IN THE HIGH COURT FOR ZAMBIA **2016/HN/CA.10**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

JULIUS MASUMBA	**APPELLANT**
AND	
RUTH CHILUPULA	**1ST RESPONDENT**
NATASHA CHILUPULA	**2ND RESPONDENT**
MULENGA NEDDY KAKOMA	**3RD RESPONDENT**
MIMBULULU LEWIS	**4TH RESPONDENT**
CHOLA DONNY	**5TH RESPONDENT**

BEFORE THE HONOURABLE MADAM JUSTICE M.C. MULANDA IN CHAMBERS.

For the Appellant:	**Mr. W.M. Forrest** **Messrs Forrest Price Legal Practitioners**
For the Respondents:	**Ruth Chilupula (Representing herself and the other Respondents)**

JUDGMENT

This is an appeal by one Julius Masumba against a decision of the Subordinate Court of the First Class for the Mufulira District in which the Trial Court found that the Appellant knew that the land he intended to subdivide for residential purposes was given to him by the Council as farm land, and, therefore, that he should have applied to Council for change of use from farm to residential use, before selling part of his farm. The Learned Trial Magistrate went on to order the now Appellant to apply to Council for change of use, failure to which he must refund the five Plaintiffs, who are now the Respondents in this matter, the money that he got from them, plus costs.

I wish to highlight the fact that initially, seven Plaintiffs, had filed actions against the Defendant in the Subordinate Court, under six separate actions. In one of those actions, Ruth Chilupula and Natasha Chilupula, the 1st and 2nd Respondents in this matter, had brought one action against him. On 10th February 2015, the Defendant, who is now Appellant, filed, in the Trial Court, a Summons for Consolidation of Actions. However, according to the Affidavit in Support of Application for Consolidation of Cases, filed into the Trial Court on 10th February, 2015, deposed by the Defendant, Julius Masumba, of the six cases listed in that affidavit, the cases listed at Numbers 5 and 6, that is, the cases where Brian Mwape and Chipepa Alex were Plaintiffs, were withdrawn. Letters of withdrawal were exhibited to the said affidavit. Further, according to that affidavit, the remaining cases, arose out of the same or

identical facts and that they could, therefore, be conveniently heard and determined together. The cases that remained were those listed at Numbers 1 to 4 in that affidavit, where Ruth Chilupula and Natasha Chilupula, Mulenga Neddy Kakoma, Mimbululu Lewis and Chola Donny were Plaintiffs. Upon application by the Defendant, the four actions were consolidated by the Trial Court and heard as one.

The facts of this case are as contained in the evidence of PW1, Mr. Mulenga Neddy Kakoma, the 3rd Responsent in this appeal, which evidence the Plaintiffs relied on in the Trial Court. Mr. Kakoma told the Trial Court that he had wanted a plot on the defendant's farm and that, after visiting the area and selecting a site, he paid a deposit to the Defendant. He and the other Plaintiffs went to the Mufulira Municipal Council and, after making application for consent to build on the land they were each given a building permit by the Council. The building permits were dated the 24th April, 2014, and copies of the same were filed by the Plaintiffs and the Defendant. After the Plaintiffs had started the process of building on the land pursuant to the approval of the Mufulira Municipal Council, they each expended the amounts claimed by them in their respective Affidavits in Support of Default Writ of Summons.

More than one year after the building permits were granted, the Mufulira Municipal Council revoked the Plaintiffs' building permits, even though the development which the Plaintiffs made and

expended upon was done after the Council had given them the necessary building permits. The Defendant has not, however, revoked the agreements to sell the plots to them. The Plaintiffs did not deny that such was the position.

On the other hand, the Defendant filed an affidavit in his evidence, together with the supporting documents.. The Defendant also confirmed that the contracts made with the Plaintiffs had not been set aside and was still in full force and effect. According to the Defendant, the intervention by the council and not the Defendant had caused the loss to the Plaintiffs.

Part of the Defendant's evidence in the Trial Court exhibited the Order made by the High Court in Case No. 2001/HN/404 by virtue of which the Defendant was granted possession of Farm No. 937, Mufulira, on which the Plaintiff's properties are situated.

