

**IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT LUSAKA
(Appellate Jurisdiction)**

Appeal No. 79/2009

VIVIENNE KAONGA

APPELLANT

AND

ATTORNEY GENERAL

RESPONDENT

**CORAM: CHIRWA. Ag. DCJ, MUYOVWE AND MUSONDA, JJS.
On 14th February 2012 and 3rd August 2012.**

***For the Appellant: Mr. W. Mweemba of Mweemba & Co.
For the Respondent: Mr. J. Simachela - Deputy Chief State
Advocate with him Captains Z. Namwawa,
M. Nzala and K. Kombe - State Advocates***

J U D G M E N T

Musonda, JS, delivered the Judgment of the Court.

Cases Referred To:

- 1. Steven Lungu V Attorney General (SCZ Judgment No. 20 of 2001).***
- 2. Associated Provincial Picture Houses Limited V Wednesbury Corporation (1994) 2 All ER 680.***
- 3. Council of Civil Service Unions V Minister of State for Civil Service (1981) AC 363.***
- 4. Beatrice Muimui V Sylvia Chanda (Appeal No. 50 of 2000).***
- 5. Hamwele and Another V Sipalo and Another (2010) ZR 160.***

This was an appeal against the High Court refusal to make an order of certiorari. The High Court was moved by judicial review proceedings to quash the decision of the 2nd respondent to evict the appellant from property known as Flat Number 3 Plot D/21/F377a, Sable Road Kabulonga Lusaka, on the ground that the appellant was not entitled to occupation of the same. The decision was impugned as being unreasonable and tainted with mala fide. A further Order was sought to compel the 2nd respondent to sell property known as Flat Number 3 Plot D/21/F377a, Sable Road, Kabulonga to the appellant.

The grounds upon which the reliefs were sought were that the decision by the 2nd respondent to evict the applicant from the said property lacked logic and was a breach of the appellant's fundamental right. The appellant came into occupation of the said property by virtue of the same being allocated to her as an incident of her employment. The appellant further claimed that the decision was also unreasonable as no reasonable authority acting reasonably could have arrived at such a decision. The appellant further stated that since the property was subject to a

presidential directive to be sold to sitting tenants, as such sitting tenant, the appellant had a right to purchase the said property and therefore the attempt by the 2nd respondent to evict her from the said property and allocate it to another person for purposes of purchasing the same, tainted the 2nd respondent's decision with mala fide.

There was affidavit evidence filed, as the usual practice in judicial review proceedings. The appellant deposed that prior to her employment with the Zambia Daily Mail, she was employed by the Zambia Cooperative Federation Limited (ZCF) from 1990 to 1998. During her employment, she was allocated the property in dispute. At the time she was allocated the property, it had been handed over to the Zambia Cooperative Federation Limited and later on to the then National Agricultural Marketing Board (NAMBOARD) by virtue of the fact that, the functions of the latter were handed over to the Zambia Cooperative Federation Limited, when it became defunct. Subsequently, the properties vested in the Zambia Cooperative Federation Limited were transferred to the Food Reserve Agency (FRA). By operation of law, that is

Statutory Instrument No. 101 of 2001 the properties vested in FRA and ZCF were transferred to government. Subsequently, some ex-employees of NAMBOARD sued government in the Industrial Relations Court for payment of terminal benefits and claimed to have a right to purchase the properties as sitting tenants.

The appellant and other sitting tenants attempted to join the proceedings before the Industrial Relations Court (IRC) but failed. They unsuccessfully appealed to this court. According to the appellant, the exhibited judgment of this court, in no way directed that the appellant should vacate the flat, but the respondent proceeded to issue an eviction notice without regard to her right as sitting tenant, with a right to purchase that property arising from the presidential directives issued in 1996.

The appellant had informed the 2nd respondent of her intention to purchase the flat and was informed that the application was receiving consideration. The flat was in a state of disrepair. She expended substantial sums of money to reinforce

the foundation. Documentary evidence to that effect was exhibited.

There were three grounds of appeal filed in this appeal. In ground one it was contended that the learned Judge in the court below erred in both law and fact when he held that the appellant did not meet any qualifications to purchase a flat from government as she was not an employee of the civil service, but the Zambia Daily Mail. The appellant legally occupied the flat, allocated to her by her employer, Zambia Cooperative Federation Limited (ZCF), an incident of her employment. She was contributing 8 percent of her monthly basic salary as rent upon moving into the house.

