

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

Appeal No. 1/2019
SCZ/08/01/2019

BETWEEN:

SMITH SAWILA
AND
ATTORNEY GENERAL
CHRISTINE BANDA



APPELLANT

1ST RESPONDENT

2ND RESPONDENT

Coram: Mambilima, CJ Malila and Kaoma, JJS
On 3rd June, 2020 and 30th June, 2020

For the Appellant: No Appearance

For the 1st Respondent: Ms. D.M. Mwewa - Acting Principal State
Advocate

For the 2nd Respondent: No Appearance

JUDGMENT

Kaoma, JS, delivered the Judgment of the Court.

Cases referred to:

1. Honorius Maurice Chilufya v Crispin Haluwa Kangunda (1999) Z.R. 166
2. Emmanuel Mponda v Mwansa Christopher Mulenga and others - Selected Judgment No.42 of 2017
3. PATMAT Legal Practitioners (sued as a firm) v Ndele and others (sued as joint Administrators of the Estate of the late Horace Makala) – Supreme Court Judgment No. 62 of 2017
4. Patrick Chilambwe v Attorney General - Appeal No. 82 of 2015
5. Khalid Muhamed v Attorney General (1982) Z.R.49
6. Anti-Corruption Commission v Barnnet Development Corporation Limited (2008)1 Z.R. 69
7. Corpus Legal Practitioners v Mwanandani Holdings Limited – SCZ Judgment No. 50 of 2014

Legislation referred to:

1. Lands and Deeds Registry Act, Cap 185, sections 33, 34 and 54

1 Introduction

- 1.1** This is an appeal against a decision of the High Court presided over by Lisimba, J (as he then was) dismissing the appellant's claim to the property known as Plot No. 624, Mukuba Road, Ndola and cancelling his certificate of title.
- 1.2** This judgment discusses the question whether the learned High Court judge was in order to cancel the appellant's certificate of title and to dismiss the action.

2 Background

- 2.1** The facts leading to this appeal were that the subject property belonged to the Government of the Republic of Zambia under the Ministry of Works and Supply, which manages all government properties. It initially comprised a government pool house and a one-roomed servant's quarter. In the 1970s, the main house was demolished as it was in a deplorable state, leaving only the servant's quarter.
- 2.2** On 16th October, 1987, the Ministry of Works and Supply allocated the subject property to the 2nd respondent, as caretaker on ground that she was a widow and was keeping government properties exceptionally well, as a caretaker.

- 2.3** On 22nd May, 2000 the 2nd respondent applied to the Provincial Buildings Engineer, to acquire the property, which she referred to as a vacant G.R.Z. residential plot. On 7th July, 2000 the Provincial Buildings Engineer forwarded her application to the Permanent Secretary, Copperbelt Province but she received no response, from that office.
- 2.4** On 19th February, 2003 the Provincial Housing Committee allocated the property to one, Hambai Fancy Mweetwa, a principal land resettlement officer. He accepted the offer the next day. Thereafter, the Provincial Housing Committee recommended him to the Chief Lands Officer, Northern Region for acquisition of title deeds stating that the plot became available when a government house was demolished and was allocated to the Prisons Department four years earlier who failed to develop it.
- 2.5** However, on 25th February, 2003 the Chief Lands Officer disclosed to the Provincial Buildings Engineer that the property was held on title by one Jacob Njimba Kasanshi. The Provincial Buildings Engineer strongly objected to the allocation of government plots, without going through the Provincial Housing Committee, which was the only entity in

the province mandated to allocate government houses or such government plots. He requested that the plot be reverted to the Government by withdrawing the title deed.

- 2.6** In October, 2003 the officer-in-charge at Ndola Remand Prison (now Correctional Service), requested the Chief Lands Officer to re-allocate the property to the appellant, who was about to retire, to enable him to shift to his own house upon retirement to give room to other officers as there was a shortage of staff accommodation in the camp.
- 2.7** On 8th June, 2004 the Commissioner of Lands wrote to the Acting Chief Registrar, Lands and Deeds, advising that titles to plots 623 and 624 (subject property) be cancelled as the leases were executed in error and the properties were for government and were to benefit civil servants.
- 2.8** On 12th April, 2005 the Chief Lands Officer informed the Permanent Secretary, Copperbelt Province, in writing, that in the past he had received requests from User-departments recommending that undeveloped residential plots be allocated to their employees who did not benefit from the sale of former government and council houses and in most

cases such requests, had been considered positively as long they had the blessings of the Provincial Housing Committee.

