IN THE SUPREME COURT OF ZAMBIA APPEAL NO.15/ 2017

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

WISDOM CHIYALA	**1ST APPELLANT**
BUSIKU CHIYALA	**2ND APPELLANT**

AND

JOSEPH KAMANGA	**RESPONDENT**

CORAM: Muyovwe, Kabuka and Chinyama, JJS,

On 3rd March, 2020 and 27th March, 2020.

FOR THE APPELLANTS:	Mr. K. Mwale, Messrs. Legal Resources Foundation.
FOR THE RESPONDENT:	Mr. M. Sinyangwe, Messrs. Willa Mutofwe & Associates.

JUDGMENT

KABUKA, JS, delivered the judgment of the court.

Cases referred to:

1. Mwenya and Randee v Kapinga (1998) S.J. 12 ZR 17 (SC).
2. Trevor Limpic v Rachael Mawere & 2 Others, SCZ Appeal No. 121/2006.
3. Nawakwi v Lusaka City Council, SCZ Appeal No. 26 of 2001.

Legislation and Other Works referred to:

1. The High Court Act Cap. 27, s. 13, of the Laws of Zambia.
2. The Housing (Statutory and Improvement Areas) Act, 1974.
3. Land Law in Zambia, S.M. Mudenda, UNZA, Press, 2008.
4. Burn, E.H, Cheshire Modern Law of Real Property, 9th Edition, 1962, Sweet & Maxwell, London.
5. Halsbury's Laws of England, 4th Edition, Volume 9, 1974, Butterworths, London.
6. Atkins Court Forms, 2nd Edition, Vol 12 (2), 1996 Issue, Butterworths, London.
7. Harpum C, Megarry and Wade, The Law of Property, 6th Edition, 1996 Thompson, Canada.
8. Riddall, J.G., Land Law, 6th Edition 1997, Butterworths Law, London.

1.0 Introduction

1.1 The appellants are administrators of the estate of their late father, Favour Chiyala (deceased). The deceased occupied house No. 10 Chuswe Road, Chilenje South, otherwise known as Plot No. 1283/ 7417, Lusaka ("the property"), which he purchased from the Lusaka City Council, as sitting tenant.

1.2 Following upon his death, a dispute over ownership of the property arose that was escalated to the High Court. After hearing evidence, the finding of the High Court in a judgment dated 10th May, 2016 was that, the deceased was only entitled to 50% beneficial interest in the property. The appellants have now come to this court on appeal, questioning the basis for that finding.

2.0 Background

2.1 The facts of the case are straight forward. Aaron Kanyama, was employed by the Government of Zambia as a civil servant and occupied the property in issue as a tenant of the Lusaka City Council. Upon his retirement from the civil service in 1981, he relocated to his village, leaving an unmarried daughter, Beauty Kanyama, in occupation of the property.

2.2 In 1986, Beauty got married to Favour Chiyala, who came into this marriage and house, with three children of his own. No one took issue with that arrangement, at the time,

as the couple also assumed responsibility for Beauty's school going siblings.

2.3 Beauty Kanyama died childless in 1991 upon which Favour Chiyala chased her school going siblings from the property. Aaron Kanyama reacted to that apparent cruelty to his children by requesting his son- in- law, to revert the tenancy of the property in his name. Favour Chiyala did not heed his father- in-law's request but instead proceeded to Lusaka City Council where he had the records amended, to reflect that he was the person in actual occupation of the property as a tenant. Favour Chiyala remarried in 1993.

2.4 Three years thereafter, the Government introduced a new policy intended to empower Zambians with home ownership and Councils were authorized to dispose of their housing stock to tenants. By letter dated 10th June, 1996 the Lusaka City Council offered Favour Chiyala, as a 'sitting' tenant, to purchase the property in issue at the purchase price of two million three hundred and forty

thousand Kwacha (K2, 340, 000.00 (unrebased). The offer was accepted by Favour Chiyala who also complied with the payment terms. Unfortunately, Favour Chiyala died intestate, on 27th November, 2002 before a Certificate of Title could be processed in his name.

2.5 Following upon the death of Favour Chiyala, Aaron Kanyama resurfaced, claiming ownership of the property on the basis that, he was the original tenant who had been cheated out of purchasing it.

3.0 Proceedings before the Lower Courts

3.1 When they failed to resolve the dispute over ownership of the property with the administrators of the deceased estate, Aaron Kanyama decided to assert his claimed right through the courts of law. He first took his grievance to the Local Court, which dismissed the claim. He then, appealed to the Subordinate Court in **Appeal No. 2004/SPB/LCA/275** which heard the matter *de novo*.

