

IN THE HIGH COURT FOR ZAMBIA
AT THE NDOLA DISTRICT REGISTRY
HOLDEN AT NDOLA
(CIVIL JURISDICTION)

2006/HN/291

BETWEEN:

NED MUTALIMA
LASTON HAMOONGA

1ST PLAINTIFF

2ND PLAINTIFF

AND

BRENDA MWEEMBA
COMMISSIONER FOR LANDS

1ST DEFENDANT

2ND DEFENDANT

BEFORE THE HONOURABLE LADY JUSTICE M. CHANDA THIS 10TH DAY
OF SEPTEMBER, 2020

APPEARANCES:

For the Plaintiffs : Ms D. P.S. Chabu of Lumangwe Chambers

For the 1st Defendant : Ms. N. Nyangu of Magubwi & Associates

For the 2nd Defendant : No appearance

J U D G M E N T

LEGISLATION REFERRED TO

The Lands Act, Chapter 184 of the Laws of Zambia

CASES REFERRED TO

*Anort Kabwe And Charity Mumba Kabwe V James Daka, The Attorney General
and Albert Mbazima (2006) ZR 12*

This action was began by a writ of summons by the 1st plaintiff **Ned Mutalima** on 13th October, 2006 against the defendants **Brenda Mweemba** and the **Commissioner of Lands**. With leave of the Court, the 2nd plaintiff **Laston Hamoonga** was joined to the proceedings and consequently an amended writ of summons and statement of claim were filed on 4th December, 2007. The reliefs sought by the plaintiffs were as follows: -

- i) A declaration that the 2nd plaintiff is the equitable owner of stand number 7774, Kansenshi Ndola.
- ii) A declaration and an order that the purported re-entry of the said stand number 7774 Kansenshi, Ndola by the 2nd defendant is null and void
- iii) An order compelling the 2nd defendant to cancel the certificate of title issued to the 1st defendant
- iv) An interim order of injunction restraining the 1st defendant either by herself, agents, servants or howsoever or otherwise from continuing development on the plaintiff's stand number 7774 Kansenshi, Ndola aforesaid
- v) Costs of the suit
- vi) Any other relief the Court may deem fit.

In her defence filed on 9th November, 2006, the 1st defendant refuted the plaintiffs' claims. She asserted that stand number 7774 was repossessed from the 1st plaintiff on 15th July, 2004 by the 2nd defendant. The 1st defendant contended that she was the rightful owner of the said property having been subsequently issued with a valid certificate of title number 48599 dated 21st March, 2006 by the 2nd defendant.

There was no appearance or any defence filed by the 2nd defendant. When the matter came up for trial on 3rd September, 2020 all the parties were before Court save for the 2nd defendant. This Court therefore took it that the 2nd defendant was not desirous of giving evidence and proceeded with the trial.

The plaintiffs called two witnesses in aid of their case. The 1st defendant also called two witnesses to support her defence.

Ned Mutalima was called as the first plaintiffs' witness (**PW1**). His testimony as buttressed by the statement of claim was that he was offered stand number 7774 Kansenshi Ndola by the Ndola City Council in 1994. He narrated that the Ministry of Lands subsequently issued him with a certificate of title dated 25th August, 1994 in respect of the property. PW1 testified that in or about March, 2006 he sold the said stand number 7774 to the 2nd plaintiff at K4, 500,000.00. (unrebased currency). The witness indicated that the State's consent to assign was obtained from the 2nd defendant and property transfer tax paid to Zambia Revenue Authority. PW1 went on to narrate that the 2nd plaintiff proceeded to complete constructing a two bedroomed guest wing which the witness had partially built.

The witness further stated that the 1st plaintiff later informed him that the Ministry of Lands declined to conclude the transfer of ownership of stand number, 7774 into his name because there was

another registered title holder on the property. It was PW1's evidence that a check with the Ministry of Lands revealed that the 1st defendant had been allocated stand number 7774 following a re-entry by the 2nd defendant. The witness testified that there were no documents at the Ministry of Lands to support the alleged repossession. PW1 told the Court that at no point was he informed of any intended repossession or served with a notice of re-entry by the 2nd defendant. He urged the Court to restore the title to the said stand number 7774 to him as the procedure adopted by the 2nd defendant in repossessing the property was irregular.