When the properties were being transferred the flat in question had become subject to the presidential directive to sell government houses to sitting tenants, which directive was made in 1996. It was submitted that in the case of **Steven Lungu V Attorney General⁽¹⁾**, we considered guidelines for sale of Council and University of Zambia Pool houses and stated at 'J13' that the intention of the government in selling the said houses was to

empower Zambians who were sitting tenants to purchase pool houses.

In ground two, it was contended that the learned trial Judge erred in law and fact when he found that the appellant was not a sitting tenant of the flat because she did not have a tenancy agreement when there is no law that says you can only become a tenant when you have a lease. The appellant was allocated the flat by the then employer who was the owner at the time. She was paying rent for the flat.

There was reference to the definition of tenant in Section 2 (a) of the Rent Act as follows:

“ ‘Tenant’ in relation to the premises, means the person entitled, whether exclusively or in common with others to possession thereof and shall include any person deemed to be a tenant by virtue of the meaning ascribed to this subsection to the expression ‘lease’ ”

It was argued this provision is expansive and not restrictive and could not be restricted to those occupying property pursuant to a lease or tenancy agreement.

In ground three, the appellant contends that the learned trial Judge in the court below erred in law and in fact when he found that the appellant was not a sitting tenant because she did not pay rentals to the government when in fact the house was allocated to her as a condition of employment. According to Black's Law Dictionary, 9th Edition:

“A tenant is one who holds or possesses land or tenements by any kind of right or title”

By the above definition, it is a legal misdirection to reduce the meaning of the word 'tenant' to the person paying rent to the owner. What is crucial is one must occupy the same by some claim of a right thereto. The appellant having been given the flat as a condition of employment by the ZCF, her then employers, she was a tenant. The committee on sale of government houses had accepted her application for consideration.

It was strenuously argued that the decision maker, in this case the Permanent Secretary Works and Supply took into account irrelevant considerations in determining the eligibility of the appellant to buy the flat. These were enumerated as follows:

- (i) The decision of the Supreme Court concerning ex-Namboard houses;**
- (ii) That the appellant lost the case; and**
- (iii) A letter from the Solicitor General to re-posses the houses mentioned in the said ruling of the Supreme Court**

The Supreme Court judgment did not deal with the appellant's rights for the Permanent Secretary to base his decision on that Judgment, this amounted to Wednesbury unreasonableness within the context of **Associated Provincial Picture Houses Limited V Wednesbury Corporation**⁽²⁾

The Permanent Secretary Ministry of Works and Supply Lt. Col Bizwayo Newton Nkunika (Rtd) swore the opposing affidavit.

He deposed that the appellant was an illegal sitting tenant in a government property. It was incorrect for the appellant to argue that being a sitting tenant was the only criteria in the purchase of government houses. The most important criteria was that the potential purchaser had been an employee of government. The Permanent Secretary said, the property in question was never owned by the Zambia Cooperative Federation Limited, which was a private organization and any transfer of it should have been through an Act of Parliament.

The appellant's employer ZCF had unsuccessfully applied for judicial review in respect of the same properties. By Statutory Instrument No. 145 of 1996 and the Food Reserve Act No. 12 of 1995, the government transferred all government units to itself through the Food Reserve Agency, meaning that ZCF and its affiliates ceased to have authority over those properties. The appellant's rights acquired over her flat when she was employed by ZCF were extinguished when the 2nd respondent became the rightful owner of those properties. The scheme to purchase government pool houses set the following criteria for one to be

eligible, namely, a confirmed civil servant who was in service and was a legal tenant. In the appellant's case, she was neither a civil servant nor a legal tenant, she therefore has no locus standi. The government had never decided to sell the flat to the appellant as she had never been a civil servant. The eviction notice was issued as a result of this court's judgment on 14th March, 2006 which dismissed the joinder of **Abel Mulenga and 36 Others** of whom the appellant was one. The decision to exclude all properties already sold or offered to ex- NAMBOARD employees was based on the advice of the Attorney General on 27th May, 1999 on the ground that the properties had been committed to contracts which should be honoured.

In response to ground one Mr. Simachela contended that the learned Judge did not err in both law and fact, when he found that the appellant did not meet any qualification to purchase the house as she was not a government employee nor a legal tenant. In law it was argued such could not be said to be in defiance of logic or accepted moral standard that no sensible person who has applied his mind to the question to be decided could have arrived

at it, so as to bring the decision within the ambit of Judicial Review. The cases of **Council of Civil Service Unions V Minister of State for Civil Service**⁽³⁾ and **Associate Provincial Picture Houses Limited V Wednesbury Corporation supra** were cited for that proposition of the law.

