SCZ JUDGMENT NO. 12 OF 2013

(242)

IN THE SUPREME COURT FOR ZAMBIA

SCZ/8/96/2008

HOLDEN AT LUSAKA **Appeal No 73/2009**

(Civil Jurisdiction)

BETWEEN:

SHADRICK WAMUSULA SIMUMBA

APPELLANT

AND

JUMA BANDA **1ST RESPONDENT**

LUSAKA CITY COUNCIL **2ND RESPONDENT**

CORAM: Chibesakunda, Ag CJ, Mwanamwambwa and Phiri, JJS
On 17th January, 2012, and 27th September, 2013

FOR THE APPELLANT	**:**	Mr. M. V Kaona of Messrs Nakonde Chambers
FOR THE 1ST RESPONDENT	**:**	In Person
FOR THE 2ND RESPONDENT	**:**	N/A

JUDGMENT

Chibesakunda, Ag. C.J, delivered the Judgment of the Court.

Cases referred to

1. ***Anort Kabwe and Charity Mumba Kabwe v James Daka, the Attorney General and Albert Mbazima (2006) ZR 12***

2. ***Attorney General v Peter Mvaka Ndhlovu (1986) ZR 12***

3. ***Wilson Masauso Zulu v Avondale Housing Project Limited* (1982) ZR 173**

(243)

4. ***T A Miller v Minister of Housing and Local Government and Another [1968] 2 All ER 633***

5. ***R v Deputy Industrial Commissioner ex parte Moore [1965] 1 ALL ER 81***

6. ***Cheshire County Council v Woodward [1962] 1 ALL ER 517***

7. ***Coleshill and District Investment Co Limited v Minister of Housing and Local Government and Another [1968] 1 ALL ER 65***

8. ***Jane Mwenya and Jason Randee v Paul Kapinga (1998) ZR 12***

9. ***Hunt v Lock [1902] 1 Ch D p428***

10. ***Newscastle City Council v Royal Newscastle Hospital [1959] 1 All ER 734***

11. ***Nkhata and four others v the Attorney General (1966) ZR 124***

Legislation referred to

1. ***Town and Country Planning Act Chapter 283 of the Laws of Zambia Section 22 (4)***

2. ***Lands Act Chapter 184 of the Laws of Zambia Section 13***

This is an appeal against the decision of the Lands Tribunal refusing to issue a declaratory order that the Appellant (the Complainant in the court below) was the legal owner of plot number 38/16/9013 Garden Overspill in Lusaka even though he had failed to develop the disputed plot for 14 years. The parties relied on their affidavit evidence before the Tribunal.

The Appellant's evidence was that he was offered the plot on 22nd April, 1992 following an approval by the Lusaka Urban District Council on 23rd August 1991. The offer was conditional upon the Appellant paying K1, 000.00 plot deposit and two-months service charge advance payment of K200.00 within thirty (30) days of receipt of the letter, failing which the offer was to be withdrawn. In

addition, the Appellant was required to submit building plans to the Council within sixty (60) days for scrutiny. The Appellant made the requisite payments on 28th April, 1992, submitted building plans on 4th September, 1992 and commenced construction in 1993. It later came to the Appellant's knowledge that the 2nd Respondent offered the same plot to the 1st Respondent on 3rd December, 2004.

In response to the Appellant's claim, the 1st Respondent deposed in his Affidavit that he was the legal owner of stand no 38/16/9013 as it was offered to him by the 2nd Respondent after he applied for it. It was his evidence that he was in possession of the official documents for the plot and receipts for the payments he made to the 2nd Respondent. The 1st Respondent deposed that he was not an investigator to investigate the plot in question but since he followed all the conditions set by the 2nd Respondent, the Tribunal ought to declare him the legal owner of the disputed plot. He testified that he had the legal right to access the plot and would not stop developing it. He further, deposed that if there

were any building materials at the plot, they were his and not the Appellant's.

The 2nd Respondent replied by way of an Affidavit in Opposition to Complaint filed by one Phillimon Mwanza, a Clerical Officer in the Estates Section. He submitted that despite the Appellant submitting building plans for developing stand no 38/16/9013 he abandoned the plot without reasonable cause. That it took the Appellant 14 years to commence development. The 2nd Respondent

(245)

deposed that the local authority was under an obligation to prevent squatters from occupying the said property hence its decision to offer it to the 1st Respondent. That the 1st Respondent had since began constructing on the property in dispute and had incurred costs. That in order not to inconvenience either party, the 2nd Respondent was ready, willing and able to offer the Appellant an alternative plot when the plots were available or in the alternative, that the Appellant remained on the stand and compensated the 1st Respondent for the costs incurred in developing the disputed property.

