

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 202/2019

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

**STANSLOUS SUMBULELU
COMMISSIONER OF LANDS
MARY SIZIMBULWE
MAJOR A. J. MVULA**



**1ST APPELLANT
2ND APPELLANT
3RD APPELLANT
4TH APPELLANT**

AND

**ALEX SINYANGWE
FRANCIS CHIBIYA (Acting in his capacity
as Trustee of the Hillview SDA Church)**

**1ST RESPONDENT
2ND RESPONDENT**

Coram: Makungu, Sichinga and Banda-Bobo, JJA

On the 20th day of May, 2021, 17th day of June, 2021 and 20th day of October, 2021

- For the 1st Appellant : Mr. L.E. Eyaa of Messrs Linus E. Eyaa & Partners
✓ For the 2nd Appellant : Attorney General's Chambers
For the 3rd Appellant : No appearance
For the 4th Appellant : No appearance
For the 1st Respondent : Mr. G. Lungu of Muleza Mwiimbu & Co
For the 2nd Respondent : Messrs Lusitu Chambers

JUDGMENT

MAKUNGU, JA delivered the Judgment of the Court.

Cases referred to:

1. William Masautso Zulu v. Avondale Housing Project Limited (1982) ZR 172
2. Nkhata and Others v. Attorney General (1966) ZR 124
3. Chikuta v. Chipata Rural Council (1974) ZR 241
4. Maxwell v. Kaun (1928) 1 KB 645
5. Rose v. Humbles (1972) 1 All E.R. 314
6. Mwenya & Randee v. Kapinga (1998) ZR 17

Legislation referred to:

1. *The High Court Act, Chapter 27 of the Laws of Zambia*
2. *Rules of the Supreme Court of England, 1999 Edition.*

Other Works Referred to:

1. *Patrick Matibini. (2017) Zambian Civil Procedure: Commentary and Cases. Vol. Durban. Lexis Nexis.*

1.0 INTRODUCTION

- 1.1 This appeal is against the Judgment of Mr. Justice E. L. Musona of the High Court dated 12th September, 2019 in favour of the 1st respondent.
- 1.2 In the court below, the 1st respondent was the plaintiff while the appellants were 1st to 4th defendants respectively. The 2nd respondent was not a party to the action in the court below. He was joined to the appeal by Consent Order dated 20th May, 2021.

2.0 BACKGROUND

- 2.1 For convenience, in this part of the judgment, we shall refer to the 1st respondent as plaintiff and the appellants as 1st, 2nd, 3rd and 4th defendants respectively, which designations they were in the court below.

2.2 The matter was commenced on 13th January, 2012 by way of originating summons pursuant to **Order 6 Rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia**. The plaintiff sought the following reliefs:

- 1) *A declaration that the plaintiff is the lawful owner of property No. 33464 Lusaka which is a portion of Stand No. 24946, Lusaka;*
- 2) *An order to nullify the letter of offer given to the 1st defendant by the 2nd defendant for stand number 24946 on the ground that it is null and void for violation of the plaintiff's rights to the said property;*
- 3) *An order for the 2nd defendant or its agents or servants to cancel or withdraw the offer letter issued to the 1st defendant in respect of property No. 24946, Lusaka;*
- 4) *An injunction restraining the 1st defendant from demolishing the structure on property No. 33464, Lusaka or in any way dealing with the plaintiff's said property;*
- 5) *Damages; and*
- 6) *Costs.*

3.0 AFFIDAVIT IN SUPPORT

3.1 In his affidavit in support of the originating summons, the plaintiff, Alex Sinyangwe deposed that sometime in June 2004, he purchased LUS/33464 a portion of Stand No. 24946, Lusaka from the late Jacqueline Banda through her husband, Dausen

Sinkala for K7, 000, 000.00 (unrebased). At that time, the said property had been offered to Jacqueline Banda by the 2nd defendant by letter dated 28th January, 2004. There were three other persons who had bought portions of the same property from Dausen Sinkala. Subsequently, four offer letters were issued by the 2nd defendant as follows:

- (a) Aaron Nonde - LUS/33461;
- (b) Stanslous Sumbulelu - LUS/33462;
- (c) Yona Daka - LUS/33463; and
- (d) Alex Sinyangwe - LUS/33464.