In cross examination PW1 testified that the Ministry of Lands was supposed to follow the correct procedure before repossessing his property. The witness stated that according to page 1 of the 1st defendant's bundle of documents filed on 16th April, 2009 the 1st defendant was offered the property in contention on 3rd December, 2004. He further explained that the land register report exhibited on page 9 of the same bundle of documents showed that the notice to re-enter was issued on 13th February, 2004.

The second plaintiffs' witness was **Laston Hamoonga (PW2)** who basically confirmed PW1's evidence relating to the sale of stand number, 7774 Kansenshi Ndola to him in 2006. PW3 narrated that while his advocates were attending to the conveyancing process, the 1st defendant made representations on 29th July, 2006 that she was the title holder of the property in contention. It was PW2's testimony

that a check at the Ministry of Lands office in Ndola showed that the property was still in the name of the 1st plaintiff. The witness indicated that he later on learnt that the property in issue had been repossessed and offered to the 1st defendant.

During cross-examination PW2 stated that at the time he bought the property he did not conduct any search at the Ministry of Lands as he had retained lawyers to deal with the conveyance process.

This marked the close of the plaintiffs' case.

The 1st defendant, **Blandina Brenda Mweemba**, testified as (**DW1**). She told the Court that she was offered stand Number 7774 Kansenshi Ndola on 3rd December 2004. DW1 narrated that she was issued with a certificate of title dated 21st March, 2006 after fulfilling all the conditions of the offer. The witness asserted that she commenced construction works on the property which was bare land in July, 2006. She stated that in October, 2006 the Ministry of Lands wrote her a letter requesting her to stop the development on the property. It was DW1's evidence that at page 9 of her bundle of documents filed into Court on 16th April, 2009 was a land register report which showed that the property in dispute was a subject of re-entry on 13th February, 2004 by the Commissioner of Lands. She sought the indulgence of the Court that the property be given to her as she had exhibited all the evidence to show that the land was free from any encumbrances at the time of the offer.

In cross-examination the witness informed the Court that she did the necessary due diligence before she bought the property in issue. When asked if she had obtained any documents pertaining to the re-entry, DW1 failed to give a response.

In further cross examination, DW1 testified that she submitted her building plans to the Ndola City Council for scrutiny purposes in July 2006. The witness stated that permission to build as per the documents exhibited on page 16 of her bundle of documents dated 14th January, 2016 was granted by the Ndola City Council on 3rd June, 2008.

In re-examination DW1 clarified that she commenced construction without a building permit in 2006 because she did not simply follow the procedure.

Harry Chifinda Mwewa Shamende, the Chief Lands Officer, was called as the 1st defendant's second witness (**DW2**). His testimony was mainly to the effect that the documents relating to the re-entry of stand number 7774 Kanseshi, Ndola were nonexistent at the Ministry of Lands.

There were no issues raised in cross examination and this marked the close of the 1st defendant's defence.

Having considered the evidence in this matter, I have found as fact the following: -

It is common cause that by certificate of title number L3868 dated 25th August, 1994 the 1st plaintiff was a lease holder of stand number 7774 situated in Kanseshi, Ndola.

It is also common cause that in March of 2006 the 1st plaintiff sold the said stand number 7774 to the 2nd plaintiff at a consideration of K4, 500, 000.00 (unrebased currency.)

I find that before the conveyance process could be concluded, the 1st defendant sought to acquire possession of the stand on the basis that the property was repossessed by the 2nd defendant on 13th February, 2004.

It is not in dispute that the 1st defendant was issued with a certificate of title number 48599 dated 21st March, 2006 in respect of stand 7774 by the Ministry of Lands.

I have carefully considered the evidence adduced on record. As I understand the evidence, the crux of this matter is whether the 1st plaintiff's prior title had been legally brought to an end by the Commissioner of Lands, through a valid process of re-entry to entitle the 1st defendant to the property in contention.

