

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

2017/HP/1546

(Civil Jurisdiction)



IN THE MATTER OF:

**ORDER 113 OF THE RULES OF
THE SUPREME COURT WHITE
BOOK) 1999 EDITION**

IN THE MATTER OF:

**PLOT NO. 159/38B GARDEN SITE
3 LUSAKA**

IN THE MATTER OF:

**APPLICATION FOR AN ORDER OF
EVICTION ON PLOT NO. 159/38B
GARDEN SITE 3 LUSAKA**

B E T W E E N :

AARON BANDA

APPLICANT

AND

JACKSON NKHOMA

RESPONDENT

**Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the
30th day of November, 2017**

For the Plaintiff : *In Person*
For the Defendant : *In Person*

J U D G M E N T

Cases Referred To:

1. *Khalid Mohamed v Attorney General (1982) ZR 49*

Legislation Referred To:

1. *Rules of the Supreme Court 1999*

By originating summons, the Applicant seeks:

- (i) *A declaration that the Applicant is the rightful owner of the piece of land.*
- (ii) *An order to demolish any structure illegally constructed by the Defendant on the said piece of land.*
- (iii) *An eviction order to the Respondent, his agents, tenants, servants or whoever may be deriving authority from the Defendant, from the said piece of land.*
- (iv) *An order restraining the Respondent either by himself, his agents, or servants or whosoever, from harassing, intimidating, trespassing and/or carrying out any construction work of any structure at the said piece of land.*
- (v) *Any other relief that the Court may deem fit.*
- (vi) *Costs of and incidental to the proceedings.*

The summons are supported by an Affidavit sworn by **Aaron Banda** who states that he is the biological son of Patricia Lungu who died intestate in 2016. That he obtained Letters of Administration on 30th June, 2017 from Matero Local Court as shown in the exhibit marked "**AB4**." He avers that before his mother's demise, she was on 15th January, 2016, given a subdivision of Plot CH/282/9013 by the Evangelical Mutumwa Spiritual Church. That this was by deed of gift. Further, that Reverend Robin Phiri acted on behalf of the Church. The deponent states that he received the Deed of Gift from the Church on 18th July, 2017, as shown in the exhibit marked "**AB5**."

He avers that Plot CH/282/9013 was given to Evangelical Mutumwa Spiritual Church by the Lusaka City Council on 10th November, 1997 as shown in the exhibit marked "**AB2.**" That his mother's land is approximately 30 metres by 24 metres in size covering an area of 720 metres and located in the south-west. This is shown in the sketch plan produced as exhibit "**AB3.**"

The deponent states that the Respondent encroached his land with the assistance of political party cadres. That he has threatened to kill him or his other family members if they prevent him from building a house on the property. The deponent states that the Respondent has no claim of right and prays for an order of possession.

Jackson Nkhoma filed an Affidavit in Opposition, where he states that he did not encroach the Applicant's property. That his property is different from the Applicant's as shown in the exhibit marked "**JN2.**" Further, that he acquired the property from his deceased mother in 2008, who was given land by the Lusaka City Council Garden Site 3 office.

The deponent avers that his mother died in 2010, before she could develop the property. That she introduced him to the occupants of the neighbouring plots before her death. The deponent states that he met the Applicant's mother on his plot in the company of Mrs. Dorothy Chisanga. That the Applicant's mother had a garden on his plot and he asked her to vacate it. That she asked for ZMW400.00 as compensation for her garden produce and he paid her in the presence of Mrs. Dorothy Chisanga and Mr. Racking Zulu.

The deponent states that sometime in 2016, the Applicant reported him to the Lusaka City Council Garden Site 3 office alleging that he encroached his plot. That the Council went on site and defined the boundaries of the two plots, and concluded that they were different from each other as shown in the exhibit marked "**JN3.**" He denies that he threatened the Applicant or any member of his family with death. He prays to the Court to dismiss the application with costs.

In the Affidavit in Reply, **Aaron Banda** states that the receipt and statement of ground rent exhibited by the Respondent in “**JN2**” is not for the property in dispute and belongs to Plot No. 124/67 in Garden popularly known as Garden Gabon. That “**JN2**” is meant to mislead the Court as the Respondent does not have any documents entitling him to build on his land. Further, that the Plot in issue is 159/38 Garden Site 3, which was given to him by Deed of Gift as shown in the exhibit marked “**AB6**.” The deponent states that his deceased mother was never paid K400.00 by the Respondent.