Although the Town Clerk at Mufulira Municipal Council was ordered by the Trial Court to appear before it, he did not do so. However, two witnesses from the Council gave evidence to the effect that the Council had not given permission to subdivide, but did not state why the Council then had given building permits to the Plaintiffs. Ms. L. Tembo, a witness from the Council, confirmed that the Council now agreed, and assured the Court, that the Defendant is the legal owner of Farm No. 737 Mufulira.

The Appellant filed eight grounds of appeal, but some of them are not, in actual fact, grounds of appeal, but submissions. In summary, there are only three grounds of appeal which are as follows:

1. The Trial Court grossly misdirected itself when it found that the Appellant knew that the land he intended to subdivide for residential purposes was given to him by the Council as farm land, and, therefore, that he should have applied to Council for change of use from farm to residential use before selling part of his farm.

2. The Trial Court misdirected itself when it ordered the Appellant to apply to Council for change of use, failure to which he must refund the five Plaintiffs, the money that he got from them, plus costs.

3. The Trial Court erred in law when it failed to order the Council to proceed with the survey, after it referred to the procedure for a survey to be conducted as prescribed in Section 5 of the Land survey Act.

I must state, from the outset, that ground 3 was added only at the hearing.

At the hearing of this appeal, Mr. Forrest, Counsel for the Appellant, informed the Court that in the Court below, he filed submissions on the evidence, and that he had followed them in the grounds of appeal for the current appeal. Counsel also made oral submissions before this Court.

In the submissions that he filed in the Trial Court, which he also relied upon in this Appeal, Mr. Forrest submitted that the Defendant, (who is now the Appellant), did not cause any loss to the Plaintiffs, (who are now Respondents) or that he was in breach of contracts to them. He contended that the loss was caused by the intervention of the Council which should be condemned in the Plaintiff's losses and ordered to compensate them or to allow them to perfect the transfer of the respective properties to them.

Mr. Forrest further submitted that the Mufulira Municipal Council has not denied granting the Building Permits nor has it denied having revoked them after allowing the Plaintiffs to expend on the development of their plots as confirmed in evidence by the Plaintiffs and the Council. He submitted that the Defendant, as owner of Farm 937, followed up a grant of the Building Permits by visiting the Town Clerk at the Council and making the formal application for the sub-division and development approved by the Council. He further submitted that Miss Tembo, the Council representative, gave evidence in confirmation thereof.

In his oral submissions at the hearing of this appeal by this Court, Mr. Forrest submitted, in relation to ground one of appeal, that the Plaintiffs (who are now Respondents) made applications to the Defendant (who is now the Appellant) to grant them the portions of land in issue, after which they made applications to the Council to grant them building permits. He went on to submit that they carried out certain developments and that, after a year, the Council stopped them from continuing with their development, and there was a hold up in relation to further developments. He submitted that, at that time, the Appellant wrote to the Council to lift the hold up on further developments. In short, Mr. Forrest submitted that Mufulira Municipal Council gave the Respondents permission to develop the land.

Mr. Forrest further submitted that the Appellant has no intention of interfering with the grant of those portions of land to the Respondents, and that the Respondents have the right to continue with the grant of that land. He went on to submit that the Respondents have never been excluded from the land, as the Appellant has never interfered with their occupation of the land. It was his further submission that the matter of ownership and possession of the land by Mr. Masumba, the Appellant, was re-confirmed by the High Court on 18th December, 2014 and that he remained in possession.

It was Mr. Forrest's further submission, with regard to ground two, that the Mufulira Municipal Council had nothing to do with the matter, as the position is purely administrative. He submitted that the Respondents have not raised any objection and that they are still in possession of the said plots, and have expended substantially on the development of the property in issue. He submitted that if the Respondents so wish, they are free to dispose of their property by way of sale.

As regards Ground 3, it was argued on behalf of the Appellant that the setting out in full, by the Magistrate, of Section 5 of the Survey Act should have made an order of the Court for the Council to comply in full with the Act. For these reasons, Mr. Forrest prayed to Court to determine the appeal in favour of the Appellant.