The 2nd Respondent deposed in a Further Affidavit and Reply that its surveyors undertook a survey of the property sometime in October 2003 to ascertain the status of the plot. That the survey established that the property had been abandoned for a long time and that there was only an old and abandoned foundation footing.

The 2nd Respondent deposed that when the 1st Respondent took possession of the property there was no concrete slab as alleged by the Appellant. That the offer to the 1st Respondent was not in any way done maliciously but was necessitated by the Survey Report which indicated that the property was abandoned and undeveloped for a long time. The 2nd Respondent disputed the evidence by the Appellant that he partially built the slab. The 2nd Respondent also disputed the Appellant's estimated value of the slab of K37, 000,000.00.

(246)

The Lands Tribunal ruled in favour of the 1st Respondent. The Tribunal held that the Appellant lost his right to the plot because he did not comply with the stipulated condition to develop the plot within 18 months of the offer and acceptance. The Tribunal ruled that the 2nd Respondent could not be faulted for offering the same plot, 14 years later, to the 1st Respondent. That the 1st Respondent was an innocent party and one who had complied with the conditions imposed on him. The Tribunal based its findings on the Appellant's affidavit evidence where he attested that he was granted permission to construct in 1993 but when he attempted to resume construction recently he was stopped. Part of the ruling of the Lands Tribunal reads as follows:

> ***"The Complainant attempted to resume construction in 2006, fourteen (14) years later. Surely a long***

period suggests that the developer, who had barely started, must have abandoned the project…It is the Tribunal's finding therefore, that the Complainant lost his right to the plot for it was just a plot when it was offered to the 1st Respondent. We find that the 2nd Respondent cannot be faulted for offering the same plot fourteen (14) years later to the 1st Respondent, an innocent party who applied for a (any) residential plot in the area and was allocated the land."

(247)

The Tribunal went on to say,

"The 2nd Respondent has been magnanimous enough to offer an alternative plot to the Complainant or to re-allocate it to him provided he compensated the 1st Respondent for costs incurred, in which case it would find an alternative plot for the 1st Respondent. Going by what we have already stated about the Complainant, he had his opportunity to develop the land between 1992 and 1994 but did not. The land was not in so much demand as it is today. If he (Appellant) is now serious and desires to develop, the 2nd Respondent should find him an alternative plot and add his name to the current list of applicants."

This is the judgment which is now the subject of appeal. The Appellant raised five grounds of appeal, namely that:

(1) The Lands Tribunal erred both in law and fact by implying in its Judgment that the 2nd Respondent acted legally by re-allocating stand no 38/16/9013 to the 1st Respondent when it overlooked the fact that the 2nd Respondent continued collecting ground rent from the Appellant up to 11th December, 2006, two years after the purported re-allocation of the stand to the 1st Respondent thus confirming that the Appellant was the lawful owner of stand no 38/16/9013.

(248)

(2) The Lands Tribunal erred in law and fact by stating that the 1st Respondent "complied and commenced construction" as it is not clear what it is that the 1st Respondent complied with since there is no evidence that the 1st Respondent paid any service charges. Further there is no evidence that the 1st Respondent tendered building plans for approval by the 2nd Respondent. The Lands Tribunal erred by also stating that the 1st Respondent commenced construction as there is no evidence that the 1st Respondent commenced construction of an undeveloped structure on stand no 38/16/9013 as the Appellant has clearly shown that the 1st

Respondent built on top of his existing slab which was not disputed.

(3) The Lands Tribunal erred in law and fact when it stated that the Laws of Zambia require property should be developed within 18 months of the offer if accepted, when the letter of offer to the Appellant did not stipulate time limit within which the Appellant should have completed the construction and yet the letter of offer to the 1st Respondent did contain these stipulations.

(4) The Lands Tribunal's findings that the 1st Respondent was an innocent party who applied for (a) (any) residential plot in the area goes against the weight of

(249)

evidence because the 1st Respondent specifically applied for stand no 38/16/9013 as evidenced by his Affidavit in Support of Summons to Respond to the Appellant's claims for which he even paid survey fees.

