

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
(Civil Jurisdiction)

2010/HK/330

BETWEEN:

MOPANI COPPER MINES PLC	-	PLAINTIFF
AND		
KITWE TABERNACLE END TIME MESSAGE MINISTRIES	-	1 ST DEFENDANT
THE COMMISSIONER OF LANDS	-	2 ND DEFENDANT
THE ATTORNEY GENERAL	-	3 RD DEFENDANT

Before the Hon. Mr. Justice I.C.T. Chali in Chambers on the **15th** day of **November**,
2011

For the Plaintiff: Mr. G. Mateyo, Legal Officer

For the 1st Defendants: Mr. F. Chalenga, Freddie & Company

For the 2nd & 3rd Defendants: Ms. M. Ndhlovu

RULING

Cases referred to:

1. *Kalyoto Muhalyo Paluku v. Granny's Bakery Limited and Others* (2006) Z.R. 119
2. *London Ngoma and Others v. LCM Company Limited and UBZ (in Liquidated)* (1999) Z.R. 75

Legislation referred to:

1. *High Court Rules, Chapter 27 of the Laws of Zambia*
2. *Rules of the Supreme Court (White Book), 1999 Edition*

The Plaintiff had taken out a writ of summons accompanied with a Statement of Claim seeking, inter alia,

1. a declaration that it is entitled to ownership and possession of Lot No. 515/M Kitwe;

2. an order directing the cancellation of certificate of title No. 31257 issued to the 1st Defendant by the 2nd Defendant; and
3. damages for trespass.

According to the affidavit evidence on the record in support of and in opposition to the various interlocutory applications, the Plaintiff claims to have acquired the property as part of the assets during the privatization of Nkana Division of the Zambia Consolidated Copper Mines Limited (ZCCM). The Plaintiff further claims to be in possession of a duly executed but unregistered deed of assignment executed in its favour by ZCCM dated 31st March, 2000.

On the other hand the 1st Defendant claims to be the rightful owner of the property. The 1st Defendant's position is that by a deed of surrender dated and registered at the Lands and Deeds Registry on 19th November, 1984, ZCCM had surrendered the lease of the said property to the President. On 24th August, 2004 a 99 year lease was granted to the 1st Defendant and a Certificate of Title Number 31257 issued to it. It is the 1st Defendant's argument that it acquired the said property through the proper legal formalities without any fraud on its part. The 1st Defendant's Counter Claim is for, inter alia, a declaration that it is the legal owner of that property having rightfully acquired same and having been duly issued with the said certificate of title.

The Plaintiff has countered that the purported surrender was not by ZCCM of its lease but of a lesser term that had been granted by ZCCM to Anglo-American Corporation back to ZCCM. Hence the recording of that surrender as having been by ZCCM to the President and the subsequent grant to the 1st Defendant by the 2nd Defendant, acting on behalf of the President, was wrong.

Pending the hearing and determination of the matter, the Plaintiff had applied for and was granted, by my Ruling of 2nd February, 2011, an order of interlocutory injunction restraining the 1st Defendant, who had commenced construction works on the land, from carrying on any further developments on the disputed piece of land until further order of the Court.

The parties then proceeded to conclude the exchange of pleadings and to apply to set the matter down for trial, which I scheduled for 6th September, 2011.

However, on 18th May, 2011 a Consent Judgment was filed which I signed on 19th May, 2011, same having been executed by Counsel for the Plaintiff and on behalf of the 2nd and 3rd Defendant. Further, on 20th May, 2011 the Plaintiff's Counsel filed a notice of discontinuance of the action against the 1st Defendant.

The Consent Judgment was couched in the following terms:

“By consent of the Plaintiff and the 2nd and 3rd Defendant's it is hereby adjudged as follows:

- 1. That the Plaintiff having secured alternative land for the 1st Defendant through the Kitwe City Council,***
- 2. The 2nd Defendant hereby acknowledges the pre-existence of Certificate of Title No. 29349 relating to Lot 515/M, Kitwe granting the Plaintiff a beneficial interest in the said piece of land,***
- 3. The 2nd Defendant shall cancel Certificate of Title No. 31257 issued to the 1st Defendant relating to the same piece of land,***
- 4. The 2nd Defendant shall forthwith issue a Certificate of Title relating to Lot 515/M in the name of the Plaintiff and title to that property shall vest in the Plaintiff,***
- 5. The Plaintiff shall have no further claim against the 2nd and 3rd Defendants.***
- 6. Each party shall bear its own costs”.***

