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

APPEAL NO. 82/2015
SCZ/8/018/2015

BETWEEN:

PATRICK CHILAMBWE — APPELLANT

AND

ATTORNEY GENERAL — RESPONDENT

CORAM: Mambilima, CJ, Kaoma and Kajimanga, JJS.
On: 5th December, 2017 and 12th December, 2017

For the Appellant: Mr. E. Mwansa-Mwansa, Phiri, Shilimi and Theo Legal Practitioners

For the Respondent: N\A

J U D G M E N T

KAOMA, JS delivered the Judgment of the Court.

Cases referred to:

1. **Patmat Legal Practitioners (sued as a firm) and Chipo Zyamwaika Mudenda Ndele, Cramos Makanda, Sally Jarielle Trollip v Kenny H. Makala (sued as Joint Administrators of the Estate of the late Horace Makala) – Appeal No. 68/2015 – Selected Judgment No. 62 of 2017**
2. **Emmanuel Mponda v Mwansa Christopher Mulenga, Christopher Mungoya and Attorney General - Selected Judgment No. 42 of 2017**
3. **Standard Chartered Bank Zambia Plc v Kasote Singogo – Appeal No. 212/2016**
4. **Simwanza Namposhya v ZSIC (2010) Volume 2 Z.R. 339**
5. **Zambia Revenue Authority v Dorothy Mwanza and others (2010) Volume 2 Z.R. 181**

6. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 179**

Legislation referred to:

1. **Supreme Court Rules, Cap 25, Rules 49(8) and 58(2)**
2. **Lands and Deeds Registry Act, Cap 185, sections 4, 6 and 33**

The background to this appeal as can be gathered from the appellant's testimony in the court below and from the judgment appealed against, is that the appellant was a quantity surveyor in the Ministry of Works and Supply. He was employed on 8th September, 1988. He was initially allocated flat No. 11 Pipit Court, NIPA flats. On 20th December, 1993 he applied for change of quarters since he was now married, and his family was growing.

On 20th May, 1998 the Director of Buildings wrote to the chairman of the Lusaka Housing Committee to consider allocating to the appellant flat No. 6, Teal Court, Church Road, which at the time, was occupied by the late Mr. and Mrs. Arora, a couple of Indian origin. Mr. Arora was a senior engineer in the Ministry of Works and Supply while his wife was working for the Ministry of Health. Mrs. Arora had been allocated flat No. 6, Teal Court on 12th August, 1994. On 24th June, 1998 the Lusaka Housing Committee allocated flat No. 6, Teal Court, to the appellant. At the same time, flat No. 11 Pipit Court was allocated to the late Rosemary Katalilo.

In August, 1998 the appellant applied to the Committee on the Sale of Government Pool Houses (the Committee) to purchase flat No. 6, Teal Court under the Government Home Empowerment Policy. On 30th October, 1998 the Commissioner of Lands offered him the said flat to purchase at a cost of K6,660,000 (old currency). He accepted the offer and on 2nd November, 1998 paid the initial sum of K54,000 (old currency) for ground rent and lease charges. The late Mrs. Katalilo was also offered to buy flat 11, Pipit Court.

On 3rd November, 1998 the Government and the appellant entered into an agreement by which the Government advanced him the sum K6,660,000 for the purchase of flat No. 6, Teal Court. The sum advanced as purchase price was to be recovered from the appellant's salary on a monthly basis. The appellant also used other personal resources to settle the balance. He obtained his Certificate of Title No. 14131 on 4th December, 2002. Mrs. Katalilo also obtained a certificate of title for flat 11, Pipit Court in 2007.

On 26th January, 1999 the Ministry of Works and Supply had terminated the lease agreement with Mrs. Arora effective 31st December, 1998 advising that the Ministry would no longer be the owner of the flats which had been bought by serving Zambian civil

servants and that if the affected tenants wanted to continue occupying the flats, they should contact the new owners and make necessary arrangements for new tenancies.

On 24th March, 1999 the Committee issued a notice to vacate, to Mrs. Arora, giving her 14 days within which to vacate the flat. Later, the appellant agreed with the Committee that he should wait until Mrs. Arora's contract expired in 1999 to take possession of the flat. On 4th January, 2000 the Ministry of Health allocated to Mrs. Arora flat No. 9, in the Chainama area and requested her to vacate flat No. 6, Teal Court, to enable the one who had bought it to take occupation. Meantime, she had also applied to buy flat No. 6.

