 19th July 2016, the Respondents herein, commenced an action by way of writ of summons, predominantly for an Order, that they are the rightful owner of Stand 2118, out of which Lot 12561/M, had been carved out of and imposed. They also sought cancellation of certificate of title no. 1690 which had been issued to Chandiwira Nyirenda, an injunction, removal of what had been erected by Chandiwira Nyirenda, and damages for trespass.

2.12 In its defence, the 1st Appellants denied being trespassers, as they had title to Lot No. 12561/M and denied having obtained the same by fraud or mistake. The 1st Appellants then counter claimed damages for

being called criminals who obtained title fraudulently. They further claimed damages resulting from damage caused by the injunction which was granted by the court below.

2.13 The 2nd Appellant in its defence, averred that it erroneously accepted the final approval of extension to Stand 465, which over stretched into and swallowed the already existing Lot 12561/M and that as such, the 2nd Respondent is only entitled to that portion of the land not encroaching into Lot 12561/M.

3.0 DECISION OF THE COURT BELOW

3.1 After evaluating the pleadings, evidence and the submissions, the learned Judge made a number of findings of fact, prominent amongst them that, by a letter dated 25th November 2011, the Commissioner of Lands stated that Lot 12561/M, was cancelled and that, there was no letter on record to show that the cancellation was withdrawn.

3.2 The learned Judge then went on to formulate thirteen (13) issues for determination. We will only make

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reference to the issues relevant to the determination of the appeal.

- (i) **Whether Burton was beneficial owner, without obtaining a certificate of title to Stand 2118:** The learned Judge cited the case of **Saidi Chibwana & Others v Marian Mutiata Chitauka**¹ (*suing as Administrator of the Estate of the late Hachabwa Chitauka*) in which the Supreme Court held that, an offer confers legal rights on the offeree to the subject of offer and the offeree could enter into any valid contract for the disposal of the property to any willing and consenting party
- (ii) **Whether the 2nd Appellant had duly recommended Burton to be offered Stand 2118:** the learned Judge found that the claim by the 2nd Appellant that the approval and recommendation was in error was an afterthought. That there was no written evidence prior to the launching of the proceedings that the 2nd Appellant had

repented its alleged mistakes. That there was legitimate expectation on the part of Burton and indeed the Commissioner of Lands acted on the recommendation and offered Stand 2118 to Burton.

(iii) Whether Lot 12561/M was cancelled by the

Commissioner of Lands. According to the learned Judge, there was no evidence to the contrary, to the uncontroverted documentary evidence that the Commissioner of Lands by letter dated 27th November 2011 cancelled Lot 12561/M. That therefore, certificate of title no. 1690 was issued in error or mistake or fraudulently.

(iv) Admissibility of map drawn by KAYO surveyors in plaintiffs bundle of documents:

the learned Judge made a finding that there is nowhere on the record where the 1st Appellants challenged the admissibility of the letter and map authored by KAYO Surveyors (Private Surveyors) either at the time of

discovery or trial. That therefore the documents having been admitted, the only issue left was what weight to attach to it. The learned Judge observed that indeed the works of private surveyors do not enjoy the same favourable status as that of Government Surveyors. More especially that they were made at the instigation of the 2nd Respondent and after the dispute had arisen. That however, the cancellation of Lot 12561/M, was consistent with the findings of KAYO Surveyors, that Lot 12561/M is engulfed by Stand 2118.

- (v) Separate legal entity of Deep Six Limited and Burton:** the learned Judge was of the view that the complaint advanced by the 1st Appellant is devoid of merit. That it is not in dispute that a company is a separate legal entity from its shareholders and directors. The learned Judge after perusing the sales and shares agreement, found that Burton is a

party to the agreement in his personal capacity and consequently entitled to dispose of his shares and properties

(vi) 1st Appellants aggrievements on allegations by the 1st Respondent of fraud in securing title deeds as contained in the counter

claim: According to the learned Judge, it is an established principle of law that whatever is stated, whether orally or in written form in judicial proceedings is absolutely privileged. That it does not matter how false or malicious the statement is or who makes it. The learned Judge was extremely startled that a litigant and his advocates can plead and anchor an action on a claim completely alien in our jurisprudence, to base an action on matters pleaded in court. It was on that basis that the 1st Appellants' counterclaim was found to be dissolute of any merit and was dismissed as it was not only embarrassing, but was also completely untenable at law.

(vii) Whether fraud vitiates Certificates of Title:

the learned Judge referred to the case of **Honourous Maurice Chilufya v Chrispin Haluwa Kangunda**,² where the Supreme Court held that, the law contemplates that fraud will vitiate a certificate of title. According to the learned Judge, a litany of odd coincidences, which included an undated letter of application for Lot 12561/M, cancellation of the Lot by the Commissioner of Lands, absence of proof of payments, imposition of offer letter to the 1st Appellants, absence of letter reversing cancellation, absence of approval of the 2nd Appellant authorizing building – led to the only irresistible inference that there was fraud and or mistake in the manner, fashion and style the 1st Appellants acquired the certificate of title issued in the circumstances.

