

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2014/HP/1356

(Civil jurisdiction)

**IN THE MATTER OF: SECTION 81 AND 82 OF LANDS AND
DEEDS REGISTRY ACT CHAPTER 185
OF THE LAWS ZAMBIA;**

**IN THE MATTER OF: REMOVAL OF CAVEAT ON PROPERTY
KNOWN AS FARM No. 9124
CHIRUNDU**

**IN THE SOUTHERN PROVINCE OF
ZAMBIA;**

**IN THE MATTER OF: ORDER 113 OF THE RULES OF THE
SUPREME COURT**

BETWEEN:

TRANSLATABA FARM LIMITED

APPLICANT

AND

**PENIAS CHILIMBWA
(Sued in his personal capacity
as well as in his capacity
as Chief SIKONGO)**

RESPONDENT

***Before: Hon. Mrs. Justice B.M.M. Mung'omba on this 2nd day of
September, 2014.***

For the Applicant: Mr. Simbao of Messrs Mulungushi Chambers

For the Respondents: In Person

JUDGMENT

Cases referred to:

1. *Construction and Investments Holdings Ltd vs William Jacks and Company (Z) Ltd (1972) Z.R. 66.*
2. *Lenton Holdings Limited vs Moyo (1984) Z.R. 55.*
3. *Anti-Corruption Commission vs Barnett Development Corporation Limited (2008) Vol.1 Z.R. 69.*

Legislation referred to:

1. Lands and Deeds Registry Act cap. 185, S.76, 8

On 9th November, 2012, the Plaintiff, **TRANSLATABA FARM LIMITED**, commenced this matter by way of Originating Summons taken out of the Principal Registry. The Plaintiff is claiming for an order that the Caveat lodged by the Respondent on Farm No. 9124, Chirundu in the Southern Province of Zambia, be removed and the Respondent be evicted from the farm aforesaid.

In support of the Originating Summons, the Applicant filed an affidavit dated 9th November, 2014 and sworn by one **Willem Gerhadt Van De Gryp**, the Managing Director in the employ of the Applicant Company. He deposes that the Applicant is the registered proprietor of property known as Farm No. 9124, Chirundu, in the Southern Province of Zambia. He exhibited a copy of the Certificate of Title No. 34049 marked as "**WGG1**". The deponent avers further that the Respondent has placed a caveat on the said property as shown by exhibit "**WGG2**"; a Lands Register print out from Ministry of Lands. He contends that the Respondent has no reason to place a caveat on the said property. On this basis the deponent is urging the Court to order removal of the said caveat.

An affidavit in opposition was filed into Court on 18th February, 2013. It was sworn by the Respondent, one **Penias Chilimba**. He deposed in paragraph 5 that he placed a caveat on the property after efforts to resolve the matter amicably with the Applicant yielded

negative results. Further, that the Applicant unilaterally acquired 35.980 hectares of land instead of 30.00 hectares which was consented to be converted into leasehold tenure. Mr. Chilimbwa states that the location of the 30 hectares does not reach the Chirundu road but the Applicant allegedly extended it to reach the said road thereby encroaching on the customary land. He exhibited an approved site plan for Farm 9124 which shows 30 hectares and the position of the said farm relative to the Chirundu Road, marked "**PC1**". The deponent also exhibited the survey diagram for the farm in question indicating the 35.980 hectares relative to the same Chirundu road. He maintains that the Applicant unilaterally increased the land from 30 hectares to 35.980 hectares. He avers that the Applicant has built structures on the 5 hectares which he demands the Applicant to surrender and remain with the consented 30 hectares.

When this matter came up for hearing on 13th August, 2014, the Respondent was not in attendance. Mr. **Simbao**, Counsel for the Plaintiff, told Court that he had communication from the Respondent to the effect that **Penias Chilimbwa**, the Caveator, is no longer Chief Sikongo having been removed from the royal throne. Counsel stated that the Committee of Sikongo Royal Establishment would appear instead of **Penias Chilimbwa**. Counsel revealed the names of the representatives of the Sikongo Royal Establishment as Mr. Njoma, the Chairperson and Mr. Mwanja, the Secretary.

