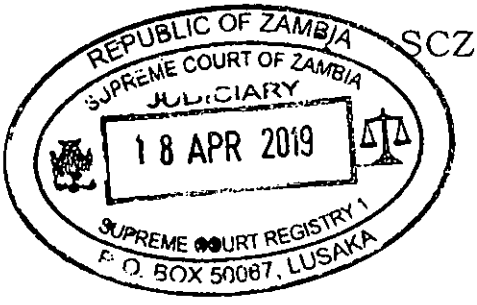
IN THE SUPREME COURT OF ZAMBIA Appeal No. 105/2016

HOLDEN AT KABWE SCZ/8/137/2015

(Civil Jurisdiction)



BETWEEN:

DERRICK LUKONDE CHILESHE AND OTHERS APPELLANTS

AND

THE ATTORNEY GENERAL RESPONDENT

Coram: Mambilima, CJ, Malila and Kaoma, JJS

On 2nd April, 2019 and 18th April, 2019

For Appellants: Mr. A. Gondwe for Mr. F. Chalenga of Freddie & Co.

For Respondent: Mrs. K.N. Mundia - Attorney General's Chambers.

JUDGMENT

Kaoma, JS delivered the Judgment of the Court.

Cases referred to:

1. **Lt. General Geojago Robert Chaswe Musengule v Attorney General (2009) Z.R. 359**
2. **Attorney General v Achiume (1983) Z.R. 821**
3. **Frank Walichupa and others v Tanzania- Zambia Railway Authority (2008) Vol. 2 Z.R. 112**
4. **Josephine Kabwe v Dominic Kapasa - Selected Judgment No. 4 of 2014**

Documents referred to:

1. **Circular No. 12 of 1996**
2. **Handbook on Civil Service Home Ownership Scheme**

This is an appeal against a decision of the High Court which held that the houses occupied by the appellants were not for sale in line with clause 1.2(b) of the Government Circular on the implementation of the Civil Service Home Ownership Scheme.

The appellants, who were teachers\lecturers in the Ministry of Education, based in Kitwe, occupied government houses situated in Parklands. Following the issuance in 1996 of the Cabinet Circular on the implementation of the Civil Service Home Ownership Scheme (Circular No. 12 of 1996), they applied, between 1998 and 1999 to purchase the subject houses. They believed that they were eligible to purchase the houses under clause 2(a) and (b) of the above Circular as none of them had been retrenched or paid their packages or benefited from the sale of council houses.

They also believed that they qualified under clause 1.2 (b) of the Handbook on Civil Servants Home Ownership Scheme because they, as occupants, were not teaching at Kitwe Boys High School. However, they received no response to their applications. Next, they wrote to the Permanent Secretary, Copperbelt Province and to the District Administrator (now District Commissioner), Kitwe but still got no response. They visited the District Administrator who

recommended to the Permanent Secretary, Copperbelt Province that the houses must be sold to the occupants. The houses were even valued by government valuers.

Thereafter, several letters were written by the provincial administration to the Permanent Secretary, Ministry of Education and to the Secretary to the Committee on the sale of Government houses. The Permanent Secretary still did not respond. In 2005, the appellants wrote to the Minister of Works and Supply. Again nothing happened. In 2009, the District Education Officer advised heads of education institutions on the Copperbelt that all retired officers who had been paid their benefits should vacate institutional houses to enable serving officers occupy the houses.

The appellants wrote a grievance letter to the Ministry of Justice and the Permanent Secretary, Ministry of Education. The Permanent Secretary responded on 14th July, 2009 informing the appellants that the Ministry of Education had no intention of selling the subject houses as stated in 2005 when the Ministry of Works and Supply refused to allow the sale of the houses.

The appellants then came to court to seek, among others, a declaration that as sitting tenants or occupants of the subject

houses, they were entitled to purchase the houses; and an order directing the sale of the houses to them.

The respondent's defence was that the appellants were not eligible to purchase the subject houses as the houses were institutional houses located within the boundaries, confines or proximity of Helen Kaunda Girls and Kitwe Boys High Schools; and that the houses were used and meant to be used by serving teachers and were not being sold to the occupants.

