

**IN THE HIGH COURT OF ZAMBIA
2014/HP/1676
AT THE PRINCIPAL REGISTRY
AT LUSAKA**

(Divorce Jurisdiction)

BETWEEN:

CHRISTOPHER LUBASI MUNDIA

PLAINTIFF

AND

JOHN MAOKA

1st DEFENDANT

AMON PHIRI

2nd DEFENDANT

SHADRECK TEMEYO

3RD DEFENDANT

Before: Hon. Judge B.M.M. Mung'omba on this 30th day of June, 2015.

For the Plaintiff:

Mr. C. L. Mundia SC, of C. L. Mundia & Co

For the 1st, 2nd & 3rd Defendants:

In person

J U D G M E N T

Cases referred to:

- 1. Simbeye Enterprises Limited and Investrust Merchant Bank (Z) Limited vs. Ibrahim Yousuf SCZ No. 36 of 2009***
- 2. Jarlath Mutoyangwa Sinvula vs. Zambia National Provident Fund - Appeal No. 65 of 2003.***
- 3. Raphael Ackim Namung'andu vs. Lusaka City Council [1978] ZR 358.***
- 4. Anti-Corruption Commission vs Barnnet Development Corporation Limited***
- 5. Masausu Zulu vs Avondale Housing Project.(1982) ZR 172.***

Legislation referred to:

- 1. Section 33 of the Lands and Deeds Registry Act Cap 185.***

By a writ of summons accompanied by a statement of claim issued on 21st October, 2014 the Plaintiff, Christopher Lubasi Mundia SC, brought an action against the three Defendants, John Maoka, Amon Phiri and Shadreck Temeyo, claiming as follows:

- (a) An eviction Order against the three Defendants who have continued to occupy the Plaintiff's Farm No. 4448, Chisamba in spite of several warnings to vacate;
- (b) Damages for trespass by the Defendants who are squatters and have continued to cultivate, grow crops and carry out illegal charcoal burning and erection of illegal structures to the detriment of the Plaintiff;
- (c) An injunction to restrain the Defendants, their agents or servants from carrying out any activity whatsoever on the Plaintiff's aforesaid farm until the matter has been finally disposed of by Court;
- (d) Damages for mental strain and anguish as a result of the Defendants' continued illegal stay and activities on the Plaintiff's farm;
- (e) Any other relief the Court may deem fit appropriate and costs.

The relevant brief facts are revealed by the statement of claim. The Plaintiff holds statutory title to Farm No. 4448, situate at Chisamba District of the Central Province of Zambia. He had earlier purchased the said farm from one Winter Kabwiku and Margaret Kabwiku, the joint-tenants.

The three Defendants are alleged to have settled on this farm without the authority or consent of the Plaintiff and are hence squatting on it. On 16th January, 2013, the Defendants were served with notices to vacate the said

land. They did not comply because they had asked for more time, up to June, 2013, to be specific, to enable them move out of the aforesaid land.

When the agreed time expired, the three Defendants, however, did not vacate the land. They have continued to be in occupation and to undertake various activities such as cultivation, charcoal burning and building of structures. It is further alleged that the 1st Defendant has been removing the survey beacons on the farm.

According to the Plaintiff, the Defendants' are all illegal squatters who have no just cause or excuse to the continued occupation of the farm in question. Their continued stay on the aforesaid farm has frustrated the Plaintiff from developing his farm 4448.

The three Defendants entered appearance and defences on 13th November, 2014. I note that although each Defendant filed a separate defence in this matter, the contents are the same, word for word. The gist of their defence is that they admit to be in occupation of farm 4448, located in Chisamba District of the Central Province of Zambia.

Their contention, however, is that they genuinely believe that they are the *bona fide* and legal owners of farm 4448. They assert that said farm was granted to them by the Ministry of Agriculture through the cooperative union called Mupamapamo Virginia Tobacco Cooperative Society to which they belong. Therefore, they deny both the allegation that they are squatters and that they are illegally undertaking the activities I have mentioned earlier. In short, the Defendants claim that they are the rightful owners of farm 4448 Chisamba.

On 5th May, 2015, this matter came up for trial before me and both parties were present. The Plaintiff, who is 74 years old, gave sworn evidence and did not call any other witness. He is the statutory lessee of farm 4448 as per Certificate of Title No. 203285 at page 7 of the Plaintiff's bundle of

documents. On 24th September, 1998, he purchased farm 4448 from Mr. and Mrs. Winter Kabwiku as per contract of sale at page 5 of the Plaintiff's bundle of documents. The purchase price was K 35, 000, 000.00 (now K35, 000.00).

