

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

2012/HP/1112



BETWEEN:

MARY NYIRONGO

1ST PLAINTIFF

BRIDGET NDAFWACHI NYIRONGO

2ND PLAINTIFF

AND

**JONATHAN PHIRI
AND OTHERS UNKNOWN**

1ST DEFENDANT

**SQUATTERS ON LOT NO. 3766/M/RE
AND LOT NO. 3766/M/A**

2ND DEFENDANT

**Before the Honourable Mrs. Justice J.Z. Mulongoti
on the 24th day of June, 2016**

For the plaintiffs: Mr. S. Mulengeshi of Messrs AB & David
Legal Practitioners

For the defendants: N/A

J U D G M E N T

Cases referred to:

1. Khalid Mohammed V Attorney General (1982) ZR 49 (S.C)
2. Zulu V Avondale Housing Project (1982) ZR 172 (S.C)
3. Anderson Kambela Mazoka and others V Levy Patrick Mwanawasa and Others (2005) ZR 138 (S.C)
4. Anti-Corruption Commission V Barnnet Development Corporation Limited (2008) ZR 69 Vol. 1 (S.C)
5. Lonrho Cotton Zambia Limited V Mukuba Textiles Limited (SCZ No. 168 of 2000) (unreported)
6. Honorius Maurice Chilufya v. Chrispin Haluwa Kangunda (1999) ZR 166

7. Sablehand Zambia Limited V Zambia Revenue Authority (2005) Z.R. 109 (S.C)
8. Sithole V State Lotteries Board (1975) ZR 106 (S.C)
9. Raphael Ackim Namung'andu V Lusaka City Council (1978) ZR 358 (H.C)
10. Shell & B.P. Zambia Limited V Conidaris and Others (1975) Z.R. 174 (S.C.)
11. Swordheath Properties Ltd v Tabet (1979) 1 All ER 240

Legislation referred to:

1. The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia
2. The Lands Act, Chapter 184 of the Laws of Zambia
3. Order XXXV Rule 3 of the High Court Rules Chapter 27 of the Laws of Zambia

This is an action for possession of Lot No. 3766/M/RE and Lot No. 3766/M/A hereinafter referred to as 'the properties'. The plaintiffs allege that sometime in 2005 the defendants unlawfully entered the plaintiffs' properties without permission and built houses and made a road leading to a quarry site belonging to one of the second defendants. The plaintiffs claim that the defendants' actions amount to trespass and that they have been put out of use of the full extent of their properties. The plaintiffs seek the following reliefs:

- (i) An order to evict the first and second defendants from Lot No. 3766/M/RE and Lot No. 3766/M/A;
- (ii) An order to demolish all structures and or houses built by the defendant on Lot No. 3766/M;
- (iii) An order to permanently restrain the defendants from trespassing on the plaintiffs' land;
- (iv) Damages for trespass to land belonging to the plaintiffs;

- (v) Damages for loss of use of Lot No. 3766/M/RE and Lot No. 3766/M/A;
- (vi) Interest on the amount found due;
- (vii) Any other relief the court may deem fit; and
- (viii) Costs.

The defendants denied the plaintiffs' claims. They pleaded that they are legal settlers who settled on the land in 2005 when Kafue District Council created a legal settlement called Handabana in the area under a block title in its name. They have made valuable unexhausted improvements on the properties. They stated further that the plaintiffs appeared on the scene around 2008/2009 when they acquired the land adjoining the said settlement. The Kafue District Council engaged a surveyor to subdivide the plots for the defendants and requested them to pay for the service which they did. According to them, the plaintiffs bribed the surveyor engaged by the council who prepared a report stating that the plaintiffs' land extended into their land. They further stated that the Kafue District Council has created survey diagrams and other title documents for the land which they have occupied and developed.

At trial, the plaintiffs gave oral evidence. The first plaintiff, Mary Nyirongo Kumwenda (PW1), aged 47, testified that she found squatters building on the properties, among them were the defendants. It was her testimony that Lot 6377/M was bequeathed to her and her sister (the second defendant) by their late father who died in 1992, when it was under a 14 year lease. In 2009, they obtained a 99 year lease and subdivided the property and obtained separate certificates of title in the same year. In 2009, the squatters began harassing them when they wanted to start building. According to her the first squatter whom she referred to as 'the chairman' lived on the land prior to their father's death. The chairman and her father had differed over the properties and the matter ended up at the police but she was not aware of the outcome. After their father's death, the chairman began selling the land to the first defendant and the other squatters. When referred to the Lands Register at page 23 of the bundle of the plaintiff's documents, she said her father obtained the first certificate of title in 1986 for a period of 14 years.