3.2 He stated that in October 2004, one Newton Ng'uni claimed that Stand No. 24946, Lusaka was his. This claim was challenged by the 1st defendant, Aaron Nonde and Yona Daka in the Lands Tribunal. However, that case was discontinued to enable the parties reach an amicable settlement with the 2nd defendant. At a meeting of all parties concerned, the parties were told by the Commissioner of Lands that the land did not belong to Newton Ng'uni but to the deceased, Jacqueline Banda.

3.3 On 12th January, 2010, the plaintiff entered into a contract of sale with Lushomo Seventh Day Adventist Church, for the sale of LUS/33464 at the price of K76 million (unrebased). The

church made a part payment and it was agreed between the parties that the balance would be paid once a Certificate of Title was issued to the plaintiff by the 2nd defendant.

- 3.4 In the process of negotiations with the 2nd defendant for possible subdivision of the property in issue, the 1st defendant went behind the plaintiff's backs to obtain an offer letter dated 2nd June, 2011 from the 2nd defendant for the entire Stand No. 24946, Lusaka. The 1st defendant has since demolished structures constructed by the church on the land in issue and destroyed their furniture. Consequently, the church has been reluctant to complete the sale.
- 3.5 The plaintiff Alex Sinyangwe, further deposed that the 2nd defendant has failed to resolve the issue and to cancel the offer letter issued to the 1st defendant even in the face of a report prepared by the 1st defendant to the Lands Tribunal in which he admitted that parts of Stand 24946 belong to the 2nd defendant, Aaron Nondé and Yona Daka. There was also a letter authored by Dausen Sinkala stating that he sold a portion of stand No.24946 to the plaintiff.

AFFIDAVIT IN OPPOSITION

- 3.6 An affidavit in opposition was filed by the 1st Defendant Sumbulelu. The essence thereof is that on 24th March, 2004, the late Jacqueline Banda, through her husband, Dausen Sinkala, sold the whole of Stand No. 24946, Lusaka to him at a consideration of K14, 000.00. He applied to the 2nd defendant for consent to assign and an offer letter was subsequently issued to him on 16th April, 2004 by the 2nd defendant.
- 3.7 The 1st defendant further stated that sometime in May 2004, Dausen Sinkala came to him in the company of the plaintiff whom he introduced as an estate agent working with the Lusaka City Council and the Ministry of Lands to prepare demand letters for service charges and ground rates. The plaintiff collected Sumbulelu's original offer letter on the pretext that he was going to use it to prepare a demand letter. The plaintiff later returned to say that the offer letter had been misplaced by the Ministry of Lands. He then gave the plaintiff K500.00 to pursue the 2nd defendant and to resubmit a certified true copy of the survey diagram for issuance of a new offer letter.

- 3.8 In June, 2004 the plaintiff brought a new offer letter written by the 2nd defendant to 1st defendant for Stand No. LUS/33462, Lusaka as a subdivision of Stand No. 24946, Lusaka.
- 3.9 Sumbulelu alleged that the subdivisions were created without his consent and sold to Aaron Nondé, Yona Daka and Alex Sinyangwe. He then reported the matter to the police and Sinkala was apprehended who named the plaintiff as his accomplice.
- 3.10 When the plaintiff was about to be apprehended, one Newton Ng'uni claimed Stand No. 24946 as his own.
- 3.11 In July, 2005 Ng'uni, without making any enquiries from the 2nd defendant, had the 1st defendant's house demolished after reporting the matter to the Lusaka City Council. When Sumbulelu had a meeting with the Director of City Planning at the Council, he was told that the subdivisions created on Stand No. 24946 were illegal. The Commissioner of Lands also confirmed this in a subsequent meeting with Sumbulelu, Nondé and Daka.
- 3.12 Sumbulelu further deposed that in a meeting held on 6th December, 2005, the Commissioner of Lands offered replacement plots to him, Nondé and Daka but declined to give

one to the plaintiff on account of his fraudulent and illegal activities in the transactions in issue. Nondé and Daka went on to sell their replacement plots.