At the time of the purchase, the said land was held on a 14 year lease by said Mr. and Mrs. Kabwiku as shown at page 3 of the Plaintiff's bundle of documents. The Plaintiff explained that prior to the land being owned by Mr. and Mrs. Kabwiku, the title holder was Simuwana Musholwa Moono as per deed of tile at page 2 of the Plaintiff's bundle of documents.

For the foregoing, the Plaintiff contends that farm 4448 has never at any time been the property of the Mupamapamo Virginia Tobacco Cooperative Society as alleged by the Defendants in their defence. He proceeded to testify actually the farm was, in 1995, subject of Court action brought by Mrs. Kabwiku against the squatters. The Court Order, as per document number 4, reveals that the squatters were ordered to vacate this land. According to the plaintiff, all the squatters vacated the said farm except for the father to the 1st Defendant, Mr. Washen Maoka, who unfortunately died when the order was about to be enforced.

The Plaintiff also told me when he gave 15 and 7 hectares of farm 4448 to Mr. Zyambo and Mr. Chimwanya, he commissioned a fresh survey to reflect the changes and a new Survey Diagram was produced by the government surveyor as shown at page 8 of the Plaintiff's bundle of documents. The beacons indicated on the new Survey Diagram are the ones being removed by the 1st Defendant.

The Plaintiff stressed that instead of violently evicting the three Defendants, he gave notice as at pages 9, 10 and 11 of his bundle of documents. The Defendants have been defiant although the 2nd and 3rd Defendants had responded, as shown by documents at pages 12 and 13 of the Plaintiff's bundle of documents, to the said notices seeking for more

time. According to the Plaintiff, despite allowing the Defendants the time they had requested, they now have refused and are not prepared to vacate the farm in question. Faced with these difficulties, the Plaintiff commenced this action claiming as I have outlined earlier in this judgment. He prayed accordingly.

When cross-examined by the 1st Defendant, he confirmed much of his testimony. He informed me that because of the change in the lease system, the 14 year held by Mr. and Mrs. Kabwiku could not be conveyed to him until a survey was undertaken to produce the Survey Diagrams required for issuance of a 99 year title. Hence, the reason why the conveyance was delayed and only done after 1998 when he purchased the said farm land.

The Plaintiff also admitted that the 14 year lease in the names of Mr. and Mrs. Kabwiku expired in 2008 and he obtained his 99 year lease in 2013. He explained that the Certificate of Title is not issued until a Survey Diagram is produced and submitted. He also explained, and correctly so, that the disparity in hectares shown in the 99 year title (233.8487 Ha) and in the 14 year lease (230.0000 Ha) is due to the fact that the 14 year lease is issued based on a sketch plan and not a Survey Diagram. The measurements on the sketch plan are merely estimates while the Survey Diagram carries exact dimensions of the farm perimeter boundary.

In responding to questions from the 2nd and 3rd Defendants, the Plaintiff stated that when he bought farm 4448, the 14 year title was valid. He also indicated that he undertook some farming activities of this farm prior to the disruptions by the squatters. He denied any knowledge of the Mupamapamo Virginia Tobacco Cooperative Society.

All the three Defendants gave evidence on oath. DW1 was John Maoka, the 1st Defendant. He is 56 years old. He stated that his late father, Mr. Washen Maoka was given the land on which he now resides by the

Department of Agriculture and Cooperatives in the 1970s. The land was virgin and his father embarked on farming activities and building on it of some structures. When his father died, he was buried on the same land.

DW1 stated that he never heard of the Plaintiff owning the said farm until in the year 2012. When he made enquires at Chibombo District Council and at Ministry of Agriculture in Kabwe, Central Province, he established that the farm in question belongs to Ministry of Agriculture and it was given to cooperative members.

When cross-examined by Mr. Mundia SC, the Plaintiff, DW1 was not aware that Mrs. Kabwiku had commenced an action against squatters including his late father. The names of his father appear as 5th Defendant at page 4 of the Plaintiff's bundle of documents. He admitted that his father did not vacate the farm but insisted that the land belongs to Mupamapamo Virginia Tobacco Cooperative society.

According to DW1, his claim to this land is based on the information that his late father was given a subdivision of this farm. However, he did not indicate the extent of the subdivision in his defence.

He also admitted that farm 4448 did belong to Mr. and Mrs. Kabwiku according to information at Ministry of Lands. Hence, they had the right to sell the land to anyone they pleased. He finally informed me that he does not hold any certificate of title to the land in issue.