By letter dated 7th March, 2000 the Committee rejected her application to buy flat No. 6, Teal Court on the basis that she was not a Zambian citizen as required under the Civil Service Home Ownership Scheme Conditions. She was again advised to vacate the flat immediately as her employers had already found alternative accommodation which was ready for occupation.

On 9th March, 2000 the Committee instructed the Sheriff of Zambia to evict Mrs. Arora from flat No. 6, Teal Court as she was staying there illegally whilst the flat had been offered to a Zambian

civil servant who was already suffering salary deductions. The Sheriff asked the appellant to pay K330,000 eviction fees and to provide two mortice locks. When he went to deliver the locks he was told that the Committee had instructed them not to do the eviction and refunded him the money. When he made a follow-up with the Committee, he was told that he would be informed in writing.

On 10th March, 2000 Mrs. Arora applied in the Lusaka High Court for leave to apply for judicial review of the decision taken by the Committee on 7th March not to sale her flat No. 6 and for her to immediately vacate the flat. She was asking for orders of certiorari and mandamus and for a declaration. On 14th March, 2000 leave to apply for judicial review was granted to her.

On 17th March, 2000 the Committee wrote to the appellant informing him that at its sitting held the previous day, it had resolved that he should only occupy the subject flat after the end of the contract for Mrs. Arora in August, 2000. No reasons were given in the letter as to why the eviction was stopped.

By letter dated 20th March, 2000, Simeza Sangwa & Associates (Mrs. Arora's lawyers), served the Attorney General with the court

process. The next day a copy of the order for leave to apply for judicial review was also served on the chairman of the Committee.

According to the appellant, he learnt about the court case three months later through Mr. Sweta, the secretary to the Committee, who advised him to see the principal state advocate at the Attorney General's Chambers. He saw Mr. Chirambo who explained to him about the matter involving flat 6, Teal Court and that he needed to be joined as a party to the proceedings since the flat was offered to him. He was also advised to look for a private lawyer. By then he had paid 50% towards the purchase of the flat.

On 27th February, 2001 the High Court granted all the orders sought by Mrs. Arora in the judicial review proceedings. An application by the respondent to set aside the order of certiorari and mandamus was dismissed by the judge on 31st January, 2002.

Sometime in 2003, the appellant applied by counsel to be joined and was joined as a party to the judicial review proceedings. Later, Mrs. Arora applied to set aside the order for joinder on the basis that it was irregular. The judge agreed and set aside the joinder. The appellant appealed to this Court. Later, the Attorney General joined the appeal. The appeal was heard in 2005.

On 11th May, 2006 this Court delivered its judgment in favour of the appellant. The Court condemned the procedure applied by the judge to grant orders of certiorari and mandamus by default and held that the case was not even a proper one for judicial review. This Court quashed all the judicial review proceedings that were before the High Court and directed that the proceedings be commenced *de novo* by writ of summons. Mrs. Arora started the matter afresh in which the appellant was included as defendant.

On the night of 1st February, 2009 Mr. and Mrs. Arora died in a fire that swept through flat No. 6, Teal Court and extensively damaged the flat. The fire had also spread to flat No. 5. According to the appellant, all the flats comprising Teal Court were completely damaged and the owners of the other five flats agreed to do a temporal roof to protect themselves from the elements and the cost of the roof came to K27,000,000 (old currency).

This was what prompted the appellant to commence the action, the subject of this appeal on 9th June, 2010. He claimed against the respondent, pursuant to section 12 of the State Proceedings Act, Cap 71 various amounts of money for (1) the total rentals he would have received from the flat had he put it on rent or

in the alternative mesne profits, (2) legal fees and costs he incurred during court proceedings, (3) expenses he incurred for renovations and rehabilitation of the flat after it was gutted by fire, (4) damages for mental anguish suffered during the time the matter was before the courts, (5) general damages, (6) interest, (7) any other relief, and (8) costs.

The respondent denied the appellant's claims, pleading among other things, that the appellant was aware of the court order that was granted to the Aroras, against the decision of the Committee, which later resulted in the letter of 17th March, 2000; and that the directive to allow the Aroras to continue staying in the flat was by virtue of the court order and due to the fact that it was a condition of service for government employees that they must be paid their terminal benefits before they could vacate any government quarters they were occupying. The appellant was put to strict proof.