At the hearing, Mrs. Ruth Chilupula represented the Respondents. In response to Ground one of appeal, she submitted that the Trial Court was on firm ground when it found that the Plaintiff (now the Appellant) needed to apply to Council for change of use from farmland to residential purposes before selling part of his farm. She submitted that when the Respondents told the Appellant that the Council told them that he was supposed to effect change of use from a farm to residential plots, he refused to go to the Council and never reported back anything to the Respondents after that. Mrs. Chilupula further submitted that although, in the Trial Court, the Appellant confirmed that he was the owner of the farm, he was told

in Court that he was supposed to follow the procedure for subdivision and that he should apply for change of use and engage surveyors to survey the land and subdivide it.

In relation to Ground two, Mrs. Chilupula submitted that the Trial Court was on firm ground when it ordered the Appellant to apply to the Council for change of use and that if he fails to do so, he should refund the Appellants their money, plus costs. It was her further submission that when she and the other Respondents went back to the Council, they were told that their building permits which the Council had given to them had been cancelled, and that if they continued to build they would lose out. It was her further submission that when they informed the Appellant about it, he told them that it was not him who had stopped them from building and that he had already sold them the plots. She submitted that the Appellant refused to give them back their money. and contended that if the appellant fails to comply with the Court's decision, he must refund the Respondents the money, because the money was losing value. She submitted that the Trial Court did not misdirect itself and that it was on firm ground when it decided the way it did, so that there can be justice between the parties. As regards Ground 3 of appeal Mrs. Chilupula did not make submissions in response, on behalf of the Respondents.

As regards Ground 3 of appeal, Mrs. Chilupula did not make any submissions in response, on behalf of the Respondents.

I have scrutinized the grounds of appeal, the submissions that Counsel for the Appellant filed in the Trial Court, as well as the submissions which he made before this Court. I have also scrutinized the submissions on behalf of the Respondents, made before this court. In this judgment, I shall deal with grounds one and two of appeal together.

While I do appreciate Mr. Forrest's argument that the Appellant did not cause any loss to the Respondents and was not in breach of contracts to them, I must state that the Appellant did not follow the provisions of the repealed Town and Country Planning Act, Chapter 283 of the Laws of Zambia, which was then in force, which in this judgment, I shall refer to as "the repealed Act". This repealed Act was repealed on 14th August 2015, by the Urban and Regional Planning Act No.3 of 2015 of the Laws of Zambia. Therefore, at the time that the Respondents bought their pieces of land from the Appellant on various dates in April, May and June 2014, it was the repealed Act which was in force. Section 22 of the repealed Act provided 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.*** *(This,*

according to Section 2 of the repealed Act, was the 16th November, 1962).

(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 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."

(3) In this Act, "subdivision", in relation to land, means the division of any holding of land into two or more parts, whether the subdivision is effected for purposes of conveyance, transfer, partition, sale, gift, lease, mortgage or any other purpose, and "subdivide" has a corresponding meaning.

(4) In this Act, "development" means the carrying out of any building, rebuilding or other works or operations on or under land, or the making of any material changes in

the use of land or buildings but shall not include –

(j) development outside a development plan area in any of the following, namely, forest reserves, protected forest areas and game reserves, but excluding the sitting of buildings within nine hundred and fifteen metres from the centre line of any road or proposed road;"

Further, Section 23(4) of the repealed Act provided for the grant of permission for development and subdivision of land through a development or subdivision order issued by the line Minister. For the avoidance of doubt, the relevant part of that section provided that:

(4) The Minister may, in any subdivision order in respect of land situated outside the area of a structure plan or local plan or approved structure plan or local plan, grant permission-

(a) for residential purposes or purposes ancillary thereto:

Provided that-

(i) no subdivision shall be less than twenty-five acres in extent;

(ii) a condition that there shall be no further subdivision of the subdivision is stipulated by him in the approval;

(iii) the land to be subdivided is not considered by the Environmental council of Zambia to be of high agricultural value;

This provision shows that even in respect of a subdivision of land that is situated outside the area of a development plan or approved development plan, permission to subdivide the land for residential purposes or purposes ancillary to residential purposes was required.

