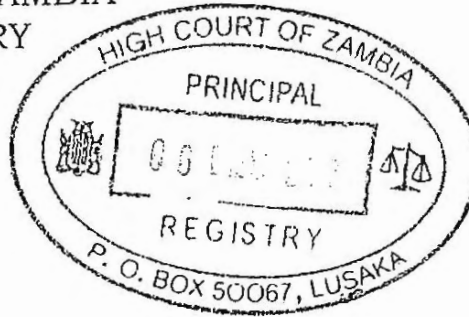


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA

2010/HP/0636

(Civil Jurisdiction)



BETWEEN:

BENJAMIN NKOWANE
ANNETE MWANSA NKOWANE

1st Plaintiff
2nd Plaintiff

AND

ZAKARIA SIMUKONDA
SUNSHINE SIAFWA MALAMBO
ATTORNEY GENERAL

1st Defendant
2nd Defendant
3rd Defendant

Before the Hon. Mrs. Justice N.A. Sharpe-Phiri on the 6th December 2017

For the Plaintiffs: Mr. K. Simbao of Messrs Mulungushi Chambers
For the 1st Defendant: No appearance
For the 2nd Defendant: Mr. R. Ngulube of Messrs Tembo Ngulube & Associates
For the 3rd Defendant: No appearance

J U D G M E N T

Legislation referred to:

1. Lands and Deeds Registry, Act Chapter 185 of the Laws of Zambia
2. The Supreme Court Practice, 1999 Edition, White Book
3. The Land Survey Act, Chapter 188 of the Laws of Zambia

Cases referred to:

1. Sebastian Zulu v The People (1991) S.J (S.C)
2. Raphael Ackim Namungandu v Lusaka City Council (1978) ZR 358
3. Zambia Consolidated Copper Mines Limited v Eddie Katalayi and Max Chilongo (2001) ZR.28

Benjamin Nkowane and Annete Mwansa Nkowane, (the Plaintiffs) commenced this action by writ of summons on 16th June 2010 against Zakaria Simukonda (the 1st Defendant).

The brief facts of this matter are that the Plaintiffs were the registered owners of a property known as Stand number 225, Chelston, Lusaka. They commenced development on their property and left Zambia for some time. Upon their return they discovered that the 1st Defendant had built a house on the property they believed to be theirs. This prompted them to commence this action seeking possession of the property from the 1st Defendant. The 1st Defendant was the registered owner of a property known as subdivision 225 of subdivision A of Farm number 609, Lusaka which he sold to the 2nd Defendant, whilst these proceedings were underway. The 2nd Defendant is now in occupation of the said property and registered as the owner of subdivision 225 of subdivision A of Farm 609, Lusaka.

In the statement of claim, the Plaintiffs allege that they are the registered proprietors of the property known as Stand 225, Chelston, Lusaka and that a Certificate of Title L2681 in respect of the property was issued to them on 20th June 1994. They contended further that following the issuance of title, they obtained planning permission from the Council to construct a clinic on the property and later proceeded to construct a boundary wall fence thereon. However, sometime in November 2005, they discovered that the 1st Defendant had built a house on their property and that he has remained there without their consent. The Plaintiffs now seek possession of the property and/or in the alternative, an order for payment of the commercial value of the property plus \$43,400 or its Kwacha

equivalent for improvements made on the property. They also claim for damages for trespass and any other remedy that the Court may deem fit.

The 1st Defendant filed a conditional memorandum of appearance on the 12th July 2010 and a defence on 14th July 2010.

In his defence, the 1st Defendant contended that he is the registered owner of property number F/609/A/225 situated in Chelston, Lusaka and that the layout plans from the lands register are proof of his ownership of the property. He denied being in occupation of the Plaintiffs property or that the Plaintiffs were entitled to any of the reliefs sought.

This case was initially allocated to the Honourable Sunkuntu, J but following my sister's transfer, the matter was reallocated to my Court on 4th December 2012. The matter was scheduled for hearing before me on 24th January 2013. On the said date, both Counsel for the Plaintiff and the Defendant were in attendance. Defence Counsel sought an adjournment of the matter on the basis that Counsel having conduct of the matter was indisposed. The matter was rescheduled for commencement of trial on 25th June 2013. However, on that date, trial of the matter could not commence in view of an application brought by the Plaintiff for joinder of the Attorney General. The matter was adjourned. The matter came up for hearing on 19th September 2013. After discussions, the parties were directed to explore an ex-curia settlement. A notice of discontinuance of the joinder application was filed on 1st October 2013.

