

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

(2011/SSR/93) HR/002/2015

CHIBWE LEWIS MWEWA

PLAINTIFF

AND



JOSEPH MWABA

1ST DEFENDANT

MWEWA THOMAS LAMECK

2ND DEFENDANT

HAPPY MWANSA

3RD DEFENDANT

CORAM : Honorable Mr. Justice Mubanga M. Kondolo, SC

FOR THE PEOPLE : Mr. P. Chavula - Senior Legal Aid Counsel

FOR THE DEFENDANTS : In Person

JUDGMENT

AUTHORITIES

STATUTES & TEXT

1. The Subordinate Courts Act, Chapter 28, Laws of Zambia
2. The Lands and Deeds Registry Act Chapter 185, Laws of Zambia
3. B.A. Garner. Black's Law Dictionary. 8th Edition. Thomson West. (2004)

CASES

1. Tadeous Shipe, Major Muyoba, Geoff Burton v Victor Nalisa Mung'ambata SZC
8/30/2009

2. Raphael Ackim Namung'andu v Lusaka City (1978) Z.R. 358.

This matter was originally commenced in the Subordinate Court and was subsequently transferred to the High Court by agreement of the parties pursuant to **Section 23 of the Subordinate Courts Act**¹. The matter was then commenced before my sister Sunkutu J when she visited Mansa on a circuit Court. When I visited Mansa on my own circuit the parties asked the Court to proceed where Sunkutu J had left off and she was at the time unable to return to Mansa. It was not possible to commence the matter *de novo* as I had travelled for criminal sessions and on account of the available time I could only accommodate this matter if I continued where Sunkutu J had left off. I proceeded to hear the matter from the point of the fourth defence witness – DW4. The other reason I decided to proceed with the matter was because it was based largely on documentary evidence.

In his Statement of Claim filed in the Subordinate Court, the Plaintiff alleged that the Defendants were erecting structures on his land without any authority and as such he has suffered loss and damage and that they have continued to erect the said structures. He sought the following reliefs:

- i) Declaration that he is the legal owner of the aforesaid stand # 1703, Mansa*
- ii) An Order directing the Defendants to vacate the aforesaid stand*
- iii) An Injunction restraining the Defendants from erecting or continuing to erect any structure on the aforesaid land.*
- iv) Costs of and incidental to this action.*

At the hearing, before my Learned Sister, the Plaintiff relied on the record and on his Title Deeds which he filed for the Court's attention and he testified *viva voce*. He told the Court that in 1991 he applied to the Mansa District Council for a commercial plot, paid the requisite fees

¹ Section 23 of the Subordinate Courts Act, Chapter 28, Laws of Zambia

and thereafter returned to Lusaka. In 1994, the Ministry of Lands issued him with an initial Certificate of Title on a 14 year lease and upon its expiry he applied for a 99 year lease and the property was re-surveyed and a new Certificate of Title issued to him in 2009.

The Plaintiff further testified that in 2002 he discovered that one Noah Chaifyala had built a house on his plot but he was informed by the Council that the plot belonged to the Plaintiff and he consequently sold the plot to the 2nd Defendant, Thomas Lameck Mwewa. The Plaintiff approached Mr. Mwewa who said he knew that the land belonged to the Plaintiff. He asked for forgiveness and promised to vacate.

In 2003 he noticed that the 3rd Defendant, Abel Mwenya was making bricks from an anthill on his plot. The Plaintiff informed the 3rd Defendant that the land was his but the 3rd Defendant ignored what he'd been told and proceeded to build a house on the land and sold the bricks that he made from the anthill.

The Plaintiff further told the Court that in 2011 he noticed the presence of the 1st Defendant, Joseph Mwaba on his land and he informed the 1st Defendant of his ownership of the plot. The Plaintiff stopped the 1st Defendant from constructing a structure on the land. They went for a meeting at the Lands Department and the Luapula Planning Authority, where the Plaintiff produced his Certificate of Title. The 1st Defendant was unable to substantiate his claim to the land and was instructed to vacate the land.

The Plaintiff concluded his testimony by saying that the Defendants had encroached on his land.

