

IN THE HIGH COURT FOR ZAMBIA

2015/HP/1972

AT THE PRINCIPAL REGISTRAR

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

LUSINDE INVESTMENTS LIMITED

PLAINTIFF

AND

COSMOS INVESTMENTS LIMITED

1ST DEFENDANT

ALBERT MAKUYU *(T/A TRY YOUR LUCK ENTERPRISES)*

2ND DEFENDANT

COMMISSIONER OF LANDS

3RD DEFENDANT

ATTORNEY GENERAL

4TH DEFENDANT

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN
OPEN COURT, ON 24TH DAY OF NOVEMBER, 2023.**

For the Plaintiff:

*Mr. B. Mosha & Mr. C. Nyangu –
Messrs. Mosha & Company.*

For the 1st Defendant:

No Appearance.

For the 2nd Defendant:

No Appearance.

For the 3rd & 4th Defendants:

*Mr. P. S. Phiri, State Advocate –
Attorney General's Chambers.*

JUDGMENT

CASES REFERRED TO:

1. *Robert Simeza and 3 others v Elizabeth Mzyece* (2011) Vol. 3 Z.R. 290;
2. *Mary Musambo Kaunda v The Attorney General* (1993-1994) Z.R. 1;
3. *Ozokwo v The Attorney General – SCZ Judgment No. 25 of 1985*;
4. *Livingstone v Rawyards Company* (1880) 5 A.C. 25;
5. *Zambia Railways Limited v Pauline S Mundia, Brian Sialumba* (2008) Vol. 1 Z.R. 287 (S.C);
6. *Anti-Corruption Commission v Barnett Development Corporation Limited* (2008) Z.R. 69; and
7. *JZ Car Hire Limited v Malvin Chala and Scirocco Enterprises Limited* (2002) Z.R. 112.

LEGISLATION REFERRED TO:

1. *The High Court Act, Chapter 27, Volume 3 of the Laws of Zambia*; and
2. *The Lands and Deeds Registry Act, Chapter 185, Volume 12 of the Laws of Zambia*.

1 INTRODUCTION

1.1 The Plaintiff, Lusinde Investments Limited, launched this action against the 1st and 2nd Defendants, Cosmos Investments Limited and Albert Makuyu (T/A Try Your Luck Enterprises), respectively, whom it alleges that they have been trespassing on its property known as Lot No. L/17971/M, Mongu (“Subject Property”). The Plaintiff also joined the 3rd and 4th Defendants, the Commissioner of Lands and Attorney General, respectively, on the basis that they issued a second Certificate of Title, in respect of the Subject Property, to the 1st Defendant. Accordingly, this Court has been moved to determine who is the *bona fide* owner of the Subject Property.

2 BACKGROUND

2.1 The genesis of this matter is that the Plaintiff was issued with Certificate of Title No. 47498, in respect of the Subject Property, on 15th February, 2006. The 1st and 2nd Defendants entered the Subject Property on various dates, without the Plaintiff's consent, and started building illegal structures on the Subject Property. Unknown to the Plaintiff, the 3rd Defendant had issued a second Certificate of Title to the 1st Defendant. It is against this backdrop that the Plaintiff launched this action.

3 PLEADINGS

3.1 This matter was launched by way of Writ of Summons, on 21st October, 2015, which Writ was amended on 12th February, 2019. The Writ of Summons is endorsed with claims for the following reliefs: -

- 1. A declaration that the Plaintiff is the sole and lawful owner of Property No. 17971/M Mongu;*
- 2. An injunction restraining the Defendants either by themselves, agents or whomsoever from interfering with the Plaintiff's quiet possession of the property;*
- 3. Damages for loss of business/income occasioned by the Defendants' actions;*
- 4. Costs of and incidental to these proceedings; and*
- 5. Any other relief that the Court may deem fit.*