- 2.9** In the same letter, he stated that in view of the confirmation by the User-department (Prison Service) and the resolution from the Provincial Housing Committee, he was seeking the Permanent Secretary's indulgence in the matter between the appellant and Mr. Mweetwa.
- 2.10** On 27th July, 2005 the Ministry of Lands offered the appellant the property. In September, 2005 he obtained a temporary buildings permit from Ndola City Council and commenced construction works. However, in the same month, the Provincial Buildings Engineer advised him to stop all construction works as the plot still belonged to the Government. He was asked to furnish documents to show that he was the rightful owner of the plot.

- 2.11** On 19th October, 2005 the Permanent Secretary informed the appellant in writing that the Provincial Housing Committee had resolved to recommend to the Commissioner of Lands for cancellation of his offer letter/title deed to the subject plot. He gave three reasons. First, that the plot was a government plot that still had an existing government

building in form of a servant's quarter; so, it could not be considered as virgin land. Secondly, that the plot could only be offered after a recommendation by the Provincial Housing Committee under the arrangement for the sale of government pool houses, whereby the servant's quarter had to be valued and paid for. Thirdly, that the Provincial Housing Committee had resolved to reserve the plot for future development of a government building. The appellant was again directed to stop all activities at the plot.

2.12 Despite that, on 2nd November, 2005 the appellant was issued with a certificate of title. Two weeks later, he commenced legal action against the respondents claiming for an order and declaration that the 1st respondent's purported decision to repossess the property was illegal, null and void and; for an order and declaration that he was the legal owner of the property.

2.13 In his defence, the Attorney General averred that the appellant did not follow the correct procedure in acquiring the plot and that the Department of Lands had no mandate to allocate government plots to any individual without recommendation from the Provincial Administration. The 2nd

respondent also asserted, that the appellant's acquisition of documents relating to the property was irregular.

2.14 At the trial of the action, the appellant refused that he skipped the procedure of going through the Provincial Housing Committee when acquiring the property. He said since the plot was virgin land, the Provincial Housing Committee was irrelevant and the Ministry of Lands did not ask him to surrender the certificate of title. However, he was aware at the time, of the state of the property and that the 2nd respondent occupied the servant's quarter.

2.15 The Chief Lands Officer, George Susiku Sindila testified as DW1. He said the Provincial Housing Committee, which fell under the Permanent Secretary, had no role to play in the allocation of the property since it was a bare plot. However, he conceded that the existence of the servant's quarter on the property meant that it was not bare land.

2.16 On her part, the 2nd respondent testified that she once worked as a general worker at Ndola Central Hospital but she was not a civil servant. She had a daughter who worked at the Ministry of Works and Supply who also applied to buy the property. She said she applied to acquire the property

she had been looking after for a long time as caretaker but she received no response. She said while the appellant held title to the land, he did not follow the procedure.

2.17 Daniel Kunda Kalebaila, a Senior Human Resource Officer in Mongu testified as DW3. At the material time, he was an administrative officer in the office of the Permanent Secretary, Copperbelt Province and secretary of the Provincial [Pool] Housing Committee. He confirmed that the pool house on the property was demolished leaving the servant's quarter but the plot remained government property and the 2nd respondent was a caretaker.

2.18 He insisted that the appellant should have directed his request to buy the property to the Pool Housing Committee as it was the final authority in the allocation of government houses. Since the appellant did not follow the procedure, the Permanent Secretary was right to revoke his offer.

2.19 DW3 also confirmed that the 2nd respondent had applied for the property but the application was not considered. He said the Commissioner of Lands had no authority to allocate property where there was a pool house and that a certificate of title could be cancelled if procedure was not followed.

3 Decision by the High Court

- 3.1** On the evidence and submissions before him, the learned High Court judge made several findings of fact. He found that the subject property belonged to the Ministry of Works and Supply and not the Prison Service as claimed by the appellant. That the Ministry of Works and Supply did not offer the property to the appellant; and there was no evidence that he was a *bona fide* purchaser. Further, he knew that the servant's quarter was occupied and had constructive notice but he did not investigate the interest of the occupant. Instead, he went round and obtained title surreptitiously. In doing so, he acted in bad faith.
- 3.2** The judge also found that the property had improvements and fell under the category of Government pool houses and that certain procedures should be followed for someone to acquire such property. Accordingly, the appellant was required to file an application to the Provincial Housing Committee; the Pool Housing Committee should have assessed his application and recommended to the Provincial Housing Committee for approval. Thereafter, the matter

would have been referred to the Commissioner of Lands for change of ownership but the procedures were not followed.

