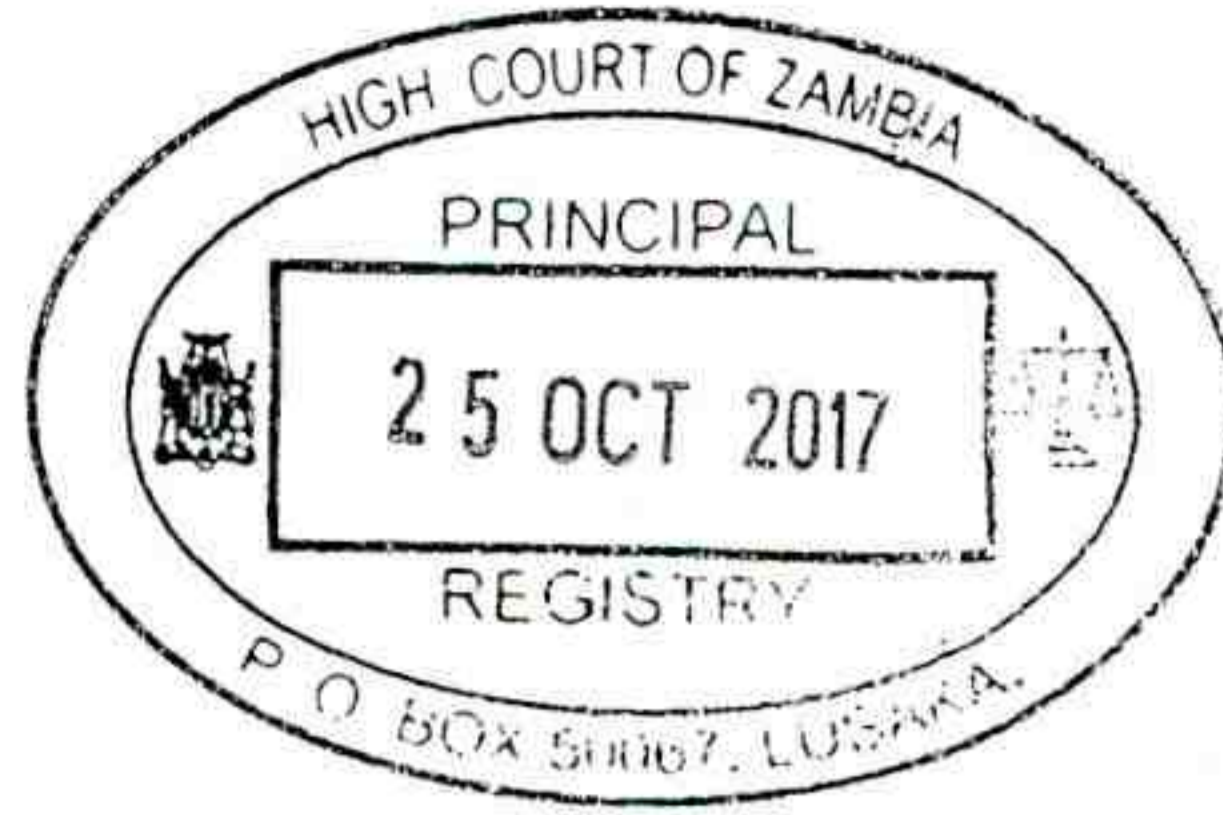


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2016/HP/A026

(Civil Jurisdiction)



BETWEEN:

PATSON BBENKELE *(T/A Powermark Private School)*

APPELLANT

AND

CHOMA MUNICIPAL COUNCIL

RESPONDENT

***Before: Hon. Judge Betty Majula-Mung'omba on this 25th day of
October, 2017.***

✓ *For the Appellant: Mr. F.H. Hamakando of Batoka Chambers*

For the Respondent: Mr. C. Nhari of Nhari Advocates

JUDGMENT

Legislation Referred to:

- 1. Town and Country Planning Act, Chapter 283 of the Laws of
Zambia, s22*

2. Registration of Business Names Act, Chapter 389 of the Laws of Zambia

This is an appeal by the appellant against the Ruling of the Town and Country Planning Tribunal of 16th May, 2016. By that Ruling the Tribunal found that the creation of fish ponds in the open space by the appellant was illegal for lack of planning permission from the respondent as well as being outside the appellant's boundaries.

The appellant's case is that he is the proprietor of a property known as plot number 128 Mining Area/Chandamali in the Municipality of Choma, Southern Province of the Republic of Zambia. It was his evidence that he is a businessman running a school on the premises by the name of Powermark Private School which is registered under the provisions of the Registration of Business Names Act, Chapter 389 of the Laws of Zambia.

The appellant went on to state that on 20th June, 2012 he submitted to the Choma Municipal Council Planning Authority the following documents for approval:

- (a) Site Plan for Powermark Private School;
- (b) Detailed lay out plan;
- (c) 1 x 3 Classroom Block plan.