- 3.2 By Statement of Claim, the Plaintiff averred, *inter alia*, that it is a registered company and engaged in the business of mining Diatomite. It was stated that on diverse dates, the Defendants entered the Subject Property without the Plaintiff's permission and started erecting illegal structures. On becoming aware of the Defendants' illegal activities, the Plaintiff made efforts to remove the Defendants from its property but that the Defendants have without valid reasons continued to occupy the Subject Property.
- 3.3 It was asserted that the Plaintiff is the legal owner of the Subject Property and holds a Certificate of Title No. 47498, issued on 15th February, 2006, in respect of the Subject Property. The Plaintiff stated that it was prompted to conduct a search at the Ministry of Lands to ascertain why the 1st Defendant had continued to interfere with its quiet enjoyment of the Subject Property, which revealed that the 3rd Defendant issued a second Certificate of Title to the 1st Defendant on the same date as the one issued to the Plaintiff.
- 3.4 The Plaintiff affirmed that the Defendants' actions have caused the Plaintiff to suffer damage as it can no longer enjoy quiet possession of the Subject Property and cannot conduct processing of activities on the Subject Property leading to the Plaintiff incurring huge losses. It was

further affirmed that if the Defendants are not restrained from interfering with the Plaintiff's quiet possession of the Subject Property, the Plaintiff shall continue suffering losses which cannot be atoned for by damages.

3.5 By the 3rd and 4th Defendants' Defence, filed on 1st April, 2019, it was averred, *inter alia*, that according to the record at the Lands Registry, the Offer, Lease and Certificate of Title of the Subject Property are in the name of the Plaintiff. It was further averred that the 1st Defendant's Offer and Lease were not available, therefore the 1st Defendant's Certificate of Title was registered in error.

3.6 The 1st and 2nd Defendants were served with Court process through substituted service and at the time of trial, they had not entered appearances nor filed the necessary documents herein.

4 EVIDENCE AT TRIAL

4.1 **PW1** was **Singumbe Keith Mutupo**, aged 72 years old, who is a Director of the Plaintiff company. His Witness Statement filed herein on 22nd April, 2022, was admitted into evidence as his evidence in chief. By the said Witness Statement, PW1 testified, *inter alia*, that on 9th September, 2005, the Plaintiff was offered the Subject Property by the Ministry of Lands and it was requested to pay the sum of

K76,000.00, which sum was broken down to include Consideration Fees at K10,000.00; Registration Fees at K46,000.00; and Preparation Fees at K20,000.00. A copy of the Offer Letter was produced at page 1 of the Plaintiff's Bundle of Documents.

- 4.2 PW1 further testified that a Certificate of Title No. 47498 was issued to the Plaintiff, on 15th February, 2006, as shown at pages 4 to 11 of the Plaintiff's Bundle of Documents. He stated that the Subject Property was acquired for the purpose of setting up a plant processing facility in Mongu, Zambia and the processing plant involved the mining of diatomite in Ngonga area.
- 4.3 PW1 asserted that according to the Barotse Royal Establishment, the grant of the title to the Plaintiff was permanent and irreversible as shown at page 14 of the Plaintiff's Bundle of Documents. He stated that in preparation of the activities to be undertaken on the Subject Property, various meetings were held and progress reports recorded with interested stakeholders and was only awaiting actual use of the property.
- 4.4 PW1 further asserted that on various dates, the 1st and 2nd Defendants entered the Plaintiff's Subject Property without permission and started erecting illegal structures on the Subject Property. Owing to the disturbance, the Plaintiff was and had been unable to commence any of the

activities for which the Subject Property was procured for. The 1st and 2nd Defendants have continued to engage in illegal activities without lawful excuse.

4.5 PW1 affirmed that he conducted a search at the Ministry of Lands on the Subject Property, which disclosed that the 3rd Defendant had issued a second Certificate of Title to the 1st Defendant on the same date as the one issued to the Plaintiff. PW1 stated that based on the 3rd and 4th Defendant's Defence, the 1st Defendant's Certificate of Title was issued in error.

4.6 It was PW1's testimony that owing to the said error, the Plaintiff has suffered damage as the entire project has been on stand still since 2006. PW1 stated that if not for the error, the Plaintiff would have been able to set up the plant processing facility on the Subject Property in Mongu and engage in mining on the Subject Property. PW1 requested that the time spent in clearing this matter should be atoned for in damages. He further stated that the Plaintiff is entitled to the loss of business and income occasioned firstly by the erroneous issue of Certificate of Title by the 3rd and 4th Defendants and continued illegal use of the Subject Property by the 1st and 2nd Defendants.