(5) The 2nd Respondent did not follow the right procedure in repossessing the Appellant's plot no 38/16/9013, Garden Overspill in that there was no communication between the 2nd Respondent and the Appellant and further there was no issuance of

any notice of re-entry and withdrawal of offer concerning the plot.

The Appellant relied entirely on his written Heads of Argument. He argued grounds one, three and five as one. Counsel for the Appellant submitted that the Lands Tribunal stated that the Laws of Zambia required that the property should be developed within 18 months of the offer if accepted without stating which Laws of Zambia. Counsel argued that this was a gross misdirection because there was no such requirement in Town and Country Planning Act Chapter 283 of the Laws of Zambia nor in the Lands Act Chapter 184 of the Laws of Zambia. Counsel for the Appellant argued that the Tribunal misdirected itself, when answering the question who was the true owner of plot 38/16/9013, by stating that the Appellant had abandoned the plot and that,

(250)

"…where the statutory 18 months period was exceeded by a reasonable period the 2nd Respondent would give notice of re-entry with an opportunity to explain any problems that may have delayed the development. However it is our view that to do absolutely nothing for as long as fourteen (14) years is abandonment or sitting on ones rights. It is the Tribunal's findings therefore the complainant lost his right to the plot for it was still just a plot when it was offered to the 1st Respondent."

Counsel submitted that Section 13 of the Lands Act provided the procedure for re-entry of land. This statutory provision was buttressed by this Court's pronouncement on the consequences of failing to follow procedure for re-entry in the case of ***Anort Kabwe and Charity Mumba Kabwe v James Daka, the Attorney General and Albert Mbazima***[1]. The Appellant submitted that from the authorities cited above, the Tribunal took into account wrong considerations in arriving at its findings. The question was not how long did the holder of the property take in failing to develop the property but whether, in view of lack of development, he was afforded an opportunity to explain the failure or delay before the property was repossessed. The Appellant submitted that from the 2nd Respondent's Affidavit in Opposition and Further Affidavit and Reply at pages 84 and 107 of the Record of Appeal, it was understood to mean that the Council gave no notice for re-entry nor did it make a certificate of re-entry to be entered in the register but

(251)

merely offered it to another developer on account of under development for 14 years. That the Tribunal also misdirected itself when it held that notice of re-entry was only required where the statutory 18 months was only exceeded by a reasonable period as there was no such provision or exception. Counsel for the Appellant submitted that in fact his letter of offer from the 2nd Respondent made no such condition or requirement.

Counsel for the Appellant submitted that interestingly the 2nd Respondent continued to collect ground rent from the Appellant up to December 2006, two years after the purported re-allocation to the 1st Respondent. The Appellant argued that the 2nd Respondent breached the law in the manner it purported to repossess the property and as such it could not be said that 1st Respondent had good title. Counsel submitted that even if the question to be decided was whether the Appellant had commenced the development, that question ought to have been resolved in the Appellant's favour based on the weight of the evidence. According to him, there was evidence that the Appellant submitted building plans which were approved. There was also evidence that the Appellant built a slab on which the 1st Respondent began his construction. Counsel for the Appellant submitted that the Tribunal erred in concluding that as at October 2003 there was only a foundation and footing. The Appellant submitted that the 2nd Respondent's surveyor report and picture did not have a date indicating when the report was made.

(252)

Counsel therefore urged this court to reverse the findings of the Lands Tribunal as there was non-direction in accepting the evidence before it. The Appellant referred us to the case of ***Attorney General v Peter Mvaka Ndhlovu***[2] where this Court pronounced instances when the Appellate Court could reverse findings of fact by a lower court.

The Appellant argued ground two and four as one. Counsel for the Appellant argued that it was erroneous for the Lands Tribunal to find that no developmental activity had taken place in 14 years when the Appellant commenced construction in 1993 and by 2006 there was an existing slab on the property which the 1st Respondent was building on. Further, that the record showed that the Appellant's building plans were approved. Counsel argued that in the alternative, the footing and foundation was part of building or development. He referred us to Section 22 (4) of the Town and Country Planning Act which states,

> ***"Development" means the carrying out of any building, rebuilding or other works or operation on or under land,***
> ***or the making of any material changes in the use of land or building but shall not include……."***

Counsel for the Appellant argued further that there was no disposition to the fact that the 1st Respondent paid service charges and wondered how the Lands Tribunal arrived at that finding. On the finding that the 1st Respondent was an innocent party, Counsel

(253)

argued that the finding was not supported by the evidence on record. The Appellant referred us to the case of ***Wilson Masauso Zulu v Avondale Housing Project Limited***[3] to support the proposition that the lower court's findings must be supported by

the evidence before it. Counsel for the Appellant submitted further that from the 1st Respondent's Affidavit in Support of the Summons to Respond to the Appellant's claims it was clear that he applied for the plot in dispute. Counsel submitted that since the 1st Respondent did not apply for (just) any plot but that plot in particular, he was, therefore, not an innocent party. The Appellant requested this court to find in his favour.