The matter was set down for hearing on 14th November 2013. On the said date, the Advocates were present.

The Court directed the parties to obtain a survey report from the Surveyor-General on the physical locations of the properties in question. The matter was rescheduled for hearing on 5th March 2014. It was later rescheduled to 6th May 2014 on account of a notice of motion brought by the 1st Defendant's Advocates. On the said date, the matter was rescheduled to 9th June 2014 on account of an illness of Defence Counsel Mr. Linyama. On 9th June 2014, the Defendant's counsel informed the Court that he could not proceed as they did not have instructions. The matter was adjourned to 16th September 2014.

On that date, Counsel for the Plaintiff was in attendance but the Defendant's Counsel was absent. The Court was informed that the 1st Defendant's Counsel had filed an application to withdraw from the record. The matter was therefore adjourned to enable service of process be effected directly on the 1st Defendant. On 18th November 2014, the Plaintiff's Advocate was in Court but the 1st Defendant was absent. Notwithstanding there being proof of service from the affidavit of service of 29th October 2014 that the 1st Defendant had been duly served with the notice of hearing, the Court opted to give the 1st Defendant the benefit of doubt and rescheduled the matter for hearing on the 9th February 2015. A notice of hearing for trial of the matter was issued. The matter was later rescheduled to 19th March 2015 on account of criminal sessions.

On 19th March 2015, the Plaintiff and his Counsel were in attendance but the 1st Defendant was absent. Although there were numerous affidavits of service on file, the Court adjourned the hearing to give the 1st Defendant one last opportunity to attend. The Court ordered that it would not entertain further adjournments on the part of the 1st Defendant.

The trial was scheduled for hearing on 16th April 2015. On that date, the Plaintiffs' Advocate was in attendance but the 1st Defendant was absent. An affidavit of service of 8th April 2015 showed that the 1st Defendant was duly served with a notice of hearing. Being satisfied that the 1st Defendant was fully aware of the hearing date, and had had sufficient opportunities to attend, the Court allowed the Plaintiff to commence trial in the absence of the 1st Defendant.

The Plaintiffs' only witness was **Fergus Nkowane**, PW1. His evidence was that he was the 1st Plaintiff's brother and that he was acting on behalf of the Plaintiffs by virtue of a Power of Attorney. He testified that the Plaintiffs were the registered owners of the property known as Stand 225, Chelston, Lusaka and that they were issued with a Certificate of Title in respect of this piece of land on 23rd June 1994. He stated further that, in November 2005, they had discovered that the 1st Defendant had built a house on the Plaintiff's property and that he was claiming ownership of the said property. He proceeded to conduct a search at the Ministry of Lands which revealed that the 1st Defendant had title to a piece of land in Avondale known as Plot number 225, Lusaka which property he believed to be different property from that of the Plaintiffs. He concluded by restating the Plaintiffs claim for possession of the subject property.

After the conclusion of PW1's testimony, the matter was adjourned to 21st May 2015 to avail the 1st Defendant an opportunity to cross examine PW1 and to present his defence. The Plaintiff's Advocates were directed to notify the Defendant of the hearing date. On 21st May 2015, the Plaintiffs' Advocate was in attendance but the 1st Defendant was absent. No reasons were advanced to the Court for the non attendance of the 1st Defendant.

The Court was referred to an affidavit of service of 15th May 2015 which showed that the 1st Defendant had been served with the notice of hearing on 13th May 2015.

Being satisfied that the 1st Defendant was aware of the hearing date, I allowed the Plaintiffs to close their case. The 1st Defendant not being in attendance to present his defence despite having been given ample opportunity to defend the case, the trial was closed. The parties were invited to file written submissions by 28th May 2015. The Court was informed that the office of the Surveyor General had requested for time to comply with the directive of the Court issued on the 13th November 2013 to render a Survey Report in respect of the two properties in contention namely property number CHELS/225 and subdivision number 225 of subdivision A of Farm 609, Lusaka. The court directed the Plaintiff to pursue the Surveyor General's Office for the survey to be undertaken. A report of the Surveyor General was filed into Court on 13th January 2016.