3.13 Dissatisfied with the decision of the 2nd defendant, Nondé and Daka commenced an action in the Lands Tribunal against the 2nd defendant, the Lusaka City Council and Newton Ng'uni.

3.14 In the proceedings before the Tribunal, the Lusaka City Council submitted that the property in issue did not belong to Newton Ng'uni as per the Council minutes of 18th November, 2004. However, on 26th December, 2007 the 2nd defendant withdrew the offer letter for the replacement plot given to Sumbulelu with a promise to give him a replacement plot.

3.15 Later, proceedings before the Lands Tribunal were discontinued in favour of an *ex curia* settlement.

3.16 Sumbulelu further deposed that the plaintiff, later sold his subdivision LUS/33464 to the Seventh Day Adventist Church now represented by the 2nd respondent.

3.17 On 2nd June, 2011, the 2nd defendant issued a fresh letter of offer of the entire plot No. 24946 to Sumbulelu to replace the lost one dated 16th April, 2004.

3.18 He stated that on 18th November, 2011, he gave the SDA Church a final notice to vacate Stand No. 24946, Lusaka. By letter dated 27th November, 2011, the church representatives sought an extension of time to vacate the premises and find alternative premises to relocate to.

3.19 Sumbulelu finally stated that he had continued paying ground rent to the 2nd defendant for stand No. 249446 as evidenced by the receipts annexed to his affidavit.

4.0 ORAL EVIDENCE

4.1 On 14th February, 2018, the court below ordered the parties to file a consent order for the matter to proceed as though commenced by writ of summons as the parties had observed that there were contentious issues. However, such a consent order was not filed.

4.2 When the matter came up for hearing on 3rd June, 2019, the court below directed as follows:

“Parties were advised more than a year ago to enter consent so that the matter proceeds as if it was commenced by writ of summons but (the) parties have not done so.

We shall therefore proceed as an originating summons which is what it is. I shall receive evidence

from parties briefly. The rest shall be left to submissions.”

- 4.3 The plaintiff repeated his affidavit evidence. In cross-examination, he stated that he was never offered an alternative piece of land by the Commissioner of Lands. He denied being an estate agent for Sumbulelu.
- 4.4 Yona Banda the plaintiff's witness testified that the plaintiff sold his portion of land to the SDA Church. Before Newton N'guni claimed the whole stand, the church had already built a structure and a toilet on it. The Church has since not paid the plaintiff the balance of the purchase price because of the confusion brought about by Nguni and the 1st defendant.
- 4.5 He stated that the offer to Sumbulelu should be cancelled because all the purchasers of the subdivisions had already developed the land when the Commissioner of Lands offered the entire property to Sumbulelu the second time.
- 4.6 Daka, further testified that he was not aware that the Ministry of Lands wrote to Sumbulelu withdrawing the replacement plot offer letter on the basis that the creation of the plots was illegal.

- 4.7 At this point, the plaintiff closed his case. The defence sought an adjournment as their only witness, the 1st defendant had allegedly suffered a partial stroke and needed time to recover.
- 4.8 The lower court refused to adjourn the trial as the case had already been delayed. That is how trial was terminated.

5.0 DECISION OF THE COURT BELOW

- 5.1 In its judgment, the court below considered the pleadings, the affidavit evidence, the brief oral evidence and submissions made.
- 5.2 With respect to the claim for a declaration that the plaintiff is the lawful owner of Plot No. LUS/33464, the learned Judge was of the view that the evidence was clear that Stand No. 24946 Lusaka was offered to Jacqueline Banda on 28th January, 2004; the 1st defendant was offered to purchase the plot but did not pay in full resulting in the property being subdivided into four plots which were sold to the 1st defendant, the plaintiff, Yona Daka and Aaron Nonde.
- 5.3 The problem arose after the 1st defendant purchased one of the four subdivisions but proceeded to apply for and obtain an offer letter for the entire Stand No. 24946, Lusaka. The second offer to the 1st defendant for Stand No. 24946 was issued on 2nd

June, 2011 while the offer to the plaintiff in respect of Plot No. LUS/33464 of Stand No. 24946 was issued on 2nd June, 2004. The plaintiff was also paying land rates to the Ministry of Lands. On this basis, the court below found that the plaintiff is the lawful owner of Plot No. LUS/33464, Lusaka.

