

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

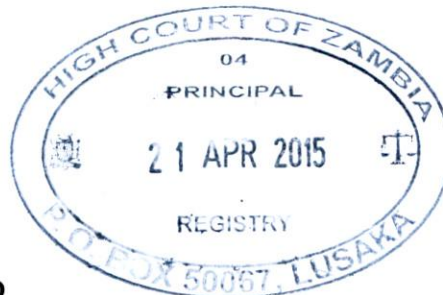
2014/HP/A030

BETWEEN:

SAKALA BOTI HARRY

AND

RAINBALL PLASTIC LIMITED



APPELLANT

RESPONDENT

BEFORE : HON. G.C.M CHAWATAMA

For the Appellant : *Messrs Philsong & Partners*

For the Respondent : *Messrs AED Advocates*

*M.C Kaoma (intending party) – KMG Chisanga
Advocates*

RULING

CASES REFERRED TO:

1. *Audrey Wafwa Gondwe V Supa Baking Limited (in liquidation) and Vu Akubat Supreme Court Judgment No. 9 of 2001)*
2. *Isaac Chibule Tantemens Chali (the Excutor of the will of the late Mwalla) Vs Lisseli Mwalla (single woman) Sc No. 6 of 1997*
3. *Kelvin Bwalya Fube V Nawa Felix Siywa, BA Property Consultants and Stanbic Bank Zambia Limited 2012/HP/0679*
4. *Banda and another V Mudimba 2010/HP/A39*
5. *Zambia Consolidated Copper Mines Limited V Eddie Katayi and Max Chilango (Supreme Court Judgment no. 2 of 2001*
6. *Bajan Patel V Attorney General (2002) ZR*
7. *Shadreck Wamusula Simumba V Juma Banda and Lusaka City Council Appeal No. 73/2009*
8. *Darshan Lal Ghambhir & Another v Ireen Tembo & Others (SCZ/8/30/2011) Appeal No. 32 of 2011*

AUTHORITIES REFERRED TO:

1. *Black's Law Dictionary 9th Edition 2009 at Page 1355*
2. *Section 33, 34 and 59 of the Lands and Deeds Registry Act Cap 185 of the Laws of Zambia*

This matter comes by way of appeal against the decision of the Lands Tribunal. Dissatisfied with the decision of the Lands Tribunal the Appellant Sakala Boti Harry filed an appeal and relied on four grounds.

GROUND 1

The Honourable Tribunal erred at law when it ignored the Appellant's request that it hears the legal owner of the property at the time the proceedings were commenced, namely Mr. Irfan Patel and instead proceeded to issue orders against M. Patel, who was not made a party to the proceedings, depriving him of landed property without hearing him at all.

The argument advanced was that the Honourable Tribunal ordered the Appellant to refund the money which he received from a third party Mr. Patel who has been asked to vacate the disputed property. Mr. Patel was not party to this action nor was he heard.

The court's attention was drawn to the case of *Audrey Wafwa Gondwe V Supa Baking Limited (in liquidation) and Vu Akubat Supreme Court Judgment No. 9 of 2001*, Ngulube Chief Justice as he then was stated that:

“It would be unthinkable to make a decision which might have adversely affected the rights of the third party without affording him any opportunity to be heard.”

In another case the court was referred to ***Isaac Chibule Tantemens Chali (the Excutor of the will of the late Mwalla) Vs Lisseli Mwalla (single woman) Sc No. 6 of 1997*** where it was held that:

“According to the rules of practice governing joinder of parties and due to non-joinder, a Judge is legally and effectively precluded from considering the interest of non parties.”

Counsel in his head of arguments stated that owing to the non-joinder of Mr. Irfan Patel, the Honourable Tribunal was legally and effectively precluded from making orders against Mr. Irfan Patel. The court was urged to set aside the orders made by the Honourable Tribunal in relation to the Appellant and the third party.

Counsel further referred the court to the case of ***Kelvin Bwalya Fube V Nawa Felix Siywa, BA Property Consultants and Stanbic Bank Zambia Limited 2012/HP/0679*** in which the Honourable Judge ruled as follows:-

“No malafides has been raised against the third parties. That being the case, it is incompetent to enjoin the first Defendant as prayed as the whole interest in the land no longer reposes in him.”

GROUND 2

The Honourable Tribunal erred at law and in fact when it held that the Appellant was not a bonafide purchaser for value without notice.

The court was referred to the definition of bonafide purchase as defined in *Black's Law Dictionary 9th Edition 2009 at Page 1355*:

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or iniquities against the Seller’s Title; one who has in good faith paid valuable consideration for property without notice of prior claims.”

The court was also referred to the case of *Banda and another V Mudimba 2010/HP/A39*, a case which is not reported but one which sets out the best for the doctrine of bonafide purchaser as follows:

“The following requirements need to be fulfilled when relying on the doctrine.

