

IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
AT LUSAKA  
(CIVIL JURISDICTION)

2015/HP/A001

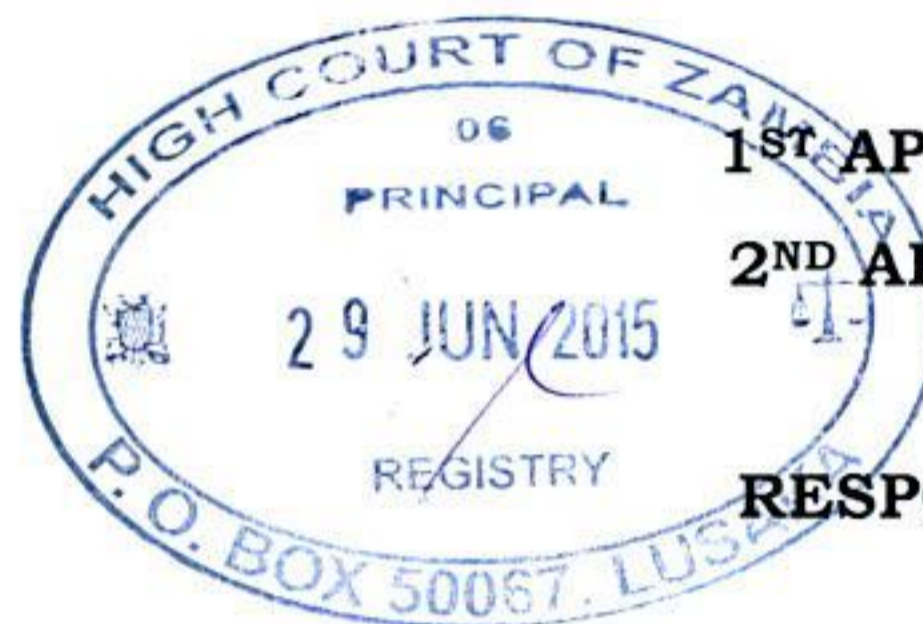
BETWEEN:

ALICK TEMBO

DAINESS TEMBO

AND

JOSEPHINE MOOMBA



1<sup>ST</sup> APPELLANT

2<sup>ND</sup> APPELLANT

RESPONDENT

BEFORE HON. MRS. JUSTICE P.C.M NGULUBE ON 29<sup>th</sup> DAY OF JUNE 2015

For the Appellants : Mr K. Mwale (Messrs Simeza Sangwa & Associates)

For the Respondent : Mr M.C. Hamachila (Messrs Iven Mulenga & Co)

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## J U D G M E N T

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**Cases referred to:**

1. *Mwenya and Randee v Kapinga* (1998) S.J. 12 (S.C.)
2. *Rosemary Phiri Madaza v Awadh Keren Coleen* (2008) 1Z.R. 12
3. *Communications Authority v Vodacom Zambia Limited* (2009) Z.R. 196
4. *Wilson Zulu v Avondale Housing Project Limited* (1982) Z.R. 172(S.C.)
5. *The Attorney General v Marcus Achiume* (1983) Z.R. 1(S.C.)
6. *James Mbewe and Another v James Mwaanga* (2012) ZR. p88
7. *Nora Mwaanga kayuba and Another v Eunice Ngulube and Another* (2003 SJ) p.19
8. *Construction and Investment Holdings Ltd v William Jacks & Co (Zambia) Ltd* (1972) Z.R. 66

**Legislation referred to:**

1. *The Lands and Deeds Act, Chapter 185 of the Laws of Zamb*

This is an Appeal against the Judgment of the Subordinate Court of the First Class passed on 5<sup>th</sup> December, 2014.

The brief facts of the case being that the Respondent successfully claimed ownership and possession of house no. 1097 situated in Kaunda Square Stage two which she had purchased from a Nelly Phiri on 4<sup>th</sup> April, 2001. The said house had been in the possession of the Appellants on the basis that the house belonged to their deceased father a Mr Jacob Tembo and as a consequence of which the Appellants had placed a caveat on the said property on 5<sup>th</sup> June, 2000.