The Plaintiff was cross examined by the 2nd Defendant and when asked why the Council wrote to him concerning demarcation of Stand No. 1703 on 1st June, 2004, his response was that the Council wanted to know where the reserve road was on the site plan. He further stated that as indicated on the site plan, the road reserve was the boundary of the plot. The Plaintiff

reiterated that at the meeting at the Council, the 2nd Defendant had failed to prove his claims. When asked in whose favour the case was decided at a meeting held at the Chief's palace on 26th January 2010 attended by Mansa councilors and three from Muchinka ward, the Plaintiff said that the matter was not decided in anyone's favour.

In response to cross examination by the 3rd Defendant, the Plaintiff denied that the Mansa District Council would close the road leading to the cemetery. The Plaintiff said that according to the site plan the 3rd Defendant lived on council land. He also said that to his knowledge beacons are placed before issuance of Title.

In re-examination, the Plaintiff clarified that the council land referred to as that occupied by the 3rd Defendant, is on his Plot 1703 and with this he closed his case,

The Defence called 5 witnesses, DW1-DW5.

DW1 was Thomas Lameck Mwewa, the 2nd Defendant, who stated that on 13th June 2002, he bought a house in Chimupeni village from one Noah Chaifyala. He applied to the Council to survey the area and he paid ZK50 and the land was surveyed by a Mr. G. Mwewa who failed to demarcate the same for the reason that the area was in someone's plot. He told the Court that the said the surveyor told him that there were no beacons placed on this plot and that it had not been demarcated.

DW1 further testified that Mr. Mwewa told him that the Council, Lands Ministry and the Luapula Province Planning Unit needed to sit together and on 27th February, 2004 representatives of these institutions went to the site. These representatives, a Mr. Mbewe and a Mr. Chilombo from Ministry of Lands and Provincial Planning Unit respectively, told him that they did not know the boundary of the Plaintiff's plot and, as such they would call him to demarcate or find out the extent of his land.

DW1 explained that on 1st June, 2004, a letter was written to the Plaintiff asking him to avail himself and a meeting was called for and among the attendees were Mr. Mbewe, the Plaintiff, Mr. G Silondwa, Mr. Mungomba Mushisha, the village headman and himself. Subsequently the Plaintiff's plot was demarcated and there was a portion left over. DW1 said he paid demarcation fees and a survey and demarcation was done on 21st September, 2006. When he went to obtain the site plan he was informed that the Plaintiff had on 22nd December 2006, written to the Council refusing to demarcate and give a portion of the land to DW1. Later in January 2007, the Plaintiff wrote to DW1 to vacate his plot.

DW1 further informed the Court that around 7th October 2006, Mr. Mubanga a surveyor, surveyed the Plaintiff's land for the purpose of granting the Plaintiff a 99 year lease. Mr. Mubanga told DW1 that they were not in the Plaintiff's land. He further said that the Plaintiff wrote a letter to the Provincial Lands Officer on 22nd December, 2006 confirming that Mr. Mubanga had said that the Defendants were not on the Plaintiff's land.

DW1 said that the Plaintiff nonetheless asked him to vacate the plot and DW1 was advised to see the Chief as the subject land was customary land. At a meeting attended by the Chief and Council officers on 22nd January, 2010 the council told the Chief that the boundary between customary land and state land was the road made in 1968. DW1 said that following this meeting, the Council decided to give the Plaintiff the land that was originally demarcated for him and told him that if it was too small they would give him land elsewhere. However, the Council did not do that and the Plaintiff blocked the road that separated council land from customary land and he dug a foundation for a wall which included the Defendants in his property. The Council officials inspected the foundation and said that the Defendants had not encroached on the Plaintiff's land. DW1 concluded his testimony by saying that he had not encroached on the Plaintiff's land.

Under cross examination DW1 said that his land was situated on village land. He further said that as *per* Council regulations he made payment and requested for Title Deeds but the request was denied because the Council did not know the extent or boundary of the Plaintiff's land.

Under further cross examination he agreed that the site plan given to the Plaintiff was done by the Survey Department in which Mr. Mubanga worked and he accepted that he had no letter informing him that he had not encroached on the Plaintiff's land but insisted that the Defendant had not encroached on the Plaintiff's land and he also disagreed with the assertion that no part of the Plaintiff's land was in the village.