3.2 In a judgment dated 5th October, 2005 ('the first judgment') the trial magistrate found that, Aaron Kanyama was

unfairly treated by Favour Chiyala. On the basis of what the trial magistrate referred to as 'equitable principles,' which he did not specify, Aaron Kanyama was granted a 50% interest in the property. The trial magistrate further ordered that the property be sold and the proceeds be shared equally between Aaron Kanyama and the estate of Favour Chiyala.

3.3 A day after that judgment was pronounced, on 6th of October, 2005 Aaron Kanyama, without involving representatives of the estate of Favour Chiyala, proceeded to dispose of the whole property to the respondent in this appeal, at the purchase price of sixty million Kwacha (K60, 000, 000.00 (unrebased).

3.4 About two years after buying the property and failing to secure vacant possession, the respondent caused a notice to be published in a public newspaper of daily circulation, THE ZAMBIA DAILY MAIL, of 21st August, 2007. By this notice, the respondent was informing the general public of his intention to have the whole property transferred into

his name within (30) days. Evidence on record shows this notice was not served on the persons who were in occupation of the property. That position notwithstanding, the respondent was issued with a Certificate of Title on 19th December, 2007 for the whole property, pursuant to the provisions of **the Housing (Statutory and Improvement Areas) Act, 1974**.

3.5 Armed with his newly acquired title deed, the respondent went to commence fresh proceedings before the Subordinate Court in **Cause No. 2008/SSP/338** in which he was seeking an eviction order directed at the occupants of the property. A different magistrate dealt with the matter and in the course of the hearing, turned it into a full trial at the end of which she proceeded to deliver a judgment on 27th June, 2008 ('the second judgment'). The respondent was by that judgment found to be a *bonafide* purchaser for value without notice, of the whole property and the eviction order sought was accordingly, granted to him.

3.6 Aggrieved by that outcome, the appellants appealed to the High Court, as a result of which the second judgment was overturned by a ruling dated 7th October, 2010. C.B Phiri, J, (rtd), who heard the appeal, gave two reasons for her said decision. The first reason, was procedural in nature. The court found there were serious irregularities of failure by the respondent, to serve relevant documents on the appellants. The second, raised a question of jurisdiction. From the evidence on record, the appellate judge considered there was no dispute that the property in issue was bought for sixty million Kwacha (K60,000,000.00 (unrebased). She noted that, **section 20 of the Subordinate Courts Act, Cap. 28** at the material time, restricted the jurisdiction of a magistrate in civil matters to only, thirty million Kwacha, (K30,000,000.00 (unrebased). Her finding was that, a magistrate had no powers to hear a matter whose value exceeded that amount. She accordingly, declared that the Subordinate Court proceedings and the second judgment were a nullity for want of jurisdiction. The parties were however, granted

liberty to commence fresh proceedings before the High Court.

4.0 Proceedings in the High Court and decision

4.1 It is pursuant to that guidance that the respondent commenced a fresh action in the High Court, seeking vacant possession of the property; and payment of *mesne profits* in respect of rentals he would have received, had the property been handed over to him immediately after the sale.

4.2 The appellants defended the action and also counter-claimed for a declaration, that the property in question actually belonged to the estate of their late father, Favour Chiyala, who had duly purchased it from the Lusaka City Council. The appellants further claimed for an order to have the respondent's Certificate of Title cancelled and for rectification of the Lands Register, accordingly.

4.3 The matter was tried by another judge of the High Court, Mulenga, J, as she then was, and the evidence from the parties was materially, as earlier, at paragraphs 2.0-3.6

highlighted. Upon considering the said evidence, the trial judge identified the main issue raised by both parties as being, whether or not the purchase of the property by the respondent was valid, on the basis that, he was a *bonafide* purchaser for value without notice, as he claimed.

4.4 In determining the said issue, the learned judge took into account the need for a purchaser of land to first make the necessary enquiries or undertake full investigation of title before completing the purchase, failing which, such person is deemed to have constructive notice of all facts he would have acquired had he done so.

4.5 Relying on the case of **Mwenya and Randee v Kapinga[1], S.M. Mudenda, Land Law in Zambia, UNZA, Press, 2008;** and **Cheshire's Modern Law of Real Property, Burn, 9th Edition, Sweet & Maxwell, London**, the findings of the learned trial judge were that, there was no dispute that the property in question was purchased by the late Favour Chiyala from Lusaka City Council, as a sitting tenant. After his death, it was in possession of the

beneficiaries of his estate, against whom Aaron Kanyama brought an action, claiming ownership of the property.

