

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

2012/HP/132

BETWEEN:

ROBERT SICHAMBA



PLAINTIFF

AND

AFDUB SAID FARAH (T/A AFDUB  
TRANSPORT)

1<sup>ST</sup> DEFENDANT

LUSAKA CITY COUNCIL

2<sup>ND</sup> DEFENDANT

*Delivered in open Court by the Hon. Mr. Justice Mathew L.  
Zulu, at Lusaka the 14<sup>th</sup> day of May, 2020*

*For the Plaintiff:*

*Mr. G. Mhango with Mr. O. Sinkamba,  
Messrs. Ganje Mhango and Co and  
Sinkamba Legal Practitioners  
respectively*

*For the 1<sup>st</sup> Defendant:*

*Mr. T. K. Ndhlovu, Messrs. Batoka  
Chambers Advocates*

*For the 2<sup>nd</sup> Defendant:*

*Mrs. M.B. Mupeso, Legal officer,  
Lusaka City Council*

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## JUDGMENT

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**Cases referred to:**

- 1. Anti Corruption Commission v. Barnett Development Corporation Ltd (2008) Z.R. 69.*
- 2. Sailas Nzowani and others v. Flamingo Farms Ltd( Appeal No 90 of 2016)*

**3. *Hanif Mohammed v. Yusuf Ibrahim Issa Ismail*(Appeal No 146 of 2013)**

**Legislation referred to:**

- 1. *The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia***
- 2. *The Housing (Statutory and Improvement Areas) Act, Chapter 194 of the Laws of Zambia( repealed)***

This matter is characterized by a lengthy process of pleadings and amendments, coupled with the filing of several bundles and further and supplementary bundles of documents. For the tidiness of the record and to put the pleadings into proper perspective, I will summaries the pleadings in a manner that will do justice to the case.

The action was commenced by the plaintiff by way of writ of summons accompanied by a statement of claim on 7<sup>th</sup> February, 2012. The plaintiff simultaneously applied for an injunction which was granted ex parte on 13<sup>th</sup> February, 2012. The pleadings were subsequently amended with leave of court on 25<sup>th</sup> February, 2016. The plaintiff seeks the following reliefs:

- 1. A declaration that he is the rightful owner of Stand No. B41W/8632, Emmasdale, Lusaka Province of Zambia which was allocated to him by the 2<sup>nd</sup> defendant;**



- 2. An injunction restraining the defendants whether by themselves, their agents or servants or howsoever from demolishing the structure put up by the plaintiff or in any way interfering with the plaintiff's activities and construction on stand No. B41W/8632, Emmasdale, Lusaka until further order or until the final determination of this matter;**
- 3. Damages for inconvenience; and**
- 4. Costs.**

In his amended statement of claim, the plaintiff states that he applied and was allocated plot or stand no. B41W/8632 Emmasdale, Lusaka by the 2<sup>nd</sup> defendant on 18<sup>th</sup> April, 2006. After paying the council the fees required, he started developing the land in 2011 and put up a warehouse and a slab for a two storey building valued at K400,000.00. In January, 2012, he was called to the police at the instance of the 1<sup>st</sup> defendant who was claiming ownership of the land and there were allegations by the police that the documents he produced to confirm his ownership of the land were fake. The plaintiff states that the 1<sup>st</sup> defendant's certificate of title was fraudulently obtained on the premise that the description of the property shows B5-1E of 8632 on the first page and 8632/1E-B5 and 8632/1EB5/1 on the

second page. He also states that the sketch plan in the 1<sup>st</sup> defendant's title was approved by the 2<sup>nd</sup> defendant a month after the issuance of the title. The plaintiff therefore, claims the reliefs in the writ of summons.