- 3.3** The judge further found that on 19th October, 2005 the Permanent Secretary wrote to the Commissioner of Lands cancelling the offer of plot 624 to anyone and also stated that the appellant's application did not have the blessings of the Provincial Housing Committee, which was mandated to recommend the sale of Government houses.
- 3.4** Finally, he found that on 8th June, 2004 the Commissioner of Lands had confirmed the cancellation of the offer of Stands 623 and 624 and directed the Acting Chief Registrar to effect the cancellation. Instead, for unexplained reasons, the Registrar, on 2nd November, 2005 issued a certificate of title to the appellant although there was no offer from the Commissioner of Lands or other supporting documents to indicate how the property was given to him.
- 3.5** The judge applied the case of **Honorius Maurice Chilufya v Crispin Haluwa Kangunda**¹ where we held that a certificate of title obtained surreptitiously is liable to be cancelled; that **section 54** of the **Lands and Deeds Registry Act** does not allow fraud; and that the law thus contemplates that fraud

will vitiate the certificate. He concluded that the appellant did not follow the procedure relating to the acquisition of Government pool houses or get an offer from the Ministry of Works and Supply who were the owners of the property.

3.6 As a result, the judge held that the certificate of title was obtained in circumstances amounting to fraud and was *null and void*. Hence, he cancelled it and reverted the property to Government. The Ministry of Works and Supply, was to decide, after correct procedures had been followed at their own discretion, to allocate it to anyone.

3.7 However, the judge expressed the view that should the Ministry of Works and Supply decide to allocate the property to someone, the 2nd respondent deserved to be given priority as she had been in the servant's quarter since 1977 and had made improvements to it, although the value of such improvements was not given.

4 Appeal to this Court and arguments by the parties

4.1 It is against this decision that the appellant filed this appeal on two grounds. We say two grounds because the purported third ground is not a ground of appeal at all. The grounds of appeal read as follows:

- 4.1.1 The court below erred in fact and law when it held that the appellant surreptitiously obtained title to the land in question, and thereby decreed cancellation of his title deed thereof.
- 4.1.2 The lower court glossed over many elements of the evidence that proved that the appellant acquired title to the subject property bona fide (sic).
- 4.1.3 The appellant shall raise such other and/or further grounds of appeal as shall be appropriate at the hearing of the appeal.

- 4.2 The appellant who appears in person did not attend the hearing of the appeal. We were informed by Ms. Mwewa, learned counsel for the 1st respondent, that he was reportedly sick and undergoing dialysis at Ndola Teaching Hospital. We proceeded to hear the appeal in his absence given that he had already filed his heads of argument.
- 4.3 We hasten to say that the appellant has raised a third ground of appeal in his heads of argument, in which he assails the trial judge for recommending the 2nd respondent. However, this third ground is not in the memorandum of appeal nor have we seen any leave to amend the memorandum of appeal to add this ground of appeal.
- 4.4 We have dealt with this kind of situation before in various cases such as **Emmanuel Mponda v Mwansa Christopher Mulenga, Christopher Mungoya and The Attorney General², PATMAT Legal Practitioners (sued as a firm) v**

**Chipo Zyamwaika Mudenda Ndele, Cramos Makanda,
Sally Jarielle Trollip and Kenny H. Makala (sued as joint
Administrators of the Estate of the late Horace Makala)³,
and Patrick Chilambwe v The Attorney General⁴.**

- 4.5** In all the above cases, we expressed our disdain on the practice by advocates and parties to attempt to introduce new grounds of appeal through such kind of statements in the memorandum of appeal, as appears in paragraph 4.1.3 above in complete disregard of the rules of the Court.
- 4.6** We also emphasised that such a statement cannot be used to circumvent the requirement of the rules of court to seek leave before filing grounds of appeal that are not stated in the memorandum of appeal. We held that additional grounds advanced in heads of argument without prior amendment of the memorandum of appeal are incompetent.
- 4.7** In fact, in **Patrick Chilambwe v Attorney General⁴** we went further to forbid, any advocate to stand up before us again to argue any additional grounds advanced in heads of argument without prior amendment of the memorandum of appeal. This equally applies to litigants appearing in person.