The evidence given before the Trial Court shows that the Appellant's land was in a forest (farm), but he demarcated the land into small residential plots. In this case, there was no evidence produced before the Trial Court to show that permission for change of use or subdivision of the Appellant's Farm was granted by the Mufulira Municipal Council ("the Council") or the Minister, as the case may be. Clearly, in terms of the repealed Act, the Appellant was supposed to apply, to the Council, for change of use of the relevant portion of his farm from farming to residential use, before demarcating it into residential plots. That having been said, I must state that supposing the Appellant had applied for change of use as stated above, and it was granted, then, the Respondents would have also been required to apply for planning permission before starting to construct houses on the plots in issue. However, in the current

case, in the first place, the Appellant had not applied for change of use from farming to residential use in respect of the area that he demarcated into residential plots. That, logically, follows that the Respondents were not legally entitled to apply for planning permission without the Appellant having fulfilled the condition precedent to the demarcation of the relevant portion of his farm into residential plots. This condition precedent was the application for change of use from farming to residential use and the granting of permission by the Council to do so. Therefore, the various applications by the Respondents, to the Council, for planning permission were irregular, even though they, as laymen, did not know this.

I must, however, state that, as regards the granting of planning permission to the Respondents, which was later cancelled by the Council, the fault lies on the Council which did not do proper investigations to find out if the Appellant had applied for, and obtained, the requisite permission for change of use from farming to residential use, and also to subdivide the relevant portion of his farm and sell it to the Respondents.

Section 30 of the repealed Act provided for revocation and modification of planning permission by the Minister or the planning authority. For the avoidance of doubt that Section provided, in part, as follows:

"30. (1) Subject to the provisions of this section, if it appears to the Minister or planning authority to whom functions have been delegated under section twenty-four that it is expedient, having regard to the structure plan or local plan or approved structure plan or local plan and to any other material considerations, that any permission to develop or subdivide land granted by a development or subdivision order or on an application made in that behalf under this Part should be revoked or modified, he may by order revoke or modify the permission to such extent as appears to him to be expedient as aforesaid.

(2) The power conferred by this section to revoke or modify permission to develop or subdivide land may be exercised-

(a) where the permission relates to the carrying out of building or other operations, at any time before those operations have been completed;

(b) where the permission relates to a change of the use of any land, at any time before the change has taken place:

(3) Where permission to develop or subdivide land is revoked or modified by an order

made under this section, then if, on a claim made to the Minister or planning authority within six months of the making of the order, it is shown that any person interested in the land has incurred expenditure in carrying out work that is rendered abortive by the revocation or modification, or has otherwise sustained loss or damage that is directly attributable to the revocation or modification, the Minister or planning authority shall pay to that person compensation in respect of that expenditure, loss or damage.

This section empowers the Minister or the council which is the planning authority to revoke any permission to develop or subdivide the land, as the case may be. In the current case, what was revoked by the Council was the permission to develop the land, and not permission to subdivide the land, as this was never applied for by the Appellant.

In terms of section 31(1) of the repealed Act, the Minister or planning authority to whom functions have been delegated by the Minister is empowered to serve on the owner and occupier of the land a notice (hereinafter called an enforcement notice) where development or subdivision of land has been carried out after the appointed day without the grant of permission required in that

behalf under this Part, or if any conditions subject to which such permission was granted in respect of any development or subdivision have not been complied with. This was to be done within four years of such development being carried out, if the Minister considered it expedient so to do having regard to the provisions of the appropriate structure plan or local plan or approved structure plan or local plan, if any, and to any other material considerations.

In terms of subsection (3) of Section 31 of the repealed Act, any enforcement notice served under subsection (1) was required to specify the development or subdivision that was alleged to have been carried out without the grant of permission for development or subdivision of land, as the case may be, and may require, among other things, the discontinuance of any use of land or the carrying out on land of any building or other operations.

In terms of subsection (6) of section 31 of the repealed Act, if any person on whom an enforcement notice was served under subsection (1) of that section was aggrieved by the enforcement notice, that person was at liberty to, at any time within a period of not less than twenty-eight days after service of such notice, as may be specified in the enforcement notice itself, appeal to the Town and Country Planning Tribunal.