- 5.4 With respect to the second claim that the 2nd defendant acted unlawfully in issuing the offer letter to the 1st defendant, the court below found that there was no dispute that the 2nd defendant was demanding and receiving rates from the occupants of the four subdivisions being LUS/33461, LUS/33462, LUS/33463 and LUS/33464. The court therefore dismissed the proposition that the said plots were illegal as there was no proof that the subdivisions were cancelled.
- 5.5 The court further found that the conduct of the 2nd defendant to offer the entire Stand No. 24946, Lusaka to the 1st defendant was unlawful, null and void.
- 5.6 The lower court further ordered that the offer letter issued to the 1st defendant, be cancelled or withdrawn by the 2nd defendant.
- 5.7 The claim for damages failed because the lower court found that the plaintiff did not adduce any evidence to show that the SDA

Church had not paid the purchase price in full, or that the delay in completing payment was on account of the court proceedings.

6.0 GROUNDS OF APPEAL

6.1 The appellants have raised the following grounds of appeal:

- 1) The Honourable Learned Judge erred when he refused to have the matter adjourned on account of the 1st appellant being ill, having suffered a partial stroke, the 1st appellant thus not having a chance to be heard.*
- 2) The Honourable Learned trial Judge erred in fact and law when he rendered judgment in favour of the Commissioner of Lands pertaining to the disputed property and the lack of witnesses from the Ministry of Lands confirming what the true position was as regards the conflicting documents relating to the disputed property,*
- 3) The Honourable Learned trial Judge erred in fact and law when he found that the plaintiff is the lawful owner of LUS/33462 despite there being evidence of the 1st appellant that subdivision LUS/33462 which he was offered alongside subdivision LUS/33464 of the plaintiff are illegal creations and thus only documents pertaining to Stand No. 24946 can be legal,*
- 4) The Learned trial Judge erred in fact and law when he ordered that the offer letter issued to the 1st appellant be cancelled or withdrawn by the 2nd appellant; and*

5) The Learned trial Judge misdirected himself when he held that the issuance of a replacement offer letter to the 1st appellant by the 2nd appellant for Stand No. 24946 Lusaka was illegal despite there being evidence showing that the subdivisions were illegal creations.

7.0 1ST APPELLANTS ARGUMENTS

- 7.1 For convenience, we shall now refer to the parties by their respective designations in this court.
- 7.2 Heads of argument were filed on behalf of the 1st appellant on 18th November, 2019. In arguing ground one, it was submitted that evidence, in form of a clinic status book was brought to court on the material day, though not filed into court. **Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia**, mandates the High Court to administer law and equity concurrently. Therefore, the trial court went against this provision by depriving the 1st appellant the opportunity to give oral evidence, which opportunity had been extended to him. This was an unjust and inequitable decision by the learned trial Judge.
- 7.3 Grounds two to five were argued together. The 1st appellant submitted that the findings of the lower court that the 1st

respondent is the lawful owner of Plot No. LUS/33464, Lusaka and that the four plots created on Stand No. 24946, Lusaka were not illegal, ought to be reversed. He submitted that the letter dated 26th December, 2007 from the Ministry of Lands exhibited in the 1st appellant's affidavit in opposition at page 231 of the record of appeal, shows that the offer letter to the 1st appellant for the alternative Plot No. LUS/30474, Lusaka, had been withdrawn because Plot No. LUS/33462, Lusaka was illegally created. It follows that the other three plots created together with Plot No. LUS/33462 are also illegal.

7.4 However, the lower court did not take this evidence into consideration and consequently found that the four subdivisions namely LUS/33461, LUS/33462, LUS/33463 and LUS/33463 were legal.

7.5 The lower court further found that the 2nd appellant acted illegally in issuing an offer letter to the 1st appellant for Stand No. 24946, Lusaka and ordered that it be cancelled. The 1st appellant submitted that in light of the letter dated 26th December, 2007, the findings of fact by the lower court are flawed and ought to be reversed. Reliance was placed on various cases including **William Masautso Zulu v. Avondale Housing**

Project Limited,¹ and Nkhata and Others v. Attorney

General,² to support the submission that as the findings of fact made by the trial court were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts they should be reversed.