I noted from the record that this is the second time the Respondent failed and/or neglected to appear before this Court and no reasons have been advanced. I therefore arrived at a conclusion that the Respondent is not desirous of defending this matter. Accordingly, I proceeded to hear the matter having been satisfied that the Respondent was given an opportunity to be heard and had not taken it.

In addressing the Court, Mr. **Simbao**, Counsel for the Plaintiff, sought to rely on the affidavit dated 9th November, 2012 accompanying the originating summons and sworn by one **Willem Gerhardt Van de Gryp**, especially paragraph 4.

Counsel submitted, as regards exhibit “PC1” in the affidavit in opposition that the same is technically defective because it shows a plot located in the middle of nowhere, without an access road. According to Mr. **Simbao**, the Surveyor General was obligated to provide an access road when creating the said plot.

Learned Counsel proceeded to submit that without any genuine allegations of fraud, the Certificate of Title issued in respect of Farm No. 9124 should be taken as conclusive evidence of ownership by the Applicant. He ended his submission by urging the Court to order removal of the said caveat. It was the close of Applicant’s case. At the conclusion of the hearing, I adjourned the matter for judgment to 2nd September, 2014.

The matter before me centers on the removal of a caveat placed by the Respondent. It is therefore imperative that I address my mind to the law pertaining to the administration of caveats which is found in the **Land and Deeds Registry Act, Chapter 185 of the Laws of Zambia** of particular relevance is Section 76 which reads as follows:

“76 Any person,

(a) Claiming to be entitled to or to be beneficially interested in land or any estate or interest therein by virtue of any unregistered agreement or other instrument or transmission, or any trust expressed or implied, or otherwise howsoever; or

(b) Transferring any estate or interest in land to any other person to be held in trust; or

(c) Being an intending purchaser or mortgagee of any kind:

Pertaining to what the nature and effect of caveat's, I have found the case of **Construction Investment Holdings Ltd vs William Jacks and Company (Z) Ltd (1972) Z.R. 55** ⁽¹⁾ to be illuminating where **Scott J at page 68** opines as follows:

"...if one looks at this Ordinance one observes that, where a person lodges a caveat under S. 49, the Registrar is forbidden to make any entry on the register having the effect of charging or transferring or otherwise affecting the estate or interest protected by a caveat. This means that the registered proprietor is prevented from showing a clear title and dealing with his property as he might wish to do and would be able to do but for the caveat. It seems to me to be necessary, therefore, to ask in what circumstances another person would have the right to prevent the registered proprietor dealing freely with the property registered in his name and to my mind the answer should be if that other person has or purports to have, an enforceable interest in the property in question. If that other person has not and does not even purport to have any such interest in the property, then he should not in my opinion be justified in interfering with the rights of the registered proprietor. I would say that a caveator's cause for lodging a caveat is dependent upon his to be entitled to an interest in the land, and that "reasonable" in those circumstances must mean the same as "justifiable." If he has not a justifiable claim then he cannot be said to have reasonable cause for lodging the caveat and if he is not able to justify his claim it must follow that his action in lodging a caveat was without reasonable cause. If his claim is not justifiable and he interferes with the rights of the registered proprietor so that the latter suffers damages it would appear to me that is only right and proper that such damage should be laid at the door of the person who by this action, caused it. One might therefore say caveat caveator."

It is clear to me from the preceding passage that Scott J, has adequately explained the function of a caveat.

I have also found that there is much wisdom to be gleaned from the observations of Ngulube DCJ in the case of **Lenton Holdings Limited vs Moyo** ⁽²⁾ when he said:

“Although the terms of S.76 (a) would appear to be very wide indeed, as can be seen, yet they are not, in our considered opinion go so far as to cover rights which are otherwise recognizable as being lawfully claimed or held. However, Section 77(1) which we have set out would appear to require that the caveat should disclose the interest claimed.”

What is cardinal according to the Supreme Court when construing Sections, 76 and 77 of the **Lands and Deeds Registry Act** is that to be effective a caveat should disclose the interest claimed. The enforceable interest must be lawfully claimed and justifiable as provided for in Section 76 of the **Land and Deeds Registry Act**.