DW2 was the 2nd Defendant, Amon Phiri. He is 71 years old. According to DW2, he joined a cooperative society in 1970 and was allocated some land. He wonders why he is called a squatter particularly that he was given the land. He is looking after orphans and he does not know where to take them.

In cross-examination, DW2 confirmed that he is living at farm 4448. He has no certificate of title to this land. He is aware that the land had at one time belonged to General Moono and used to hear of Mr. and Mrs. Kabwiku having owned the farm in issue. He denied receiving a notice to vacate from the Plaintiff.

DW3, Shadreck Temeyo is 75 years old. His story is no different from the rest. After retiring in 1970, he decided to join a cooperative at farm 4448. His complaint is given his age. He has built houses on the land he resides on costing a lot of money.

In cross examination, DW3 admitted to having no certificate of title as proof of ownership. He is aware that the land did belong to General Moono but he does not know Mr. and Mrs. Kabwiku. He claims to have had a cooperative card but it was eaten by rats; hence he has no any document as regards the land in question. He pleaded with the Court that he is too old and has nowhere to go.

At the end of trial, both sides proposed to make written submissions. I ordered that the Plaintiff's Counsel should file written submissions after 7 days. The Defendants were also given 7 days after receipt of the Plaintiff's submission to file theirs. I then adjourned this matter for judgment.

The Plaintiff submits that he has proved ownership of the farm in question through Certificate of Title No 203285 at page 7 of the Plaintiff's bundle of documents. As a Title holder, he submits that he is prima facie the owner of the Farm and not the Defendants. To buttress this position, the Plaintiff referred me to two authorities, ***Simbeye Enterprises Limited and Investrust Merchant Bank (Z) Limited vs. Ibrahim Yousuf SCZ No. 36 of 2009***⁽¹⁾ and Section 33 of the Lands and Deeds Registry Act Cap 185.

As regards his prayer for damages for mental distress, inconvenience and the Plaintiff drew my attention to the case of ***Jarlath Mutoyangwa***

Sinvulavs & Zambia National Provident Fund - Appeal No. 65 of 2003.⁽²⁾

The Plaintiff also submitted that issues of squatters are not new in this Country. In this respect, he referred to the decision in the case of ***Raphael Ackim Namung'andu vs. Lusaka City Council [1978] ZR 358.***⁽³⁾ In this case, erstwhile Commissioner Mathew Ngulube, (as he then was) stated, regarding the status of squatters in Law, that:

'Squatters build at their own risk and if the owners of the land withdraw their permission or licence or if they decide to demolish a structure built in the absence of any permission or other lawful relationship, the Squatters' losses though very regrettable are not recoverable in a Court of Law.'

Further that:

'A squatter is a squatter and the Defendants can demolish unauthorized structures build without their permission'.

On this authority, the Plaintiff submitted that the Defendants are squatters as they have no title to that land in support of their claims. Their evidence that they have nowhere to go should not be entertained by this Court. He contends that the Defendants have no defence to this action whatsoever or at all.

The Plaintiff concluded by stating that he has proved his case on a preponderance of probabilities and should be granted the reliefs sought with, costs.

In their three paragraphed joint written submission, the Defendants contend that this case is prematurely before this Court as it lacks original

jurisdiction in land matters. This is premised on an argument that the present Lands Act as amended gives the Lands Tribunal original jurisdiction and accords the High Court Appellant Status.

The purported Vendor, they argue, had no title to the said property to enable him or her to transact with the purported purchaser as the Vendor acted contrary to the law, in this regard, Intestate Act as it concerns a widowed spouse who has since remarried. Therefore the contract of sale is null and void, they submit.

It is also submitted that the alleged farm claimed by the Plaintiff is totally different from theirs. The Defendants contend that their farmland is 230.000 hectares in extent while that of the Plaintiff is 233.8487 hectares in extent. According to them, the Plaintiff's farm 4448 is none existent in their area as evidenced by the Certificate of Titles presented by the Plaintiff before Court.

I must hasten to mention here that the Defendant's submissions seemed to raise issues which had not been pleaded earlier.

I have considered the evidence on record, the submissions by both parties and the authorities cited.

In a nutshell the Plaintiff's claim against the Defendants is that he holds a statutory title in respect of Farm No. 448 in Chisamba District and that the Defendants have settled on the farm without his authority or consent and are squatters. He seeks to have them evicted from his property as they hold no title. The Defendants do admit that they do not have any Certificate of Title pertaining to where they are resident. They have argued however that the land in issue belongs to the Ministry of Agriculture which in turn gave it to Mupamapamo Virginia Tobacco Cooperative Society, that they are members of the said Cooperative Society and were given 'ownership' of the land. They do not understand why they are referred to as squatters. As

far as they are concerned they were allocated the land by Mupamapamo Virginia Cooperative Society. Their lamentation is that they are old and do not have anywhere else to go if evicted.