8.0 1ST RESPONDENT'S ARGUMENTS

- 8.1 In his heads of argument filed on 17th June, 2021 the 1st respondent opposed ground 1 separately and grounds 2 to 5 together.
- 8.2 In opposing the 1st ground of appeal, the 1st respondent's counsel submitted that the lower court was on firm ground when it proceeded to hear the matter in the absence of the 1st appellant. The record shows that the lower court directed the parties to file a consent order to proceed as though the matter was commenced by writ of summons and statement of claim but that was not done.
- 8.3 Citing the case of **Chikuta v. Chipata Rural Council,**² counsel submitted that the court has no jurisdiction to make any declaration where the matter is brought by means of originating summons when it should have been commenced by writ of summons. Counsel stated that accordingly, the lower court

cannot be faulted for relying on affidavit evidence in line with the manner in which the case was commenced.

8.4 In fact, the 1st appellant was represented by his legal counsel who sought an adjournment which was denied. The 1st respondent's counsel did not in fact produce a "clinic status book" to prove that his client was indisposed that day. He purported to adduce evidence from the bar, which is improper. We were therefore, requested not to entertain that submission and to dismiss the 1st ground of appeal.

8.5 It was argued that the 1st appellant and his wife misled the 2nd appellant to re-issue the letter to the 1st appellant for the whole plot 24946 despite the same having been subdivided and individual subdivisions offered to the 1st appellant, the 1st respondent, Nonde Aaron and Yona Daka. The record shows that the said offerees commenced an action in the lands Tribunal challenging the offer of the whole plot No. 24946 to Newton Nguni.

8.6 Counsel for the 1st respondent contended that it was not the duty of the court to summon witnesses. Moreover, this matter was supposed to be decided on the basis of the affidavit evidence. The first appellant was fully aware that his colleagues

who were offered the subdivisions developed their pieces of land and sold them to third parties who are not parties to this appeal.

8.7 Counsel stated that the findings of the court below were not perverse or made in the absence of relevant evidence on record and urged us not to reverse any of the findings. Reliance was placed on the case of **Wilson Masauso Zulu v. Avondale Housing Project Limited.**¹

8.8 Further, the 1st respondent contended that subdivisions 33461, 33462, 33463 and 334664 were all legal as the record shows that the offerees thereof paid the relevant fees to the 2nd appellant. He stated that, in any case if subdivision 33463 was questionable, this could not justify the offer of the entire plot 24946 to the 1st appellant.

8.9 The record of appeal clearly shows that there were no conflicting documents from the Commissioner of Lands pertaining to the plot in dispute.

8.10 Counsel finally submitted that the appeal should be dismissed with costs.

9.0 2ND RESPONDENT'S ARGUMENTS

9.1 Heads of argument in opposition dated 3rd June, 2021 were filed on behalf of the 2nd respondent, the SDA Church. In opposing

ground one, the 2nd respondent's advocate referred us to **Order 35 Rule 3(1) of the Rules of the Supreme Court, 1999 Edition** which provides that:

"The judge may, if he thinks it expedient in the interest of justice, adjourn a trial for such time, and to such place, and upon such terms, if any, as he thinks fit."

He also relied on the case of **Maxwell v. Kaun**,⁴ where Atkin LJ, stated that:

"I quite agree, the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned Judge on such questions as an adjournment of a trial, and it very seldom does so; but on the other hand, if it appears that the result of the order made below is to defeat the right of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the court has power to review such an order, and it is to my mind, in its duty to do so."

9.2 Citing the learned author of **Zambian Civil Procedure: Commentary and Cases**, it was submitted that the paramount consideration when determining whether or not to grant an adjournment is the interest of justice.

