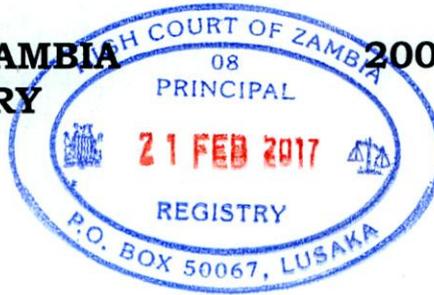


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



2004/HP/1228

B E T W E E N :

FIATAXIS LIMITED

PLAINTIFF

AND

JOACKIM CHAMI CHISHALA

1st DEFENDANT

JOHN MUMBA

2nd DEFENDANT

CHRISTOPHER CHEWE

3rd DEFENDANT

YOHANI NGOMA

4th DEFENDANT

NATHAN PHIRI

5th DEFENDANT

DANIEL MFULA

6th DEFENDANT

Before Honourable Mrs. Justice M. Mapani-Kawimbe on 21st February, 2017

For the Plaintiff : *Dr. J.M. Mulwila SC, Assisted by Ms. M. Mbuyi, Messrs. Ituna Partners*

For the Defendant : *No Appearance*

J U D G M E N T

Case Authorities Referred To:

1. *Joackim Chani Chishala, Chris Phiri and Chisanga v Fiataxis Limited SCZ Appeal No. 23 of 2007*
2. *Anti Corruption Commission v Barnnet Investment Corporation Limited (2008) Z.R 69*
3. *David Nzooza Lumanyenda and Goodwin Kafulo Muzumbwa v Chief Chamuka and Kabwe District Council and Zambia Consolidated Copper Mines Limited (1974) Z.R 194*

Other Works Referred To:

1. *Land Law in Zambia, Cases and Materials, Frederick S. Mudenda, 2007*

The Plaintiff commenced this action by way of Writ of Summons seeking the following reliefs:

- (i) *Possession of land known as Lot No. 3546. Lusaka being wrongfully occupied by the Defendants without the permission of the Plaintiff who is the registered owner and entitled to possession*
- (ii) *Damages for trespass or in the alternative mesne profits*
- (iii) *Costs and interest*

In the Statement of Claim, the Plaintiff contends that it is the owner of Lot No. 3546 and is entitled to possession of the land and premises. The Plaintiff states that on dates unknown the Defendants wrongfully entered its land and premises and have wrongfully taken possession and are still trespassing thereon. The

Plaintiff also states that it has been deprived of its use and enjoyment of the land and premises, and has thereby suffered loss and damage.

The 1st Defendant settled a Defence where he averred that he did not know or take possession of Lot No. 3546/M claimed by the Plaintiff. He stated that he was the owner of land known as Lot 2951/M Kabanana, which he traced from Mr. Young James Mambwe who possessed it in 1974, and in the same year subdivided it into two plots. The 1st Defendant also stated that Mr. Young James Mambwe maintained one side of the plot while the other portion went to Mr P. T Zilifi who both obtained title deeds for a 14 year lease.

The 1st Defendant contends that Mr. Young James Mambwe further sub-divided his land into three plots and sold one to his sister Mrs. Enelle Matombo and the other to Mrs. Nyirenda. These plots were registered as 2951B/M and 2951C/M respectively. The

1st Defendant stated that Mr. Young James Mambwe thereafter remained with two hectares of land on Lot No. 2951/M.

The 1st Defendant further avers that in 1984, Mr. Young James Mambwe and his family were attacked by thieves and he relocated to South Africa. Further, that Mr. Young James Mambwe brought the 1st Defendant to Lot No. 2951/M as a caretaker.

The 1st Defendant states that in 1990, Mr. Young James Mambwe passed away and prior to his death, he wrote the Commissioner of Lands a letter, where he sold the 1st Defendant his land. In 1992, the 1st Defendant avers that he begun to pursue his title deeds at the Ministry of Lands. Further, that he attended a meeting at the Council where the Council officials advised him to sell portions of his land, which were undeveloped, because the land would be repossessed. The 1st Defendant states that he took their advice and sub-divided his land. He thereafter sold portions of it.