The issue for resolution by this Court is who is the legal owner of Farm No.4448 situated at Chisamba District?

Legal ownership of land is evidenced by a Certificate of title to the property. This is as per section 33 of the Lands and Deeds Registry Act which states as follows:

“A certificate of Title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise, which but for Parts III to VII might be held to be paramount or to have priority; the registered proprietor of the land comprised in such Certificate shall, except in case of fraud, hold the same subject only to such encumbrances, liens, estates or interests as may be shown by such Certificate of Title and any encumbrances, liens, estates or interests created after the issue of such Certificates as may be notified on the folium of the Register relating to such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever: (emphasis mine)

(a) Except the estate or interest of a proprietor claiming the same land under a current prior Certificate of Title issued under the provisions of parts III to VII; and

(b) Except so far as regards the omission or misdirection of any right of way or other easement created in or existing upon any land; and

(c) Except so far as regards any portion of land that may be erroneously include in the Certificate of Title, evidencing the title of such Registered Proprietor by wrong description of parcels or of boundaries.”

In the case of **Anti-Corruption Commission vs Barnnet Development Corporation Limited**,⁽⁴⁾ held that:

“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 reasons for impropriety in its acquisition.”

The Plaintiff has exhibited Certificate of Title No. 203285 (see page 7 of the Plaintiff’s Bundle)

The inescapable conclusion therefore is that the Plaintiff is the legal owner of Plot 4448 Chisamba. There has been no title exhibited by the Defendants. I find that the Defendants were of the mistaken belief that they had title to the property by virtue of belonging to Mupamapamo Co-operative Society.

According to Section 33 of the Land Act, a Certificate of Title is conclusive evidence of ownership of the land. I therefore find and hold that the Plaintiff is the owner of Farm 4448, Chisamba. The Defendants are mere squatters.

The case of **Raphael Ackim Namung’andu vs Lusaka City Council**⁽³⁾ cited by the Plaintiff is instructive where Commissioner Mathew Ngulube (as he then was) opined as follows:

“Squatters build at their own risk and if the owners of the land withdraw their permission or licence or if they decide to demolish a

structure built in the absence of any permission or other lawful relationship, the squatter losses' though very much regrettable, are not recoverable in a Court of Law."

He went on to say:

"A squatter is a squatter and the Defendants can demolish unauthorized structures build without their permission."

Further, in ***Humane vs D.P. Chinkuli*** where both the Plaintiff and the Defendant were squatters, it was elucidated that a squatter is a person in mere adverse possession. And that the position in law was that his want of title dis-entitles him to any remedy in a Court of law.

In light of the preceding paragraphs the Defendants have no legal standing in the eyes of the law.

Before I conclude I wish to address the issue raised by the Defendants in their submissions that the matter was irregularly before Court and should have been dealt with by the Land Tribunal. This was not pleaded earlier. However, I wish to clarify the misplaced argument.

I say so because the jurisdiction of the Land Tribunal which is stated in Section 4 of the Lands Tribunal Act No.39 of 2010 is subject to the provisions of the Constitution. Chapter 1 of the Laws of Zambia in particular Article 94(d) of the Constitution gives the Court unlimited and original jurisdiction to hear and determine, inter-alia, any civil proceeding under any law as conferred upon it by the Court or any other laws. This includes land matters. It therefore means that the jurisdiction of the Lands Tribunal to determine land issues does not oust this Court's jurisdiction in land matters.

I therefore, find and hold that as the Court has original jurisdiction in land matters this matter is properly before Court.

Regarding the alleged illegality of the contract of sale no evidence was led to substantiate this claim and I find it holds no water and dismiss it forthwith.

As for the extent of farmland owned by the Plaintiff this is evidenced by the Certificate of title he holds.

The sum of my decision is that I find that the Plaintiff has proved his case on preponderance of probabilities which is the standard required in civil matters, see ***Masausu Zulu vs Avondale Housing Project***.⁽⁵⁾ He is the registered owner of Farm No.4448 Chisamba. The Defendants are squatters with no legal rights. I enter Judgment in his favour and I order that the Defendants be evicted from Farm No.4448 Chisamba effective forthwith.

I decline to order damages for trespass. I award costs to the Plaintiff to be taxed in default of agreement.

Leave to appeal granted.

Dated at Lusaka this 30th day of June, 2015

Judge Betty Majula-Mung'omba
HIGH COURT