It was her testimony that they used to farm on the land. That there was a borehole and a caretaker's house with a grocery store. However, they were unable to use the land because the squatters threatened to kill them.

The second plaintiff, Bridget Ndafwachi Nyirongo (PW2), aged 37 testified that their father left them the property which was initially in her sister's name, the first plaintiff. When she was ready to develop it, the property was subdivided and Lot No. 3766/M/A was given to her and registered in her name. When the property was being surveyed in the process of subdividing it, they found the first defendant building partly on her plot and partly on the first plaintiff's plot. When they advised him to stop, he threatened to kill them. According to her, the properties are about six hectares altogether and the squatters have taken up almost four hectares of it. She said they were unable to use the land because of the squatters who were building on it.

PW3, Charles Pole, 48, a surveyor at Ministry of Lands testified that in 2008, PW2 engaged him to survey the properties to verify the boundaries. PW2 gave him a sketch plan and a certificate of title and paid the necessary fees. The survey was conducted and the

boundary verification report was generated exhibited on pages 17 to 20 of the plaintiff's bundle of documents. The diagrams were submitted and approved by the office of the Surveyor General in 2009. It was his testimony that from his twenty years of experience as a surveyor, it is not practicable that the squatters could have the same diagram because diagrams have specific coordinates indicating the location of the land.

That was the plaintiffs' case.

The defendant did not attend court despite being aware of the hearing. I adjourned the matter to allow them to defend the case on several occasions but they neglected to do so. Accordingly, I ordered that the trial be closed and adjourned the matter for judgment in accordance with order XXXV rule 3 of the High Court Rules.

I am however, mindful that the onus is still on the plaintiffs to prove their case on a balance of probabilities whatever may be said of the defendant's case as enunciated in **Mohammed V Attorney General(1)** and **Zulu V Avondale Housing Project(2)**. In **Anderson Kambela Mazoka and others V Levy Patrick Mwanawasa and Others(3)**, the Supreme Court held

that it is not enough to say that the defendants have completely failed to provide a defence or to call witnesses.

Mr. Mulengeshi filed written submissions on behalf of the plaintiff. He argued that the plaintiffs have certificates of title relating to the properties. Under section 33 of the Lands and Deeds Registry Act the certificates of title are conclusive evidence of ownership as the Supreme Court held in the case of **Anti-Corruption Commission V Barnnet Development Corporation Limited(4)**. He argued that since there was neither re-possession nor re-entry by the Commissioner of Lands and that there has never been a cancellation or revocation of the plaintiffs' title deeds the properties were at all material times and still remain that of the plaintiffs.

It was further submitted that the defendants' claim that they acquired the properties through Kafue District Council when it created a settlement called Handabana was not supported by evidence. That section 3(1) of the Lands Act vests the mandate to alienate land in the President through the Commissioner of Lands. Kafue District Council did not have the mandate to allocate the properties to the defendants after it had been given to the plaintiffs. Therefore, it could not pass good title to the

defendants. The case of **Lonrho Cotton Zambia Limited V Mukuba Textiles Limited(5)** was relied upon that *“a person who is not the owner thereof, and who did not sell them under the authority or with consent of the owner, acquires no better title than the seller had.”*

Additionally, that the defendants are squatters on the property as they have no permission, authority, consent, legal claim or title to the properties. He relied on Black's Law Dictionary which defines a squatter as *“a person who settles on property without any legal claim or title”*. Learned counsel urged the court to find for the plaintiffs and grant them the reliefs sought.

After analysing the pleadings, the evidence on record and the submissions by counsel for the plaintiff, it is common cause that the property known as Lot3766/M was initially owned by the plaintiffs' father Whiteson Nyirongo under a 14 year lease on certificate of title number 59719 from 1st July, 1986. The property was later transferred to the first plaintiff under certificate of title number L3301 in 1993. After the 14 year lease expired, the first plaintiff obtained a 99 year lease under certificate of title number 84519 in 2009. The property was then subdivided into two. Lot 3766/M/A was given to the

second plaintiff which she currently holds under certificate of title number 90329. The first plaintiff retained the remaining extent which she too currently holds under certificate of title number 90328. The defendants entered on the property then lot no. 3766/M in 2005 and have been building and carrying out other activities thereon.