The lower Court found that the Respondent was a bonafide purchaser for value and thus held that the Respondent had proved her case against the Appellants and ought to enjoy her legal rights in the property in issue.

Dissatisfied with the finding of the lower Court, the Appellants appeal against the said Judgment on the following grounds;

1. The Learned Trial Magistrate misdirected himself in law and fact when he held that the Plaintiff was a bona fide purchaser of House no. 1097 Kaunda Square, Lusaka.

2. That the Learned Trial Magistrate misdirected himself in law and fact when he held that the Plaintiff bought House no. 1097 Kaunda Square, Lusaka before the caveat was placed by the 1<sup>st</sup> Defendant.

In support of the first ground of Appeal, the Appellants submitted in their heads of argument that the lower Court erred when it found that the Respondent was a bonafide purchaser for value without notice by virtue of the Respondent having bought the said property. That this was so as the Respondent did have notice of a prior interest in the land and as such cannot qualify as a bonafide purchaser without notice. That this was evident from the fact that the caveat was placed on the property on 5<sup>th</sup> June 2000 whilst the purported purchase of the property took place on 4<sup>th</sup> April, 2001.

Relying on **Mwenya and Randee v Kapinga (1998) S.J. 12 (S.C.)** and **Rosemary Phiri Madaza v Awadh Keren Coleen (2008) 1Z.R. 12**, it was submitted that as the caveat was placed before the transaction for the sale of the property took place, it follows that the Respondent does not qualify as a bonafide purchaser for value without notice as the law prevents a party who has notice from acquiring rights as a bonafide purchaser for value without notice. That therefore the lower court misdirected itself in finding that the Respondent was a bonafide purchase for value without notice when she had actual notice of a prior interest by virtue of the registration of the caveat on the part of the Appellant.

In support of ground two, the appellants submitted that the lower court fell in error when it found that the Respondent had bought the house in question before a caveat was placed by the 1<sup>st</sup> Appellant. That the said decision was clearly a misapprehension of the facts or findings which on proper view of the evidence no trial court acting correctly can find being that the caveat was placed on the property on 5<sup>th</sup> June, 2000 while the agreement for sale was executed on 4 April, 2001. That therefore, the Court erroneously found that the Respondent bought the property prior to the caveat being placed on it.

It was submitted that this Court must reverse the said finding of fact made by the lower court in keeping with the principles enunciated in **Communications Authority v Vodacom Zambia Limited (2009) Z.R. 196**; **Wilson Zulu v Avondale Housing Project Limited (1982) Z.R. 172(S.C.)** and **The Attorney General v Marcus Achiume (1983) Z.R. 1(S.C.)**.

In the Respondent's heads of Argument, it was submitted that the lower Court did not err in law or in fact when it held that the Plaintiff was a bonafide purchaser of house number 1097, Kaunda Square, Lusaka. That there was evidence on record that the Respondent bought the said property in question from Nelly Phiri by a contract of sale dated 4<sup>th</sup> April, 2001. Further that the Respondent was not aware of any claim by any third party as to the ownership of the property in question and paid a part payment of K4, 000,000.00 (KR4000.00) towards the purchase price. That once

she realized that there was a claim by way of the Court action she suspended any payment until the matter was resolved and that the Respondent had no notice of either actual or constructive at the time that she made the initial payment.

Further that as there was a Judgment under cause number SSF/LCA/118/1999 determining the question of ownership in favour of Nelly Phiri from whom the Respondent had purchased the property, the caveat placed by the Appellant on the ground of having a beneficial interest in the estate of the deceased father could not stand as the house was not part of the estate of the said deceased. That the interest which the Appellants sought to protect by way of caveat ceased to exist.

That only after the said Judgment did the Respondent proceed to settle the balance on the purchase price and effected transfer of ownership which was proper as there was no legal interest demonstrated in the caveat.

The Respondent conceded the second ground and submitted that though the caveat was entered on 5<sup>th</sup> May, 2000, there was no evidence on record that it was brought to the Respondent's attention at the time of the contract of sale.