He further led evidence that the said plans were approved on 8th December, 2012 to allow him commence the project of the School blocks.

He went on to state that he purchased the property in issue from Gift Kalunga and Moses Kalunga Mbwende in the presence of Mr. H.M.C. Himakanta who is an officer at Choma Municipal Council. He later approached Chandamali Residential Development Committee for various additional pieces of land which were approved on 20th August, 2008.

To consolidate the said plots he paid K6,000.00 to Choma Municipal Council for the plots he purchased from Chandamali Residential Development Committee.

That by a letter dated 21st April, 2015 from the Respondent he was informed that he had illegally encroached on Council plots namely plots 5847, 5841, 5848, 5842, 5849 and 5843. In light of this encroachment the Council ordered him to do the following:

- i) *Remove all occupants from the structures at the site/ cease all use of the structures;*
- ii) *Remove all loose materials and other valuables from the land;*
- iii) *Remove all illegal structures and restore the land to the original status as before the illegal construction took place.*

That this is what prompted him to appeal to the Town and Country Planning Tribunal for an order to set aside the decision of the respondent for fear that he would lose money to the tune of K315,000 spent on various project and construction of the fish ponds on the property.

The respondent's case was from two key witnesses. RW1 was Mr. Killian Malambo a physical planner for Choma Municipal Council. He testified that the appellant was appealing against the respondent's decision through its enforcement notice to order him to bury the fish ponds created on plots, 5841, 5842, 5847 and 5848.

He explained that the reason why the appellant was given an enforcement notice by the respondent was because he did not obtain planning permission as required by law to enable the respondent be aware of the proposed developments he was intending to put up.

It was his evidence that the appellant acted illegally by erecting fish ponds in an area designated for residential when fish ponds are only allowed in an agricultural area. He further testified that from their records and maps, the appellant's property is 158 meters by 153 meters and not 180 x 269 meters as claimed by him.

By a Ruling dated 18th June, 2015, the Town and Country Planning Tribunal dismissed the appellant's appeal. In doing so, it said:

"(i) The creation of the fish ponds in the open space by the appellant was illegal for lack of planning permission from the Respondent as well as being outside the appellant's boundaries.

(ii) We order that the respondent herein should restore the land in question to its original use by burying the fish ponds within a period of 90 days from the date hereof failure to which the

respondent shall reserve the right to move in and restore the land to its original use."

Dissatisfied with the decision of the Tribunal, the appellant had appealed to this court advancing the following grounds of appeal.

1. The Town and Country Planning Tribunal misdirected itself in law and in fact by holding that the construction of the fish ponds by the appellant was without the authority of the Planning Authority when in actual fact the fish ponds were within the boundaries of the site plan which was approved by the respondent on 8th December 2012 in its capacity as planning Authority. The plot was allocated to the appellant in 2008 by the Chandamali Resident Development Committee (RDC), which at the time was an agent of the Respondent.
2. That the learned Tribunal misdirected itself in law and fact when it ignored the allocation of this piece of land by the respondent to the appellant which is the subject of these proceedings.
3. That the learned Tribunal misdirected itself in law and fact by holding that the appellant should restore the land in question on which the fish ponds are constructed to its original use when the appellant has in his position approved site and building plans approved by the respondent and necessary payments were paid to the respondent for the same piece of land.

4. That the learned Tribunal misdirected itself in law and in fact when it held that the fish ponds were outside the appellant's boundaries when in fact the respondent placed the beacons in 2010, marking or showing the boundary for the appellant's land which included the area where the fish ponds are situated.
5. That the learned Tribunal misdirected itself in law and in fact when it ignored the 2012 Choma Municipal Council approved layout plan of Chandamali area in preference for the proposed layout plan of 2014, for the same area which had not been presented to the public scrutiny and possible objections as provided for under section 19(2) of the Town and Country Planning (Amendment) Act of 1997 of the Laws of Zambia, before presentation to the Minister or Director for approval.
6. That the learned Tribunal misdirected itself in law and fact when it exhibited open biasness in favour of the respondent during the proceedings, notwithstanding caution from the President of the Tribunal.

I turn to the appellant's submissions of law. These submissions which were essentially a repetition of the grounds of appeal may be summarized as follows:

1. The Town and Country Planning Tribunal misdirected itself in law and fact by holding that the construction of the fish ponds was without the authority of the Planning Authority.

2. That the Town and Country Planning Tribunal misdirected itself in law and in fact when it held that the appellant created fish ponds beyond the appellant's boundaries.
3. The Town and Country Planning Tribunal misdirected itself in law and in fact by holding that the appellant should restore the land in question on which the fish ponds are constructed to its original use.
4. The Town and Country Planning Tribunal misdirected itself in law and in fact when it held that the fish ponds were outside the appellant's boundaries.
5. The Town and Country Planning Tribunal misdirected itself in law and in fact when it held that the building plans for the school submitted by the appellant were not duly authorised by the respondent on or about 8th December, 2012.
6. That the Town and Country Planning Tribunal acted biased towards the respondent.