The issue that falls for determination is who between the plaintiffs and the defendants own Lot Nos. 3766/M/RE and 3766/M/A, formerly No. 3766/M.

I am alive to the fact that the defendants did not adduce oral evidence. I note the plaintiffs' testimony that their late father initially had a 14 year lease which expired in 2008. The defendants averred in their defence, that they settled on the land in 2005 when Kafue District Council created a legal settlement there. It is worth noting that at the time (2005) the land was on a 14 year lease to the plaintiffs' father. The said lease in fact expired in the year 2000.

In the case of **Honorius Maurice Chilufya v. Chrispin Haluwa Kangunda(6)** where the appellant's 14 year title had expired, the Supreme Court held that; *"the lease did not and could not terminate automatically. The appellant was entitled to obtain a 99 year lease as of right unless there was a major default"*.

It is clear that the plaintiffs late father had a 14 year lease from 1986 as confirmed by the lands register at page 23 of the plaintiffs' bundle of documents and testified by PW1. The 14 year lease by calculation expired in 2000.

The plaintiffs applied for a 99 year lease in 2009. As was held in the case aforementioned, the 14 year lease could not terminate automatically. The plaintiffs' through their late father who had bequeathed the land to them were entitled to obtain a 99 year lease as of right. Thus, though they delayed to obtain the 99 year lease they were entitled to it as of right and their interest in the land did not expire by effluxion of time. I am guided by the Supreme Court in the same case where it was observed that, *"a state lease which confers ownership and which obliges a lessee to develop the land does not simply expire by effluxion of time"*.

The plaintiffs eventually obtained the 99 year lease which was properly given to them. They later subdivided the land and obtained certificates of title in their respective names. And as argued by their counsel, in accordance with section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of the land.

I am thus inclined to find in favour of the plaintiffs. The provisions of section 33 above were interpreted in the case of **Anti-Corruption Commission V Barnnet Development Corporation Limited, supra**, cited by Mr. Mulengeshi wherein the Supreme Court held that:

“Under section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of land by the holder of the certificate...we also know that under the same section or section 34 a certificate of title can be challenged and cancelled for fraud or for reasons of impropriety in its acquisition.”

In addition, section 54 of the Lands and Deeds Registry Act states that:

“Every Provisional Certificate and every Certificate of Title, duly authenticated under the hand and seal of the registrar, shall be received in all courts of law and equity as evidence of the particulars therein set forth or endorsed thereon, and of their being entered in the Register, and shall, unless the contrary is proved by the production of the Register or a copy thereof certified under the hand and seal of the Register, or unless the rectification of a Provisional Certificate is ordered by the Court, be conclusive evidence that the person named in such Provisional Certificate or Certificate of Title, or in any entry thereon, as seised of or taking estate or interest in the land therein described is seised or possessed of such land for the estate or interest therein specified as from the date of such Certificate or as from the date from which the same is expressed to take effect, and such certificate has been duly issued.”

In casu, the defendant pleaded that the plaintiffs bribed the surveyor who in turn produced a report that the plaintiffs' properties extended into the defendants land. However, the defendant did not attend Court to substantiate these allegations which could vitiate the plaintiffs' title to the properties. In **Sablehand Zambia Limited V Zambia Revenue Authority(7)** it was held that:

“...at the trial of the cause, the party alleging fraud must equally lead evidence so that the allegation is clearly and distinctly proved...Fraud must, once pleaded, be proved on a higher standard of proof than on a mere balance of probabilities because they are criminal in nature...”

Further, in **Sithole V State Lotteries Board(8)** it was enunciated that if a party alleges fraud, the extent of the onus on the party alleging is greater than a simple balance of probabilities. In the present case, the defendants have failed to prove fraud nor did it lead evidence on how the plaintiffs bribed the surveyor. The plaintiffs have shown that they are the registered proprietors of the properties under certificates of title numbers 90328 and 90329 respectively. And that the land was originally on a 14 year lease to their late father.

Thus, Kafue District Council could not allocate their land to the defendants as it did. If anything the defendants did not adduce any evidence to prove that the council gave them the land.