The 1<sup>st</sup> defendant entered appearance and filed into court his defence to the suit on 28<sup>th</sup> February, 2012. The defence was amended once without leave on 13<sup>th</sup> June, 2014 and on 16<sup>th</sup> March, 2016 with leave following the plaintiff's amendment to his originating process. In his defence, the 1<sup>st</sup> defendant denies that the land he was allocated is Stand no. B4/1W/8632 but maintains that he was allocated plot B5/1E/8632. He claims that his plot is not located near the plaintiff's plot and claims that the plaintiff is being deceptive when he claims their plots are one and the same when in fact not. The 1<sup>st</sup> defendant also challenges the authenticity of the sketch plan the plaintiff produced in relation to the land and asserts that the same are fake and forged as they don't belong to the 2<sup>nd</sup> defendant. He also disputes the value of the property the plaintiff has put up on his plot and claims that the structure is an illegal structure. The 1<sup>st</sup> defendant



denies that his certificate of title was fraudulently issued. In his counter claim, the 1<sup>st</sup> defendant seeks the following reliefs:

- a. A declaration that Stand B5-1E/8632 rightfully belongs to him;**
- b. An order for the plaintiff to yield vacant possession of the said stand;**
- c. An injunction restraining the plaintiff from trespassing and erecting any structure on the said Stand No. B5-1E/8632 Emmasdale, Lusaka;**
- d. Damages for trespass; and**
- e. Costs.**

The plaintiff filed into court his amended reply and defence to the 1<sup>st</sup> defendant's amended defence and counter claim on 5<sup>th</sup> April, 2016. The plaintiff admits that he was allocated stand B4/1W/8632 and not B5-1E/8632 in respect of which a certificate of title has been issued in favour of the 1<sup>st</sup> defendant. He states that the map is genuine as it was given to him by the 2<sup>nd</sup> defendant and he was physically shown the land he was allocated by a surveyor in the 2<sup>nd</sup> defendant's employ. The plaintiff also maintains that the anomalies on the 1<sup>st</sup> defendant's title are consistent with fraud. The plaintiff

disputes the defendant's counter claim and insists that he is the owner of stand B41W Emmasdale.

The 2<sup>nd</sup> defendant entered appearance and also filed into court its defence on 28<sup>th</sup> February, 2012. The defence was subsequently amended on 6<sup>th</sup> May, 2016 and further amended after trial had commenced on 29<sup>th</sup> June, 2018. In his amended defence, the 2<sup>nd</sup> defendant admits that the plaintiff was offered stand B41W/8632 Emmasdale on 18<sup>th</sup> April, 2006 after a re-entry by the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant admits that the plaintiff paid the service charges but denies that he was granted planning permission. The 2<sup>nd</sup> defendant however, denies that plot B51E was offered to the plaintiff. It states that plot B41W/8632 was initially offered to Victor Chibaya on 8<sup>th</sup> August, 2001 but was re-entered on 7<sup>th</sup> October, 2005. After the re-entry, the property was later offered to the plaintiff on 18<sup>th</sup> April, 2006 who had applied for land on 5<sup>th</sup> October, 2005. The 2<sup>nd</sup> defendant states that stand no. B41W/8632 is neighbouring B4-IS, B2-1D and B3-1R. The 2<sup>nd</sup> defendant disputes that the certificate of title issued to the 1<sup>st</sup> defendant was fraudulently issued and states that the certificate of title was issued for property no. B51E/8632. It



is alleged that the plaintiff connived with other unknown persons to alter the layout plan for the area as the council has neither re-planned nor re-numbered the layout plan for the area.

The 2<sup>nd</sup> defendant states that plot B4W1/8632 which ought to be B5/1E/8632 on the approved lay out plan was once a subject of litigation before the Town and Country Planning Tribunal under case number TCP/8/2006 between Saeli Ricky Kalaluka and Lusaka City Council and the 1<sup>st</sup> defendant. It is asserted that as at 2006 what the plaintiff is claiming to be stand B41W/8632 was BE/1E/8632 which is neighbouring B5-1R, B3-1K and B5-1D.

The plaintiff filed into court a reply to the 2<sup>nd</sup> defendant's amended defence on 31<sup>st</sup> July, 2018. The plaintiff claims that stand B41W/8632 was initially offered to Victor Chibaya in August, 2001, it was later offered to J.J. Musepa in February 2002 and finally to him in April, 2006. He asserts that the plans were approved but the 2<sup>nd</sup> defendant refused to release them when the matter came up. He states that stand B5/1E/8632 is reflected in the certificate of title issued to the 1<sup>st</sup> defendant and not B41W/8632.