The appellants' testimony in the court below was as we have stated above. They also claimed that they were discriminated against because other institutions, like the Copperbelt University (CBU), Kitwe Teachers College (KTC) and Mukuba High School (MHS) had sold institutional houses to teachers or lecturers. They beseeched the court to order that the houses be sold to them.

The District Works Supervisor in the Ministry of Works and Supply at Kitwe, Nicholas Mulenga Musonda (DW1) testified, on behalf of the respondent, that the subject houses were institutional houses belonging to the Ministry of Education; and that the Permanent Secretary in that Ministry was the only officer clothed with the authority to sell institutional houses.

His evidence was also that houses that were in the proximity of 50 metres from the school were regarded as institutional houses. His office physically inspected the subject houses and established that they sit on one plot with the two schools with a boundary wall being 25 metres between the schools and the houses. He also referred to a site plan which showed the specific houses.

On the evidence before it, the court below found, as fact, that the appellants occupied the subject houses; that the houses were located near Helen Kaunda Girls and Kitwe Boys High Schools; and that the Ministry of Education had refused to let the appellants buy the houses despite being sitting tenants and or teachers/lecturers.

The court identified the issue to resolve as whether the houses qualified to be sold to the appellants as sitting tenants or civil servants in accordance with Circular No. 12 of 1996. It referred to clause 1.2 of Circular No. 12 of 1996 which provided as follows:

> **"Institutional houses: these are dwelling houses which are attached by use, construction and/or location to a specialised institution, such as, hospitals, schools, college, police camps, research stations, military barracks, immigration and customs posts and used or occupied by an officer of such institution for the benefit and convenience of the institution:**
>
> **a) Institutional houses not to be sold: Institutional houses described above will not be sold because this would deprive user institutions of the facility for attracting and retaining qualified staff at the stations where they are serving.**

b) Institutional houses to be sold: Institutional houses purchased or constructed by an institution using government/donor funds and located within ordinary residential areas but are not ancillary to the operations of the institution concerned will be sold".

While the court found that there was no mention in clause 1.2(b) of the 50 metres proximity which DW1 talked about, it considered whether the boundary wall being close to the schools made the houses ancillary to the operations of the school. From the site plan referred to by DW1, though again there was no mention of the 25 metres between the walls, the court found that the houses were very close to the schools. It also noted that the majority of the appellants were teachers at Kitwe Boys High School. The court held that the houses were ancillary to the operations of the schools and could not be sold as provided by clause 1.2(b) of the circular.

The court was also alive to the fact that the houses had not been offered to the appellants despite their frantic efforts to get the respondent to sell them the houses; and concluded that the appellants could not force the respondent to sell them the houses. The court also concluded that the fact that the Copperbelt University and other institutions had sold institutional houses to

teachers or lecturers, could not amount to discrimination because none of the subject houses had been sold.

Consequently, the action failed and was dismissed with costs.

The appellants have now appealed on two grounds, namely:

1. **Having found as a fact that the appellants occupied the houses as sitting tenants by virtue of their positions as teachers and lecturers, the trial Judge erred in law and in fact when she held that the houses were located near Helen Kaunda Girls Secondary School and Kitwe Boys High School and therefore, the appellants were not entitled to purchase the said houses.**

2. **Having found as a fact that the appellants qualified to purchase the houses under clause 1.2(b) of Circular No. 12 of 1996, the trial Judge erred both in law and fact when she held that the houses were ancillary to the operations of the school and could not be sold.**

Both parties filed heads of argument. Counsel for the appellants was indisposed and was represented at the hearing of the appeal by Mr. Gondwe who told us that the appellants would rely entirely on their heads of argument.

The gist of their arguments in ground 1 is that the court erred when it held that the houses were close to the schools upon the uncorroborated evidence of DW1 who made it believe that the subject houses were adjacent to the Kitwe Playing Fields with the boundary wall being 25 meters between the schools and the houses, when in fact not; and also by taking the view that the

houses were ancillary to the operations of the schools and could not be sold as provided in clause 1.2(b) of the circular.

It was argued that the court should not have used the literal rule of interpretation which is completely out of date and has been replaced by the purposive approach; and that the court did not take judicial notice of the fact that the locality of the houses is far from the two schools or consider the importance of the Home Ownership Scheme when it ruled out discrimination on ground that none of the subject houses were sold when other lecturers/teachers who were government employees were sold institutional houses.

