

IN THE SUPREME COURT OF ZAMBIA

SCZ APPEAL No.26 OF 1991

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N :

DICK BWALYA

APPELLANT

and

CHINSALI DISTRICT COUNCIL

RESPONDENT

Coram: Sakala, Chaila and Muzyamba, J.J.J.S.

20th July, 1993 and 8th September, 1993

For the Appellant : D. Kafunda of Kafunda and Co.,

For the Respondent : Mrs. I.T. Mundia, Director of Legal Services
Kitwe City Council

J U D G M E N T

Muzyamba, J.S. delivered the judgment of the court

Cases referred to:-

1. WILSON MASAUSO ZULU Vs AVONDALE HOUSING PROJECT LIMITED
1982 Z.R. 172
2. ORDER 113 R.S.C. 1988 Edition

This is an appeal against a decision of the High Court at Ndola refusing to issue an eviction order against the respondent from Stand Number 71 Chinsali.

The brief facts of this case are that in 1968 the appellant bought a bar from the respondent for K16,000. He did not until 19th May, 1987, get title deeds which described his bar or land as stand number 71. In the meantime, in 1970 the respondent built a butchery and market near the bananas planted by the appellant. This happened to be on Stand 71. There then rose a

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dispute between the appellant and respondent regarding ownership of the stand. In an attempt to resolve the dispute the respondent invited the Provincial Planning Officer at Kasama to survey the area and in August, 1989 an Officer from the Planning Office visited Chinsali and made a physical survey of the disputed land and drew a plan showing the positions of the appellant's buildings, the market and nearby structures. This did not solve the problem and on 29th January, 1991 the appellant brought an action against the respondent for possession of the market alleging that the respondent and people in occupation were trespassers. The court refused the application and hence this appeal.

The appellant has, through his learned Counsel Mr. Kafunda, put forward two grounds of appeal namely:

1. The learned trial Commissioner failed to conclusively exhaustively and/or definitively resolve the dispute before him which centred on the question of possession of land and the right of the appellant to the unfettered enjoyment thereof. Having failed as alleged, the court below then erred in Law when it failed to deliver a judicial decision on the matter; the learned trial Commissioner fell into further error in any event by making an untenable and incompetent direction beyond purview of the provisions of Order 113/1 - 3/1 of the Supreme Court practice, 1991 Edition.
2. Having grossly misapprehended the law and his function in the court below, the learned trial Commissioner, misdirected himself both in fact and law when he made certain findings of fact based on a wholly erroneous view of the evidence on record particularly the uncontroverted evidence of the appellant.

Mr. Kafunda contended, quite forcefully, that the learned trial Commissioner misapprehended the facts of the case and the law applicable and failed to resolve

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the real issue before him which was whether or not the people in possession of the market were there with the appellant's licence or consent. That he fell into error by addressing his mind to Sections 11, 33 and 34 of the Lands and Deeds Registry Act, Cap 287 of the Laws of Zambia which were irrelevant to the determination of the issue before him. In support of his argument he cited the case of **WILSON MASAUSO ZULU Vs AVONDALE HOUSING PROJECT LIMITED (1)** where this court said:

"The trial court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter, in controversy is determined in finality".

In response, Mrs. Mundia, learned Counsel for the respondent submitted that the fact that the learned Commissioner rejected the application meant that he had determined the real issue before him.

Order 113 rule 1 (2) under which the application was made to court provides:

"113. r 1: Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order".

And rule 3 of same order provides:

"113. r 3: The plaintiff shall file in support of the originating summons an affidavit stating-

- (a) his interest in the land;
- (b) the circumstances in which the land has been occupied without licence or consent and in which his claim to possession arise; and

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(c) that he does not know the name of any person occupying the land who is not named in the summons."

We would, from the wording of this order, agree with Mr. Kafunda that the real issue before the lower court was whether or not the respondent or occupants of the market were there with the licence or consent of the appellant. But before resolving that issue the court had to be satisfied that the appellant had an interest in the land, in this case the market. Ownership of the stand on which the market is situated was certainly a primary issue and had to be resolved first along side the question of licence and failure to do so would have been contrary to the decision in the ZULU (1) case relied upon by the appellant.

In his judgment, at page 7 of the record, the learned Commissioner, after concluding that there was a mistake, said:

"The anomaly could be dealt with under section 31 (1) (d) of Cap. 287 of the Laws of Zambia. The findings of the court

In conclusion, the defendant should ensure that the error for which it is fully responsible is quickly corrected in accordance with sections 11 and 34 (1) (d) of the Lands and deeds Registry Act, Cap. 287."