At trial, the plaintiff testified as the sole witness in support of his case and he was PW1. It was his evidence that he applied for land from the 2<sup>nd</sup> defendant in August, 2005, and he was given a letter of offer in April, 2006. He was later given a surveyor, a Mr. Nyirenda who showed him the plot he had applied for. PW1 testified that he fell ill and only returned to the council in 2011 to confirm the availability of the plot, which he found was still available. He paid the service charges, scrutiny fees and the plans and he was given a number to take to the Council for building plans.

PW1 testified that the plot was bare at the time. He put up a small storage building on one side and a multi story building which is incomplete on the other side. It was his evidence that the 1<sup>st</sup> defendant started going to his building claiming it was his. When he went to the 2<sup>nd</sup> defendant, upon presenting the documents he had pertaining to the property, he was told to continue building on the premise that they would give the 1<sup>st</sup> defendant alternative land.

When cross examined, PW1 confirmed that he was given B41W and he bought B31K from Kalaluka and that he has title to this plot though still in the name of Kalaluka. He confirmed that the scrutiny



fees were for the two plots and the structure he is building is on the two plots. PW1 confirmed that B41W is on Lumumba Road and B31K is behind the former. He confirmed that he paid scrutiny charges first before paying for service charges.

When referred to paragraph 6 of his affidavit in reply to the application for an injunction where he deposed that he did not know any Saeli Rick Kalaluka, he testified that he knew the same in relation to Stand B31K and not B41W. He confirmed that he developed B41W before his building plans were approved by the Council. He confirmed that he came into contact with the 1<sup>st</sup> defendant in 2012 and that it was then that he learnt that the 1<sup>st</sup> defendant had a certificate of title which was issued in 2005. PW1 confirmed that the layout plan he produced at page 16 of his bundle of documents has no indication that it is from the 2<sup>nd</sup> defendant.

PW1 confirmed that after he was offered B41W and shown the land, he took 6 years to visit the site but he was the first one to develop in the area. He confirmed that when he went to develop the property, he was accompanied by an official from the 2<sup>nd</sup> defendant. PW1 confirmed that the survey diagram at page 13 of the 2<sup>nd</sup> defendant's

supplementary bundle of documents was generated in 2005 and that according to the same B51E and B31K are next to each other. He also confirmed that according to that document, B51E was offered to the 1<sup>st</sup> defendant.

During re-examination, PW1 confirmed that he paid building inspection fee, scrutiny fees and service charges for B41W and B31K. He testified that the Council's position was that the 1<sup>st</sup> defendant should be given alternative land.

This marked the close of the plaintiff's case.

The 1<sup>st</sup> defendant testified as the sole witness in his defence and he was DW1. He testified that he has title to property number B51E and he applied for building plans which were approved. However, when he wanted to start constructions, Mr. Kalaluka sued him in the Lands Tribunal but the same lost the case. He later found the plaintiff building on his plot. He reported the matter to the police and at the time, the plaintiff only had an offer letter to B41W which was a different plot. DW1 later went to the 2<sup>nd</sup> defendant to complain that he had found people building on his land and they issued an order



stopping them from continuing with the constructions. Later, a surveyor by the name of Madumba verified the property and he discovered that B51W was appearing opposite Spectra and it belonged to a Victor Chibaya who had title to the land.

When cross examined, DW1 confirmed that he applied for land from the Council and he received a response.

During re-examination, DW1 confirmed that he was offered the land as produced at page 11 of the 2<sup>nd</sup> defendant's supplementary bundle of documents. He testified that he was shown the land by a Mr. Zulu. He testified that while he was in court, the plaintiff was building on the land.

This marked the close of the 1<sup>st</sup> defendant's case.

The 2<sup>nd</sup> defendant called Joseph M. Zulu, a Town and Country Planner and he was DW2. He testified that he used to be the Director of Planning at Lusaka City Council. It was his evidence that there was a Town and Country Planning Tribunal case involving Kalaluka and Afdub Transport and he was called to give evidence because the former was claiming ownership of B51E which was given to the latter.

He testified that his role was to show that the land the two were claiming were different. It was his evidence that there was an award in favour of the defendants. Later, the 1<sup>st</sup> defendant went to the 2<sup>nd</sup> defendant to complain about the illegality on the land. The Council issued a stop notice and on carrying out investigations, they discovered that the development was illegal and the developer was purporting to be developing on a different plot. After they were satisfied with the investigations, they issued an enforcement notice asking the developer to demolish the structure but it was never complied with.