4.7 When cross examined, PW1 testified that he has people on the ground in Mongu who told him that the Defendants had encroached on the Subject Property. He stated that

when he conducted a search at Ministry of Lands, it revealed that the 1st Defendant had title that was similar to the Plaintiff's title. He later discovered that the 2nd Defendant did not have title, but had put up a milling plant on the Subject Property.

4.8 PW1 asserted that he had a mining license to mine industrial material and process various products. He stated that when he was issued with a mining license, he needed land to set up a factory for processing. He conceded that when the land was encroached he had not yet started the activities or any business on the Subject Property.

4.9 In re-examination, PW1 stated that he was in the process of obtaining the appropriate licenses to enable him start the business on the Subject Property. He further stated that the Zambia Environmental Management Agency needed to go to the Subject Property to assess the area so that the Plaintiff does not cause pollution.

4.10 PW1 also stated that he was required to apply for a mining license which he did and it was issued. He needed to prepare a business plan to invite people to partner with him. He asserted that the people who encroached on the Subject Property affected the Plaintiff's business plans.

- 4.11 The Plaintiff did not call any other witnesses and this marked the close of the Plaintiff's case.
- 4.12 The 3rd and 4th Defendants opened their case with **DW1** who is **Loreta Musumali Mwansa**, a Senior Lands Officer, at Ministry of Lands. She testified, *inter alia*, that there was initially an application for conversion of customary land to leasehold tenure, by the Plaintiff, which application was granted, following which an offer was issued to the Plaintiff in 2005 and a Certificate of Title in respect to the Subject Property was issued to the Plaintiff, in 2006.
- 4.13 DW1 affirmed that the Plaintiff conducted a search on their system at Ministry of Lands and found that another name was registered on the Subject Property. To find out who the real owner of the Subject Property was, the officials at Ministry of Lands reverted to the records on the file to see who the actual applicant of the Subject Property was and if there was any other subsequent application, at all. They found out that the only records on the file were for the Plaintiff.
- 4.14 DW1 asserted that it is a system error which led to having two Certificates of Title and that in the few instances that such has occurred, they reverted to the records of the Lands Register.

- 4.15 In cross examination, DW1 admitted that there was an error on the Lands Register, but that she was not aware when the error happened. She stated that she would not know when the other Certificate of Title was issued to the 1st Defendant, but acknowledged that the Certificate of Title was issued to the 1st Defendant in error. She further stated that in the past, where it was clear that it is a system error and after records are interrogated, the Chief Registrar is requested to amend the entry in the Lands Register. She also stated that in *casu*, this had not been done due to the fact that the Commissioner of Lands only became aware of the error when the matter was in Court.
- 4.16 DW1 testified that the procedure to convert land from customary law to leasehold comes at a cost in the form of statutory fees and that the Plaintiff incurred those costs. She further testified that she was not aware that the Plaintiff was embarking on projects on the Subject Property. She conceded that the failure to amend the system inconvenienced the Plaintiff.
- 4.17 There was no re-examination conducted and that marked the close of the 3rd and 4th Defendant's case.
- 4.18 At trial, the 1st and 2nd Defendants were absent without advancing any reasons, despite being aware of the date of hearing. Therefore, this Court closed this case and gave the parties an opportunity to file their written

submissions. It is trite law that where a party does not appear for a hearing, in the absence of sufficient reason justifying their non-appearance, a Court may proceed to hear the matter and give Judgment on the basis of the evidence adduced by the Plaintiff. This is as provided by **Order XXXV, Rule 3** of **The High Court Rules**¹, which is couched as follows: -

“If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the Court may, upon proof of service of notice of trial, proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant.” (Court's emphasis)

4.19 My decision to close the case is further fortified by the case of **Robert Simeza and 3 others v Elizabeth Mzyece**¹, where the Supreme Court stated as follows: -

“There is no procedural injustice occasioned when a party who is aware of proceedings does not turn up.”