We are satisfied, from the wording of his conclusion, that the only reason why the learned Commissioner cited the provisions of the Lands and Deeds Registry Act was merely to draw the attention of the respondent, after finding that there was a mistake to the fact that such a mistake could be rectified by making representations to the Registrar of Lands and Deeds under or by virtue of those Sections. Had he treated the evidence of the respondent as a counter-claim then he would no doubt have ordered rectification of the register.

Mr. Kafunda also contended that the learned trial Commissioner was wrong to find that there was a mistake or error in the description of the property. That no such error or mistake existed because had it been there then the respondent would have taken steps to have it rectified instead of waiting until the appellant took the matter to court, especially that the dispute arose before the title deeds were issued. That, in any case it was unimaginable that a mistake could have been made by the respondent because according to procedure that obtains in allocation of Council land it is the Council who recommends and made recommendations in this case to the Commissioner of Lands for the issuance of title deeds to the appellant and that the deeds were issued only after the land had been physically surveyed and a diagram, now annexed to the certificate of title, prepared with the knowledge of the Council, the respondent. Therefore, that the defence put up by the respondent was an after thought. Moreover, that the certificate of title was good against the holder. He therefore urged the court to allow the appeal.

In reply, Mrs. Mundia submitted that the plan in the supplementary record of appeal which was prepared after the dispute arose clearly showed that the appellant's bar or buildings were outside stand 71 for which title deeds were issued to the appellant. That when this plan was put in cross examination to the appellant, the appellant did not dispute its propriety or accuracy and that the appellant infact pointed at his buildings, where they are shown to be, on the plan. That there was therefore an obvious mistake or error by the Council in its recommendation to the Commissioner of Lands and that the learned Commissioner was therefore right in his finding that there was a mistake and refusing to grant the application. That it could not therefore be said that he failed to deliver a judicial decision on the matter and she urged the court to dismiss the appeal.

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It is not clear from the evidence when the respondent made recommendations to the Commissioner of Lands for the appellant to have title deeds for the bar. What is clear, however is that the title deeds were issued on 19th May, 1987 and that the dispute over stand 71 started in 1987. At page 19 of the record the appellant said:

"The problems started in 1987 because at the stand I had planted bananas about one hectre. I planted these even before I obtained the title deeds".

We would safely say from this statement, that the dispute started in 1987 after the appellant obtained the title deeds. We do not therefore accept Mr. Kafunda's argument that the dispute arose before the appellant obtained the title deeds.

It is common cause that in August, 1989 an independent person, an officer from the Provincial Planning Office in Kasama surveyed the land in dispute in an attempt to resolve the dispute and came up with a plan of the area. This plan is in the supplementary record of appeal. A close examination of this plan shows that the appellant's bar or buildings are outside stand 71 on which is built the market. The market and bar are separated by a road or road reserve. In cross examination the appellant was shown the plan and at page 20 of the record this is what he said:

"I can identify my buildings. It is where it is written Dick Bwalya Buildings. The bananas border the market place".

It is quite clear from this statement that the appellant did not, as rightly submitted by Mrs. Mundia, dispute or doubt the propriety or accuracy of the plan. He accepted it as representing the true positions of his bar and market.

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And the true position, as earlier pointed out, is that the bar is outside stand 71 on which is built the market. There is therefore an obvious mistake or misdescription of the appellant's bar or property. It certainly does not encompass the market and it is most unfortunate that the appellant was trying to take advantage of the mistake. We do not therefore accept Mr. Kafunda's argument that the respondent could not have made a mistake in its recommendations and that the learned Commissioner misapprehended the facts of this case and that he failed to resolve the real issue before him or indeed to deliver a judicial decision on the matter. In our view, he adopted the right approach and having found that there was a misdescription of the appellant's property or indeed that the appellant did not own the market then there was no need for him to decide whether or not the occupants of the market were there without the appellant's licence or consent, for he has no right over the market. We would therefore, for the foregoing reasons, dismiss the appeal with costs to be taxed in default of agreement.

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E.L. SAKALA
SUPREME COURT JUDGE

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M.S. CHAILA
SUPREME COURT JUDGE

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W.M. MUZYAMBA
SUPREME COURT JUDGE