The appellant was the only witness who testified at the trial and his evidence was, as we have recounted above. Suffice to add, that in his evidence in cross-examination, he conceded that Mrs. Arora sought judicial review of the Committee's decision rejecting her application to buy flat 6 Teal Court. He also admitted that he

was aware that she obtained a Court Order against the Committee's decision and that the Order was served on the Committee. He said he had to bear the cost of repairing the roof of his flat because the Aroras had died. He agreed that the State was not responsible for the fire and that he was still living at 11 Pipit Court and was not paying rent.

However, in re-examination he said he was claiming from the State as they never handed him the flat after he had paid for it and they remained in charge up to the time of the fire; and that the Committee was supposed to tell Mrs. Arora to move out of the flat.

The respondent did not adduce any evidence in defence. They chose only to file written submissions, which they did.

The learned trial judge considered the evidence and the submissions before him. Essentially, he found undisputed the facts as we have narrated above except that the judge also found that the date of occupation of the flat by the appellant was later changed from 1999 to 2000 by mutual agreement of the parties, which was not the case.

On the appellant's argument that the State had allowed Mrs. Arora to remain in occupation of the flat even after her employer

had allocated her alternative accommodation on 4th January, 2000 the judge found that there was evidence that on 26th January, 1999, the Ministry of Works and Supply wrote to Mrs. Arora informing her of the termination of the lease agreement between her and the Ministry on the ground that the Ministry was no longer owner of the flat. The judge further found that by the letter dated 7th March, 2000 she was not only informed about the Committee's rejection of her application to buy the flat, but was also reminded to vacate the same for the new owner, the appellant.

The judge also referred to the earlier letter dated 24th March, 1999 in which Mrs. Arora had been given 14 days to vacate the flat. He then observed that as rightly pointed out by Colonel Makanta on behalf of the Attorney General, it was only after Mrs. Arora had sought judicial review of the Committee's decision to reject her claim to purchase the flat, which stayed the decision to sell the flat to the appellant, that Mrs. Arora continued in occupation of the flat defying the notice to vacate.

Therefore, the judge rejected the submission by the appellant's counsel that Mrs. Arora continued in occupation of the flat with the authority of government. The judge held that the government was

no longer responsible for her continued unlawful occupation of the flat as she was occupying it at her own peril in defiance of the eviction notices she had been given. The judge also pointed out that the appellant admitted having been aware of the Court Order which restrained the government implementing the decision to sell the flat to him and that in view of the Court Order, the respondent, through the Committee, could not evict Mrs. Arora from the flat.

The judge further opined that the State took measures to try to evict Mrs. Arora from the flat as shown by the various notices, but those efforts were thwarted by the Court Order she obtained over the flat. Furthermore, the judge found that the appellant did not show that the respondent was responsible for the fire that gutted the flat. In the premises, the judge found no merit in the appellant's entire action and dismissed it with costs.

Unhappy with this decision, the appellant filed this appeal raising five grounds in the Memorandum of Appeal as follows:

1. **The learned trial judge erred both in law and in fact by holding that Indira Arora held on to the property at her own peril.**
2. **The learned trial Judge erred both in law and in fact by holding that the property belonged to the Appellant prior to the Appellant having finished paying the full purchase price.**

3. **The learned trial Court erred both in law and in fact by holding that the property belonged to the Appellant when title to the flat had not passed to the Appellant.**
4. **The learned trial judge erred both in law and in fact by holding that the late Mrs. Arora occupied the flat in defiance of the eviction notice.**
5. **The learned trial judge erred both in law and in fact by holding that the reason for ruling as he did in ground 4 above is that the appellant had admitted having been aware of the Court Order.**

The appellant also included a purported 'ground six' stating that '**The Appellant shall, if necessary add more grounds of appeal upon perusal of the entire record**'. Annoyingly, the appellant has argued ten grounds in his heads of argument. Further, ground 5 in the heads of argument is different from the one in the memorandum of appeal. We have perused the entire record of appeal but we have found no leave to amend the memorandum of appeal or an amended memorandum of appeal.

We hasten to point out that we met a similar challenge, at this same sitting, in the case of **Patmat Legal Practitioners (sued as a firm) and Chipo Zyamwaika Mudenda Ndele, Cramos Makanda, Sally Jarielle Trollip v Kenny H. Makala (sued as Joint Administrators of the Estate of the late Horace Makala)**[1] where the appellant raised two grounds of appeal in its memorandum of

appeal but added three more grounds in the heads of argument without first obtaining leave of this Court. This was done pursuant to a paragraph in the memorandum of appeal which stated: "**Such further grounds as may be filed later upon perusal of the Case Record**".