- a) A Purchaser must act in good faith*
- b) A Purchaser is a person who acquires an interest in property by grant rather than operation of law. The Purchaser must also have given value for the property*

- c) *The Purchaser must generally have obtained the legal interest in the property; and*
- d) *The Purchaser must have had no notice of the equitable inherent at the time he gave his consideration for the conveyance.”*

The court was further asked to consider the findings in two cases. In the case of *Zambia Consolidated Copper Mines Limited V Eddie Katayi and Max Chilango (Supreme Court Judgment no. 2 of 2001* Ngulube Chief Justice as he then was had this to say-

“It was not possible without basis to ignore the rights of an innocent Purchaser for value and who had no reason to suspect there was to be an adverse claim... there would be no justification to inflict injustice on the third party in the name of justice.”

The second case was *Audrey Wafwa Gondwe V Supa Baking Company Limited (in liquidation) And V.U. Akubat (Supreme Court Judgment No. 9 of 2001)* wherein it was stated as follows:-

“Where the property has already passed to the third party, the third party is an innocent Purchaser for value without notice of an adverse claim.”

GROUND 3

The Learned Honourable Tribunal erred at law when it held that the Respondent is the owner of the disputed property ignoring the fact that the Appellant acquired the land from none other

than the Commissioner of Lands for the Republic in a market overt.

Counsel argued that the Appellant as a bonafide purchaser for value without notice bought the disputed property from the Commissioner of Lands for the Republic in a market overt.

In support of this, Counsel referred the court to the case of ***Bajan Patel V Attorney General (2002) ZR*** in this case the Supreme Court gave guidance on the conditions under which one can buy property in a market overt.

“Where goods are sold in the market according to the usage of the market, the buyer carries good title to the goods provided that he buys them in good faith and without notice of any defect or want of title on the part of the seller.”

GROUND 4

The Honourable Tribunal erred in law and in fact when it neglected to distinguish the facts in casu and the facts in the case of ***Shadreck Wamusula Simumba V Juma Banda and Lusaka City Council Appeal No. 73/2009.***

Counsel pointed out that the Honourable Tribunal misdirected itself when it applied the ratio decided in the case of Shadreck Simumbe without regard to the difference in facts of the Appellant’s case.

GROUND 5

The Honourable Tribunal erred at law when it neglected to take into consideration the provisions of *Section 33, 34 and 59 of the Lands and Deeds Registry Act Cap 185 of the Laws of Zambia.*

Section 33 of the Lands and Deeds Registry Act CAP 185 of the Laws of Zambia states:

“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,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 Certificate 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...”

Section 34 of the Lands and Deeds Registry Act Cap 185 of the Laws of Zambia provides that:

1. *“No action for possession, or other action for the recovery of any land, shall lie or be sustained against the Registered Proprietor holding a Certificate of Title for the state or interest in respect to which he is registered, except in any of the following cases, that is to say: Restriction on ejectment after issue of Certificate of Title:
a) The case of a mortgage as against a mortgagor in default;*

- b) *The case of the President as against the holder of a State Lease in default;*
 - c) *The case of a person deprived of any land by fraud, as against the person registered as proprietor of such land through fraud, or against a person deriving otherwise than as a transferee bonafide for value from or through a person so registered through fraud;*
 - d) *The case of a person deprived of or claiming any land included in any Certificate of Title of other land by misdescription of such other land, or of its boundaries, as against the Registered Proprietor of such other land, not being a transferee, or deriving from or through a transferee, thereof bonafide, or deriving from or through a transferee, thereof bonafide for value;*
 - e) *The case of a Registered Proprietor claiming under a Certificate of Title prior in date in any case in which two or more Certificates of Title have been issued under the provisions of parts III to VII in respect to the same land.*
2. *In any case other than as aforesaid, the production of the Register or of a copy of an extract therefrom, certified under the hand and seal of the Registrar, shall be held in every court of law or equity to be an absolute bar and estoppels to any such action against the Registered Proprietor of land the subject of such action, and in respect of which a Certificate of Title has been issued, any rule of law or equity to the contrary notwithstanding.”*

Section 59 of the Lands and Deeds Registry Act Cap 185 of the Laws of Zambia provides that:

“Nothing in parts III to VII shall be so interpreted as to render subject to action for recovery of damages, or for possession, or to deprivation

of any land in respect to which a Certificate of Title has been issued, any purchaser or mortgage bonafide for valuable consideration of such land on the ground that his vendor or mortgagor may have become a Registered Proprietor through fraud or error, or under any void or voidable instrument, and this whether such fraud or error consists in wrong description of the boundaries or of the parcels of any land, or otherwise howsoever.”

It was argued that the Tribunal ignored the provisions of section 59 of Cap 185, as the Appellant pursuant to the said section holds a valid Certificate of Title free if fraud, error or any voidable instrument and that even if there was an error or any voidable instrument, section 59 still precludes the title holder from being deprived of his landed property.