It was submitted that the houses accommodate teachers from different schools and colleges, so it was illogical and unreasonable for the Ministry of Education to decline the appellants' request to buy the houses and that it was a mistake on the part of the court to state that the houses were not meant for sale to sitting tenants.

According to the appellants, the court was called upon to inquire (which it did not do), into the reasonableness of the denial by the Permanent Secretary, Ministry of Education to allow the appellants to buy the houses to which they were entitled by virtue of their positions as government workers and this stance was

against our constitution law which requires that no citizen should be deprived of his land by any authority.

In support of ground 2, the appellants reiterated their argument that the decision by the Ministry of Education to deny them an opportunity to buy the subject houses was discriminatory particularly that it flouted its own guidelines when it sold houses in teachers' compounds to sitting tenants like at the Copperbelt University and Mukuba High School. The case of **Lt. General Geojago Robert Chaswe Musengule v Attorney General**[1] was cited where it was argued that institutional houses were declassified and sold.

We were also referred to the case of **Attorney General v Achiume**[2] to support the argument that the findings made by the trial judge were perverse and based on a misapprehension of facts and ought to be set aside; and that the judge was made to rely on a map when it should, on its own motion, have demanded to visit the locality and see whether or not what was on the map was a reality.

In response to ground 1, counsel for the respondent agreed, in her oral submissions, that the court below did find that the appellants were sitting tenants, contrary to their contention in the

heads of argument that the court did not find as a fact that the appellants were sitting tenants. However, counsel argued that the court held that the appellants did not qualify to purchase the houses because the houses were not for sale.

In respect of ground 2, it was submitted that the accommodation of teachers within close range of the school was ancillary to the operations of the school; and that since the appellants did not qualify to purchase the houses by virtue of clause 1.2(b) of the Government Circular, the subject houses did not fall under the category of houses that could be sold and the appellants could not force the respondent to sell the houses.

We have considered the grounds of appeal and the arguments by both parties. The appeal raises only one issue; whether the court could order the respondent to sell the houses to the appellants.

The position on the above question is well settled by this Court. In the case of **Frank Walichupa and others v Tanzania-Zambia Railway Authority**[3], we held that there was no law which compels an unwilling person to sell his property to a sitting tenant. Later, in the case of **Josephine Kabwe v Dominic Kapasa**[4], we

reiterated that the court had no power to order ZCCM to offer the house in issue to the respondent.

In this case, as rightly found by the court below, the Ministry of Education had refused to sell the houses to the appellants despite the intervention by the provincial administration because it required the houses for serving teachers. We do not see any unreasonableness in this. The fact that the appellants were sitting tenants and government workers did not automatically entitle them to purchase the houses. The houses had to be available for sale.

The case of **Lt. General Geojago Robert Chaswe Musengule v Attorney General**[1] is clearly distinguishable. As submitted by the appellants, in that case, the houses were declassified and sold to the officers who had applied to purchase them whilst here; none of the houses were declassified or offered to any of the appellants.

Moreover, the fact that the houses accommodated teachers from different schools and colleges was not decisive. The court found that the houses were ancillary to the operations of the schools and could not be sold. It was satisfied that the houses were very close to the schools; and the majority of the appellants were teachers at Kitwe Boys High School. The findings were based on the

evidence before the court and, therefore, cannot be said to have been perverse or based on a misapprehension of facts.

Further still, we do not appreciate the need for corroboration of DW1's testimony. If the appellants had wanted the court to visit the site, they ought to have made that request at the trial but they did not. Neither did they invite the court to take judicial notice of any fact. Hence, the court cannot be faulted for not visiting the locality or relying on the site plan which was referred to in evidence.

The court was also on firm ground when it found that there was no discrimination because none of the subject houses had been sold. Besides, PW1 conceded that she had no proof that CBU, KTC and MHS sold similar houses to their teachers/lecturers. We reiterate that the court had no power to direct or order the respondent to sell the houses to the appellants when the former had no intention of selling the houses.

Both grounds of appeal must fail for lack of merit. In short, we dismiss the appeal with costs.

I.C. MAMBILIMA
CHIEF JUSTICE

M. MALILA
SUPREME COURT JUDGE

R.M.C. KAOMA
SUPREME COURT JUDGE