IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 113/2001**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

WORKERS COMPENSATION FUND CONTROL BOARD **Appellant**

And

KANG'OMBE AND COMPANY **Respondent**

Coram: Sakala, CJ. Mambilima and Chitengi, JJS.

On 4th June, 2003 and 8th September, 2004

For the Appellant: Mr. J. Kabuka of
Messrs J. Kabuka & Company

For the Respondent: Mr. M. Chitabo of
Messrs Chitabo Chiinga Associates

JUDGMENT

Chitengi, JS, delivered the Judgment of the court.

Case referred to: -

1. ***Beatrice Muimui Vs Sylvia Chungu SCJ Judgment No. 50 of 2000***

In this Judgment, we shall refer to the Appellant as the Defendant and the Respondent as the Plaintiff which is what they were in the Court below.

This Notice of Motion was originally brought under Rule 78 of the ***Supreme Court Rules, Cap 25 of the Laws of Zambia***, which is our slip Rule. Before we could hear the Motion, the Plaintiff took out another

Motion to amend the Motion so as to ground it on ***Order 59/1/157* RSC 1999 Edition**. In short, the Notice of Motion now before us is for rehearing of the appeal. Indeed, on the facts of this case, we do not see how the slip rule would apply.

The Plaintiff relies on the Affidavit he swore on 3rd September, 2002 and filed on 5th September, 2002 in support of the Notice of Motion pursuant to Rule 78 of the Supreme Court Rules and on another Affidavit entitled Additional Affidavit in Support of application to correct accidental slip etc.

Before coming to the contents of the Affidavits in Support and Opposition of the Notice of Motion, it is necessary to refer to the history of this case. By a lease dated 30th July, 1998 the Plaintiff leased from the Defendant, House Number 12 Oval, Northrise, Ndola, being Subdivisions 36 and 37 of Subdivision 187 of Farm 748 "Njojo" situate in the Copperbelt Province of Zambia. The Defendant is a statutory body created by an Act of Parliament. Sometime in December, 1998 the Defendant offered the house to its employee, one Mr. S. Kapeza for sale at K50,000,000. There was some evidence that Mr. Kapeza already owns a house bought through a loan from the Defendant. Later, the Defendant said it was not selling the house to Mr. S. Kapeza at all but was keeping it as housing stock for housing its employees. The Plaintiff felt aggrieved and relying on the Presidential pronouncements on sale of government and parastal houses to sitting tenants brought an action in the High Court claiming the right to buy the house. The Plaintiff was successful in the High Court. But on appeal to this Court we reversed the High Court, holding that for purposes of purchase of government and parastatal houses, it was not enough to be a sitting tenant and that one must also be an employee of the government or parastatal selling the house.

We now revert to the Affidavits supporting the notice of motion.

In his Affidavit of 3rd September, 2002, the Plaintiff deposed that after we had heard the arguments he took out a Notice of Motion to arrest judgment. In the Affidavit in Support of the Notice of Motion to arrest judgment, he deposed that he exhibited video tape evidence of the Presidential pronouncements that ordinary commercial tenants, like him, were entitled to purchase parastatal houses they occupied but this Notice of Motion was never heard. In the additional Affidavit, the Plaintiff referred to Presidential pronouncements in newspapers and television broadcasts in which the President is alleged to have said that sitting tenants of all strata of society were entitled to purchase parastatal houses they occupied.

The Plaintiff filed heads of argument and additional heads of argument in which we are referred to numerous authorities.

The Plaintiff's head of argument mainly deal with the slip rule and raise matters which, more or less, amount to an appeal against our judgment.

The first part of the Plaintiffs additional heads of argument deals with the Court's power to hear fresh evidence at the hearing of an appeal and refers to numerous authorities in support. But in our view that is not an issue now because the judgment has already been delivered. As we see it the real issue is whether we can rehear the appeal and alter our judgment in terms of ***Order 59/1/151 of the RSC***.

In the second part of the additional heads of argument, Mr. Chitabo, learned counsel for the Plaintiff, relying on ***Order 59/1/157 RSC*** submitted that this court has power to alter its decision before its order is perfected. He submitted that in this case, the judgment has not been

passed and entered because the judgment is presently in draft form and has not been signed and scaled and circulated to the parties. Further, he said the Plaintiff is still occupying the house in question.

It is also submitted that under **Order 59/1/157,** this Court has inherent jurisdiction to reinstate an appeal which has been heard on its merits and allowed, if the Applicant shows good reasons for reopening the matter. According to Mr. Chitabo, there are good reasons for reopening the matter because the Notice of Motion to arrest judgment which was filed before delivery of the judgment was not heard. Mr. Chitabo submitted that because the Notice of Motion to arrest judgment was not heard the judgment was obtained irregularly and the judgment should be altered and the appeal reinstated for purposes of hearing the application to arrest judgment.

The Defendant's Affidavit in Opposition and heads of argument related to the Notice of Motion to arrest judgment, which application is now not before court. The application before court is one under ***Order 59/1/157*** dealing with rehearing of the appeal. This notwithstanding, Mr. Kabuka, learned counsel for the Defendant, in his brief submission, objected to the application contending that there was no lacuna in our laws for us to resort to the White Book. Mr. Chitabo's short reply to this is that there is an obvious lacuna in our laws .

We have carefully considered **Order 59/1/157 of RSC** under which the application has been brought and the submissions of counsel.

As Mr. Kabuka has raised the issue that there is no lacuna in our laws for us to resort to the White Book, we must dispose of this issue first before considering the substance of the application itself. Mr. Chitabo

submitted that there is an obvious lacuna in our laws justifying resort to the White Book.

The application before us is one of rehearing the appeal after we had delivered our judgment. We have gone through the provisions of the Supreme Court of Zambia Chapter 25 of the Laws of Zambia and the Rules made there under to find any provision which authorizes us to rehear an appeal which we have heard and determined, but in vain. In the circumstances, we agree with Mr. Chitabo that there is a lacuna in our laws. The Plaintiff can, therefore, rely on Order 59/1/157 of RSC and we can entertain this application under that Order.

Mr. Chitabo in his written heads of argument made long submissions and cited numerous cases to us, but in the view we take of this application we do not intend to go into the details of those submissions and cases. Suffice it to say that we have given our anxious consideration to the submissions and the cases cited to us.

As we understand the Affidavit evidence and the heads of argument, the Plaintiffs' complaint is simply this. The court decided the appeal without considering evidence of pronouncements that ordinary commercial tenants, like him, were entitled to purchase parastatal houses they occupied; that he had taken out a Notice of Motion to arrest judgment in which he was to produce evidence to the effect that the President had made pronouncements which entitled him to purchase the house he was occupying; that the Notice of Motion for unexplained reasons was not heard and judgment was delivered without him being heard on the issue of Presidential pronouncements; that consequently the judgment was obtained irregularly; that since our judgment has not yet been perfected we can alter it in terms of ***Order 59/1/157***.

On the facts of this application, we find no force in the submissions by Mr. Chitabo. Even if the Notice of Motion to arrest judgment was heard and the evidence of Presidential pronouncements were brought before us, it would not have taken the Plaintiff's case any further. This is not the first time we have decided a case like this one. Since the commencement of sale of Government, parastatal and council houses, we have decided many similar cases in light of the Presidential pronouncements, which the Plaintiff appears to assume we are not aware of. Properly read, our judgment on appeal clearly shows that we were alive to the Presidential pronouncements when we decided the appeal.

In ***Beatrice Muimui Vs Sylvia Chungu***[1] we stated the position at law when dealing with sale of government/quasi government houses. We said: -

> *"We do not subscribe to the argument that being a sitting tenant is the sole criterion in purchasing of a government/quasi government house in the current policy of empowering employees by the Government. We take judicial notice that other important criterion is that potential purchaser has to be an employee of the Government/quasi Government Organisation."*

We are not able to say that Muimui and similar cases on sale of Government/quasi government houses were wrongly decided and that there is a sufficiently strong reason to decline to follow them. Muimui is still good law.

Like in this case, the potential buyer who lost in Muimui was the one who had no employment connection with the Government/quasi Government organization. The issue of the employee having bought a house on loan from the government/quasi government organization is

not a sword in the non employee's hand. In this case, the Defendant even later resiled from its intention to sell the house in question saying it would keep it as its housing stock to accommodate its employees. And we know of no law, constitutional or the general law, which forces an unwilling person to sell his property. The motive of a property owner not to sell is irrelevant.

As to the arguments and submissions that the judgment was irregularly obtained and the judgment was in draft form and was not signed and so on, all we can say is that we find these submissions startling.

There was nothing irregular about our judgment. We cannot deliver a judgment, which is in draft form. Clearly counsel has no knowledge of what goes on before judgment is delivered. When a judgment is delivered it is the final judgment of the court and not a draft.

For these reasons, we find no merit in this Notice of motion and, therefore, it is not even necessary for us to consider whether this is a proper case to consider under Order 59/1/151 of the Rules of the Supreme Court. Accordingly, this Notice of Motion is dismissed with costs to the Defendant to be taxed in default of agreement.

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E. L. SAKALA
CHIEF JUSTICE

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I. C. MAMBILIMA
SUPREME COURT JUDGE

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PETER CHITENGI
SUPREME COURT JUDGE