When pressed DW1 agreed that he bought his land from Mr. Noah Chaifyala and that the Plaintiff asked him to vacate his land after some years. DW1 insisted that part of the Plaintiff's land extended onto traditional land.

The next Defence witness was DW2, Joseph Mwaba, the 1st Defendant. He testified that on 14th April 2010, he bought a plot in Chimupeni village from Village Headman Chimupeni, for the sum of ZK2,500 and he was shown the extent of the plot and told that the boundary was Kamanda Road and that the Council Plots were located on the other side of the road. He said the Plaintiff's land was a council plot on the other side of the road.

He told the Court that in 2011, after he finished making the foundation box, he received summons from the Plaintiff. DW2 said that he had no idea that the plot had problems and the Village Headman was responsible for the consequences of selling him the plot in question.

His cross examination confirmed what he said in-chief.

DW3 was Happy Mwansa the 3rd Defendant (the proceedings had been amended to change his name to Happy Mwansa from Abel Mwenya). He testified that in 1996, he bought a plot in Chimupeni Village from his workmate's aunt and he built a house on the plot in 1999 after which he left to undertake a course in Carpentry at Don Bosco. Whilst there, he received a letter from Lameck Mwewa, DW1, informing him that his land was under threat of being taken

away and when he returned he found a letter from the Plaintiff, requesting him to vacate the land.

DW3 said that following a meeting with the Chief and Council officials, the Defendants were authorized to stay on the land. Around 2011, the Plaintiff asked them to vacate the land but the Council visited the site and said they had made a mistake and allowed the Defendants to stay. DW3 concluded by saying that the Defendants had not encroached on the Plaintiff's land.

Under cross examination he confirmed that he bought the land from Bana Bwalya and the Chief only authorized him to stay there. He added that the receipt for the land bears the name of Mulonga Daniel Mwape, the nephew to Bana Bwalya. DW3 further said that Bana Bwalya occupied the area in 1975. He conceded that Plaintiff had insisted that the land was his and had produced Title Deeds to that effect.

The Defence called Richard Chimupeni the village headman from Chimupeni Village as DW4. He testified that though he had not seen any documents to that effect, the Chief and the Council had agreed on the road as the demarcation between council land and traditional land. He said that continued to be the position until 2011 when the Plaintiff and the 2nd Defendant had a land dispute. He told the Court that DW1 complained to him that the Plaintiff had encroached onto the village and DW4 summoned the Plaintiff who told him that he had Title Deeds but didn't know the extent of his land because he was not around when the Title was issued to him. DW4 informed the Chief who later summoned the parties and the Council to discuss the matter.

When the parties met DW1 produced a document which he got from the Council relating to the said property but only the Plaintiff produced Title Deeds. DW4 said that the Council's representative told the Plaintiff that he had not obtained the Titles correctly because instead of getting them from Mansa District council he had opted to get them from Lusaka. The Council's representative further told the Plaintiff that even though the place had originally been demarcated as an industrial area, part of it was now a residential area and that the boundary between the two areas was the road. The man from the Council explained to the Plaintiff that

the Council had made a mistake and given him the a plot which encroached into the residential area and that the Council would compensate him by giving him a plot of similar size elsewhere and the he agreed to be given an alternative piece of land.

Under cross examination DW4 confirmed that that the only person he gave land to was the 1st Defendant and that he did not consult the Council Surveyor or Engineer about the boundary. He said that the 2nd and 3rd Defendants were given their land by the previous headman, Mr. Titus Chabu, and PW4 insisted that Plot 1703 was in his village and that it belonged to the 2nd Defendant.

DW4 said he was aware that the Council had recently graded a road which clearly demarcated the council and traditional land. He conceded that after the demarcation the three Defendants properties now fell within council land but he was not happy with the new road because he had not been consulted. Under intense cross examination DW4 suggested that there were two Plots numbered Plot 1703, one on council land and the other one on village land and that they were both numbered by the Council. He further said that the one given to the Plaintiff was cancelled. He said that the 2nd Defendant was given his plot by the Council who also numbered it but in the same breath he said he had no idea when he bought it but that he bought it from the previous village headman.

In further cross examination DW4 said he was aware that Title Deeds were issued by the Commissioner of Lands in Lusaka and Ndola and that he was also aware that a Council cannot amend a Title deed by increasing or reducing its size. DW4 insisted that the Plaintiff had accepted to be given an alternative piece of land and had only come to Court because the Council had failed to give him the land which was promised to him.