For the first four submissions no authorities were cited. For the fifth submission the appellant sought to rely on the Town and Country Planning Act of 1997 of the laws of Zambia, specifically section 19(2). Neither was any authority cited for the sixth ground.

The respondent's submissions in a nutshell were that on the five grounds advanced the Tribunal did not misdirect itself and pertaining to the 6th submission they refuted the averment that the Town and Country Planning Tribunal exhibited bias towards the respondent.

In support of the first submission the respondent sought to rely on section 22 of the Town and County Planning Act Chapter 283 of the Laws of Zambia which deals with the requirement for one to obtain permission from the respondent as the planning authority before erecting fish ponds.

Turning to ground six which is the assertion that the Tribunal acted with biasness, the respondent called in aid section 11(1) (c) of the Town and Country Planning Act Chapter which affords a person with an interest in land the right to be heard. According to the respondent all the parties were heard and therefore the appellant cannot claim biasness on the part of the Tribunal.

I have given due consideration to all the arguments raised and authorities cited in this appeal.

The burning issue for determination in this appeal hinges is my view on whether or not the appellant had planning permission.

It is common ground that the appellant did construct fish ponds. A convenient starting point is the Town and Country Planning Act Chapter 283 of the Laws of Zambia, section 22 which provides as follows:

22. (1) Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part for any development or subdivision of land that is carried out after the appointed day.

(2) The provisions of this Part, in so far as they relate to development, shall apply only-

(a) in areas in respect of which there is an order, made under the provisions of this Act, to prepare a structure plan or local plan; and

(b) in areas subject to an approved structure plan or local plan: and

(c) in such areas as are within a distance of twenty miles from the boundaries of any area mentioned in paragraph (a) or (b); and

(d) in such other areas as may be specified by the Minister by statutory notice.

I have combed the record and scrutinized the decision of the Tribunal. The evidence reveals that the appellant did not obtain permission from the respondent before erecting the fish ponds. The provisions of section 22 of the Town and Country Planning Act vest authority in the respondent to approve structure plans or local plans for areas that are within a distance of twenty miles from the boundaries of Choma Central Business.

If a person fails to obtain the requisite permission, he or she does so at their own peril. In this case I find as a fact that the appellant failed and or neglected to obtain permission from the planning authority by erecting the fish ponds. By so doing the

construction can only be deemed illegal for lack of planning authority. In light of what I have stated in the preceding paragraph I find that the appellant is the author of his own misfortune. I find and hold that the Tribunal did not misdirect itself in law and in fact by holding the construction of the fish ponds by the appellant was without authority.

This ground of appeal must accordingly fail.

Regarding the second ground that the fish ponds were created beyond the appellant boundaries, from the record there is uncontroverted evidence by Mr. Killian Malambo that the fish ponds were for breeding fish and not for ornamental or decorative purposes or meant to enhance the appearance for the school surroundings. Further it was established that the fish ponds were set up in an area earmarked for residential purposes and not agriculture. Against this backdrop I am satisfied that the Tribunal cannot be faulted for finding that the fish ponds were beyond the appellant's boundaries. The argument by the appellant does not hold any water and I reject it. This ground too is dismissed.

Regarding the holding that the appellant must restore the land in question to its original state, I must quickly say that in light of my findings in ground 1 that the erection of the fish ponds was illegal it only stands to reason that having created the mess, the appellant must clean it up. Simply put there is nothing untoward by the decision of the Tribunal in this regard.

I am fortified in my decision by the provisions of section 22(1) of the Town and Country Planning Act Chapter 283 of the Laws of Zambia in which Counsel for the respondent sought refuge.

Turning to the issue regarding the fish ponds being outside the boundaries, the evidence adduced from the witness for the respondent Mr. Killian Malambo was that a physical inspection was carried out at the premises measurements were taken and it was in fact established that indeed the appellants' ponds were constructed outside his boundaries and were erected on an open space outside the school area which was left vacant by the respondent.

I have no difficulty against this backdrop to arrive at the inescapable conclusion that the Tribunal was on *terra firma* when it held that the fish ponds were outside the appellant's boundaries. The argument by the appellant that the fish ponds were within his boundaries as the respondent had placed beacons in 2010 to mark the boundary for the appellant's land which included the area where the fish ponds were created flies in the teeth of the evidence.

Pertaining to the allegation of biasness of the Tribunal in favour of the respondent, I find this has not been established. Based on the documentary evidence on record I find that rules of natural justice were complied with in that both parties were given an opportunity to be heard. Secondly having scrutinized the findings of the Tribunal I find no pretext upon which I can fault their findings.

I have come to the conclusion that all the grounds of appeal are bereft of merit.

I accordingly dismiss it with costs to the respondent to be taxed in default of agreement.

Dated at Lusaka this 25th day of October 2017.



Judge Betty Majula-Mung'omba
HIGH COURT