We have said in that case that such a statement cannot be used to circumvent the requirements of the rules of the Court to seek leave before filing grounds of appeal that are not stated in the memorandum of appeal and that the statement relied on by the appellant's counsel was not a ground of appeal but merely an indication that the appellant may file further grounds of appeal later. Yet again, we expressed our disdain on the practice by advocates and parties to attempt to introduce new grounds of appeal through such kind of statements.

We have in that case also referred to our recent decision in the case of **Emmanuel Mponda v Mwansa Christopher Mulenga, Christopher Mungoya and Attorney General**[2], where we had reiterated that a statement such as *'further grounds to follow upon perusal of the Record of Appeal'* or *'... such other grounds as may be furnished upon further perusal of the record'* which mindlessly find

their way in memoranda of appeal do not constitute a valid ground. We went on to refer to the earlier case of **Standard Chartered Bank Zambia Plc v Kasote Singogo**[3], where there was a purported 'fourth' ground of appeal which was expressed as *'such other grounds that may be furnished upon further perusal of record'*.

In that case we had put the matter as follows:

> **"We shall, at the outset, dismiss the purported ground of appeal which was numbered 'fourth' in the memorandum of appeal. This purported 'fourth' ground of appeal is not a ground known to the rules of this court. Our rules [relating to] filing of memoranda of appeal do not make provision for '... such other grounds ...' as a ground of appeal. Grounds of appeal must be specific and succinct and in the event that an amendment is desired, an application to that effect should be made. We hope that practitioners and litigants will now refrain from the practice of promising future grounds of appeal as this practice serves no useful purpose."**

We also referred to **Rules 49(8) and 58(2) and (3) of the Supreme Court Rules, Cap 25** and **Form CIV/3** which is referred to in both rules and observed that the way the form is structured does not envisage, let alone, suggest that an appellant would defer the task of setting out their grounds of appeal in the memorandum of appeal at the time of its preparation and filing into court to a future date or even *'... upon perusal or further perusal of the record of appeal'* as a good number of practitioners who appear before the us clearly misapprehend.

In the present case, the manner in which the memorandum of appeal filed into court on 7th January, 2015 was crafted equally offends the rules of this Court in so far as it includes a purported 'ground six' of appeal which we have explained above. It follows that we cannot entertain the extra grounds of appeal in the appellant's heads of argument. We shall determine this appeal on the basis of the initial five grounds of appeal.

Suffice to add that after our decision in these two current appeals, we forbid any advocate to stand up before us to argue any purported additional grounds advanced in heads of argument without prior amendment of the memorandum of appeal.

Coming now to the main matter, in support of ground 1, which attacks the holding by the trial judge that Mrs. Arora held on to the property at her own peril, Mr. Mwansa, counsel for the appellant argued that this holding is based on a misunderstanding of the sequence of events as testified by the appellant which led to the late Mrs. Arora occupying the flat in issue until it was gutted by fire. That, the judge accepted, although there was no evidence, the assertion by Colonel Makanta that it was only after Mrs. Arora had sought for judicial review of the Committee's decision to sell the flat

to the appellant that she continued in occupation of the flat defying the notices to vacate.

It was also argued that if it was the Court Order that allowed the late Mrs. Arora to continue to stay in the flat, it cannot in law be called occupying the flat in defiance when a person continues to occupy a flat by order of the court as the court order validates such a continued stay.

Further, that counsel for the respondent was not a witness and that in the absence of evidence, documentary or oral, that the respondent became aware of the court documents as soon as they were filed, the court should have relied on the appellant's evidence on oath and the documentary evidence on record to come to its conclusion. That, had the court done so, it could not have concluded that Mrs. Arora occupied the property in defiance of the eviction notices or that she occupied the flat at her own peril.

According to Mr. Mwansa, the question we must decide is whether the Committee was aware of the court documents at the time it stopped the appellant from occupying the flat until the end of Mrs. Arora's contract. It was contended that the evidence showed that she was allowed to stay in the flat by the Committee and that

the Sheriff of Zambia was also stopped from evicting her by the Committee, since the court documents only came to the attention of the respondent on 22nd March, 2000 when the office of the Attorney General received the same and could only notify the Committee of the proceedings afterward. Mr. Mwansa submitted that the court did not give any reason why it believed that it was the court proceedings which forced the respondent to stop the appellant from occupying the flat.