The matter was scheduled for hearing on 27th January 2016. The Court directed that a copy of the Surveyor General's report be served on the 1st Defendant. In order for the parties to have an opportunity to examine the contents of the report of the Surveyor General, the matter was rescheduled to 11th February 2016.

On the 11th February 2016, Counsel for the Plaintiff was in attendance but there was no appearance for the 1st Defendant. The Court observed that an application for joinder of a party had been filed. A return date was issued for the said application for 17th February 2016.

By the said application, one Sunshine Siafwa Malambo sought to be joined to the action as 2nd Defendant. The application for joinder was heard on 17th February 2016. Counsel for the Plaintiff was present but the 1st Defendant and Counsel for the intended 2nd Defendant were absent. Notwithstanding the absence of Counsel for the intended 2nd Defendant, the Court proceeded to entertain the application for joinder as the Plaintiff's Counsel notified the Court that they had no objection to the application. The 2nd Defendant was accordingly joined to the action. The 2nd Defendant was directed to respond to the matter and the case was adjourned to 7th April 2016. On that date, Counsel for the Plaintiff was in attendance but there was no appearance for both the 1st and 2nd Defendants. The matter was rescheduled to 12th April 2016. On the said date, both Counsel for the Plaintiff and the 2nd Defendant were present. Fresh orders for directions were issued to the parties and on the 21st April 2016, the 2nd Defendant was granted leave to re-open the case.

The 2nd Defendant filed a memorandum of appearance and defence on 3rd May 2016. In her defence, she contends that she was the beneficial owner of the property known as subdivision 225 of subdivision A of Farm 609, Lusaka having purchased the same from the 1st Defendant on 26th July 2013. She contended further that prior to the purchase of the property she had conducted requisite searches at the Lands and Deeds Registry and she had ascertained that the 1st Defendant was the owner of the property. She stated that she had purchased a fully completed house from the 1st Defendant and that she had enjoyed quiet possession of the property since the day of purchase. She concluded by stating that she was aware that the Surveyor General had produced a report dated 13th January 2016 indicating that there were no maps at the Ministry of Lands that showed

Stand 225, Chelstone and that the Chelstone area was actually part of Farm 609, Lusaka.

The Plaintiffs filed a reply to the 2nd Defendant's defence in which they dispute that the 2nd Defendant is the beneficial owner of subdivision 225 of subdivision A of Farm 609, Lusaka. They contend that the 1st Defendant's title to the property was defective and thus he could not pass a defective title to the 2nd Defendant. They contended further that the 1st and 2nd Defendants were fully aware of these court proceedings as the court processes had been served at the subject property. On the question of the report of the Surveyor General, the Plaintiffs stated that the report clearly indicated that the Plaintiffs and 1st Defendant's certificates of title had the same diagram but that the Plaintiff's title was obtained earlier. They contended further that the 1st Defendant's title had a supersede diagram attached thereto and that it was not normal to use a supersede diagram to generate a new offer to the 1st Defendant.

The 2nd Defendant filed bundles of documents on the 18th May 2016.

The matter was scheduled for hearing of the 2nd Defendant's case on 26th May 2016. On the said date, both Counsel for the Plaintiffs and the 2nd Defendant were in attendance. The 1st Defendant was absent. The Court allowed the 2nd Defendant to present her case.

The 2nd Defendant testified on her own behalf as DW1. Her evidence was that she was a head teacher at Northmead Secondary School and that sometime in 2012 she had rented a 4 bed roomed house in Chelston from the 1st Defendant. She stated that the 1st Defendant subsequently offered

to sell the property to her in July 2013 for the sum of K300,000. She accepted the offer and a contract of sale was executed between them on 26th July 2013 (*refer to pages 1-4 of the 2nd Defendant's bundle of documents*). She contended further that prior to entering into an agreement to purchase the property she had conducted a search at the Lands department to ascertain whether there were any encumbrances on the property. Her searches revealed that there were no encumbrances. She referred the Court to a print out of the Lands Register shown at pages 18 to 19 of her bundles of documents. She contended further that the legal counsel of the Pension Funds Scheme, (who availed her with a loan to buy the property), had also conducted a search at the Lands and Deeds Registry. Further, that the 1st Defendant had produced title to the property which showed that he was the registered owner of the property (shown at *page 8 of the 2nd Defendant's bundle of documents*). In relation to this action, she stated that she did not know the Plaintiffs and that she only became aware of this action in February 2016 when the Plaintiffs' advocates delivered a copy of the report of the Surveyor General to the property.