4.6 The trial judge also took into account the first judgment of 2005, which pronounced Aaron Kanyama and Favour Chiyala co-owners of the property which should be sold and the proceeds shared equally. She noted that the said judgment was the basis on which the respondent's mother purchased the property from Aaron Kanyama and registered it in the respondent's name. That, in his evidence, the respondent had admitted that no representative of Favour Chiyala's estate was involved in the sale of the property to himself. The observations of the trial judge in that regard, were that, by ignoring the party that co-owned the property and dealing with only one party, the respondent could not thereafter, turn around and claim that the transaction was for the entire property.

4.7 The learned trial judge came to the conclusion that, the respondent had actual notice of the interest of the appellants in the property. That by dealing with Aaron

Kanyama, only, he was not a *bonafide* purchaser for value, without notice. She further found that, the respondent's conduct reeked of *malafides* in the manner he finally obtained his Certificate of Title for the property. Accordingly, the trial judge declined to grant the respondent the relief for vacant possession of the property; and, payment of *mesne profits,* that he was seeking.

4.8 The learned judge however, did not end there. She went back to the first judgment, reasoning that it was still subsisting. Premised on that further consideration, her final determination was that, the sale transaction the respondent had entered into with Aaron Kanyama, being one of the two alleged owners, entitled him to only 50 % ownership of the property.

4.9 As a result of that finding, the trial judge ordered that the Certificate of Title in the respondent's name be cancelled; and, that the property be co-owned by the parties. The court did not order rectification of names in the Lands Register and gave as the reason, that the appeal against

the first judgment was still pending determination, whose outcome would have a bearing on that issue.

5.0 **Appeal to this Court, arguments and submissions**

5.1 Dissatisfied with that judgment, the appellants have come to this Court, advancing a single ground of appeal, faulting the learned trial judge as having:

> 1. **'misdirected herself in law and fact, when she found that 50% of the property in dispute was for Joseph Kamanga, through the purchase transaction with Aaron Kanyama, as owner.'**

5.2 In their written heads of arguments filed on record, the submission of the appellants in support of their sole ground of appeal was anchored on the principle of law that, where a party purchases property owned in common with others, without the consent of all the co-owners, such sale is void *ab initio*. The case of **Trevor Limpic v Rachael Mawere & 2 Others**[2] was cited as authority, where this Court upheld a judgment of the High Court, that nullified a sale and ordered the appellant to return property bought from one co-owner, without the consent of the others.

5.3 Counsel for the appellants argued that, once a court declares the sale of a property a *nullity* or *void ab initio*, then the effect of such declaration is that the purchaser must be paid back his money and the owner should recover his property. The learned authors of **Halsbury' s Laws of England, 4th Ed, Volume 9** and **Atkins Court Forms, 2nd Ed, Vol 12 (2)** were cited, to underscore the point that, where a contract is void, no rights accrue and any money paid as consideration is recoverable.

5.4 It was further argued that, the respondent had constructive notice of the interest of the appellants in the property, but nonetheless proceeded to obtain title to the whole property. In so acting, so counsel proceeded to argue, the respondent had embarked on this transaction to his own detriment, as the entire transaction was void *ab initio* for lack of consent from the appellants. This position was said to have been confirmed by the learned trial judge's own admission when she opined that, the only proper recourse available to the respondent, was for him

to institute a fresh action against the estate of the late Aaron Kanyama, for the recovery of the purchase price of K60, 000 000.00 (unrebased).

5.5 For their part, learned counsel for the respondent in their written heads of argument filed in opposition to the appeal argued that, the late Aaron Kanyama and the appellants became tenants in common in equal shares of 50/50, by virtue of the first judgment. The respondent cited **Megarry and Wade, Law of Property, 6th Edition**, which defines tenants in common as those that hold undivided shares, with a distinct fixed share in property which has not yet been divided among the co-tenants and are both entitled to use the entire property.

5.6 The learned author **Riddal, J.G., Land Law, 6th Edition,** was further referred to, in advancing the argument that, a tenant in common can transfer his interest *intervivos* to another person. This, according to counsel, is what Aaron Kanyama did, when he was alive and sold his share to the respondent for K60, 000,000.00.

5.7 In the alternative, the further submission was that, according to **Megarry and Wade, Law of Property,** if a joint tenant alienated his interest *intervivos*, then the joint tenancy was severed. The person to whom interest was conveyed took it as a tenant in common with the other joint tenants. He has unity in title with them and his share would thus, be as a tenant in common.