At the hearing, the parties relied on the Affidavits filed herein, which I have earnestly considered. Order 113 of the Rules of the Supreme Court provides that:

“Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.”

Order 113 of the Rules of the Supreme Court entitles a person who claims possession of land, which has been occupied by persons without his licence or consent to eject such persons. These persons

are considered as squatters or trespassers and have no claim of right.

In the case of **Khalid Mohamed v The Attorney General**¹, the Supreme Court held that a Plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. It therefore follows that for the Applicant to succeed, it would not be enough to say that the Respondents have completely failed to provide a defence but that the evidence adduced establishes the issues raised to the required standard of proof, that is on a preponderance of probabilities.

In support of his application, the Applicant produced the offer letter for Stand No. CH/282/9013 in Garden Site office 3, Lusaka issued to the Evangelical Mutumwa Spiritual Church by the Lusaka City Council dated 10th November, 1997. This is shown in the exhibit "**AB2**." He has also produced a Deed of Gift between Reverend Robin Phiri who acted on behalf of the Church and himself as Administrator of his deceased mother's estate (Patricia Lungu) for a portion of Stand No. CH/282/9013. Clause 1 of the Deed of Gift in exhibit "**AB5**" reads:

“1. The donor hereby freely and voluntarily and without valuable consideration ASSIGNS unto the Donee ALL AND SINGULAR proposed subdivision ‘A’ of the property described in the second schedule aforementioned TO HOLD the same unto the Donee for all the residue of the term created by the lease SUBJECT henceforth to the payment of the said rent to the observance and performance of the covenants on the lessee’s part and the conditions contained in the lease.”

The Second Schedule of the Deed of Gift in exhibit **“AB5”**

states:

“ALL THAT proposed subdivision ‘A’ marked red on the sketch plan annexed hereto in extent 720 square metres more or less being proposed division ‘A’ of Stand no. CH/282/9013 situate in the Lusaka Province of Zambia which piece of land is more particularly delineated and described on a sketch diagram annexed hereto relating to the said land EXCEPT and RESERVED all minerals oils and precious stones whatsoever upon or under the said land.”

On the other hand, the Defendant asserts his claim on the basis of exhibits **“JN1”**, a writ of summons, **“JN2”**, a ground rent receipt for a residential quarter issued by Lusaka City Council and **“JN3”** another ground rent statement for plot 124/67.

The Applicant has not produced a certificate of title but relies on the Deed of Gift. According to section 33 of the Lands and

Deeds Registry, a certificate of title serves as conclusive proof of ownership of land. Section 33 of the Lands and Deeds Registry Act provides that:

“33. 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, estate 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.”

Order 113 of the Rules of the Supreme Court, however, is open to a person who claims that he is rightfully entitled to the possession of land. A person does not necessarily need to possess a certificate of title to prove his claim. In the present case, the Applicant is in possession of a Deed of Gift, which has not been challenged by the Respondent. The Deed of Gift is dated 18th July, 2017. However, the second recital states that the Applicant's mother was in fact given the land on 15th January, 2006 and she died intestate on 1st April, 2016. Upon obtaining Letters of Administration from Matero Local Court on 30th June, 2017, the

Applicant completed the transaction between his deceased mother and the Church by executing the Deed of Gift on 18th July, 2017.

He traces possession of the land from 15th January, 2006 as opposed to the Respondent whose claim is founded in 2008. The Respondent has produced a ground rent statement for plot 124/67, which is not in dispute and therefore has no bearing on this application. In my view, the Applicant has established an interest in the land as opposed to the Respondent.

My view therefore, is that the Deed of Gift ascribes the Applicant sufficient interest in the property for the purposes of Order 113 of the Rules of the Supreme Court. The Respondent has failed to prove his interest in the land. The showing of a ground rent payment receipt and statement does not confer him with any right to the land. He is a squatter and should therefore be evicted for being on the Applicant's land without his consent or licence.

I am fortified by section 9 of the Lands Act, which reads:

“(1) A person shall not without lawful authority occupy or continue to occupy vacant land.

- (2) **Any person who occupies land in contravention of subsection (1) is liable to be evicted.”**

I accordingly, grant the Applicant an order for possession of Plot No. 159/38B Garden Site 3, Lusaka. I further order the eviction of the Respondent, who is a squatter. The Applicant is at liberty to demolish all structures illegally erected on his property without further recourse to Court.

Costs for these proceedings are for the Applicant to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 30th day of November, 2017.

M. Mapani-Kawimbe
M. Mapani-Kawimbe
HIGH COURT JUDGE