DW2 testified that a lay out plan can be modified if there is a cancellation of a plot or extension or reduction of plots. It was his evidence that it is not possible to transfer the number of a particular plot to another because the numbers are a unique identifier of a unique parcel of land with a unique geographical location. If the plot was cancelled, the number could not be used again. He testified that to his knowledge, plot B51E has never been changed to another number. DW2 testified that he wrote a report to the police to the effect that the other number purportedly on the same location was not



supposed to be there but in a different location. DW2 maintained that B41W and B51E are not the same plot.

It was his evidence that B41W is located in the Southern part further from B51E around the mid left of the document at page 2 of the plaintiff's further bundle of documents dated 31<sup>st</sup> July, 2018. In relation to the diagram for B41W at page 3 of the 2<sup>nd</sup> defendant's supplementary bundle of documents, DW2 testified that the same was prepared on 16<sup>th</sup> August, 2002 and that this plot is next to B41S and B31R and behind it is B21D and that the diagram was from a layout plan. DW2 identified the survey diagram for B51E at page 5 of the plaintiff's supplementary bundle of documents prepared on 19<sup>th</sup> April, 2005. He testified that B41W is on title in favour of Victor Chibaya from 3<sup>rd</sup> May, 2002 and that the survey diagram is the one at page 3 of the 2<sup>nd</sup> defendant's supplementary bundle of documents. DW2 testified that the 1<sup>st</sup> defendant applied to develop and he submitted a plan in which one is required to show proof of ownership of property and the plan was approved as shown at pages 11 to 13 of the 1<sup>st</sup> defendant's bundle of documents. He testified that the survey diagram is similar to the location plan at page 12 in terms of the

boundaries for plot B51E and it is surrounded by the same boundaries.

DW2 testified that the layout plan at page 3 of the plaintiff's further bundle of documents is for plots created before B41W and B51E were created and these plots appear on top on the layout plan at page 22 of the same bundle. Subsequently more plots were created in about 2005 and the numbering was a continuation from the previous sequence of B21's and B31's followed by letters and they were B41's and B51. He testified that B31K is next to B31J and B31L and B41W according to the layout plan. DW2 told the court that he could not see B51E on this plan but based on the survey diagram and location plan, it would be where B41W is. It was his evidence that the explanation was that the plan was altered. In relation to the memorandum in the 2<sup>nd</sup> defendant's bundle of documents, DW2 testified that the Director relied on the diagrams submitted by both owners of the plots and not the official layout plan.

When cross examined, he confirmed that one could apply for building permission if they have an offer letter and they had paid all the service charges and if they had been cleared by legal services. He



confirmed that the plaintiff was building illegally as he had no approved planning permission. He confirmed that when a person lodges an application for planning permission, they are given a number but the final step is approval which comes by way of a letter and stamped copies of the plans. He confirmed that according to the memorandum from the Council, the plaintiff must remain on the land. He testified that the time he visited the site there was no building just a barrow in 2012. He testified that the plaintiff acquired the property after the Lands Tribunal matter. He confirmed that a lay person could not know the numbering. He confirmed that he did not prepare the maps before court.

During re-examination DW2 testified that he was not aware of any regularization of the plaintiff's structure. He testified that there was no mix up in the numbering. He confirmed that the layout map belongs to the Council and it is a public document.

This marked the close of the 2<sup>nd</sup> defendant's case.

After the close of trial, only the plaintiff and the 1<sup>st</sup> defendant filed into court their written submissions. The gist of the plaintiff's

submissions is that he applied and was offered plot B41W/8632 which is physically the same as plot B51E/8632 which is on title to the 1<sup>st</sup> defendant. The plaintiff contends that the land was bare when it was shown to him by a surveyor from the 2<sup>nd</sup> defendant Council and as such, there was no actual or constructive notice that there was someone else on the land. Counsel for the plaintiff therefore, argues that the plaintiff is a bona fide purchaser for value of the land in dispute. Counsel for the plaintiff also contends that there are glaring defects in the 1<sup>st</sup> defendant's title which cannot be ignored and these include: the title is in the name of Afdub Transport which is not a legal entity and the survey diagram was approved after the issuance of the certificate of title. Counsel entreats this court to find for the plaintiff and that the 1<sup>st</sup> defendant should be given alternative land.