In ground 2, which alleged that the court erred by holding that the property belonged to the appellant when title to the flat had not passed to him, Mr. Mwansa argued that the evidence before the court was that the appellant only finished paying the purchase price in June, 2000 which was corroborated by the letter dated 6th December, 2000 requesting the Commissioner of Lands to release the title deed to the appellant.

It was submitted that to hold that the flat belonged to the appellant is to hold that title in the flat changed to him even before he finished paying for it. We were referred to the Handbook on the Civil Service Home Ownership Scheme which states that:

i) A civil servant buying a Government pool house shall be expected to pay survey fees, where applicable, and lease and registration fees for the issuance of title deeds. The Commissioner shall only commence the preparation of title deeds after all these shall be paid;

ii) The Commissioner of Lands shall retain Title Deeds for all Government pool houses offered to civil servants, retirees and retrenches until they have been fully paid for.

According to Mr. Mwansa, the only reasonable inference from these provisions is that paying fully for the house was a condition precedent to ownership of any of the sold government pool houses.

In respect of ground 3, where the appellant accuses the trial judge of holding that the property belonged to him when title to the flat had not passed to him, Mr. Mwansa referred us to **sections 4 and 6 of the Lands and Deeds Registry Act, Cap 185** which according to him, make registration of any document purporting to grant, convey, or transfer land or any interest in land a condition precedent for title to pass to the purchaser.

Regarding ground 4, which attacks the holding by the trial judge that Mrs. Arora occupied the flat in defiance of the eviction notice, the arguments by Mr. Mwansa are a mere repetition of the arguments already made in ground 1. And as we said earlier, ground 5 in the heads of argument is different from ground 5 in the memorandum of appeal. Hence, we shall not summarise the

arguments made in support of ground 5 in the heads of argument. In other words, there are no arguments to support ground 5.

Counsel for the respondent did not appear at the hearing of the appeal. However, we have the written heads of argument which we have taken into account. The respondent has collectively addressed grounds 1 to 8 in the appellant's heads of argument. The kernel of the arguments is that from the record, Mrs. Arora was told by the Committee to vacate the flat on many occasions and by her employer, the Ministry of Health, after she was offered another property and that the Committee asked for an extension to August, 2000 when she could leave the flat. However, she continued to stay in the flat on the strength of the Court Order after she commenced judicial review proceedings.

It was further argued that the appellant obtained a certificate of title to the flat in 2002 which was proof of ownership as provided in **section 33 of the Lands and Deeds Registry Act, Cap 185**. That even if the appellant was not a party to the judicial review proceedings, by the time the matter was concluded in the Supreme Court, he was already the legitimate owner of the property and had the power to evict Mrs. Arora.

The respondent further contended that after this Court quashed the judicial review proceedings and advised Mrs. Arora to recommence the action by writ, there was no subsisting court action on the basis of which Mrs. Arora could remain in the flat. Therefore, the appellant could have evicted her. Instead, he sat on his rights and allowed her to remain in his flat for many years until it finally burnt down. We were urged to dismiss the appeal.

In reply to the respondent's heads of argument, the appellant repeated most of what he had already said in his main heads of argument relating to absence of evidence, to show that a court order was subsisting at the time the letter of 17th March, 2000 was written, which gave Mrs. Arora the window through which she filed the suit the respondent is trying to use as the reason for not allowing him to take possession of his flat. Counsel argued that since the sale and transfer of the flat to him was put in abeyance by the Committee, it could not be his fault if he waited until the end of August, 2000 to take measures to repossess his flat.

It was contended that the respondent did not even try to help or add him to the proceedings as a co-defendant and that he could not evict Mrs. Arora after he obtained title because there was a

matter before the court concerning the property. The appellant further argued that he prosecuted the appeal in the Supreme Court alone as the respondent refused to make any submissions when the matter refusing the application for joinder was heard, a fact which, according to him, goes to show that the respondent was in reality favouring Mrs. Arora in the case of ownership of the flat.

It was also submitted that the ruling of this Court ordering the commencement of the matter *de novo* did not give ownership of the flat to the appellant and that the matter was subsisting until much later than 2000 when the appellant was stopped from occupying the flat. That, even when there is a certificate of title, the High Court has power to order its cancellation, and so it would be unwise for a litigant, to rush to evict someone when there is a matter challenging ownership of such property.