5 SUBMISSIONS

5.1 By the Plaintiff's submissions filed on 21st August, 2023, Counsel for the Plaintiff submitted, *inter alia*, that as it was not in dispute that the Plaintiff is the registered owner of the Subject Property, what is in issue is whether the

Plaintiff is entitled to damages for loss of income occasioned by the Defendants' actions.

5.2 Counsel cited the case of ***Mary Musambo Kaunda v The Attorney General***², in support of the submission that the Plaintiff has a duty to prove its case on a balance of probabilities. It was submitted that for the Plaintiff to succeed, they must tender and bring forth evidence that makes it more probable than not that the Defendant was under obligation to perform its duty to the Plaintiff within the confines of the law. It was further submitted that the issuance of title on a property that already has title is not permissible.

5.3 Counsel cited **Section 33 of *The Lands and Deeds Registry Act***¹, in support of the submission that a Certificate of Title is conclusive evidence of ownership of property from the date of its issue. Counsel submitted that before the Plaintiff could commence its project, it was discovered that the 1st and 2nd Defendants had entered Subject Property, started erecting buildings without authorisation from the Plaintiff and all efforts to evict them failed. Counsel further submitted that the Plaintiff's project stalled and as a result, it incurred losses that could not have been incurred if the 3rd and 4th Defendants did not erroneously issue title to the 1st Defendant. Counsel

cited the case of ***Ozokwo v The Attorney General***³, in which the Supreme Court stated as follows: -

“A Plaintiff who has been deprived of something must be awarded realistic damages which shall afford him a fair recompense for his loss.”

5.4 Based on the foregoing, Counsel submitted that the Plaintiff is entitled to damages for loss of business as it stalled its project for 18 years and that the Plaintiff is entitled to be put, so far as money can do it, in the position that the Plaintiff would have occupied if the wrong had not been done. The case of ***Livingstone v Rawyards Company***⁴, was cited in fortifying the foregoing submission.

5.5 None of the Defendants filed herein their written submissions.

6 CONSIDERATION AND DECISION OF THE COURT

6.1 I have considered the Pleadings and evidence adduced before this Court. I have also considered the submissions filed herein and list of authorities cited, for which I am grateful to learned Counsel for the Plaintiff.

6.2 The Plaintiff claims, *inter alia*, for a declaration that it is the sole and lawful owner of the Subject Property, damages for loss of business or income occasioned by the

Defendant's actions and costs of and incidental to these proceedings.

- 6.3 The burden of proof is on the Plaintiff to prove its claims to the required standard. The Supreme Court in the case of ***Zambia Railways Limited v Pauline S Mundia, Brian Sialumba***⁵ held that: -

“The standard of proof in a civil case is not as rigorous as the one obtaining in a criminal case. Simply stated, the proof required is on a balance of probability as opposed to beyond all reasonable doubt in a criminal case. The old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable...”

- 6.4 The facts in this matter are that the Plaintiff is the registered owner of the Subject Property. The Plaintiff alleges that the 1st and 2nd Defendants entered on the Subject Property, without its permission and started erecting illegal structures. It is further alleged that when the Plaintiff conducted a search at the Ministry of Lands, it was revealed that the 3rd Defendant issued a second Certificate of Title to the 1st Defendant on the same date as the one issued to the Plaintiff.
- 6.5 In response to these allegations, the 3rd and 4th Defendants stated that the 1st Defendant's Certificate of Title, with respect to the Subject Property, was registered and issued

in error, as the record at the Ministry of Lands reveals that the Offer, Lease and Certificate of Title, with respect to the Subject Property, are in the name of the Plaintiff.

6.6 On my analysis of the foregoing, I find that the following are the legal issues for determination: -

1. Whether the Plaintiff is entitled to a declaration that it is the registered owner of the Subject Property;
2. Whether the Plaintiff has proved that the Defendants interfered with the quiet possession of the Subject Property; and
3. Whether the Plaintiff is entitled to damages for loss of business or income.