In cross-examination, DW1 contended that she was not aware that the Plaintiffs had constructed on the property nor had she seen the Plaintiffs certificate of title. When directed to a copy of the Certificate of Title issued to the Plaintiffs, she conceded that this title deed showed that the title was issued to them in 1994. She conceded also that the report of the Surveyor General indicated that the diagrams on the certificates of title for both the Plaintiffs and Defendants properties were the same; that the property being claimed by the Plaintiffs and the Defendants was the same property and that the Plaintiffs had acquired their title first in 1994.

The 2nd Defendant also conceded that the offer issued to the 1st Defendant was generated from a supersede diagram which was not normal practice. Finally, she stated that she had learned that the 1st Defendant had initially engaged a lawyer to represent him in this case and that he was aware of these proceedings.

In re-examination, DW1 restated that the Surveyor General had indicated that although two different title deeds were issued to the parties, there was only one diagram in existence and this was utilised for both plots. She maintained that she was the registered owner of subdivision 225 of subdivision A of Farm 609, Lusaka.

That marked the close of the 2nd Defendant's case. The parties were invited to file submissions. Having carefully reviewed the evidence on record, the court was of the view that the Lands Department needed to be heard in order for the issues in this matter to be fully determined. On the 31st March 2017, the Court proceeded, on its own motion, to order that the Attorney General be joined to these proceedings as the 3rd Defendant. The matter was scheduled for hearing on the 28th April 2017.

On this date, only Counsel for the Plaintiff and the 2nd Defendant were in attendance. The Court was informed that the 3rd Defendant had been served with the process. An affidavit of service dated 26th April 2017 was on record. The matter was adjourned to 11th May 2017 and subsequently 24th May 2017 to give the 3rd Defendant an opportunity to attend. The matter came up for hearing on the 24th May 2017, Counsel for the Plaintiff, 2nd and 3rd Defendants were all in attendance. Counsel for the 3rd Defendant sought an adjournment of the matter to explore an ex-curia settlement as

the State was of the view that this matter ought to have been resolved out of court. The application was allowed and the matter adjourned to 30th June 2017. On the 30th June 2017, Counsel for the Plaintiff and the 2nd and 3rd Defendants were present. Counsel for the Plaintiff lamented that the State had not taken any active steps to explore the out of court negotiations. He urged the Court to proceed to render judgment in the matter. Counsel for the 3rd Defendant notified the Court that the Attorney General was still desirous to settle the matter and that they had intended to offer the Plaintiff an alternative piece of land. He pleaded with the Court for more time to be granted to the 3rd Defendant to resolve the matter. The Court allowed an adjournment but indicated that it would not entertain any further adjournments on the part of the 3rd Defendant. The Court further directed Counsel for the 3rd Defendant to file its defence. The matter was adjourned to the 8th August 2017 and subsequently to 24th August 2017. On the said date, only Counsel for the Plaintiff was in attendance. He lamented once again that the State had not taken any active steps to engage the parties on an ex-curia settlement as undertaken nor had they presented any defence to the Court since March 2017. He urged the Court to proceed to render judgment in the matter. The Court proceeded to close the 3rd Defendant's case and reserved its judgment.

The Plaintiffs submissions were filed on 28th May 2015. In these submissions, Counsel for the Plaintiffs repeated in substance the contents of the statement of claim. He argued that the investigations carried out by the land surveyors had revealed that although the 1st Defendant's property was subdivision no. 225 of subdivision A of Farm No. 609, Lusaka he had built on the wrong plot. Counsel contended further that the 1st Defendant had no defence to the action and hence his failure to attend Court.

Counsel cited the case of **Raphael Ackim Namungandu v Lusaka City Council** in which the Supreme Court decided that squatters build at their own risk. Counsel submitted that the Plaintiffs have been unable to use the property since 2005 and have suffered loss as a result of the trespass. He urged the Court to rule in favour of the Plaintiffs.