According to the appellant, had the court taken a proper view of the evidence before it, it could not have reasonably made the findings it did. We were referred to the cases of **Simwanza Namposhya v ZSIC**[4] and **Zambia Revenue Authority v Dorothy Mwanza and Others**[5], in respect of when the appellate court will upset findings of fact made by the trial court. We were asked to

allow the appeal with costs for all monies legitimately expended by the appellant to protect his property.

We have considered the record of appeal, the judgment appealed against and the arguments by counsel for the parties. The main issue in this appeal is whether or not the respondent was liable to the appellant for the claims he made in the court below because of the letter of 17th March, 2000 by which Mrs. Arora was allowed to remain in the flat until August, 2000.

Grounds 1 and 4 are similar and so are grounds 2 and 3. Further, the appellant's arguments in the two sets of grounds of appeal are also similar. Besides, these grounds of appeal attack findings of fact made by the learned trial judge. Thus, we shall deal with grounds 1 and 4 together and grounds 2 and 3 also at once.

The appellant has accused the trial judge of misunderstanding the progression of events as testified by him which led to the late Mrs. Arora occupying the flat until it was gutted by fire and of arriving at wrong findings of fact not supported by the evidence.

We agree with the appellant's argument that the respondent did not adduce evidence at the trial and that the trial judge referred to the submission by Colonel Makanta that it was only after Mrs.

Arora had sought judicial review of the Committee's decision to reject her claim to purchase the flat, which stayed the decision to sell the flat to the appellant, that Mrs. Arora continued in occupation of the flat defying the notice to vacate.

However, the appellant had the burden to prove his case and the standard expected of him was that of proof on the balance of probabilities. In the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[6] we held that:

> **"Where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case where he makes any allegations it is generally for him to prove those allegations and that a plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case." (Underlining is for emphasis only).**

In the current case, the mere fact that the respondent did not adduce any evidence to substantiate its defence did not mean that the appellant's claims should automatically succeed. The facts of the case, as we narrated earlier in our judgment, were actually given by the appellant in his evidence. The appellant also conceded that Mrs. Arora had obtained an order for leave to apply for judicial review of the Committee's decision rejecting her application to buy

the flat in issue. The court matter was brought to his attention by Mr. Sweta the secretary of the Committee.

Later, Mr. Chirambo the Principal State Advocate explained the court case to him and advised him to apply for joinder and to get a private lawyer since the flat had been offered to him. Quite clearly, the appellant and his advocates were aware that on 14th March, 2000 leave to apply for judicial review was granted to Mrs. Arora and that by that leave, the court stayed all decisions made and all further proceedings on the said decisions on the said flat until after the hearing of the motion for judicial review or further order.

What the stay entailed was that the Committee could not act on its decision to remove Mrs. Arora from the flat. This applied to the Committee's directive to the Sheriff of Zambia to evict Mrs. Arora from the flat. Much as there was no evidence by the respondent that the Committee was aware of the Court Order before it wrote the letter of 17th March, 2000 these events happened within a very short period of time, between 7th and 17th March, 2000.

We would not even be wrong to conclude that the Committee may have been aware of the court proceedings when it stopped the

appellant from occupying the flat until August, 2000 even though the letter was silent on that point. Moreover, the fact that the Court Order was served on the respondent on 20th March, 2000 and on the Committee on 21st March, 2000 did not prove that they were not aware of the court proceedings or the Court Order before that.

Even if we were to accept that Mrs. Arora could have been evicted by the time the Court Order was served on the respondent, the eviction would still have been reversed because the decision by the Committee to evict Mrs. Arora from the flat was stayed. Anyhow, the letter of 17th March, 2000 which was later in time, simply confirmed what was in the Court Order although the letter spoke of the matter laying in abeyance until August, 2000.

From the record, the evidence relating to the subsistence of the Court Order before the letter of 17th March, 2000 was written was put before the trial judge. The significance of that evidence was that Mrs. Arora remained in occupation of the flat from 14th March, 2000 under the Court Order. Colonel Makanta simply submitted on the basis of that evidence and the trial judge made findings of fact based on the evidence before him, both oral and documentary. To believe otherwise and to insist that the Committee opened the

window through which Mrs. Arora filed the suit, the respondent is trying to use as the reason for not allowing him to take possession of his flat, is to shy away from the implications of the Court Order.