6.7 I will begin by addressing the first legal issue of whether the Plaintiff is entitled to a declaration that it is the registered owner of the Subject Property. In doing so, I shall consider the provisions of **Section 33 of *The Lands and Deeds Registry Act***², cited by Counsel for the Plaintiff and which provides as follows: -

“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 interests whatsoever:

- (a) Except the estate or interest of a proprietor claiming the same land under a current prior Certificate of Title issued under the provisions of Parts III to VII; and*
- (b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and*
- (c) Except so far as regards any portion of land that may be erroneously included in the Certificate of Title, evidencing the title of such Registered Proprietor by wrong description of parcels or of boundaries.”*

6.8 The import of the foregoing section was discussed in the case of ***Anti-Corruption Commission v Barnett Development Corporation Limited***⁶, where the Supreme Court held as follows: -

“We agree that under Section 33 of the Lands and Deeds Registry Act, a Certificate of Title is conclusive evidence

of ownership of land by the holder of the certificate, in this case the Respondent. But we also know that under the same section or Section 34, a certificate of title can be challenged and cancelled for fraud or for reasons of impropriety in its acquisition. So, the statement that a certificate of title is conclusive evidence of ownership of land is only true when there is no challenge based on fraud.”

6.9 From the foregoing authorities, it is clear that a Certificate of Title is conclusive proof of ownership of the property to which it relates and that the ownership can only be challenged if one successfully proves fraud or impropriety in its acquisition. The Plaintiff herein has demonstrated that it is the registered owner of the Subject Property by producing a copy of the Certificate of Title relating to the Subject Property registered in its name, which was not disputed by the 3rd and 4th Defendants. Further, as the both the 3rd and 4th Defendants have admitted that the title issued to the 1st Defendant, relating to the Subject Property, was issued in error, there is no challenge regarding the propriety of the Plaintiff's acquisition of the Subject Property. Therefore, the Plaintiff is entitled to a declaration that it is the owner of the Subject Property and I so declare.

6.10 I now turn to consider the second legal issue of whether the Plaintiff has proved that the Defendants interfered with

approval to conduct its project of setting up a processing plant along Mongu-Limulunga Road by the Barotse Royal Establishment as per page 14 of the Plaintiff's Bundle of Documents. Further, the Plaintiff has produced a copy of an approval letter for the mining of Diatomite and processing project in Mongu from Zambia Environmental Management Agency (ZEMA), dated 17th August, 2004. This, in my view, is an indication that the Plaintiff intended to conduct mining activities. However, the Plaintiff has not demonstrated that the mining activities were to be conducted on the Subject Property or demonstrated how the Defendants interfered with the commencement of the mining project.

6.13 Furthermore, as the Plaintiff has failed to prove that the 1st and 2nd Defendants interfered with the possession of the Subject Property, the Plaintiff's claim for damages has no basis. In the case of **JZ Car Hire Limited v Malvin Chala and Scirocco Enterprises Limited**⁷, it was held as follows: -

"It is the party claiming any damages to prove the damages."

6.14 Based on the foregoing authority, it is clear that it is for the party claiming damages to prove the damages. Therefore, as the Plaintiff herein has not proved to the required standard that the 1st and 2nd Defendants

interfered with the quiet possession of the Subject Property or with the commencement of Plaintiff's mining project, the Plaintiff herein is not entitled to any damages for loss of business or income. Accordingly, the Plaintiff's claim for damages for loss of business or income lacks merit and is accordingly dismissed.

7 CONCLUSION

- 7.1 In conclusion, the Plaintiff herein is entitled to a declaration that it is the owner of the Subject Property and I so declare.
- 7.2 Further, as the Plaintiff herein has failed to prove that the Defendants interfered with the quiet possession of the Subject Property or with the commencement of Plaintiff's mining project, the Plaintiff herein is not entitled to any damages for loss of business or income. Accordingly, the said claims are dismissed.
- 7.3 In the circumstances of this case, each party shall bear its own costs.
- 7.4 Leave to appeal is granted

**SIGNED, SEALED AND DELIVERED AT LUSAKA, THIS 24TH
DAY OF NOVEMBER, 2023.**



**P. K. YANGA'LO
HIGH COURT JUDGE**