At the hearing of the appeal, this Court gave the Respondents 14 days in which to file their Heads of Argument. The 1st Respondent filed written submissions on 31st January, 2013 the gist of which was that he was the owner of stand no 38/16/9013 as he had acquired the plot in the normal way through the 2nd Respondent. That the arguments raised in the Appeal were personal attacks on him and yet he was just an innocent person. The 1st Respondent submitted that the Appellant was depriving him of his quiet and peaceful enjoyment of the land. That the land was not just a plot but a residential area as that is where he and his family were staying. The 1st Respondent submitted that the Appellant ought to have asked the 2nd Respondent to allocate him another plot. That the action commenced by the Appellant had brought untold misery to his family.

(254)

The 2nd Respondent also filed written submissions on 1st February, 2013 which were to the effect that the Lands Tribunal did not err in law and in fact by holding in its judgment that the

2nd Respondent acted legally by re-allocating stand no 38/16/9013 to the 1st Respondent as the evidence on record did indicate that the Appellant had abandoned the property for over 14 years. Counsel for the 2nd Respondent submitted that the Lands Tribunal did not err in law and in fact when it found that the 1st Respondent complied and commenced construction as the evidence on record would show that the 1st Respondent complied with the conditions of the offer given to him on 3rd December, 2004. Counsel for the 2nd Respondent further submitted that the Lands Tribunal was on firm ground when it stated that the Laws of Zambia require that property should be developed within reasonable timeframe of the offer. The 2nd Respondent argued that the Appellant's offer required him to develop the property within reasonable time not exceeding sixty (60) days from the date of offer. Counsel for the 2nd Respondent submitted that the condition for development of the land was made pursuant to the Town and Country Planning Act Chapter 283 of the Laws of Zambia.

Counsel for the 2nd Respondent submitted that the right procedure was followed in re-possessing the Appellant's plot for failure on the Appellant's part to develop the property within reasonable time. Counsel for the 2nd Respondent submitted that the Appellant committed a fundamental breach of the terms of the offer

made between the Appellant and the 2nd Respondent. That the Appellant was required to put the land to use, but instead he abandoned it for over 14 years leading to the re-allocation of the plot to the 1st Respondent.

We have looked at the issues raised and the evidence before this Court. The facts not in dispute are that the Appellant was offered stand no 38/16/9013 Garden Overspill in Lusaka on 22nd April, 1992. It is also not in dispute that the 2nd Respondent offered the same plot to the 1st Respondent on 3rd December, 2004. We also agree with the Lands Tribunal that the main question to be determined is who the legal owner of Plot no 38/16/9013 is. To that we shall add another issue. This court has to address the question whether the 2nd Respondent acted legally when dispossessing the plot from the Appellant and re-allocating it to the 1st Respondent. We feel the answer to the second question is what will determine who the owner of the disputed plot is.

It is clear from the evidence that the Appellant was given conditions in his letter of offer. The letter at pages 10 and 24 of the Record of Appeal reads,

Mr S.W Simumba
P.O Box 30683
LUSAKA

Dear Sir,

<u>Re: Application for a residential stand in Lusaka</u>

I refer to your application in respect of the above referred to subject.

I am pleased to inform you that Council at its meeting held on 23rd August, 1991 offered you stand no 38/16/9013 in Garden Overspill, Lusaka.

(1) You are requested to pay K1,000.00 plot deposit and two months service charge advance payment of K200.00 within thirty (30) days from the date hereof and failure to pay offer shall be withdrawn.

(2) Submit building plans to the Council for scrutiny within sixty (60) days from the date of offer thereof.

The said payment should either be by hard cash or bank certified cheque.