Finally, the Defence called DW5, Gilbert Yumba who testified in his capacity as Secretary General of the Institutional Land Alliance of Mansa District. He told the Court that in January 2010, the 2nd Defendant registered a complaint with them that the Plaintiff had

encroached onto his land situated in customary tenure. As a Committee, they invited the membership of the inter Institutional Committee to discuss the complaint and the meeting was comprised of Mansa Municipal Council, the Survey Department, Ministry of Lands and the Village Headman, Mr. Katuta Chimupeni. He informed the Court that they went to the site and discovered that the land which was said to have been encroached onto by the 2nd Defendant's land was actually on Title and just off the road that leads to Chembe.

He stated that on 1st April 2011, the Board of the Alliance convened a meeting to discuss the way forward on how best to assist the parties to amicably resolve the matter. The parties themselves, the Ward Councilor (Stephen Chenda), the Survey Department Representative, Ministry of Lands Representative, the Village Headman Mr. Katuta Chimupeni and the Council Representative went to the site and the findings of the earlier committee's visit were confirmed. The Council was advised of the findings and they said they were going to re-demarcate the Plaintiff's plot by leaving the road as it was and increasing the Plaintiff plot in size on the opposite side of his plot equivalent to the area that he would lose. He informed the Court that to date they have not gotten any feedback.

In cross examination, DW5 agreed that they found that the disputed land plot No. 1703 was on Title and it belonged to the Plaintiff and that the 2nd Committee made same finding. He also agreed that they advised the parties to seek legal redress because of the dispute over land which was on title.

The Parties agreed to file written submissions which I have received. I will briefly state the arguments of all the Parties.

Mr. P. Chavula, on behalf of the Plaintiff submitted that the Plaintiff had proved his case on a balance of probabilities and Judgment ought to be entered in his favour. He argued that the land was not customary land as alleged by the Defendants because a Certificate of Title which clearly identified the owner of the land had been issued. He relied on **Section 33 of the Lands**

and Deeds Registry Act², which provided that a Certificate of Title is conclusive evidence of ownership except in cases of fraud. He therefore argued that there was no genuine competing interest which matched the rights of the Plaintiff.

The 1st Defendant submitted that in 2010 he approached the village headman over the land and he was offered to buy the plot situated in the same village though without knowing who the land belonged to. He submitted that he paid fees but acquired land that belonged to someone else therefore he prayed that the monies he paid and costs incurred be refunded to him.

The 2nd Defendant, in his submissions, stated that the Plaintiff had glossed over some salient facts and as such was not entitled to Judgment in his favour but that Judgment must be in favour of the 2nd Defendant. He argued that the Plaintiff's Plot is on state land on the other side of the road which the Mansa Municipal Council constructed in 1960. He submitted that his plot was demarcated in 2006 under customary land by the Luapula Province Planning Unit. It was his further submission that in 1990 headman Chimupeni allocated land to Noah Chaifyala who in turn sold the plot to the 2nd Defendant and that his application to convert the customary land to statutory land was approved by the Mansa Municipal Council.

He argued that the 99 year lease given to the Plaintiff was issued fraudulently in 2009 because of various anomalies on his title to include the lack of physical beacons and the discrepancy with the extent of the land on the 14 year lease and the 99 year lease. Lastly, he submitted that the road was graded to ease access and not created by the Council for it has no bearing on both the site plans and the Council's map.

Finally, the 3rd Defendant submitted that the land on which he built his house was faithfully purchased from one Daniel Mulonga which land is in a customary land set up, meaning that the procedures to acquire it were satisfied. He argued that the road that separates the Plaintiff's land from that of the Defendants' land confirmed that the said Defendants did not encroach on

² Section 33, Lands and Deeds Registry Act, Chapter 185, Laws of Zambia

the land in dispute. He further argued that the technocrats at inter-institutional land committee at Mansa District Land Committee resolved to add 15 meters of the Plaintiff's land in the northern direction to compensate him for his claims. It was his argument that the Plaintiff was the one who had encroached onto the Kamanda road which separates the land in issue and that the Plaintiff did not prove why the Defendants could not build on customary land.