5.8 On the case of **Trevor Limpic**[2] relied upon by the appellants, counsel for the respondent argued that, it does not apply to the case in *casu,* as the said case dealt with co-ownership or consent of the other co-owner for property to be sold. It was submitted for the respondent that, the question of consent does not arise in *casu* and was not relevant for determination of issues before the trial court, as Aaron Kanyama only sold and transferred his interest of 50% in the property, to the respondent.

5.9 At the hearing of the appeal, learned counsel for the parties on both sides relied on their written heads of

argument that were filed on record, as earlier referred to in paragraphs 5.0-5.9 which they rehashed, orally.

6.0 **Consideration of the appeal and decision of this Court**

6.1 We have considered the record of appeal, heads of argument filed by counsel for the respective parties, oral submissions made before us, together with case law and other authorities to which we were referred.

6.2 As evidence on record will confirm, it is not in dispute that, Favour Chiyala was a direct tenant of the Lusaka City Council and a sitting tenant in actual occupation of the property, when the decision was made to dispose of Council houses by way of sale to sitting tenants. By letter dated 10th February, 1996 he was offered to purchase the property, which he accepted, paid the purchase price and concluded all the formalities attendant to the sale. He died whilst awaiting the processing of title deeds in his name.

6.3 This evidence shows the deceased, Favour Chiyala, duly purchased house No. 10 Chuswe Road, Chilenje South,

otherwise known as Plot No. 1283/ 7417, Lusaka and acquired the whole beneficial interest in it.

6.4 That position notwithstanding, Aaron Kanyama claimed ownership of the property on the basis that Favour Chiyala had changed the tenancy from his daughter, Beauty Kanyama, when she died and thereby cheated him out of 'his house.' Later, when Lusaka City Council decided to sale the house, it was offered to him for purchase, as a result.

6.5 It is interesting to note that, Mulenga, J, when dealing with the issue she had identified as arising for determination in the matter, being, whether or not the purchase of the property by the respondent was valid, on the basis that he was a *bonafide* purchaser for value, without notice, as he claimed, at pages 26 and 28 of the record of appeal, opined as follows:

> *"PW2 and PW3 (the respondent and his mother) also admitted that they found the 1st Defendant as administrator of Favour Chiyala's estate, in occupation or possession of the property in issue. But despite having so found, they did not inquire as to what rights she had in occupying that property but went ahead and completed the transaction without her involvement*

> *or consent whilst being armed with the judgment which directed that she was a co-owner. This shows that the Plaintiff or PW2 had actual notice of the interest of the Defendants in the property. They therefore decided not to involve the 1st Defendant in their sale transaction at their own peril..... Therefore, for all intents and purposes, their transaction is only valid as against the late Aaron Kanyama and his estate and not the Defendants. Thus the Plaintiff's claim cannot succeed against the Defendants (the appellants). He, however, has a valid claim against Aaron Kanyama's estate."*

6.6 From that reasoning, in our view, the learned judge properly determined that the respondent was not a *bonafide* purchaser for value without notice. That determination in effect disentitled the respondent to any claim in the entire property. The learned trial judge also correctly relied on the decision of this Court in **Mwenya and Randee v Kapinga**[1] to the effect that, a purchaser who has notice that the vendor is not in possession of the property, should make enquiries from the person in possession as to such person's rights over the property, failing which whatever title he acquires as purchaser will be subject to the title or rights of the tenant in possession.

6.7 Those sentiments were echoed in our unreported decision of **Nawakwi v Lusaka City Council**[3] where we equally,

held that, the appellant ought to have made enquiries as a prudent purchaser, and that purchasing of real property cannot be taken as casually as purchasing household goods. Further, that the appellant knew of the existence of the 2nd respondent as tenant or if she did not know, she was taken to have had constructive notice of her existence as a tenant of the property.

6.8 Coming back to the case in *casu*, the respondent's claim in the High Court was pursued on two fronts. His first argument was that, he was a *bonafide* purchaser for value without notice of any other person's interest in the property apart from that of the vendor, Aaron Kanyama. That claim failed, on the evidence which, as correctly found by the trial judge, leaves no doubt whatsoever, that the very judgment upon which the respondent anchored his said claim, stated that the person from whom he purportedly purchased the entire property, only owned 50% beneficial interest in it.

6.9 Even assuming we accept the respondent's second argument made in the alternative, which we do not, that Aaron Kanyama only sold and transferred his interest of 50% in the property, to the respondent; and, that a tenant in common can transfer his interest in a property *intervivos;* that argument is defeated by evidence on record confirming that, Aaron Kanyama, who was bestowed with only 50% ownership by the first judgment, proceeded to transfer the entire interest in the property. The Certificate of Title at page 42 of the record attests that fact. It shows the respondent, Joseph Kamanga, as *sole* lessee of Plot No. 1283/7417 for the unexpired term of 99 years with effect from 19th December, 2007.