I have also taken note of the evidence of PW3 that it is not practicable that the defendants could have the same diagrams because diagrams have specific coordinates indicating the location of a particular piece of land. As aforesaid, the defendants in the defence pleaded that they acquired the properties through Kafue District Council and that the council went ahead and processed documentation for the properties. However, the defendants have failed to substantiate their claims

regarding ownership of the properties. They have not produced any documents to show that the property is under a block title for Kafue District Council after creating a settlement on the property known as Handabana.

It is also significant to note that under paragraph 4 (i) of their defence, the defendants have disclosed that they have been in occupation of the property since 2005 and that they have made improvements thereon. This position was confirmed by the testimonies of PW1 and PW2. The evidence of PW1 that their late father had a dispute with the defendants and reported the matter to the police shows that the defendants were not given permission to occupy the land even by the initial owner. On the totality of the evidence, therefore, their line of defence that the plaintiffs only appeared on the scene around 2008/2009 cannot stand. Further, as already determined, the plaintiffs are the legal owners of the properties. I find that the defendants are merely squatters and have no legal claim to the property. I agree with the decision in **Raphael Ackim Namang'andu V Lusaka City Council(9)** in which the case of Fabiano Humane v D.P. Chinkuli 1971/HP/407 (unreported) was cited per Scott, J., that *"no one properly advised would*

build without endeavouring to get a good and legal title to the land. His failure to do so even if his story is correct results in his loss."

Although the defendant pleaded in their defence that they have made valuable unexhausted improvements on the property, they are still squatters on the property and there is no obligation on the plaintiff to refund them as held in **Raphael Ackim Namang'andu V Lusaka City Council, supra**, that:

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

In light of all the foregoing, I find that the plaintiffs have proved their case on a balance of probabilities. I order that the defendants and all squatters on properties No. L/3766/M/RE and L/3766/M/A Lusaka yield up vacant possession to the plaintiffs.

The plaintiffs have also claimed damages for trespass. It is clear that the defendants' entry on the plaintiffs' properties from 2005 amounted to trespass and the evidence shows that they interfered with the rights of the

plaintiffs to use the property. I am guided by the pronouncement of the Supreme Court in **Shell and BP V Conidaris and others(10)** that trespass to land is an unlawful entry on land in the possession of another. The plaintiffs retained legal possession of the property at all material times when the defendants entered on their property. In fact, the plaintiffs' testimony was that the defendants have been threatening to kill them whenever they attempted to assert their rights over the property. As such, they have been unable to make use of the properties. I am inclined to award damages for trespass. I take judicial notice that land disputes of this nature have been prevalent in Zambia in the recent past and people have lost their lives.

Furthermore, in **Swordheath Properties Limited V Tabet(11)** it was held that:

"There is indeed, curiously, no authority which directly deals with this question in relation to trespass on residential property but in Halsbury's Laws of England the authors of the title 'damages' say:

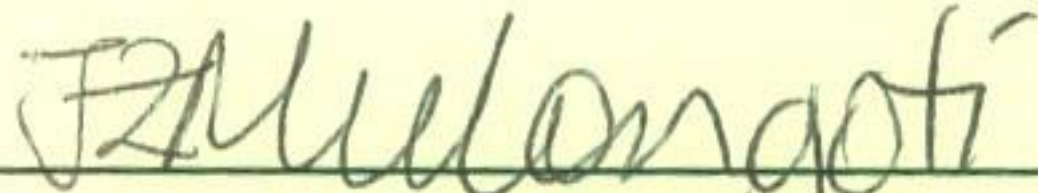
Where the defendant has by trespass made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such sum as should be reasonably paid for the use. It is immaterial that the plaintiff was not in fact thereby impeded or prevented from himself using his own land either because he did not wish to do so or for any other reason..."

Having established that the defendants unlawfully entered on the plaintiffs' land and kept them out of use of the properties, I find that the plaintiffs are entitled to damages. I award K20,000.00 as damages for trespass.

In the net result, I find that the plaintiffs have proved their case on a balance of probabilities. Accordingly, I enter judgment for the plaintiffs and make the following orders:

1. The defendants should yield vacant possession of the properties namely Lot No. 3766/M/RE and Lot No. 3766/M/A to the plaintiffs forthwith.
2. I award the plaintiffs K20,000.00 as damages for trespass.
3. The costs of this action shall be borne by the defendants to be taxed failing agreement.

Delivered at Lusaka this 24th day of June, 2016.



J.Z. MULONGOTI
HIGH COURT JUDGE