The 1<sup>st</sup> defendant in his submissions contends that the plaintiff applied for plot B41W in 2003 which was offered to him in April, 2006. The plaintiff however has no title to the land and he developed a structure on the land in dispute without planning permission. The 1<sup>st</sup> defendant contends that the plot the plaintiff claims he bought is



far away from the plot B51E owned by the 1<sup>st</sup> defendant as confirmed by DW2 a Town and Country Planner. It is argued that the plot the plaintiff is claiming is also on title to a Victor Chibaya and far away from B51E. Counsel for the defendant contends that a certificate of title is conclusive evidence of ownership as per **section 33 of the Lands and Deeds Registry Act, Chapter, 185 of the Laws of Zambia**. It is argued that the plaintiff has committed perjury and lied that he did not know Saeli Kalaluka and also that he had planning permission when in fact not. The 1<sup>st</sup> defendant therefore seeks the dismissal of the plaintiff's case.

I have considered the pleadings in this matter, the parties' bundles of documents, the oral evidence and the submissions of counsel. The issue at the core of this action is whether B51E and B41W fall on the same land and if so, who between the plaintiff and the 1<sup>st</sup> defendant owns the land in dispute.

The following facts are my findings of fact: The plaintiff applied for a plot in Emmasdale on 5<sup>th</sup> October, 2005. He was offered stand B41W Emmasdale on 18<sup>th</sup> April, 2006. I also find that title has not yet been issued in favour of the plaintiff. It is further my finding that the

plaintiff purchased stand B31K on 2<sup>nd</sup> August, 2011 which was transferred to him on 23<sup>rd</sup> February, 2018. Afdub Transport a business name, under which the 1<sup>st</sup> defendant conducts business was offered plot B51E Emmasdale on 31<sup>st</sup> March, 2005 as evidenced by the offer letter at page 11 of the 2<sup>nd</sup> defendant's supplementary Bundle of documents. What is however, surprising is that a certificate of title in respect of stand B51E was issued in favour of Afdub Transport on 17<sup>th</sup> March, 2005 which is prior to the property being offered to the said Afdub Transport. I will revert to this fact later.

I also find that both the plaintiff and the 1<sup>st</sup> defendant were shown the land they had been offered by the 2<sup>nd</sup> defendant's surveyors. It is also my finding that on 3<sup>rd</sup> May, 2002, title was issued on stand B41W/8632 in favour of Victor Chibaya. There was a notice of intention to re-enter this plot on 7<sup>th</sup> October, 2005 and a certificate of re-entry was subsequently issued on 19<sup>th</sup> January, 2006. It is also my finding that plot B4IW was firstly offered to Victor Chibaya, after which it was offered to J.J. Musepa and finally to the plaintiff on 18<sup>th</sup> April, 2006 as admitted by the plaintiff at paragraph 1 of the



plaintiff's reply to the 2<sup>nd</sup> defendant's amended defence and counter claim dated 31<sup>st</sup> July, 2018.

I shall now consider whether stand B41W and B51E geographically fall on the same piece of land. The plaintiff in his evidence as well as his defence posits that plot B41W is in front plot BK13. The 1<sup>st</sup> defendant however, claims that his property, plot B51E is where the plaintiff claims B41W is. The 1<sup>st</sup> defendant also contends that the plaintiff's property is not near his land. The 2<sup>nd</sup> defendant in its memorandum produced in the 2<sup>nd</sup> defendant's bundle of documents filed into court on 28<sup>th</sup> May, 2015 confirmed that the two properties were on the same land going by the survey diagrams in the possession of the parties and that both parties had genuine offer letters. The uncontested evidence of PW1 was that the 2<sup>nd</sup> defendant has always insisted that the plaintiff should remain on the land in dispute and that the 1<sup>st</sup> defendant would be offered alternative land and DW2 confirmed this. The 2<sup>nd</sup> defendant however, claims that the plaintiff connived with other persons to alter the layout plan for the Emmasdale area as the Council has neither re-planned nor renumbered the layout plan for the area.