The 2nd Defendant filed submissions on 13th June 2016. Counsel for the 2nd Defendant argued that the issue in contention was whether the Plaintiffs were correctly asserting ownership of the property situated at subdivision 225 of subdivision A of Farm 609, Lusaka. He argued that the Plaintiffs certificate of title showed that they owned a property referred to as Stand 225 Chelston whereas the property that was sold to the 2nd Defendant is known as subdivision 225 of subdivision A of Farm 609, Lusaka. Counsel submitted that the Surveyors report shown at pages 20 to 27 of the 2nd Defendant's bundle of documents clearly establishes that Chelston is located in Farm 609, Lusaka. Therefore, the properties located in Chelston are a subdivision of Farm 609, Lusaka. He stated further that if the Plaintiff's property was not a subdivision of Farm 609, Lusaka, then the Plaintiff's plot was not located in Chelston. He submitted further that the Surveyors report confirmed that the Plaintiff's property is known as Stand 225, Lusaka and that this property does not have data at the Ministry of Lands save for a computer printout. Counsel argued that it is therefore not plausible for the Plaintiff to conclude that their land is located in Chelston. Counsel insisted that the Plaintiff' Certificate of Title was fake or a forgery. Finally, Counsel argued that the computer printout from the Lands Registry clearly showed that the property known as subdivision 225 of subdivision A of Farm 609, Lusaka was registered in the name of the 1st Defendant and that there was no encumbrance registered on the property.

Counsel insisted that the Plaintiff's property is distinct from the 2nd Defendant's and that there was no application to impeach the 2nd Defendant's title. He urged the Court to dismiss the action with costs.

The Plaintiffs filed additional submissions on 14th June 2016 in which Counsel highlighted that the 1st Defendant had not defended the action and that he had proceeded to dispose of the property despite knowing that the title was disputed and that the proceedings in relation to the property were in Court. Counsel argued further that the 2nd Defendant could not claim to be a bona fide purchaser for value without notice as she was aware of these court proceedings as all notices were being served at the subject property. Finally, Counsel for the Plaintiff argued that the Plaintiffs certificate of title was issued on 23rd June 1994 before the one issued to the 1st Defendant on 9th November 2005. He submitted further that the Survey diagram attached to the Plaintiffs title was prepared in 1960 whereas the one in the Defendants title was prepared in 2005. He also submitted that the Surveyors Report clearly indicated that the offer to the 1st Defendant was irregular. He insisted that the 1st Defendant was aware that he had obtained irregular title and hence the reason that he made no effort to defend the action. In conclusion, Counsel for the Plaintiffs argued that the 1st Defendant's title being defective meant he could not pass good title to the 2nd Defendant.

I have carefully considered the pleadings of the parties, the evidence adduced on behalf of the Plaintiffs and the 2nd Defendant as well as the submissions of the parties.

The relief sought by the Plaintiffs in the writ of summons is for an order for possession of the property or in the alternative the commercial value of the property plus the sum of \$43,400 for improvements made to the property and damages for trespass.

The contention of the Plaintiffs is that they are the registered owners of Stand No. 225 Chelston Lusaka and that the 1st Defendant and now the 2nd Defendant occupies their property. The 1st Defendant contended in his defence that he was the registered owner of Subdivision 225 of subdivision A of Farm 609, Lusaka. He denies that this land belongs to the Plaintiffs. He argued that the Plaintiff's property was distinct from his. The 2nd Defendant contends that she lawfully bought the properties from the 1st Defendant.

Before considering the entitlements to possession of the property, the first issue to consider is the correct description of the property in dispute.

The evidence before me reveals that the Ministry of Lands issued title to the Plaintiffs on the 23rd June 1994 in respect of a property referred to on the Certificate of Title number L2681 as Stand No. 225, Chelston, Lusaka. A copy of this certificate is exhibited at *page 2 of Plaintiff's bundle of documents dated 11th November 2010*. This shows that the property was alienated to the Plaintiffs for the unexpired term of ninety-nine years from 1st January 1989. The deed describes the said land as Stand number 225 situate at Chelston, Lusaka of more or less 445 square metres and more particularly delineated and described on Diagram number 99 of 1961 dated 27th February 1961.

It indicates that the diagram was surveyed in September 1959 and approved by the Deputy Surveyor-General on the 27th February 1961. The diagram describes the property alienated to the Plaintiff as subdivision 225 of subdivision A of Farm 609, Chelston Township.

The evidence of the Defendants reveal that a Certificate of title number 43537 was issued to the 1st Defendant on 9th November 2005 in respect of subdivision No. 225 of subdivision A of Farm 609, Lusaka. The said certificate of title shown at *page 8 of the 2nd Defendant's bundle of documents of 18th May 2016* describes the land as being in extent 445 square metres and more particularly delineated and described on diagram no. 5515 of 2005. The said diagram was surveyed in September 1959 and approved by the Government Surveyor on 20th June 2005.