3.3 The learned Judge then declared the Respondents as the rightful owners of Stand 2118, to which Lot 12561/M

had been carved out or imposed and ordered revocation and cancellation of certificate of title no. 1690. He further ordered the 1st Appellants to yield peaceable vacant possession to the Respondents and also granted them leave to issue writ of possession. In addition the Respondents were awarded general damages and damages for trespass. They were further awarded interest on the damages and costs.

4.0 THE APPEAL

4.1 Dissatisfied with the Judgment, the 1st Appellants has appealed to this Court advancing fourteen (14) grounds of appeal couched as follows:

(1) *The erudite Judge in the court below erred in both law and fact in that he failed to consider the issues of law on the part of the Appellants even after submitting on the effect it would have on the registered owner of the property who hold certificate of title to a property.*

And or alternatively

(2) *The erudite Judge in the court below erred in both law and fact by relying on letter of offer as basis of acquiring rights and ownership in land property, rather than what is provided for in the law.*

(3) *The erudite Judge in the court below erred in both law and fact by canvassing that L. 12561/M was cancelled when it was actually a request on*

the status of various properties to which the council ably responded

- (4) The erudite Judge in the court below erred both in law and fact by failing to follow the law as contained in Lands and Deeds Registry Act on what amounts to having legal rights in the land.*
- (5) The erudite Judge in the court below erred both in law and fact by failing to distinguish the status of a limited company and its shareholders or directors*
- (6) The erudite Judge in the court below erred both in law and fact by failing to appreciate how land ownership is transferred from one person to another*
- (7) The erudite Judge in the court below erred both in law and fact by failing to justify its reasoning on why a plan or document made or drawn by a private surveyor is acceptable in evidence than a document or plan made by a government official*
- (8) The erudite Judge in the court below erred both in law and fact by failing to explain how and why it accepted in the statement of claim which were not supported by any evidence that there was fraud in the manner the appellant obtained his certificate of title*
- (9) The erudite Judge in the court below erred both in law and fact by failing to give reasons for arriving at the Judgment of the 17th February 2021 by failing to give any explanation on any of the following issues contained in the submission as required by law:-*

- (a) How it granted an injunction against a single name and no address**
 - (b) The court below failed to answer the question or distinguish the cases cited in the submissions to the case which was before it as required by law**
 - (c) That the court below failed to give an explanation to the evidence by the PW2 Leroy Gabriel Gomes who stated in his evidence that he had never been to Siavonga since the purchase of Deep Six Co. Limited which was on 13th September 2011, and that whatever evidence he gave came from people who were on the ground as the said evidence then required corroboration**
 - (d) The court below failed to give an explanation to the contents of the statement of claim that the survey of SIA/2118 was only done after the offer was made on 16th November 2010**
- (10) That the court below erred in law and fact when it dismissed the counter-claims without giving any reasons to justify the dismissal**
- (11) That the court below erred in law and fact when it dismissed the claim for damages for calling 1st defendant in court below now appellant that he obtained certificate of title relating to Lot 1256/M through fraud without justification**
- (12) That the court below erred in law and fact when it dismissed the counterclaim for damages arising from the stall of work on the property due to an injunction of 2016 which is still in force**

(13) That the court below erred in law and fact when it dismissed a counterclaim for damages caused through enhanced material prices due to inflation

(14) That the court below erred in law and fact by dismissing the claim for costs and interest as a result of the conduct of the plaintiffs below now Respondents.

5.0 ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 The 1st Appellants filed together with the record what it termed as submissions in support of the appeal. Order 10/6 (a) of **The Court of Appeal Rules¹ (CAR)** provides as follows:

“6. Subject to an extension of time and to an

Order made under Order XIII rule 3, the appellant shall, within sixty days after filing a notice of appeal –

**(a) Lodge the appeal by filing in the Registry
Twenty one hard copies of the record of
appeal together with heads of argument
and an electronic copy of the record of
appeal.**

5.2 This provision strictly calls for filing of the record together with heads of argument and not submissions.

We were inclined to strike out these submissions if there had been an objection from the Respondents. We however decided to accept and consider them as heads of argument in view of the absence of the objection and also taking into consideration that the Respondents responded by filing in their heads of argument. We will not recapitulate the arguments herein, but we will refer to them in our consideration when need arises.

6.0 1ST AND 2ND RESPONDENTS ARGUMENTS IN OPPOSITION

6.1 The 1st and 2nd Respondents filed their heads of argument on 19th January 2022. Equally, we will refer to them in our consideration where need arises.