- 9.3 Counsel submitted that the balance of justice cannot be said to be in favour of the 1st appellant as he was to a large extent responsible for creating the difficulty which led the trial Judge to reject the application. The 1st appellant, through his advocate ought to have produced the requisite evidence for the Judge to arrive at a just decision, given that the matter in question had been before the court for 5 years.
- 9.4 Having considered the interest of justice in ensuring that the matter was efficiently determined and in an attempt to avoid any further delays, the trial judge was right to have rejected the application for an adjournment.
- 9.5 The 2nd respondent contended that **Section 13 of the High Court Act** was not intended to be a scapegoat for defaulters. Under the circumstances, we were urged not to interfere with the discretion of the court below and dismiss the first ground of appeal.
- 9.6 The 2nd respondent equally addressed grounds two to five together and submitted that the trial judge did not misdirect himself when he found that the 1st respondent was the rightful owner of Plot No. LUS/33464, and that the 1st appellant could not claim ownership of the entire Stand No. 24946. Thus, the

lower court was on firm ground when it ordered that the offer letter issued by the 2nd appellant to the 1st appellant in respect of Stand No. 24946 be withdrawn.

9.7 It was further submitted that in his heads of argument, the first appellant has not even come close to meeting any of the court's requirements set out in the cases cited on the power of an appellate Court to set aside findings of fact.

9.8 Counsel further contended that the reasoning of the 1st appellant regarding the letter issued by the 2nd appellant that since Plot No. LUS/33462, Lusaka was an illegal creation then Plots LUS/33461, LUS/33463 and LUS/33464 were also illegal, is flawed in many respects:

Firstly, that Stand No 24946, Lusaka which the 1st appellant claims ownership of, was subdivided into four distinct plots which were sold to the 1st respondent, 1st appellant, Aaron Nondé and Yona Daka. Letters of offer were issued by the 2nd appellant for each of the four plots and if the 2nd appellant had intended to withdraw and subsequently cancel the said offers, particularly that of the 1st respondent, the Commissioner of Lands would have communicated his intention to do so directly to the 1st respondent.

9.9 Furthermore, Stand No. 24946, Lusaka did not exist at the time the second offer letter was issued to the 1st appellant as it had been subdivided into four plots. It was stated that it is trite law that once a property has been subdivided, it ceases to exist in its old form, and takes a new form, that is, in terms of the subdivisions and the remaining extent, if any. Therefore, the 2nd appellant issued an offer letter to the 1st appellant in respect of a non-existent Stand No. 24946.

9.10 The 2nd appellant finally submitted that the trial judge was right to have concluded as he did, and that grounds two to five should be dismissed.

10.0 DECISION OF THIS COURT

10.1 We have studied the record of appeal and heads of argument. We shall deal with ground one separately. Grounds 2 to 5 will be tackled together as they are interrelated.

10.2 Before we delve into the analysis of the issues and applicable laws, we hasten to point out that the 2nd to 4th appellants were wrongly cited by the 1st appellant as they did not file notices of appeal. No wonder they have not even filed any submissions or appeared before us.

10.3 For the sake of order in the court, we urge learned counsel in general to only cite the rightful parties to an appeal as the identified error is quite common.

10.4 For the foregoing reasons, we shall henceforth not refer to the 2nd to 4th appellants as appellants, instead we shall refer to them by name.

10.5 In the first ground of the appeal, the appellant's counsel argued that the lower court should have granted his client an adjournment in the interest of justice as he had suffered a partial stroke. A perusal of the record of proceedings at page 330 of the record of appeal shows that no medical evidence was shown to the court.

10.6 We also note that the proceedings in the lower court commenced on 13th January, 2012 and the hearing of the main matter began six years later on 20th August, 2018 after it was referred to the "task force on backlog." At page 320 of the record of appeal, the learned judge explained to the parties the purpose of the "task force on backlog" which is to expedite the hearing and conclusion of matters that have been pending for far too long in the judicial system.

10.7 To achieve the said objective, a status conference is held where all the parties are enjoined to put their house in order.

10.8 Originating summons is used when it is required by a statute and the cause of action is concerned with matters of law and where there is unlikely to be any substantial dispute of facts. Therefore, originating summons should not be used if there are disputes of facts.

10.9 The claim for a declaratory order was misplaced as it is trite law that one can only claim a declaration by writ of summons.