- 4.8** Therefore, we find and hold that the purported ground three in the appellant's heads of argument is incompetent. We shall consider the appeal only on the two grounds of appeal that are contained in the memorandum of appeal.
- 4.9** In support of ground one, the appellant has submitted that he followed the right procedure by inquiring from the Lands Department, which in turn referred him to the Prison Service, who are the owners of the plot. He submits that the Ministry of Works and Supply could not offer him the plot as it was offered to the Prison Service as seen from the letter requesting the Chief Lands Officer to reallocate the plot to him. He has argued that Mweetwa, who was offered the plot by the Ministry of Works and Supply, failed to get it since he never obtained a letter of offer from the Prison Service.
- 4.10** In ground two, the appellant's argument is that the court below failed to distinguish between the procedures for purchase of a vacant plot, which was in issue, and a government pool house. He contends that the procedure for the purchase of government pool houses was not applicable to him and that the Provincial Housing Committee was irrelevant in the process of acquiring the property.

4.11 He has also submitted that the trial judge erred when he failed to recognise the documentary evidence from the Prison Service, which was the registered owner of the plot and, which had recommended that he be offered the plot as confirmed by the evidence of DW1. He lamented that the Ministry of Lands did not know about the one-roomed servant's quarter on the plot; therefore, it was illegal.

4.12 In response, learned counsel for the 1st respondent, Ms. Mwewa, has argued grounds one and two together. She has submitted that the subject property is a government plot, which used to have a government pool house with a servant's quarter but due to the poor state of the house, the house was demolished, leaving only the servant's quarter.

4.13 According to counsel, this distinguishes the subject plot from a vacant government plot. Therefore, counsel supports the conclusion by the learned trial judge that the plot belongs to the government under the Ministry of Works and Supply and not the Prison Service.

4.14 Counsel has further argued that since the appellant did not comply with the procedure for allocation of a government pool house, the learned judge was right to cancel the

certificate of title. To support this argument, she cited the case of **Honorius Maurice Chilufya v Chrispine Haluwa Kangunda**¹ which the learned judge had referred to and the case of **Khalid Muhamed v Attorney General**⁵ regarding the burden of proof.

4.15 We have received no heads of argument from the 2nd respondent, who also did not attend the hearing of the appeal, either in person or by counsel, notwithstanding that her advocates, Messrs. National Legal Aid Clinic for Women were served with the Cause List on 21st May, 2020.

5 Decision by this Court

5.1 We have considered the record of appeal and the arguments by the appellant and the learned acting Principal State Advocate. The main issue raised by this appeal is whether the learned High Court judge erred when he held that the appellant surreptitiously obtained title to the subject property and consequently cancelled his certificate of title. In our view, the two grounds of appeal are interrelated, so we shall deal with them as one.

5.2 The appellant's main contention is that he followed the correct procedure because the Prison Service, which was the

registered owner of the plot, had the right to recommend to the Ministry of Lands that he be offered the plot and that F. Mweetwa failed to acquire the plot, because he never obtained an offer from the Prison Service.

- 5.3** He also accuses the judge of glossing over evidence proving that he acquired title *bona fide* because what was at stake was the purchase of a vacant plot and not a pool house where the Provincial Housing Committee could come in.
- 5.4** In contrast, Ms. Mwewa submitted that the appellant did not follow the correct procedure and that the Ministry of Lands had no authority to allocate the plot to him without the consent of the Provincial Housing Committee.
- 5.5** As we have said above, the learned High Court judge made several findings of fact based on the totality of the evidence before him. He found that the subject property belonged to the Ministry of Works and Supply and not the Prison Service as alleged by the appellant and that it had improvements on it, in form of the servant's quarter, and thus, fell under government pool houses. He also found that the appellant did not follow the procedure for acquisition of

government pool houses nor get an offer from the Ministry of Works and Supply who were the owners of the plot.

- 5.6** We accept that there was an apparent contradiction in the evidence of DWs 1 and 3. Whilst DW1 testified that the plot was bare land and did not require the approval of the Provincial Housing Committee, DW3 said the plot was still considered as a pool house; hence, the appellant needed the approval of the Housing Committee, which was the final authority in the allocation of government houses.
- 5.7** DW1 agreed in his evidence that he had not been to the property. Nor was he aware of the servant's quarter, on the property. He also accepted that if there was a servant's quarter on the plot, then the plot was not bare land. Further, from his letter to the Permanent Secretary that we referred to in paragraph 2.8, DW1 was aware that requests from user departments recommending that undeveloped residential plots be allocated to their employees who did not benefit from the sale of government and council houses required the approval of the Provincial Housing Committee.
- 5.8** However, DW1 did not explain how the Commissioner of Lands issued a certificate of title to the appellant, without

the blessings of the Provincial Housing Committee or the Permanent Secretary and without them resolving whom between the appellant and F. Mweetwa should be allocated the property as he proposed in his letter of 12th April, 2005.