If the Tribunal was satisfied that permission was granted for the development to which the enforcement notice related, it would quash the enforcement notice to which the appeal related. The Appellants, in the first place, should have appealed to the Town and Country Planning Tribunal, instead of rushing to the Court for redress. While I agree with Mr. Forrest that the loss occasioned on the Respondents was caused by the intervention of the Council, I do not agree that only the Council should be condemned in the Respondents' losses. There is evidence given in the Trial Court by Ms. Lorraine Tembo, who testified on behalf of the Mufulira Municipal Council, that the Appellant is the owner of Farm No. 937, which is known as Mufulira Farms and that he is a Managing partner of those farm. That witness also told the Trial Court that farm No. 937 is not divided in accordance with the repealed Act, and that the use has not been changed from farm to residential, and that it is for these reasons that the Council could not approve the building permits. However, according to Ms. Lorraine Tembo, the Appellant had on two occasions gone to the Council to inquire about the procedures for change of use and subdivisions and that she explained those procedures, but he never followed those procedures. Further, according to Ms. Lorraine Tembo, the building permits were issued without Full Council Meeting, in which case she said there was an irregularity, as a result of which they were withdrawn by the Council.

Therefore, since the applicant had gone to the Council before to inquire about change of use and subdivisions and stated in his evidence before the Trial Court that his intention is to vest the property into the Plaintiffs (now Appellants), I do not think that there would be any problem on the part of the Appellant to apply for change of use and subdivision of the said farm. He also told the Trial Court that the building plans have never been revoked, therefore, ordering him to refund the Respondents their money would not be in the interest of justice, as the Respondents have already expended substantial amounts of money on the developments that they have so far carried out on their plots. In this regard, I reverse the order of the Trial Court that the Appellant refunds the Respondents their money. However, since the Appellant is the one who started the wrong-doing, by not following the legal procedure of applying for change of use of the portion of his farm that was subdivided into residential plots and offering those plots to the Respondents, I order that he applies to the Council for change of use, demarcation of the said piece of land into residential plots and permission to assign the said plots to the Respondents.

The Trial Court was, therefore, on firm ground when it found that the now Appellant needed to apply to the Council for change of use from farm to residential use. There is also evidence from Mulenga Neddy Kakoma, who testified on behalf of the now Respondents, who were Plaintiffs in the Trial Court that the Council made building plans, and issued a building permit to each of the

Respondents, but, after they had carried out some developments on their respective plots, the Council, and not the Appellant, told them to stop building for the reason that Council had not approved the developments. They were also told that there was a dispute over the land in issue. Thereafter, the building permits were cancelled.

I must state that the Council was, negligent in not carrying out due diligence investigations to find out what kind of land they were issuing building permits for, before issuing the same to the Respondents, and later revoking them. For the reasons I have given, and in the interest of justice, I order that the Appellant applies to the Council for change of use from farming to residential use within 30 days from the date of this judgment. Since he has already demarcated part of his land into smaller plots, he must regularize that act by applying for permission to subdivide the relevant part of his farm into the plots which he sold to the Respondents, within 14 days after the application for change of use has been granted to him. Since the Respondents have already spent some money on the developments that they have carried out on the plots in issue, I order the Council to allow the Appellant to effect change of use and legally subdivide and transfer the said plots to the Respondents. I further order the Council to grant the Respondents planning permission in relation to the Plots in issue after it has granted the Appellant permission to subdivide the land where those plots are situated, into residential use, so that they can continue with the developments that they have started on the plots. Finally, I order

the Council to generally do whatever it is legally supposed to do to facilitate the subdivision of the portion of the Appellant's farm in issue, into residential plots. Having said this, I shall not deal with Ground 3 of appeal, which is that the Trial Court erred in law when it failed to order the Council to proceed with the survey, after it referred to the procedure for a survey to be conducted as prescribed in Section 5 of the Land survey Act. This is because, I feel that it is not relevant anymore in view of the orders that I have made in this Judgment. I am, however, of the strong view that the Council should have been joined to these proceedings as 2nd Defendant, as they played a major role in the existence of this case.

Appellant to pay costs to the Respondents.

Leave to appeal is granted.

DATED THIS 25th **DAY OF** August **2017.**

M.C. MULANDA
JUDGE