At the hearing, the Appellants relied on their heads of argument and Learned Counsel augmented with oral submissions by referring this court to the principles enunciated in **James Mbewe and Another v James Mwaanga (2012) ZR. p88** as well as in **Nora**

**Mwaanga kayuba and Another v Eunice Ngulube and Another**  
**(2003 SJ) p.19.**

Learned Counsel further submitted that the Respondent casually purchased the property in issue without due diligence of ensuring that there were encumbrances and as such the Respondent did so at her own peril.

That the effect of a caveat is as held in **Rosemary Phiri Madaza v Awadh Keren Coleen** (cited supra) and that as the sale was subsequent to the caveat it had no effect.

In response, the Learned Counsel for the Respondent relied on the Heads of Argument filed as well as made oral submissions to the effect that though there was a caveat on the property in issue it had no effect after the Judgment under cause number SSF/LCA/118/1999. That therefore, the sale was legal and the Respondent was a bonafide purchaser for value.

It was also submitted in relation to the second ground of appeal that the erroneous finding of the lower court does not make the Respondent liable as she only proceeded with the transaction after Judgment of Court.

Having carefully considered the grounds of appeal, heads of argument and the oral submissions made by both parties, I note that the second ground of appeal has been conceded by the Respondent and therefore will not delve into it.

The ground which falls to be determined relates to the finding that the Respondent was a bonafide purchaser of house no.1097 Kaunda Square. Simply stated, Learned Counsel for the Appellant argued that the Respondent was not a bonafide purchaser for value as she had actual notice of the Appellants' interest by virtue of the caveat which was lodged on the property.

The Plethora of authorities on the principle of bonafide purchaser for value without notice are in total agreement with the Appellant's position. However, in the case at hand there are certain peculiar circumstances that surround the caveat on the property in issue and I will have to address the same in determining this Appeal.

The Appellants lodged the caveat on the basis of having a beneficial interest in the estate of one Jacob Tembo. I note that by Judgment in Cause SSF/LCA/118/1999, an action between Alaida Tembo and Nelly Phiri, the property in issue was adjudged as belonging to a Nelly Phiri and not Jacob Tembo. The Respondent had shown in the lower Court that she purchased the property in issue from the said Nelly Phiri in 2001 and processed a certificate of title on the property albeit subsequent to the registration of the caveat.

In **Construction and Investment Holdings Ltd v William Jacks & Co (Zambia) Ltd (1972) Z.R. 66** it was held that,

**“only if a person has or purports to have an enforceable interest in land may he be justified in interfering with the rights of the registered proprietor by lodging a caveat. The caveator's cause for lodging**

**a caveat is dependent upon his claim to be entitled to an interest in land and that “reasonable” in this sense means “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 this action in lodging the caveat was without reasonable cause.”**

The property having been adjudged as not being that of Jacob Tembo, the deceased, the Appellant’s beneficial interest in the property in issue ceased to subsist as the property did not form part of the estate in which he had an interest. It followed that he could not rightfully maintain a caveat on the said property as he did not have an enforceable interest in the property. I opine that this position explains why the Respondent managed to process change of ownership and secure a Certificate of Title on the property as the property was unencumbered. Had the caveat still continued subsisting, the Respondent would not have managed to do so as the effect of a caveat as stipulated in **section 79 of the Lands and Deeds Act** is to prevent any changes on the register in relation to the particular property.

Further I am of the view that by this Appeal, the Appellants are asking the court to determine a question which had already been adjudicated upon under another cause and against which there was no appeal. This amounts to abuse of process as it undermines the




said Judgment of the Court and I condemn such conduct in the strongest terms.

The proper course to have been taken on the part of the Appellants was to challenge the Judgment under SF/LCA/118/1999 had they been dissatisfied with the Judgment of the Court.

For the foregoing reasons, I uphold the finding of the lower Court on the first ground and accordingly dismiss this Appeal for lack of merit.

Costs to the Respondent.

**Dated this 29<sup>th</sup> June, 2015**

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**P. C. M. NGULUBE  
HIGH COURT JUDGE**