P. Matibini
For/Director of Legal Services

There is sufficient evidence on record to show that the Appellant met the two conditions at pages 10-14 and 25-28. The Lands Tribunal made a finding of fact to this effect at page 111 of the Record of Appeal. We note also, that other than the call out dated 3rd February, 2006 inquiring into the Appellant's expired planning permission at page 103 and the Enforcement Notice on 15th

February, 2006 at page 54, there was no evidence produced of any communication from the 2nd Respondent to the Appellant pointing out his failure or delay to develop the plot. If anything, the two documents from the council only went to prove that there was some measure of development on the plot. Otherwise the 2nd Respondent would not have ordered the demolition of "the illegal structure at slab level" in the enforcement notice. We find it odd that in the face of such evidence, the Lands Tribunal made a finding that there was no development on the disputed plot. We shall state our reasons why when we return to this point later. Suffice to say, we take cognizance of the fact that tribunals of this nature are entitled to act on any material which was logically probative even though it was not evidence in a court of law provided that the rules of natural justice were applied. (See ***T A Miller v Minister of Housing and Local Government and Another***[4] and ***R v Deputy Industrial Commissioner ex parte Moore***[5]) However, we do not agree with the Lands Tribunal's decision to rely on an undated Report and survey (at page 109 and 110) tendered in by the 2nd Respondent showing only a foundation and footing as proof that there was no development on plot 38/16/9013. Further, there was no evidence from the 1st Respondent to prove what exactly he had constructed in respect of the same property.

In addition nowhere, in the letter of offer, do we find a condition that Appellant was to complete development within a stipulated period or "reasonable timeframe" or indeed within 18

months. We were in fact taken aback by the 2nd Respondent's proposition that the Appellant was required to complete the project within a "***reasonable timeframe of the offer***" and that the reasonable time being "***not exceeding 60 days"*** of the offer. We hold that the letter of offer was very clear. The 60 days referred to the submission of the building plan, for scrutiny and not completion of the project. Moreover, we have perused the Lands Act Chapter 184 of the Laws of Zambia and the Town and Country Planning Act Chapter 283 of the Laws of Zambia and we have found no such condition limiting the period for development. Granted that the Appellant did take inordinately long in developing the plot (and we must say 14 years from 1993 to 2006 was rather excessive) but in the absence of any statutory authority, we find no evidence to support the Lands Tribunal's finding that the Appellant was required to develop the plot within 18 months or even that re-entry was only required when the statutory 18 months was exceeded by a reasonable period. In this case, it could not then be said that the Appellant breached a fundamental term of the offer as there was no such term whether express or implied in this particular contract. We agree with the Appellant that the Lands Tribunal misdirected itself on this point of Law.

We said we would return to the point of whether there was any development. The Appellant had argued in the alternative, that the foundation and footing were part of the building or development in accordance with Section 22(4) of the Town and Country Planning

(259)

Act. In this regard, we adopt the ruling of Lord Parker C.J. in ***Cheshire County Council v Woodward***[6] as cited in ***Coleshill and District Investment Co Limited v Minister of Housing and Local Government and Another***[7] where he said,

> ***"The operations contemplated must change the physical character of the land."***

We hasten to say, that in that case the development envisaged was of the "scale, complexity and difficulty which required a builder, engineer or mining expert", hence the Court's holding that given its ordinary meaning, a simple excavation or removal of earth did not fall within the meaning of ***"operation"***. So in the present case, since the development in question involved a project of a smaller scale, our considered view is that if the changes are of a substantial nature such as the construction of a concrete slab or even digging of a foundation, and not necessarily a footing, such would fall within the meaning of a building or development as they change the character of the building or land.

This brings us to the question whether the 2nd Respondent followed the right procedure in repossessing the property. We have looked at Section 13 of the Lands Act and have reproduced the relevant provisions which state that,

13. (1) Where a lessee breaches a term or a condition of a covenant under this Act the President shall give the

(260)

lessee three months notice of his intention to cause a certificate of re-entry to be entered in the register in respect of the land held by the lessee and requesting him to make representations as to why a certificate of re-entry should not be entered in the register.

(2) If the lessee does not within three months make the representations required under subsection (1), or if after making representations the President is not satisfied that a breach of a term or a condition of a covenant by the lessee was not intentional or was beyond the control of the lessee, he may cause the certificate of reentry to be entered in the register.