In our view, Mr. Mwansa's argument as to when the Committee became aware of the court order is inconsequential, especially that Counsel acknowledged that when a person continues to occupy a flat by order of the court, the court order validates such a continued stay. In addition, in 2001 the High Court granted Mrs. Arora orders of certiorari and mandamus, in effect quashing the decision of the Committee not to sale the flat to Mrs. Arora and declaring that she was qualified to buy the flat. The Committee was also commanded to sell the flat to her.

What is more, as rightly submitted by Mr. Mwansa, the letter of 17th March, 2000 put the sale and transfer of the flat to the appellant in abeyance until August, 2000. In our view, this did not justify the appellant's inaction to take measures to repossess his flat after the judicial review proceedings were quashed by this Court in May, 2006. We agree with the respondent that it was incumbent upon the appellant to ensure that Mrs. Arora was evicted from his

property. He should have protected his interest since by then, he was the title holder, having obtained title in December, 2002.

In his evidence, the appellant had testified that Mrs. Arora had recommenced the matter and Mr. Mwansa referred us to the court order at page 175 of the record to confirm that fact. We have perused that order. It related to a matter before the Lusaka High Court under cause number 2006/HP/0870 in which Mrs. Arora was the plaintiff and the appellant and respondent were 1st and 2nd defendants. The order shows that on 24th September, 2009 the matter was struck off the active cause list with costs to the defendant. The plaintiff was at liberty to apply for the matter to be restored within 30 days failing which the matter would be dismissed for want of prosecution. The order was obtained by Mwansa, Phiri and Partners (the advocates for the appellant).

We have observed that the date of the order was long after the Aroras had perished in the fire. But there is nothing on the record to show whether the matter was restored or dismissed or whether there was a stay which had stopped the appellant as title holder from evicting Mrs. Arora from the flat.

Much as there could have been a matter in court commenced in 2006, we agree with the respondent that the appellant sat on his rights as title holder and allowed Mrs. Arora to remain in his flat until the fire destroyed the flat on 1st February, 2009. The appellant has not explained why he failed to pursue the estate of the late Mrs. Arora to recover what he is claiming against the respondent especially that he failed to prove that the respondent was responsible for the fire that gutted the flat.

Moreover, in the 2006 matter, the appellant and the respondent were both defendants. Therefore, we do not understand how the appellant turned round and sued the respondent (his co-defendant), seeking reliefs which he could only seek against Mrs. Arora or her estate.

On the basis of all the foregoing, we cannot fault the trial judge for finding as he did, that Mrs. Arora had defied the eviction notices and held on to the property at her own peril and that the State took measures to try to evict her from the flat as shown by the various notices, but those efforts were thwarted by the Court Order she obtained over the flat. These findings were supported by the evidence and were not perverse. Hence, we find and hold that the

respondent was not liable to the appellant for the claims he made in the court below and we dismiss grounds 1 and 4 for lack of merit.

Turning to grounds 2 and 3, we are very surprised that Mr. Mwansa could raise the issues he has argued here. The record shows that throughout the trial, the appellant consistently referred to the flat in issue as his. That was, in fact, the basis on which he was challenging the decision of the Committee on 17th March, 2000 to allow Mrs. Arora to remain in the flat until August, 2000.

Clearly, the appellant had beneficial interest in the flat, having been offered the flat to purchase and his evidence was that by March, 2000 he had paid 50% towards the purchase price. Further, on 3rd November, 1998 the Government had advanced him the purchase price of K6,660,000 which was being recovered from his salary on a monthly basis. The learned trial judge was on firm ground when at page J4 of the judgment, which is page 10 of the record, he referred to the appellant as the new owner of the flat.

In any case, by December, 2002 the appellant had fully paid for the flat and had title to the flat. In terms of **section 33 of the Lands and Deeds Registry Act**, his certificate of title was prima facie evidence of his ownership of the flat. Therefore, the argument

by Mr. Mwansa regarding registration under **section 4 of the Lands and Deeds Registry Act** and the effect of non-registration under **section 6** is misplaced. Grounds 2 and 3 equally lack merit.

In the event, we dismiss the appeal and uphold the order of the court below dismissing the appellant's action in its entirety with costs. The respondent shall have the costs of this appeal to be taxed if not agreed.

I.C. MAMBILIMA
CHIEF JUSTICE

R.M.C. KAOMA
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE