IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)

SCZ JUDGMENT NO. 5 OF 2006
APPEAL NO. 162 OF 2003

B E T W E E N:

ANORT KABWE	1ST APPELLANT
CHARITY MUMBA KABWE	2ND APPELLANT
AND	
JAMES DAKA	1ST RESPONDENT
THE ATTORNEY-GENERAL	2ND RESPONDENT
ALBERT MBAZIMA	3RD RESPONDENT

CORAM: **CHIRWA, CHITENGI AND SILOMBA, JJS**

On the 3rd August, 2004 and 10th February, 2006

For the 1st Appellant: In Person

For the 2nd Appellant: In Person

For the 1st Respondent: Mr. H. Silweya, Silweya and Company

For the 2nd Respondent: Mr. D. Sichinga, Acting Chief State Advocate

For the 3rd Respondent: Not Present.

J U D G M E N T

SILOMBA, JS, delivered the judgment of the court.

This appeal is against the judgment of the High Court dated the 1st of April, 2003 in which the learned trial Judge nullified the purported ownership of Stand No. 1315, Chelstone, Lusaka, by the 1st and 2nd Appellants and ordered the cancellation of the title deed in the joint names of the two appellants, thereby restoring the title to the stand of the 3rd respondent.

The action was began by a writ of summons in which the two appellants, among others, prayed for a declaration that they were the absolute owners of Stand No. 1315, Chelstone, Lusaka. On the other hand, the 1st Respondent, in its amended defence, averred that he took possession of the stand and started developing it long before the appellants purportedly acquired title to it; he took possession of the stand through an arrangement with the 3rd respondent, the registered owner of the stand, and had effected substantial improvements for which he had not been paid and for which he counter-claimed against the appellants. There were no pleadings from the 2nd and 3rd respondents who were joined to the proceedings by way of third party notice.

The 1st appellant was the only witness who testified in support of the claim. His evidence was that on 18th of January, 1995 he lost employment with Zambia Airways and started to look for a flat to rent. On a day he could not remember, there was an advertisement for a flat and when he went to inspect the flat he stumbled on a vacant piece of land, which was overgrown with grass.

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When he inquired with the Ministry of Lands, he was told to push in an application. After waiting for one year, he got a reply on the 17th of January, 1996, approving the application. He paid the lease fees, as well as, the service charges demanded by the Lusaka City Council. After the rains, he moved on the stand and started to stamp out trees and to clear the land. In March, 1996, while on the stand the 1st appellant saw a group of people in the company of the 1st respondent, who attacked and harassed him.

In April, 1996 the appellants were granted a certificate of title and immediately they started to prepare building plans for the stand. In the meantime, the 1st respondent had put up a shelter with someone living in it who was later evicted by the police in the month of August, 1996. The first appellant then delivered door and window frames to the stand. This was followed by the delivery of crushed stones and an iron gate, which was never installed.

The next time he went back to the stand to check, he found it was occupied by a group of people who prevented him from entering on the premises. He found out later that the group was there on the instructions of the 1st respondent. According to the 1st appellant, the 1st respondent had since erected a wall fence and installed a gate. While this was going on, the 1st appellant never made a search at the Lands and Deeds Registry to find out if there was a rival title holder.

He confirmed that the stand was not advertised by the Lands Department and that he did not know if he was favoured. He denied corrupting any official at Lands. In cross-examination, the 1st appellant admitted that it was true that when he got his title deed in April, 1996 the 1st

respondent had constructed a servants quarter and a wall fence and had dug foundation.

The evidence in rebuttal came from four witnesses, one of whom was Mr. Patient Chihibwa (DW3), a Lands Officer from the Department of Lands. The evidence of DW1, Patrick Ngwenya, was that he occupied Stand No. 1315, Chelstone in Lusaka, on 1st of February, 1994 as a watchman in the employ of the 1st respondent. When he moved to the stand, he found a two-roomed servants quarter already constructed.

In March, 1996, as the workers were busy plastering the wall fence, DW1 saw the 1st appellant enter the premises with a friend. The 1st appellant proceeded to the dug foundation and started taking measurements. At this time, he was challenged by the 1st respondent who told him to leave the premises. He denied that the 1st appellant ever brought any building materials during his stay on the stand. In cross-examination, DW1 testified that the improvements he found on the stand were put up by J.D. Construction, a company owned by the 1st respondent. He also testified that during his stay on the stand no one from the Ministry of Lands inspected the stand.

The evidence of James Daka, DW2, was that Stand No. 1315 was in the name of Albert Mbazima, the 3rd respondent. In 1993, the 3rd respondent contracted him and his company to build a house for him at a price of K59 million and in that same year he completed a servants quarter and dug a foundation for the main house. He denied that the stand was overgrown with grass and that there was no wall fence and foundation when the 1st appellant first went to the stand. On a day he could not remember DW2, together with the 3rd respondent, went to see the Commissioner of Lands,

who, according to DW2, conceded that his officers had made a mistake to reallocate the stand to another person.

DW3 was the officer from the Lands Department who inspected the stand. His findings were that there was a wall fence on the frontage, a three course foundation and nothing else. He made a report on the 6th of February, 1995 and recommended that a notice to repossess the stand should be issued and served on the registered owner of the stand. The notice to repossess the stand was dated the 9th of April, 1995 and as far as DW3 was concerned, the wall fence on the frontage and a slab did not constitute any development, hence his recommendation to repossess the stand. Following the repossession, DW3 confirmed that the stand was offered to the appellants who were later issued with a title deed.

In cross-examination, he said that there was no servant's quarter when he inspected the stand and nobody was living on the stand. He denied that he knew the 1st appellant before the allocation of the stand to him. When he was re-examined by his counsel, DW3 told the trial court that his inspection report was dated 6th of February, 1995 while the re-entry in the Lands and Deeds Registry was entered on the 29th of November, 1995.

In response to questions put to him by the learned trial Judge, DW3 was not sure whether the 3rd respondent received the notice to re-enter the stand, as he did not serve it on him. In fact, DW3 did not prepare the notice to re-enter the stand but someone else. He admitted that on the 20th of April, 1995 he received instructions to prepare a lease to the appellants before the repossession was completed on the 29th of November, 1995.

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The foregoing evidence was thoroughly evaluated by the learned trial Judge who had, during the proceedings, visited the stand personally. He found that it was common cause that the appellants sought to acquire the stand by adverse possession because the land was already the subject of a valid title in the name of the 3rd respondent; that the appellants made no effort to find out the status of the stand before they applied for it. On the basis of the foregoing finding, the learned trial Judge was clear in his mind that the appellant's application for the stand and the inspection of the same by DW3 were done without any statutory search under the Lands and Deeds Registry Act.

Having evaluated the evidence of DW1 and DW2, who testified that no one from the Ministry of Lands inspected the stand during their stay at the premises, the learned trial Judge was of the considered view that the notice of intention to re-enter the stand was never served on the 3rd respondent or posted on the disputed stand. In fact, the learned Judge thought that he would not be wrong to conclude that the notice of intention to re-enter the stand was prepared by DW3 in collusion with the 1st appellant to facilitate the appellant's adverse possession of the stand.

He accordingly found the 1st appellant and DW3 to be untruthful witnesses and proceeded to declare the inspection report a false document because if it were genuine the appellants would have joined the Commissioner of Lands to the proceedings. On the basis of his reasoning he declared that the claim had not been proved and ordered that the title deed issued to the appellants be cancelled for being invalid.

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There are four grounds of appeal that the appellants have advanced in support of their appeal and these are as follows:-

1. **The Honourable trial Judge erred in law and in fact in holding that the appellants had no right to acquire Stand No. 1315, Chelstone, Lusaka.**

2. **The Honourable trial Judge erred in law and in fact that development on Stand No. 1315, Chelstone, Lusaka, commenced in 1993;**

3. **The learned trial Judge misdirected himself in holding that the re-entry on the land was invalid merely because the Commissioner of Lands was not joined to the proceedings; and**

4. **The Honourable trial Judge misdirected himself in disregarding all the evidence given by the appellant and upholding all the evidence given and counter-claims made by the 1st respondent.**

Both appellants relied on the filed heads of argument, which the 1st appellant endeavoured to read to the court. On our part we shall not summarise the contents of the heads of argument except to say that we have read them very carefully, including those filed by the 1st respondent's counsel. Except for ground 3, we find the rest of the grounds not relevant, because they do not address the issue of adverse possession as alluded to by the learned trial Judge.

In dealing with ground 3, we wish to state from the outset that the appellants went to court to prove their claim that they were the absolute owners of Stand No. 1315, Chelstone, Lusaka. To prove that they were the absolute owners, they had to show that they were bona fide owners of the

stand, implying that the acquisition of the stand from the Commissioner of Lands was genuine and in good faith and was backed by a bona fide offer.

To prove that the appellants were the bona fide owners of the stand, was a task that could not be performed by the appellants alone without an input from the Commissioner of Lands, the person who purportedly alienated the land to them or someone duly nominated by him. When we perused the written arguments in support of ground 3, we were taken aback by the appellant's reference to the evidence, which was never adduced in the court below.

To put it in context, the appellants submitted that the presence of the 2nd respondent in the proceedings meant that the Commissioner of Lands was represented. They referred us to the documents the 2nd respondent produced, such as, the notice of intention to re-enter dated the 14th June, 1995, the certificate of re-entry dated 29th November, 1995 and a confirmation of the re-entry also dated the 29th November, 1995, found at pages 80 to 82 of the record, as proof that the re-entry was validly made. It was argued that by ignoring the documents validly produced before him by the 2nd respondent on behalf of the Commissioner of Lands the learned trial judge was in serious error.

As far as we can ascertain, there was no one from the Commissioner of Lands to testify on the process of re-entry and introduce those documents in evidence and be cross-examined. The appellants were supposed to call such a witness, especially the one who prepared the notice of intention to re-enter the stand because this is the witness who was to shed light on the mode of service of the notice on the registered owner of the stand. In the

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circumstances of this case, we cannot fault the learned trial judge for ignoring the documents because they were in the realm of hearsay evidence.

The mode of service of the notice of intention 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 (2) 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.

We say so because 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 enabled to make representations, under the law, to show why he could not develop the land within the period allowed under the lease.

If the land is eventually taken over because of being in breach, despite the warnings from the Commissioner of Lands, the registered owner cannot successfully challenge the action to deprive him of the land. On the other hand if the notice is not properly served and there is no evidence to that effect, as was the case here, there is no way the lessee would know so as to make meaningful representations.

It follows that a repossession effected in the 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. In our view, the Commissioner of Lands cannot be justified in making the land available to another developer.

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At this stage, we wish to take the opportunity to clarify the presence of the 2nd respondent in the proceedings. The record is to the effect that he was joined at the instance of the 1st respondent as a third party to indemnify the 1st respondent against any loss suffered by him, in the development of the stand for and on behalf of the 3rd respondent.

We can, therefore, say that he was called in to take responsibility for the wrong doings, if any, of the Commissioner of Lands. In the context of what we have just said, it does not surprise us that the 2nd respondent found it necessary to rally behind the 1st and the 2nd respondents during the appeal because the re-entry was not valid at law.

We note that DW3, an officer from the Lands Department, was called by the 3rd respondent and not by the appellants. As was expected of him, his role was to give credence to the inspection report that he made and not to the process of the notice of intention to re-enter the stand. But as it turned out, DW3 was found by the learned Judge to have acted in collusion with the appellants when he began to prepare the lease even before the stand was formally taken over, an act that clearly tainted the due process of a re-entry.

The learned Judge had the opportunity to see the witnesses in action and his conclusion that he found the 1st appellant and DW3 untruthful cannot be doubted by us, as far as the record shows. From the very beginning, they acted in concert to circumvent the legally established process of re-entry on a piece of land so that the subsequent alienation of the stand to the appellants resulted in adverse possession as a prior title in the name of the 3rd respondent had not been validly brought to an end by the Commissioner of Lands. We uphold the findings of the learned Judge as he was certainly on

firm ground. The appeal is dismissed and costs will follow the event, to be taxed in default of agreement.

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D. K. Chirwa,
SUPREME COURT JUDGE.

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P. Chitengi,
SUPREME COURT JUDGE.

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S. S. Silomba,
SUPREME COURT JUDGE.