The Appellant also referred us to our decision in ***Anort Kabwe and Charity Mumba Kabwe v James Daka, the Attorney General and Albert Mbazima***[1] where we stated as follows:

"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 Lands 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 for the lessee from whom the land is

(261)

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. <u>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.</u> (Emphasis ours)

From the record, there was no evidence of a notice being given to the Appellant or certificate of re-entry being made in the register. Nor was there any evidence from the 2nd Respondent to show that the Appellant was accorded an opportunity to explain the delay in developing the property prior to repossession. We find that the provisions in Section 13 of the Lands Act Chapter 184 of the Laws of Zambia and our decision in ***Anort Kabwe*** cited above are very instructive. This is that, if repossession is effected in circumstances

(262)

where the lessee is not given an opportunity to explain, such repossession could not be said to be valid. We find that the repossession done by the 2nd Respondent was invalid. It was illegal. And as such, the 2nd Respondent was not justified in making an offer to another developer without following the due process of the law. We, therefore, find that the Appellant was the legal owner of Stand no 38/16/9013 when the 2nd Respondent purported to offer the property to the 1st Respondent. The Appeal succeeds on grounds one, three and five.

To answer the question whether the 1st Respondent was an innocent purchaser, we have this to say. The 1st Respondent was not an innocent purchaser. According to his letter of offer at pages 15 and 29 and his Affidavit responding to the Appellant's claim at page 56, the 1st Respondent specifically applied for Stand no 38/16/9013. There was also evidence that there were some building materials on the disputed plot and this was never denied

by the 1st Respondent. 1st Respondent was therefore a subsequent purchaser. And being a subsequent purchaser, the 1st Respondent ought to have been on notice. He ought to have made an inquiry into any other rights or interests in the property. See the case of ***Jane Mwenya and Jason Randee v Paul Kapinga[8]*** where we stated,

> ***"That occupation of land by a tenant (occupier or lessee) affects the purchaser with constructive notice."*** (Words in brackets our own emphasis)

(263)

See also ***Hunt v Lock[9]***, which also stated,

> ***"if the purchaser has notice that the vendor is not in possession of the property, he must make inquiries of the person in possession and find out from him what his rights are, and if he does not choose to do that, then whatever title he acquires as a purchaser will be subject to the title or rights of the tenant (occupier or lessee) in possession."*** (Words in brackets our own emphasis)

Had the 1st Respondent made such an inquiry, he ought to have noticed that the Council was still collecting ground rent from the Appellant up to mid-December 2006. The 1st Respondent argued in his submissions that he was the rightful owner as he was in occupation of the residential plot. But we hold the view thatoccupation is not the same as legal possession. We are fortified on this proposition by the case of ***Newscastle City Council v Royal Newscastle Hospital[10]*** where it was held that,

"Where no one else is in possession, possession follows title. But legal possession is not the same as occupation. Occupation is a matter of fact and only exists where there is sufficient measure of control to prevent strangers from interfering. There must be something actually done on the land, not necessarily on the whole but on part in respect of the whole."

In light of what we have said above, we therefore, agree with the Appellant that the 1st Respondent did not obtain good title. We also

(264)

agree with the Appellant that apart from the survey fees, there was no other evidence from the 1st Respondent such as payment of service charge to show consideration on his part. The Appeal succeeds on grounds two and four.

We are satisfied that this is a case where this Court can interfere with the findings of fact of the court below. This position is supported by the authorities provided by Counsel for the Appellant, to whom we are indebted. In the case of ***Nkhata and four others v the Attorney General***[11] cited in ***Attorney General v Peter Mvaka Ndhlovu***[2], we stated as follows:

> ***"By his ground of appeal the Appellant in substance attacks certain of the learned trial Judges findings of fact. A trial Judge sitting alone without a jury can only***

be reversed on fact when it is positively demonstrated to the Appellate court that:

(i) By reason of some non-direction or misdirection or otherwise the Judge erred in accepting the evidence which he did accept; or

(ii) In assessing and evaluating the evidence the Judge has taken into account some matter which he ought not to have taken into account or failed to take into account some matter which he ought to have taken into account, or….”

(265)

For the reasons stated earlier, we echo our ratio in ***Anort Kabwe*** and allow the appeal. We declare the Appellant as the legal owner of Stand no 38/16/9013 Garden Overspill. We also order that the 1st Respondent be compensated for whatever development he put on this plot. The value of such compensation to be assessed by the Deputy Registrar. The cost for such development to be borne by the 2nd Respondent. The decision of the Lands Tribunal is accordingly reversed. We award costs to the Appellant to be borne by the 2nd Respondent and to be taxed in default of agreement.

……

L. P. CHIBESAKUNDA
ACTING CHIEF JUSTICE

.....	.....
M. S. MWANAMWAMBWA	**G. S. PHIRI**
SUPREME COURT JUDGE	**SUPREME COURT JUDGE**