The 1st Defendant took issue with the Plaintiff and the 2nd and 3rd Defendants on the said Consent Judgment and applied to have it set aside pursuant to Order 35 Rule 5 of the High Court Rules Chapter 27 of the Laws of Zambia. The 1st Defendant attacked the Consent Judgment, particularly paragraphs 2, 3 and 4 thereof, on the grounds that it was obtained irregularly, and that same was fraudulently obtained by collusion in order to deprive a party to the action of its property. The 1st Defendant said it needed to be heard on its counter claims even if the Plaintiff had discontinued its action.

Order 35 under which the application was purported to be made provides rules to govern **“non-attendance of parties at hearing”**. My understanding of the order is that it governs what should happen when a party to proceedings does not attend at the trial of the action. For example, when the case is called up and neither party appears, or if the Plaintiff does not appear, the case may be struck off the list (Rules 1 and 2); if the Defendant does not appear and there is proof of service, the Court may proceed to hear the Plaintiff and give its Judgment (Rule 3); where the Defendant to a cause which has been struck out due to non-attendance of the Plaintiff has a Counter-Claim, the Court can proceed to hear the Defendant on his counter-claim and give its judgment (Rule 4). It is a judgment delivered in the circumstances contemplated under Rules 3 and 4 that may be set aside by the Court on good cause being shown.

That is not the position in the instant case because none of the instances cited under Order 35 occurred. Therefore, the provision of order 35 Rule 5 cannot, in my opinion, be invoked.

On the affidavit evidence before me, it appears that the differences between the Plaintiff on the one hand and the 2nd and 3rd Defendants on the other were resolved through discussions and various correspondence that were exchanged. However, attempts to get the 1st Defendant on board in those discussions were spurned as they refused to accept the alternative piece of land that the Plaintiff had sourced for them; they also refused to sign their part of the draft consent judgment. Hence the challenge now before me.

In a situation where parties seek to settle a matter in dispute between them, the operative legal provision is Order 42 Rule 5A of the White Book, 1999 Edition which provides:

“(1)...where all the parties to a cause or matter....are agreed upon the terms in which a judgment should be given, or an order should be made, a judgment or order in such terms may be given effect as a judgment or order of the court by the procedure provided in rule 5.....

(3) Before any judgment, or order to which this rule applies may be entered, or sealed, it must be drawn up in the terms agreed and expressed as being “By Consent” and it must be indorsed by solicitors acting for each of the parties”.

In the case of **Kalyoto Muhalyo Paluku v. Granny’s Bakery Limited and Others (2006) Z.R. 119**, the parties, excluding the appellant, negotiated and drew up what was referred to as a “**Consent Order**” in the absence of the appellant. The Supreme Court held, citing Order 42 Rule 5A, (1) and (3), that the appellant was right in challenging the consent order and that the lower court rightly set it aside.

In the earlier case of **London Ngoma and Others v. LCM Company Limited and UBZ (In Liquidation) (1999) Z.R. 75**, the Supreme Court held that a Consent Judgment could be set aside by parties who were not party to it and who were joined later to the action.

On the facts of this case, and on the foregoing authorities, I find this to be an appropriate case in which to set aside the Consent Judgment. I hereby accordingly set aside the Consent Judgment signed on 19th May, 2011.

Equally, the notice of discontinuance filed by the Plaintiff on 20th May, 2011 is set aside.

The result is that the Plaintiffs Claims against all the parties, including the 1st Defendant, are re-instated and it is ordered that the case do now proceed to trial.

This order is made pursuant to Order 3 Rule 2 of the High Court Rules which provides:

“Subject to any particular rules, the Court or a Judge may, in all causes or matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not”.

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In the same vein the order of interlocutory injunction I granted in my Ruling of 2nd February, 2011 is re-instated until final determination of the case or until further order of this Court.

The Costs on this application shall remain in the cause.

Delivered at Kitwe in Chambers this **15th** day of **November**, 2011

I.C.T. Chali
JUDGE