In determining this issue of whether the plaintiff and the 1<sup>st</sup> defendant's properties fall on the same land. The plaintiff has at page 16 of his bundle of documents dated 25<sup>th</sup> June, 2013 produced a site plan and the same shows that plot B31K is behind B41W from the Lumumba Road. This is also consistent with the site plan produced by the plaintiff in his further bundle of documents and at page 16 of the plaintiff's bundle of documents. The 2<sup>nd</sup> defendant however, claims that the plans produced by the plaintiff were altered so as to show the location of the plaintiff's plot where it now is. I will firstly consider the survey diagram on the 1<sup>st</sup> defendant's certificate of title and what according to that diagram the surrounding properties to that property are. Further, the plaintiff having admitted that the land he was offered was the same land that was previously offered to Victor Chibaya and as the certificate of title for this property, to which is annexed a survey diagram is before me, I will use the same as a guide to determine what the surrounding properties to B41W are.

According to the survey diagram relating to plot B41W as annexed to the certificate of title that was issued to Victor Chibaya produced at page 8 of the 1<sup>st</sup> defendant's supplementary bundle of documents,



Plot B41W is surrounded by plots B41S, B41R, B21C, B21D and B21E. The certificate of title relating to B31K shows that that property is in-between B31L on the right and B31J on the left. The 1<sup>st</sup> defendant's plot as shown on the survey diagram annexed to the certificate of title at page 5 of the 1<sup>st</sup> defendant's bundle of documents is surrounded by plots B51F, B51D and B31K.

Having considered the boundaries established by the certificates of title relating to plot B41W and B51E, I am of the considered view that on a balance of probabilities, it is more probable than not that B51E is where B41W is appearing on the site plans or location plans produced by the plaintiff. This is because the boundaries shown on the survey diagram in the 1<sup>st</sup> defendant's certificate of title are more consistent with the boundaries shown on the site plan produced by the plaintiff in terms of the neighbouring properties. This however, cannot be said of the boundaries or neighbouring properties to B41W. DW2 testified that B41W is located in the Southern part further from B51E around the mid left of the plan at page 2 of the plaintiff's further bundle of documents dated 31<sup>st</sup> July, 2018.



A perusal of the lay out plans at page 54 of the plaintiff's bundle of pleadings which is also at page 72 of 1<sup>st</sup> defendant's bundle of pleadings will show that there was visibly some alterations to the B4 series from B41P to the property right before where B41W is appearing. This notwithstanding the comprehensive site plan produced by the plaintiff at page 21 of the plaintiff's further bundle of documents dated 31<sup>st</sup> July, 2018 which bears the 2<sup>nd</sup> defendant's stamp in fact shows that while B21C, B21D and B21E are close to the bottom on the left side of the plan B41S, B41W and B31R should appear above B21C, B21D and B21E. However the plan shows properties that are in the B3 series. In fact based on the explanation of DW2 who testified that the numbering was done chronologically BW14 would be on the extreme right hand side of that plan among the B4 sequence which is where it currently is located.

Further, DW2 failed to point out exactly where B41W was on that plan. Also though the 2<sup>nd</sup> defendant claimed that the plans the plaintiff produced were altered, it failed to establish to the requisite standard of proof which is higher than the balance of probabilities that it is the plaintiff who forged the site plans. The plaintiff just like



the 1<sup>st</sup> defendant testified that they were both shown the land they purchased by the 2<sup>nd</sup> defendant's surveyors. In the circumstances, I find that it is more probable than not that the plaintiff's and the 1<sup>st</sup> defendant's land are located on the same geographical location.

Having found that it is probable than not that the plaintiff's and the 1<sup>st</sup> defendant's properties fall on the same, I will now consider who between the plaintiff and the 1<sup>st</sup> defendant is the rightful owner of the property. The plaintiff claims title to the property that he was a bona fide purchaser for value without notice. The 1<sup>st</sup> defendant has a certificate of title over the property having been offered the property on 31<sup>st</sup> March, 2005. The plaintiff has no title and he was only offered the property on 18<sup>th</sup> April, 2006. The Supreme Court has in a plethora of cases pronounced itself on the status of a certificate of title and the grounds on which it can be cancelled. In the celebrated case of **Anti Corruption Commission v. Barnett Development Corporation Ltd**<sup>1</sup> the Supreme Court held that under **section 33 of the Lands and Deeds Registry Act** a certificate of title is conclusive evidence of ownership of the land by the holder of the certificate of

title. However, it can be challenged and cancelled for fraud or reasons of other impropriety in its acquisition.