I have considered the evidence on record as well as the submissions filed by the Plaintiff's Counsel and the Defendants.

From the onset I wish to direct my mind to **Section 33 of the Lands and Deeds Registry Act**³ referred to by Mr. Chavula. The said Section provides 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 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:

The said Section is couched in very clear terms with respect to the effect of one having in his possession a Certificate of Title so issued. The only exception that can affect such issuance of title is a case of fraud which case must, in my view, be proved before it can have any effect on the issuance of the Certificate of Title.

³ *ibid* 2

In the case of **Tadeous Shipe, Major Muyoba, Geoff Burton v Victor Nalisa Mung'ambata**⁴ the Supreme Court opined that **Section 33** is clear and a Certificate of title is, except in a case of fraud, conclusive proof of ownership. They further stated that fraud must be specifically pleaded and proved to affect the validity of a certificate of title.

In casu, the Plaintiff in his evidence as well as his bundle of documents has produced a Certificate of Title No. 85494 issued in his names on 1st January, 2009. In his evidence, he stated that, in 1991 he bought Plot Number 1703 from the Mansa District Council and was issued with a 14 year lease from the Ministry of Lands in 1994 which expired and in 2009 he obtained another one for a term of 99 years. Contrariwise, the Defendants indicated that they purchased their respective pieces of land from various vendors but none of them have produced a Certificate of Title. In light of this overwhelming evidence I find as a fact that the Plaintiff has Title to the land in dispute.

The said **Section 33**⁵ further states that, a Certificate of Title can only be subject to other rights and interests in light of fraud. The 2nd Defendant argued, at great length, that the Certificate of Title was irregularly obtained and to substantiate his claim, he exhibited a letter dated 23rd December, 2009 to the Anti-Corruption Commission in which he alleged fraud on the part of the Plaintiff. He stated therein that neither the local Authorities nor the Plaintiff knew the extent of his property for it was neither surveyed nor beacons but a Certificate of Title for 99 years was issued. I have not seen any documents or a reply from the Anti-Corruption Commission showing that an investigation was carried out which revealed that the allegation had any semblance of truth.

The Plaintiff's bundle of documents exhibits the application letter by which he was granted the subject land and he explained that he was initially given a 14 year lease and subsequently a 99 year lease. The allegations of fraud are unsubstantiated and I therefore find that the Plaintiff

⁴ *Tadeous Shipe, Major Muyoba, Geoff Burton v Victor Nalisa Mung'ambata SZC 8/30/2009*

⁵ *Section 33, Lands and Deeds Registry Act, Chapter 185, Laws of Zambia*

is the legal owner of Stand No. 1703, Mansa and has a superior of right to the property over the Defendants.

In my view, the only issue that is left to determine is whether or not the Defendant must vacate the Plot in contention. The status of the Defendants on the Plaintiff's property is that of squatters. A squatter is defined by **Black's Law Dictionary**⁶ as a "person who settles on property without any legal claim or title." It is evident from the Record that the Plaintiff seeks to have this Court order the Defendants to vacate his property. In my view, the Defendants are squatting on the Plaintiff's property and the Plaintiff has the right to eject persons who have entered his property without permission.

The status of the anything built on the land of another by a squatter was addressed in the case of **Raphael Ackim Namung'andu v Lusaka City**⁷ which, though a High Court Judgment, is instructive on the point of law that squatters build at their own peril. 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."

It is quite unfortunate that the Defendants have invested their resources but they were required to be diligent to establish ownership of the land that they believed they had bought before they decided to commence any developments. I find that the Defendants, as well as their respective developments to and on the Plot, are illegally on the Plaintiff's Plot.

⁶B.A. Garner. Black's Law Dictionary. 8th Edition. Thomson West. (2004)

⁷ Raphael Ackim Namung'andu v Lusaka City (1978) Z.R. 358.

In light of the foregoing, it is hereby ordered as Follows;

- i) The Plaintiff is the legal owner of the aforesaid Stand No. 1703, Mansa*
- ii) The Defendants are to vacate the aforesaid land immediately*
- iii) Costs are awarded to the Plaintiff*

Dated at Lusaka this 02nd day of June, 2016



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M.M. KONDOLO, SC
JUDGE