7.0 OUR CONSIDERATION AND DECISION

7.1 We have considered the arguments by the parties and the Judgment being impugned. At the hearing of the appeal, we did bring to the attention of Counsel for the 1st Appellants, our discontent with ground 9 as contained in the memorandum of appeal. State Counsel did not proffer a satisfactory explanation.

7.2 Order 10/9 (2) **CAR** provides that:

“A memorandum of appeal shall set forth concisely and under distinct heads, without arguments or narrative, the grounds of objection to the Judgment appealed against and shall specify the points of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively.”

- 7.3 In our view, the ninth ground, which for ease of reference appears at page J14 of this Judgment, contravenes Order 10/9 (2), in that, it contains arguments and narrative, and as such we have no option, but to expunge it from the record and it is accordingly expunged.
- 7.4 The 1st Appellants has argued the first, second, fourth and sixth grounds together, as according to them the grounds are concerned with the injunction. However, a perusal of these grounds shows that none of the four grounds make any reference nor speak to the injunction. We will therefore ignore and disregard any reference by the 1st Appellants in their heads of argument to the injunction.

- 7.5 We also note that the arguments are disjointed and they lack clarity as one has to strain to make sense out of them. The only things we take from the arguments is the reference to Section 33 of **The Lands and Deeds Registry Act**¹ and the **Said Chibwana & Others**¹ case. In that respect, it is our assumption that the 1st Appellants are alleging that the learned Judge in his holding that Burton had a legal right in stand 2118, based on the offer letter, without having obtained a certificate of title and could therefore enter into a valid contract for the disposal of the property.
- 7.6 In response, the Respondents have relied on the **Saidi Chibwana & Others** case and submitted that the offer and acceptance having been given by the Commissioner of Lands, rights were created by which Mr. Burton could transfer the property to the 2nd Respondent.
- 7.7 We note that apart from the **Saidi Chibwana & Others** case there are many other Supreme Court decisions such as **Husty Moffat Mwachilele v Lusaka City Council**³ which affirms the holding by the learned Judge. In our view the learned Judge was on firm ground. Having said

that, the 1st Appellants' argument in respect to Section 33 of **The Lands and Deeds Registry Act**¹ becomes *otiose*.

7.8 The 1st Appellant have argued grounds three and seven together as according to them, they relate to cancellation of the certificate of title to Lot 12561/M. Again here, the argument does not flow. To begin with the seventh ground of appeal does not speak to cancellation of title but to the issue of the private surveyor, which has not been argued. We will therefore take it that the seventh ground having not been argued, stands abandoned.

7.9 As regards the third ground, our understanding is that it is not speaking to the cancellation of title, but to the cancellation of Lot 12561/M as a Lot. We note that the learned Judge based his findings of fact on the letter of 25th November 2011, from the Commissioner of Lands to the 2nd Appellant, in which the Commissioner of Lands stated that Lot 12561/M had been cancelled. The learned Judge observed that there was no evidence on record to show reversal of that cancellation.

7.10 We further note the letter of response from the 2nd Appellant, dated 26th January 2012, which appears at page 268 of the record. The letter talks about submitting the inspection report, which report was not before the court below. The letter says nothing about the cancellation of the Lot. In our view, the findings of fact by the court below were correct and we find no basis on which he can be faulted.

7.11 The fifth ground is alleging that the learned Judge failed to distinguish the status of a limited company in respect to its shareholders and directors. In our view, the learned Judge clearly pronounced himself on that, as shown at page J9 of this Judgment and we see no basis on which to further this argument.

7.12 In respect to the eighth ground of appeal, the allegation is that, although fraud was not pleaded in the writ of summons, it found itself in the statement of claim. Our simple answer to that, is that the 1st Appellants' having not raised issue with the pleadings in the court below, and having ably settled their defence to the statement of claim, the learned Judge was not precluded from

considering the issue of fraud and making a determination on the same.

7.13 The eleventh ground has not been argued. We will therefore take it that it has been abandoned.

7.14 Grounds ten, twelve and thirteen have been argued together as they relate to the dismissal of the counterclaim. We wholly endorse the findings of law by the learned Judge as it appears at page J10 (vi) of this Judgment. We agree that you cannot base one's claims on the court pleadings and the claims were therefore untenable at law.

8.0 CONCLUSION

8.1 The Appeal lacks merit and is therefore accordingly dismissed. Costs to the Respondents and to be borne equally by the 1st and 2nd Appellants and are to be paid forthwith. Same are to be taxed in default of agreement.



J. CHASHI

COURT OF APPEAL JUDGE



K. MUZENGA

COURT OF APPEAL JUDGE



A.N. PATEL, SC

COURT OF APPEAL JUDGE