The question that falls to be determined is whether or not the Respondent has an enforceable interest in the subject property and therefore justified in maintaining the caveat in issue.

I have turned to Section 81(1) of the Lands and Deeds Registry Act which provides that:

“Such Registered Proprietor or other interested person may, if he thinks fit, summon the caveator or the person on whose such caveat has been lodged, to attend before the Court or a Judge thereof to show cause why such caveat should not be removed.”

Section 81 (2) provides that:

“Such Court or Judge upon proof that such a person has been summoned, may make such order in the premises, either ex parte or otherwise, as to such Court or Judge seems meet.”

I must hasten to point out that as a general rule in civil matters the burden of proof rests on the Plaintiff. This rule has been explained by the authors of **Phipson on Evidence**, Seventeenth edition:

“So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on consideration of good sense and should not be departed from without strong reasons.”

The learned authors of **Phipson on Evidence** (supra) continue in paragraph 606 at page 151 as follows:

This rule is adopted principally because it is just that he who invokes the aid of the law should be first to prove his case; and partly because, in the nature of things, a negative is more difficult to establish than an affirmative. The burden of proof is fixed at the beginning of the trial by the state of the pleadings, and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleading place it, and never shifting in deciding which party asserts the affirmative, regard must be had to the substance of the issue and not merely to its grammatical form; the latter the pleader can frequently vary at will.”

A closer reading of the **Land and Deeds Registry Act** reveals that there is a reversal that there is a reversal of the burden of proof with respect to applications for removal of a caveat. In other works although an application for the removal of the caveat is at the instance of an Applicant. Section 81 of the **Lands of Deeds Registry** places

the burden of showing cause why a caveat should not be removed at the doorstep of the Respondent.

I am mindful of the fact that in deciding whether or not a caveat should be removed I should take cognizance of the provisions of Section 76 of the **Lands and Deeds Act**. In the case in casu has the Respondent disclosed an enforceable interest in the property as provided for Section 76 of the **Lands and Deeds Registry Act**?

The Applicant has contended that he is the registered owner of Farms No.9124 Chirundu and has exhibited a copy of the Certificate of Title marked "WGG1." The Respondent placed a caveat on the said property and is contending that the Applicant unilaterally acquired 35,980 hectares of land instead of 30 hectares which was amended to be converted into leasehold property. That the Applicant should surrender the 5.9 hectares and keep the 30 hectares which was officially given to the Applicant.

I have examined a copy of the Certificate of Title exhibited and marked "**PC2**" which indicates that the title farm to 9124 is in the name of the Applicant and represents 35.9880 hectares. Section 33 of the **Lands and Deeds Registry Act** provides that a Certificate of Title is conclusive evidence of ownership of land. In this regard I align myself with the holding by the Supreme Court in the case of **Anti-Corruption Commission vs Barnett Development Corporation Limited** ⁽³⁾ when they said:

"Under section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of land by a holder of a Certificate of title. However, under Section 34 of the same Act, a certificate of title can be challenged and cancelled for fraud or reason of impropriety in its acquisition."

In the instant case the Respondent has not alleged that there was impropriety in the manner the Applicant acquired the title or that the title was acquired fraudulently.

In light of the foregoing I am satisfied that the Applicant is the registered owner of the subject property namely **Farm 9124**, Chirundu, Southern Province. The Certificate of Title is conclusive evidence of ownership.

I have found that the Respondent has not shown any cause of justification to place and maintain the caveat because he has not demonstrated any beneficial interest in the property as required by Section 76 of the **Lands and Deeds Registry Act**.

The failure by the Respondent to demonstrate any lawful cause as to why the caveat should be maintained and failure to furnish the Court with any grounds upon which the caveat should not be removed pursuant to Section 81(1) of the Lands and Deeds Registry Act, I am compelled to order that the caveat that was placed on 25th August, 2009 be removed forthwith.

Costs follow the event.

Leave to appeal to the Supreme Court is hereby granted.

DELEVERED AT LUSAKA THIS.....DAY
OF.....2014

Hon. Judge B.M.M. Mung'omba
HIGH COURT