In the case of **Sailas Ngowani and others v. Flamingo Farms Ltd**<sup>2</sup>, the Supreme Court further held that other transgressions of the law such as circumvention of procedures prescribed in the law which would render the allocation of land null and void would equally be fatal and make the certificate of title liable for cancellation. The **Housing (Statutory and Improvement Areas) Act Chapter 194 of the Laws of Zambia** (which has since been repealed but which still applies to this case, similarly provides for the conclusiveness of a certificate of title as to the evidence of ownership of land.

The plaintiff in his statement of claim asserts that the 1<sup>st</sup> defendant's certificate of title was issued fraudulently. He contends that there are anomalies in the description of the property in terms of the property number and that the survey diagram was approved after the certificate of title had been issued. The Supreme Court in the case of **Hanif Mohammed v. Yusuf Ibrahim Issa Ismail**<sup>3</sup> observed that fraud must be distinctively pleaded and they referred to their earlier decisions where they emphasized that the allegations should be set



out in separate paragraphs from the particulars. The Supreme Court however, guided that the court when faced with serious anomalies and irregularities cannot turn a blind eye to such on the ground that it has not been pleaded.

On a perusal of the plaintiff's statement of claim, I am satisfied that the plaintiff pleaded fraud and gave particulars of the fraud. Indeed, a perusal of the certificate of title shows the variances in the property number. It also shows that the survey diagram for plot B51E was prepared on 18<sup>th</sup> April, 2005 and approved on 19<sup>th</sup> April, 2005 when the certificate of title was issued on 17<sup>th</sup> March, 2005. Also and most startling is that Afdub Transport (a business name) was only offered plot B51E on 31<sup>st</sup> March, 2005 after the certificate of title had already been issued on 17<sup>th</sup> March, 2005. These anomalies to me are too glaring to be ignored and they suggest that there was fraud or the procedure for the issuance of the title was not followed.

In the **Hanif case**<sup>3</sup> above the trial judge cancelled the certificate of title that was issued to the appellant on the basis of some anomalies which included the fraudulent removal of the caveat on the property and on the observation that the deed of gift and the certificate of title

were dated the same date. The trial court therefore found that the appellant had failed to prove his case and accordingly declined to declare him the legal owner of the property. The court also ordered for the cancellation of the certificate of title. On appeal, it was argued that the court exceeded its jurisdiction by canceling the appellant's certificate of title when there was no counter claim for the cancellation of the certificate of title. The Supreme Court however upheld the decision of the trial court and also observed that the trial judge could cancel the title even if there was no counter claim seeking for its cancellation because the appellant had asked for a declaration that he was the lawful title holder of the property. The appellant was therefore in effect asking the court to determine the lawful owner of the property.

Reverting to this case, though the plaintiff has not asked for any relief in relation to the 1<sup>st</sup> defendant's certificate of title, the 1<sup>st</sup> defendant in his counterclaim claims for a declaration that he is the rightful owner of plot B51E. This court is therefore, being asked by the 1<sup>st</sup> defendant to determine the lawfulness of his certificate of title. Having highlighted the anomalies in the issuance of the 1<sup>st</sup>

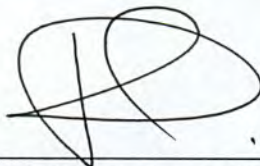


defendant's certificate of title, this court cannot make a declaration that the 1<sup>st</sup> defendant is the lawful owner of plot B51E Emmasdale. I accordingly find that there was impropriety in the issuance of the certificate of title to the 1<sup>st</sup> defendant and I accordingly dismiss his counterclaim and order the cancellation of the certificate of title relating plot B51E Emmasdale.

In a nutshell, having found that the certificate of title issued to the 1<sup>st</sup> defendant was fraudulently issued and therefore, ordering its cancellation, the net effect is that plaintiff's claim that he is the rightful owner of stand B41W/8632 Emmasdale, Lusaka Succeeds. The 1<sup>st</sup> and 2<sup>nd</sup> defendant shall bear the plaintiff's costs of this action.

Leave to appeal is granted.

**Delivered at Lusaka the.....day of May, 2020.**



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**MATHEW. L. ZULU  
HIGH COURT JUDGE**