In view of the controversy between the parties in relation to the property in question, a survey was conducted by the Regional Survey Office in relation to the two properties. A survey is the process of measuring the dimensions of a particular area of the earth's surface. It accurately determines the terrestrial or three-dimensional position of points and distance and angles between them. These points on the surface of the Earth are often used to establish land maps and boundaries for ownerships. The survey is undertaken by gathering information through observations, measurements in the field and data analysis to support planning, designing and establishing of property boundaries.

Following the land survey, a report of the officer-in-charge of the Surveyor General department was issued on the 13th January 2016.

The said report is exhibited at page 20 of the 2nd Defendants bundle of documents of 18th May 2016. The exact findings of the report are as follows:

1. *The search at Ministry of Lands shows that there is no data for Stand 225 Chelstone City of Lusaka.*
2. *Although the print-out shows that Stand 225 Chelstone exists, there are no maps to show that Stand 225 Chelstone was captured as such. What is true and it is indicated on both diagrams is that Chelstone Township is actually in Farm 609.*
3. *It was also found out that the diagram used in both title deeds for sub 225/A/F609 and Chelstone stand 225 is actually the same. The diagram used in the title deeds for the Nkowaness is a CTC (Certified True Copy) of the original diagram done in imperial system (English Feet) with reference to the Survey Record Number 188 of 1960 while the second title deeds for Mr. Zacharia Simukonda has a supersede diagram which is in Metric system (meters). The two diagrams are exactly the same in design except the units used are different yet describing the same drawing. Both diagrams are for sub 225 of sub A of Farm 609 which means that the plot in question is one despite having two titles.*
4. *It is not normal practice to generate a new offer for a supersede diagram and use the same for a separate title because what changes is the unit of measurement not the plot number as it is in this case. I presume this is an anomaly and may be the source of this mix-up.*

The report of the Surveyor reveals that although there are print outs from the land Register showing that a property known as Stand No. 225 Chelston, Lusaka exists, there are actually no maps or data captured for this property. It further indicates that the diagrams annexed to the Plaintiffs' and Defendant's properties are the same and both describe their properties as subdivision 225 of subdivision A of Farm 609, Lusaka.

Therefore, although, there are two distinct titles describing the Plaintiff's land as Stand No. 225, Chelston, and the Defendants as subdivision 225 of subdivision A of Farm 609, the diagram attached to both titles is the same.

Although, Stand 225, Chelston exists on the Lands Register and is described as such on the cover and body of the Certificate of Title, the diagram annexed thereto describes the land as subdivision 225 of subdivision A of Farm 609, Lusaka. Further, there is no supporting survey data at the Surveyor General's office for this property, or evidence showing the existence of a property known as Stand 225 in Chelston, Lusaka. Despite this, no explanation has been advanced by the 3rd Defendant as to why the Plaintiff's title is endorsed as Stand 225, Chelston yet the diagram describes the property as subdivision 225 of subdivision A of Farm 609A, Lusaka. From the foregoing, I am of the view that Stand 225 Chelston does not exist as a property. This would explain why the diagram annexed to the Certificate of Title issued for Stand 225, Chelston describes the property as subdivision 225 of subdivision A of Farm 609, Lusaka. It is evident that the endorsement of Stand 225, Chelston on the Certificate of title may have been a typographical error and I so find.

As observed, there is a discrepancy between the description of the Plaintiff's property on the body of Certificate of title and that of the diagram annexed thereto. Where there is such inconsistency, the question that arises is which would take precedence over the other?

A diagram is defined in **Section 2 of the Land Survey Act, Chapter 188 of the Laws of Zambia** as:

'diagram means a document containing geometrical, numerical and verbal representations of one or more parcels of land, the boundaries of which have been surveyed by a land surveyor, and which document has been signed by such surveyor or which has been certified by a Government surveyor as having been compiled from approved records of a survey or surveys carried out by one or more land surveyors, and includes any such document which, at any time prior to the commencement of this Act, has been accepted as a diagram in the Registry or in the office of the Surveyor-General or his predecessors.'