Clause 2.0 of the Handbook on the purchase of government pool houses was cited to us which is couched in these terms:

2.1 Eligibility:

In the process of identifying civil servants who are bona fide sitting tenants, the following criteria shall be used:-

- (a) A confirmed civil servant who is in service and is a legal tenant;***
- (b) A civil servant who retired or was retrenched, but was not paid terminal benefits and is a legal tenant;***
- (c) A civil servant who retired, but was re-appointed on contract/gratuity terms and conditions of service;***

- (d) A spouse or children of a civil servant who died, but was not paid terminal benefits and was a legal tenant; and**
- (e) A civil servant who qualifies to own land under the provision of Section 3 (2) and (3) of the Land Act No. 29 of 1995.**

We were referred to our decision in the case of **Attorney General V Steven Lungu supra** where we said:

“It was a government condition of service to sell the house to Zambian civil servants who are sitting tenants”

Further in the case of **Beatrice Muimui V Sylvia Chanda**⁽⁴⁾, we said:

“We do not subscribe to the argument that being a sitting tenant is the sole criterion in the purchasing of a government or quasi government house in the current policy of empowering employees, we take judicial notice that the potential purchaser has to be an employee”

It has been contended that though the Zambia Daily Mail is incorporated by the government of the Republic of Zambia and is the principal shareholder, it is managed privately as a distinct and separate entity and, therefore, anyone working in it is not considered to be a civil servant.

Grounds two and three were responded to together.

We were referred to the definition of tenant by Black's Law Dictionary, which the appellant also referred us to. However, Section 2 (a) of the Rent Act defines tenant as:

" 'tenant' in relation to the premises, means the person entitled, whether exclusively or in common with others, to possession thereof, and shall include:

(a) Any person deemed to be a tenant by virtue of the meaning ascribed in this subsection to the express on 'lease' "

A lease in accordance to Section 2 of the Act means:

“ ‘lease’ includes any agreement, whether written or verbal and howsoever described, where under the tenant obtains the right to possession of the premises for a consideration in money or monies worth, and whether or not such agreement includes an option to purchase the said premises or the building of which the said premises form part, and the grantor and grantee of any such right to possession shall, for the purposes of this Act be deemed to be a landlord and tenant respectively”

The learned trial Judge after examining the issues was of the view that:

“It was quite clear that the appellant’s rights as against the Government of the Republic of Zambia through the Ministry of Works and Supply are not clear at all. Numerous litigation has taken place in this country concerning the presidential directive that sitting tenants be given an opportunity to purchase government, parastatal and council housing units. One thing that is clear from the decided cases is that each

case is treated on its own merits and upon application by each sitting tenant and that there are standard qualifications set for one to qualify to purchase such accommodation as a sitting tenant”

In the present case, the trial Judge agreed with the Permanent Secretary, that there were qualifications which the appellant did not meet.

It was submitted that there was no evidence on record adduced by the appellant to describe the legal relationship between herself and the government which entitled her to claim possession of the house. There was no evidence that she was paying rent to the government or any other institution. The appellant was therefore occupying the house illegally.

We have considered affidavit evidence and submissions by counsel. We will deal with all the three grounds together as they do not raise stand alone factual or legal issues. The issues as we see them are:

- i. What is the status of Zambia Daily Mail vis-à-vis the government?;***
- ii. Whose property was this?;***
- iii. What does legal tenant mean in the context of government houses? and***
- iv. What were the contractual obligations of the appellant and the respondent?***

An incorporated company is a distinct legal personality under Section 22 of the Companies Act. It can sue and be sued. The Attorney General cannot be sued in representative capacity for acts or omissions by such an entity, the Government being the principal shareholder notwithstanding.

The property by legislative expression became government property. In the context of government pool houses, the legal tenant is the one allocated the house by the Government Housing Committee under the Ministry of Works and Supply, evidenced by an allocation slip.

The government as owner of houses, offered houses to those who met the conditions prescribed in Clause 2.2, which have been

enumerated above. The appellant was not a civil servant. As we said in **Beatrice Muimui V Sylvia Chanda supra** being a sitting tenant was not the sole criterion.

We recently held in the case of **Hamuwele and Another V Sipalo and Another**⁽⁵⁾ that:

“The 2nd respondent was not an employee of Lima Bank. She had no right to purchase the house”

Equally in this case the appellant was not an employee of government and she had no right to purchase the house. The first, second and third grounds lack merit. The entire appeal is therefore dismissed. Costs will follow the event.

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D. K. CHIRWA
SUPREME COURT JUDGE

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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P. MUSONDA
SUPREME COURT JUDGE