6.10 The second judgment which, apparently, attempted to remedy the position of having a Certificate of Title for the whole property, by declaring him a *bonafide* purchaser of the entire property, equally does not aid the respondent's case. This is so, as the Certificate of Title in his name was issued on 19th December, 2007 while the second judgment

was only delivered six months after that event, on 27th June, 2008.

6.11 Suffice to point out and it is worth noting, that the first judgment of 2005 did not state the equitable principle it relied on to justify sharing property, that was wholly paid for by one party to a contract, to someone who was not privy to the said contract; was not a tenant of the property at the material time; did not meet the qualification criteria for purchase; was never offered to purchase the property; and, did not pay anything towards the purchase price.

6.12 The person who was in occupation as 'sitting tenant' at the material time that Council Houses were made available for sale and paying rent, was Favour Chiyala. After the sale to him, he was the one paying the rates to the Lusaka City Council. Evidence on record shows, these payments were continued by the administrators following his death.

6.13 What these circumstances disclose is that, other than moral considerations of apparent unfairness in the way Favour Chiyala treated his father-in-law, Aaron Kanyama

following the death of the latter's daughter, Beauty Kanyama; there was absolutely no legal basis for the Subordinate Court in the first judgment, to have awarded Aaron Kanyama a gratuitous 50% interest in the property on which he did not spend anything and for the High Court to uphold that award. As Aaron Kanyama had no legal interest in the property that he could pass to the respondent, the Latin maxim, *nemo dat quod non habet,* is apt, as one indeed cannot give what he does not have.

6.14 The learned trial judge was correct in holding that for all intents and purposes, the only recourse the respondent has, is against the estate of the late Aaron Kanyama and not the appellants. Having so held, she was equally duty bound to go further and deal with all issues raised before her in the matter; rather than allowing herself to be constrained by the first judgment, of the Subordinate Court which she felt obliged to uphold, on considerations that it is pending hearing of an appeal and therefore, still subsisting.

6.15 The judge should properly, have proceeded to determine the fate of that judgment, on the basis that it was a nullity for want of jurisdiction on the part of the court that rendered it. This was the finding of her learned sister, C.B. Phiri, J, as she then was, in her ruling on appeal against the second judgment, dated 7th October, 2010 referred to in paragraph 3.6 of this judgment. That ruling was the basis on which the matter was re-commenced in the High Court. **Section 13 of the High Court Act Cap. 27** empowers trial judges to deal with all issues brought before them for determination with finality and the parts relevant to issues raised herein, read as follows:

> **"In every civil cause or matter..... the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant,.....all such remedies or reliefs whatsoever..... to which any of the parties thereto may appear to be entitled..... so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided**.....(underlining for emphasis only)

6.16 In light of **section 13** as quoted above and the fact that the first judgment was a nullity for want of jurisdiction on the part of the court that heard the matter; Mulenga, J, as

trial judge was obliged to deal with all issues in controversy with finality and thereby avoid escalating the multiplicity of actions from 'scattered litigation that had already been deployed piecemeal by the parties' against each other. Conflicting decisions were obtained as a result: one from the Local Court, two judgments from the Subordinate Court as well as two conflicting High Court outcomes- all arising from the same facts.

6.17 She would have been fortified by her finding, that the respondent was not a *bonafide* purchaser for value, without notice and was not owner of the property as a result, which is supported by the evidence led. Accordingly, the order made by the trial judge, should have gone beyond cancellation of the Certificate of Title, to further direct that, there be rectification of the Lands Register, to remove the respondent's names.

6.18 For the reasons given, the sole ground of appeal succeeds. The finding of the learned trial judge that the estate of the late Favour Chiyala is entitled to 50% ownership of the

property whilst the other 50% is for the respondent, through the purchase transaction with Aaron Kanyama, as the owner, is hereby set aside. In its place, we confirm that the estate of Favour Chiyala is entitled to the undivided ownership of house No. 10 Chuswe Road, Chilenje South, otherwise known as Plot No. 1283/7417, Lusaka.

6.19 Costs will follow the event and are to be taxed in default of agreement.

Appeal succeeds.

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E.C. MUYOVWE
SUPREME COURT JUDGE

.....
J.K. KABUKA
SUPREME COURT JUDGE

.....
J. CHINYAMA
SUPREME COURT JUDGE