The 1st Defendant states that he met Mr. Mwansa, the owner of the Plaintiff Company in 1995 who told him that Lot No. 3546/M belonged to him. The 1st Defendant further states that Mr. Mwansa caused his arrest on 27th September, 2004, and went on to survey Lot No. 2951/M without his consent.

The 1st Defendant avers that Mr. Mwansa told him that he bought the land from Mr. Young James Mambwe at K22,000.00 and that the contract of sale was witnessed by Pastor David Phiri. The 1st Defendant contended that he discovered that the transaction was forged and prayed to the Court to grant him possession of Plot 2951/M which is his land.

The 2nd to 6th Defendants filed a Defence. The 2nd Defendant states that he bought his plot from Mr. Enock Chishala who bought his land from Mrs. Enelle Matombo in 1996. The 3rd Defendant states that he also bought his land in 1989 in similar circumstances. The 4th and 5th Defendants state that they bought their plots in 1998 and 1995 respectively from the 1st Defendant.

The 6th Defendant states that he bought his plot from Mr. Eric Chishala, the young brother to the 1st Defendant. They prayed to the Court to grant them quiet possession of Lot No. 2951/M.

The matter came up for trial on 1st February, 2017. A notice of hearing was duly served on the Defendants' advocates on 7th November, 2016. An Affidavit of Service was filed into Court on 1st February, 2017. There was proof that the Defendants' advocates received the Notice of Hearing because a relative of the 1st Defendant now deceased appeared in Court on the date of hearing. I therefore decided to proceed with trial in accordance with Order XXXV Rule 3 of the High Court Rules.

PW1 was **Ronald Mwansa**, the owner of the Plaintiff Company Fiataxis Limited. He testified that the Plaintiff Company bought Lot No. 3546/M Lusaka from Mr. James Mambwe in 1985. Title changed to the Plaintiff Company's name in 1995 after the relevant documents were executed. PW1 testified that the assignment

between the parties was prepared by Messrs Jacques & Partners contained in the Notice to Produce dated 5th February, 2016.

PW1 further testified that the assignment was signed by the Plaintiff Company and Pastor David Sternhagen on behalf of Mr James Mambwe, whom he granted power of attorney on 20th April, 1985. PW1 testified that the Plaintiff was first a Certificate of Title issued in 1985 for a 14 year lease, and later the Plaintiff on 1st November, 2000 was issued a Certificate of Title for a 99 year lease on Lot 3546/M.

PW1 testified that Lot No. 2591/M, and Lot No. 3546/M referred to the same piece of land and he did not know why the lot numbers had changed. He added that the Supreme Court Judgment in the Notice to Produce had resolved the issue on the lot numbers when the Court confirmed that they both referred to the same piece of land. PW1 testified that he only became aware of the different lot numbers when he commenced his action in Court.

PW1 further, testified that he met the 1st Defendant when he offered him employment as a caretaker of the plot. Mr. James Mambwe introduced the 1st Defendant to him before he suddenly emigrated to South Africa. According to PW1, after employing the 1st Defendant, there was a period when he did not visit the plot. When he went to check on his plot, he found that structures had been erected, which he had not authorised. He failed to reach out to the 1st Defendant on the developments because he had gone to his village for a visit.

PW1 testified that he addressed all the people he found on his land and told them that he was the owner and that they were illegally in occupation. It was PW1's evidence that the unknown persons had erected structures on his land. They told him that they had bought their plots from the 1st Defendant who they believed was the owner of the land.

PW1 stated that he told the unknown persons to report the 1st Defendant to Kabanana Police Station because they had been

swindled. According to PW1, they took his advice and the 1st Defendant was subsequently arrested and imprisoned for a term of twenty-four months in 2004, for obtaining money by false pretence.

PW1 told the Court that he collected evidence from the people who bought land from the 1st Defendant, which was produced in his Bundle in the form of receipts and sales agreements drawn by the 1st Defendant and his buyers, with title reference to Lot 2591/M.