I am indebted to Counsel for the submissions on behalf of the Appellant. This court would have benefited greatly from the Respondent's submissions had they been filed. The appeal as it stands has not been contested by the Respondent. However, the evidence before the tribunal was sufficient to enable me come up with my decision.

In the first place I will deal with the issue of the legal owner of the property. In ground one, the Appellant's argument is that the Tribunal should have heard the legal owner of the land, that is, Mr. Patel, as opposed to just issuing orders against him. This act, it was contended, led to depriving Mr. Patel of his landed property without being heard.

In considering who the legal owner of the property is I have perused the judgment of the Land's Tribunal to understand how it came to a conclusion that the Respondent (Complainant before the tribunal) was the legal owner of the property. In the judgment a brief but helpful history is given as follows: Mr. Dipesh Patel purchased land known as stand number 12717 Lusaka on 17th April, 2009 and was issued with Certificate No. 85435. Mr. Dipesh Patel deposed in his affidavit that from the time he bought the property he has been compliant with the terms and conditions of the lease and the tribunal was shown exhibits. He also deposed to the fact that he had done significant improvements to the land, such as back filling and landscaping, building a wall fence. The total amount of landscaping and rebuilding was estimated to be K1,000,000.00.

The contention of the respondent herein was that the Commissioner of Lands did not consider the fact that there was a small office built on the piece of land and that there was no notice of re-entry that was served on Messrs Freddie and Company, who not even representing them at the purported time. That there was no certificate of re-entry served on the Respondent and the exhibit of a purported certificate was just a postage receipt. The inspection report was also disputed as it did not take into account the fact that the property underwent intense backfilling in order to restore the land and that at a huge cost. It was contended that the investment exceeded the required

K500.00 as stipulated in the lease, therefore, the repossession of the property was procedurally incorrect.

There was evidence from Ministry of Lands on how the land was repossessed, the gist of which was that it was underdeveloped. The government valuation which was conducted pegged the value of the developments at K78.00. It was also stated that ground rent was not being paid, thereupon the Commissioner issued a re-entry certificate which was sent to Messrs Freddie and Company, who were the advocates for the Respondent. The property, it was argued only had a wall fence without a gate. It was subsequently advertised and was offered to Mr. Sakala. The judgment shows that Mr. Sakala in turn sold the land to the Mr. Irfan Patel, who has been described as the innocent purchaser for value, and hence the true legal owner of the property.

The tribunal found that indeed no certificate of re-entry that was served on the Respondent as there was no proof of due service of both the notice of intention to re-enter and the certificate of re-entry. The purported certificate exhibited on the affidavit of Mr. Kachimba did look like a payment receipt, in very illegible letters.

The law as relates to re-entry is provided for in *section 13 of the Lands Act* which provides that:

- 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 reentry 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 reentry 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.*

This is the position of the law that was restated in the case of *Anort Kabwe and Another v James Daka, the Attorney-General and Another (2006) ZR 12* cited in the judgment of the tribunal.

It is also worth noting the observation of the Supreme Court in the recent case of *Darshan Lal Ghambhir & Another v Ireen Tembo & Others (SCZ/8/30/2011) Appeal No. 32 of 2011*, when it held that:

“...if, indeed, the late Ganson Simfukwe was not given notice under section 13(1) of the Lands Act, or an opportunity to make representations to the Commissioner of Lands before the certificate of re-entry was entered in the Register in respect of the property to which he held a valid certificate of title, then as held in the Kabwe case, the Commissioner of Lands was not justified in making the land in question available to other developers.”

I cannot falter the finding of the tribunal in this regard. Having had found that the notice and the certificate were not duly served, it follows that the legal owner of the property was the Respondent, and therefore, all subsequent actions by Ministry of Lands were as null and void as was the re-entry itself.

It is therefore my finding that Irfan Patel was not the legal owner of the property.

At the hearing of this appeal I had allowed Mr. Irfan Patel to be added to the proceedings so that the matter can be determined as regards his position. However, having found as I have, I do not see what prejudice was caused to Mr. Patel as the land did not belong to him ab initio. It was the Respondent who was deprived of his land without being heard.

I find no merit in this ground and consequently it must fail.

In ground two, it is argued by the Appellant that he was a bonafide purchaser for value without notice. I do not wish to go into details on this ground, suffice it to say that the issue was adequately handled by the tribunal and I am in total agreement with their finding. This was the third question that was handled by the tribunal.

This ground also fails.

As a result of what I have stated in ground one all the other grounds fall of. The net result is that this appeal fails in toto.

I make no order as to costs since the Respondent did not file any documents and were never in attendance at any hearing.

DELIVERED AT LUSAKA THISDAY OF.....2015.


G.C.M CHAWATAMA
JUDGE