5.9 Plainly, between the evidence of DWs 1 and 3, the learned judge believed that of DW3. In our view, he was entitled to do so and to disregard DW1's testimony that the Provincial Housing Committee had no role to play in the allocation of the subject plot since it was bare land.

5.10 Further, we do not agree with the appellant that Mweetwa failed to acquire the plot, as he did not approach the Prison Service. The evidence shows that the offer to Mweetwa fell through because at that time one Jacob Njimba Kasanshi held the property on title. That was the title the Permanent Secretary directed in 2004 that it must be cancelled.

5.11 As we said earlier, the trial judge held that the appellant's certificate of title was obtained in circumstances amounting to fraud since he did not follow the procedure for acquisition of government pool houses or get an offer from the Ministry of Works and Supply who were the owners of the plot.

5.12 The learned judge also held that the appellant could not be a *bona fide* purchaser because he knew that the 2nd respondent occupied the servant's quarter on the plot and had constructive notice but he did not investigate the interest of the occupant. The appellant admitted this fact but claimed that the servant's quarter was illegal as it was one-roomed and that DW1 was not aware of its existence.

5.13 Evidently, the Ministry of Works and Supply and the Provincial Administration were aware of the existence of the servant's quarter on the property and that the 2nd respondent occupied it as caretaker. Hence, the appellant cannot claim that the servant's quarter was illegal.

5.14 In the case of **Anti-Corruption Commission v Barnnet Development Corporation Limited**⁶, we held that while under **section 33** of the **Lands and Deeds Registry Act**, a certificate of title is conclusive evidence of ownership of land by a holder of a certificate of title, under **section 34** of the Act, a certificate of title can be challenged and cancelled for fraud or for reasons of impropriety in its acquisition.

5.15 Furthermore, in the case of **Corpus Legal Practitioners v Mwanandani Holdings Limited**⁷, we held that a person

alleging fraud or any other impropriety, with regard to the issuance of a certificate of title, must challenge the same through a court action and prove the allegations of fraud or other impropriety, as the case may be, to obtain a Court Order for the cancellation of the affected certificate of title by the Registrar of Lands and Deeds.

5.16 In this case, the respondents did not plead fraud. However, the Attorney General in his defence averred that the appellant did not follow the correct procedure in acquiring the plot because the Department of Lands had no mandate to allocate government plots to any individual without a recommendation from the Provincial Administration.

5.17 Further, at the trial, evidence was led from DW3, which the learned judge accepted, which proved that the appellant did not follow the correct procedure in the acquisition of the certificate of title because the request from the Prison Service that the property be allocated to him did not have the blessings of the Provincial Housing Committee.

5.18 It is clear to us from the evidence on record that there was impropriety in the manner the appellant obtained the certificate of title and that he did not acquire it *bona fide*.

Therefore, we agree with the learned trial judge that the appellant surreptitiously obtained title to the property, which justified its cancellation.

5.19 The only misdirection on the part of the learned judge, which sadly for the appellant does not affect the outcome of the appeal, is that the judge, instead of ordering the cancellation of the certificate of title, personally cancelled it.

5.20 As we said in the **Corpus Legal Practitioners⁷** case, it was for the Registrar of Lands and Deeds to effect the actual cancellation of the certificate of title. Accordingly, we reverse the cancellation of the certificate of title. Instead, we make an order for the cancellation of the certificate of title for reasons of impropriety in its acquisition.

5.21 However, this does not mean that the 2nd respondent was entitled to acquire the property. The evidence on record shows that whilst she applied in the year 2000 to acquire the property, on the basis that she had been the caretaker for a long time, she never received a response from the Permanent Secretary, and subsequently, the Provincial Housing Committee resolved to reserve the plot for future development of a government building.

6 Conclusion

6.1 In all, this appeal fails in its entirety and we dismiss it. However, we order the parties to bear their respective costs of this appeal.



**I. C. MAMBILIMA
CHIEF JUSTICE**




**M. MALILA
SUPREME COURT JUDGE**



**R. M. C. KAOMA
SUPREME COURT JUDGE**