What is clear from the provision of the **Land Survey Act** is a diagram is a document which contains accurate representations of a piece of land and once signed by a certified Government Surveyor confirms that the land has been surveyed and has been accepted as a diagram in the Registry office of the Surveyor-General. The diagram gives a proper description of the land and is therefore recognized as a true representation of such parcel of land. Therefore, where there is conflict between the description of the property on the body of the title deed and that of the diagram, the particulars of the property on the diagram shall prevail.

Having found that a diagram certified by the Surveyor General gives the most accurate description of property, I am satisfied that the description of the Plaintiff's property on the diagram annexed to the Certificate of title number L2681 is the right description of the property. This is subdivision 225 of subdivision A of Farm 609, Lusaka. This is in spite of the fact that the endorsement on the Certificate of Title is Stand 225 Chelston, Lusaka. This also explains why the office of the Surveyor General revealed that Stand 225, Chelston does not exist as a property.

Further, after carefully analysing the evidence before me, it is unmistakable that there is only one property in question and that the proper description of the property in question is subdivision 225 of subdivision A of Farm 609, Lusaka and I so find.

Turning to address the question of the title issued to the 1st Defendant. The report of the Surveyor General reveals that the diagram annexed to the Certificate of title number 43537 issued to the 1st Defendant in respect of subdivision 225 of subdivision A of Farm 609, Lusaka is a supersede diagram. **Section 18(1) of the Land Survey Act** implies that a supersede diagram is a diagram that is generated to replace an existing diagram to a registered parcel of land. It is generated upon request by the owner of such registered parcel of land upon satisfying the office of the Surveyor General that the existing diagram to such land does not correctly represent the boundaries of such parcel of land. A supersede diagram is only generated to replace an existing diagram. As stated in the report, it is not normal to generate an offer for a new piece of land from a supersede diagram and use the same to obtain separate title. This is due to the fact that a supersede diagram simply replaces an original diagram.

The only change in a supersede diagram is the unit of measurement.

In the present case, the evidence reveals that a supersede diagram was used to generate an offer to the 1st Defendant in respect of subdivision 225 of subdivision A of Farm 609A, Lusaka despite the fact that a diagram was already in existence in respect of this property. The Ministry of Lands then proceeded to issue title to the 1st Defendant for the said property on 9 November 2005 after a re-entry of the property from the Chelston Management Board in 2003. The issuance of title to the 1st Defendant with a supersede diagram was erroneous. The 1st Defendant ought not to have been issued with title for the property in question in 2005.

The next issue relates to the ownership of the subject property. **Section 33 of the Lands and Deeds Registry Act** states on certificates of title that,

'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 interest whatsoever....'

The foregoing provision clearly provides that a Certificate of title is conclusive evidence of ownership and after land has become the subject of a Certificate of Title, no right, privilege or easement, in or over the land, shall be acquired by possession or used adversely in derogation of the title of the registered proprietor. A Certificate of title having been issued to the Plaintiffs on 20th June 1994 in respect of the property described on the diagram is conclusive evidence of their ownership of the aforementioned property. Although the Plaintiffs title refers to Stand 225 Chelston, Lusaka the diagram rightly describes the land as subdivision 225 of subdivision of Farm 609 Lusaka. That notwithstanding, I am satisfied that the Plaintiffs having been the first to acquire the property in 1994, they were the true owners of the property and I so find.

The next issue to consider is **whether the Plaintiffs are entitled to possession of the said property in dispute.**

It is trite law that a registered owner is entitled to possession of their property. However, in the present case, the 1st Defendant entered into occupation of the said property under the belief that he had acquired the property unencumbered having been issued with a Certificate of Title by the Lands Department. The property had been previously alienated to the Plaintiffs but on account of the wrong description on the deed issued to it, the property ended up being offered to the 1st Defendant. After acquiring the land the 1st Defendant proceeded to build a house on the property after being issued with title. He then disposed of the house to the 2nd Defendant.

The Plaintiffs have argued that the 2nd Defendant is not an innocent purchaser for value without notice as she was aware of these proceedings.

However, I am not satisfied that the Plaintiffs have indeed demonstrated that the 2nd Defendant was aware of these proceedings prior to purchasing the property. It is clear that as soon as the Surveyor's report was served upon the property in question, the 2nd Defendant became aware of the issues in contention, she immediately applied to join these proceedings. The 2nd Defendant having conducted a due diligence to establish the rightful owner of the property prior to purchasing the property, I am of the view that the interest of the 2nd Defendant must be considered as was held in the case of **Zambia Consolidated Copper Mines Limited v Eddie Katalayi and Max Chilongo**, where the Supreme Court held that:

'It was not possible without basis to ignore the rights of an innocent purchaser for value and who had no reason to suspect that there was to be an adverse claim.'