It is cardinal to note that the procedure to be followed before a certificate of re-entry is caused to be entered in the land register is provided for in *Section 13 of The Lands Act, Chapter 184 of the Laws of Zambia*. For ease of reference the said *Section 13* is reproduced hereunder: -

13. (1) *Where a lessee breaches a term or a condition of a covenant under this Act the President shall give the lessee three months notice of his intention to cause a certificate of re-entry to be entered in the register in respect of the land held by the lessee and requesting him to make representations as to why a certificate or re-entry should not be entered in the register.*
- (2) *If the lessee does not within three months make the representations required under subsection (1), or if after making representations the President is not satisfied that a breach of a term or a condition of a covenant by the lessee was not intentional or was beyond the control of the lessee, he may cause the certificate of re-entry to be entered in the register.*
- (3) *A lessee aggrieved with the decision of the President to cause a certificate of re-entry to be entered in the register may within thirty days appeal to the Lands Tribunal for an order that the register be rectified.*

A close examination of *Section 13(1)* reveals that there are three fundamental requirements which must be effectuated in order for the re-entry to be valid at law. The three essential elements are namely that:-

- i. *There must be a breach of a term of condition or a covenant by the lessee*
- ii. *The lessee must be given three months notice of the intended re-entry*
- iii. *The lessee ought to be accorded an opportunity to dialogue with the commissioner of lands as to why the property should not be repossessed.*

I must immediately affirm that in the instant case there is no evidence to suggest that the afore mentioned elements existed prior to the purported re-entry by the 2nd defendant. The plaintiffs have endeavoured to show that a check with the Ministry of Lands at their Ndola office, revealed that no documents had been filed to validate the re-entry. It is my finding that this evidence by the plaintiffs has been substantiated by the testimony of DW2, the Chiefs Lands officer, who confirmed that the documents to authenticate the re-entry were nonexistent.

The case of **Anort Kabwe and Charity Mumba Kabwe v James Daka, The Attorney General and Albert Mbazima**¹ is instructive on the conditions to be satisfied for a repossession to be valid. In that case the Supreme Court eloquently held as follows:-

The mode of service of the notice of intentions to cause a certificate of re-entry to be entered in the register for a breach of the covenant in the lease as provided for in section 13(20 of the Land Act, is

cardinal to the validation of the subsequent acts of the Commissioner of Lands in disposing of the land to another person.

If the notice is properly served, normally by providing proof that it was by registered post using the last known address of the lessee from whom the land is to be taken away, the registered owner will be able to make representations, under the law, to show why he could not develop the land within the period allowed under the lease.

If the notice is not properly served and there is no evidence to that effect, there is no way the lessee would know so as to make meaningful representations.

A repossession effected in circumstances where a lessee is not afforded an opportunity to dialogue with the Commissioner of Lands with a view to having an extension of period in which to develop the land cannot be said to be a valid repossession.

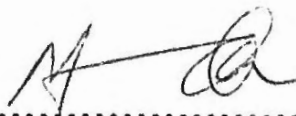
Similarly, in the matter before me it is apparent that the glaring absence of the notice of intention to re-enter and the breach of the entire process of repossession by the Commissioner of Lands, has clearly invalidated the subsequent disposal of the land to the 1st defendant.

It must be observed that the mere print out of the land register report, produced on page 9 of the 1st defendant's bundle of documents filed into Court on 16th April, 2009, is not sufficient to prove that the property in issue was a subject of re-entry on 13th February, 2004. I hold that for the said land register report to be legally efficacious it

ought to have been accompanied by the notice of intention to re-enter, the certificate of re-entry and or a confirmation of the re-entry. In addition, I am satisfied that the repossession herein was not logically valid as it was effected in circumstances where the lessee was not given any opportunity to make representations to the Commissioner of Lands as to why the certificate of re-entry should not have been entered in the register.

In view of the foregoing the 1st defendant's purported ownership of stand number 7774 Kansenshi, Ndola is hereby nullified and the title deed issued in her name is cancelled forthwith. It is further ordered that the title to the said stand number 7774 Kansenshi Ndola is restored to the 1st plaintiff. The 2nd defendant is condemned to bear the costs of the proceedings, to be taxed in default of agreement.

Dated at Ndola this 10th day of *September*, 2020.



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M.CHANDA
JUDGE