It was PW1's further evidence that the 1st Defendant never produced title to show that he owned the land. PW1 testified that all efforts to get the 1st Defendant and the squatters off his land have proved futile since 2004. He prayed to Court to grant him full possession of Lot No. 3546 and to evict the 1st Defendant and his squatters off the land.

PW2 was **Justin Bwalya** who testified that he bought two pieces of land from the 1st Defendant at K1,300,000.00 each in 2003. He told the Court that the 1st Defendant sold him land under

Lot number 2951/M. The transaction was witnessed by his late brother. He testified that he does not live on the land, however, a number of people who bought plots from the 1st Defendant are still in occupation.

PW3 was **Aubrey Godfrey Kalipenda**. His evidence was that he moved to Kabanana Site and Service in 2003 where he built a house on a plot sold to him by the 1st Defendant. He paid K1,100,000.00 for the plot and executed an agreement form with the 1st Defendant. PW3 stated that he was not given a copy of the title deed. It was PW3's evidence that he knew PW1 was the owner of the land where he built his house when he showed him the title deed.

PW3 confirmed PW1's evidence that PW1 told them to vacate his land and to report the 1st Defendant to the Police, which he did. He further confirmed PW1's evidence that the 1st Defendant who

had gone to Samfya for a visit was apprehended and imprisoned for obtaining money by false pretences.

PW3 further testified that the 1st Defendant told them that he did not have a title deed and he sold the land because he wanted PW1 to compensate him for his child's death.

Learned State Counsel for the Plaintiff filed written submissions for which I am indebted. I will not reproduce them suffice to state that I will refer to them in the judgement.

I have seriously considered the evidence adduced and the written submissions of Learned State Counsel. In my considered view, the main issue that falls for determination is whether the Plaintiff as registered owner of Lot No. 3546 is entitled to its possession.

There is no dispute that the Plaintiff Company bought Lot No. 3546/M from Mr. Young James Mambwe which was also known as

Lot No. 2951/M. The lot numbers were confirmed by the Supreme Court in the case of **Joackim Chani Chishala, Chris Phiri and Chisanga v Fiataxis Limited**¹. An assignment was prepared by Messrs Jacques & Partners and executed by the Plaintiff and James Mambwe on 15th November, 1985.

The assignment culminated into the issuance of two subsequent title deeds to the Plaintiff Company, the first of which was for a 14 year lease dated 15th November, 1985, followed by a longer lease dated 1st November, 2000 for 99 years. According to the assignment, the Plaintiff Company paid a consideration of twenty-two thousand kwacha (K22,000.00), which was confirmed by PW1 in his evidence.

As rightfully contended by Learned State Counsel, it is settled law that a certificate of title is conclusive evidence of ownership of land. This is provided in section 33 of the Lands and Deeds Act and in a plethora of authorities including the case of **Anti Corruption**

Commission v Barnnet Investment Corporation Limited² cited by Learned State Counsel.

This being the case, I hold that there is no need for further proof that the Plaintiff is the legal owner of Lot No. 3546/M Lusaka.

Having so determined, I am fortified to state that section 35 of the Lands and Deeds Registry Act, which provides that adverse possession cannot be acquired to land, which has title rigidly applies to the circumstances of this case. Thus, the Defendant's claim for adverse possession cannot be sustained. The position of laws was confirmed in the case of **David Nzooma Lumanyenda and Goodwin Kafulo Muzumbwa v Chief Chamuka and Kabwe District Council and Zambia Consolidated Copper Mines Limited³** cited by Learned State Counsel. It is therefore hardly necessary for me to say more.

In the result, I find that the Defendants are squatters and are in illegal occupation of the Plaintiff's land. I immediately order their

eviction from the Plaintiff's land without further recourse to Court. In consequence, I grant the Plaintiff immediate possession of Lot No. 3546/M Lusaka.

I further grant the Plaintiff who has been kept out of possession of his property since 2004 damages for trespass and mesne profits to be assessed by the Learned Deputy Registrar.

I award the Plaintiff interest and costs to be taxed in default of agreement.

Dated this 21st day of February, 2017


M. Mapani-Kawimbe
HIGH COURT JUDGE