The Plaintiff has not demonstrated that there was any wrong doing on the part of the 1st Defendant in this acquisition of the property. It would therefore in my opinion, be improper to award the Plaintiffs possession of the property along with the house constructed thereon by the 1st Defendant. This would also amount to unjust enrichment of the Plaintiffs and also cause an injustice to the 2nd Defendant who is now the registered owner of the property. Although I have found that the 1st Defendant ought not to have been offered the property in question, there is no basis to ignore the 2nd Defendants rights in that prior to purchasing the property she undertook all diligent steps to ascertain the 1st Defendant's title to the property in question. The 1st Defendant was reflected on the lands register as the registered proprietor of the said property.

The present dispute between the parties is as a result of the errors created by the Lands Department in that it showed that that specific land was not alienated when in fact it was granted to the Plaintiffs as far back as 1994. Perhaps on account of the improper description of the property on the Plaintiff's Certificate of title and that the Plaintiff was not reflected on the lands register as being the proprietor of subdivision 225 of subdivision A of Farm 609, Lusaka, this may have led to the Lands department creating a supersede diagram in respect of subdivision 225 of subdivision A of Farm 609, Lusaka and issuing an new offer to the 1st Defendant.

In any event, the Plaintiffs having made an alternative claim to be paid the market value of the land and that the 3rd Defendant having conceded that its agents were to blame for the errors in the lands department and this dispute arising therefrom, I am of the view that the Plaintiffs must be allocated an alternative land piece of land by the 3rd Defendant. I accordingly **ORDER** and **DIRECT** the 3rd Defendant shall through the Commissioner of Lands offer and alienate the Plaintiffs an alternative piece of land of similar size and value of the property in dispute. This piece of land must be offered within a period of 60 days from the date hereof.

I FURTHER ORDER that after the Plaintiffs have been awarded an alternative piece of land, they shall surrender their certificate of title to the Registrar of Lands. The lands department shall immediately attend to the rectification and correction of the lands register in relation to subdivision 225 of subdivision A of Farm 609, Lusaka and Stand 225, Chelstone, Lusaka accordingly.

Turning to the claim for damages, the Plaintiffs have claimed the sum of \$43,400 or its Kwacha equivalent for improvements made to the property plus damages. However, the Plaintiffs have not provided any evidence whatsoever of any of the improvements it made to the land and amounting to \$43,400. The 1st Defendant did not defend the action nor did he inform the Court of the developments that he found on the property.


In view of this, the court is unable to determine whether or not any improvements were carried out by the Plaintiffs and existed on the property at the time that the 1st Defendant took possession thereof. More importantly, the Plaintiffs have not demonstrated what improvements if any they made to the property. This claim for \$43,400 therefore fails.

Before concluding the matter, I wish to comment on the conduct of the 1st Defendant. Although he may have been unaware of the error created by the Ministry of Lands on the title deeds of the respective parties, he was fully aware of these court proceedings and the Plaintiff's claim on the property. In this regard, he had filed a defence on 14th July 2010 and had also engaged Messrs Eric Silwamba and Company to represent him in the case. However, counsel withdrew from the record on 16th September 2014 on account of lack of instructions from the 1st Defendant. Following the withdrawal of his counsel from the record, the 1st Defendant did not attend Court to defend the action nor was he represented throughout the proceedings. This caused huge delays in the proceedings. The Court later discovered that the 1st Defendant had disposed of the property in question to the 2nd Defendant on 26th July 2013 whilst these proceedings were underway. The disposal of the subject property to the 2nd Defendant by the 1st Defendant, with the full knowledge of this action, does indeed show

disregard of due process and little or no respect for the Court. The action of the 1st Defendant of disposing off the property whilst these proceedings were underway is in my view conduct calculated to obstruct or prejudice the due administration of justice and a deliberate attempt to lower the court's authority.

In view of the foregoing, I accordingly order that the 1st Defendant shall be liable to bear the costs occasioned by the Plaintiffs and the 2nd Defendant in these proceedings. These costs are to be agreed between the parties and in default to be taxed.

Delivered at Lusaka this 6th day of December 2017


N.A. Sharpe-Phiri
High Court Judge