10.10 With respect to adjournments, **Order 35 Rule 3 of the RSC, 1999** provides as follows:

“3. Adjournment of trial

The Judge may, if he thinks it expedient in the interest of justice, adjourn a trial for such time, and to such place, and upon such terms, if any, as he thinks fit.”

The explanatory notes on the effect of the rule at **35/3/1** state as follows:

“As to the inherent power of the Court to adjourn the hearing of any matter in order to do justice between the parties, see Hinckley and South Leicestershire P.B.S. v. Freeman [1941] Ch.32. The adjournment of a proceeding under this rule or under the inherent jurisdiction is a judicial act which may be reviewed

on appeal, but as it is a matter of discretion, the Court of Appeal will be slow to interfere (Maxwell v. Keun [1928] 1 K.B. 645, CA; Re Yates' Settlement Trusts [1954] 1 W.L.R. 564; [1954] 1 All E.R. 619, CA; Dick v. Piller [1943] K.B. 497 (adjournment on production of bona fide medical certificate) applied in Priddle v. Fisher & Sons [1968] 1 W.L.R. 1478; [1968] 3 All E.R. 506 (adjournment on bona fide telephone message of inability to attend hearing)). See also O.28, r.5 (»text) (Adjournment of summons).

The following matters should be taken into account when deciding whether or not to grant an adjournment:

- 1. The importance of the proceedings and their likely adverse consequences to the party seeking the adjournment.*
- 2. The risk of the party being prejudiced in the conduct of the proceedings if the application were refused.*
- 3. The risk of prejudice or other disadvantage to the other party if the adjournment were granted.*
- 4. The convenience of the court.*
- 5. The interests of justice generally in the efficient despatch of court business.*
- 6. The desirability of not delaying future litigants by adjourning early and thus leaving the court empty.*

7. The extent to which the party applying for the adjournment had been responsible for creating the difficulty which had led to the application.

....

The refusal to allow an adjournment which is properly sought on the ground of ill-health, constitutes a substantial injustice and a determination made after such refusal in the absence of a party will be set aside (Rose v. Humbles [1972] 1 W.L.R. 33; [1972] 1 All E.R. 314, CA).

10.11 We note that in refusing the adjournment, the learned Judge took into account the fact that the matter had been in backlog for more than five years at the time; no medical evidence had been produced to show that the 1st appellant was actually ill and that the matter had been commenced by originating summons. All parties concerned were heard as the affidavit evidence and their advocates' submissions were considered.

10.12 The lower court is mandated by law to take control of the proceedings. Since the matter was contentious, the learned trial judge should have simply made an order to deal with the case as though it were commenced by writ instead of leaving it to the parties to enter a consent order to proceed to trial. Nevertheless our view is that the lower court cannot be faulted

for refusing to adjourn the matter as it took into account relevant factors. The first ground of appeal is therefore dismissed for lack of merit.

10.13 We now turn to the 2nd to 5th grounds of appeal. The evidence on record shows that the 1st appellant entered into a contract of sale of Stand No. 24946, Libala South Lusaka with Dausen Sinkala on 24th March, 2004 at the purchase price of K14, 000.00. The letter of sale at page 217 of the record of appeal annexed to the affidavit in opposition to the originating summons shows that on that date, the 1st appellant paid a deposit of K7, 000.00. The letter of sale further states that the balance of K7, 000.00 was to be cleared in September, 2004.

10.14 An offer letter for LUS/24946 was issued in the names of the 1st appellant by the Commissioner of Lands on 16th April, 2004. Thereafter, the 1st appellant paid the requisite fees as per the offer letter and receipt at pages 218 to 220 of the record of appeal.

10.15 By stating that the 1st appellant was to clear the balance in September 2004, the parties to the contract of sale made time of the essence. However, the affidavit in support of originating summons filed by the 1st respondent shows that before the

expiry of the time set for completion, Dausen Sinkala sold part of Stand No. 24946, Lusaka to the 1st respondent sometime in June, 2004. According to the 1st appellant, he was tricked by the 1st respondent into surrendering his offer letter to the 1st respondent who was posing as an estate agent who assured him that he would process the title for him. However, the 1st respondent only returned with four offer letters for himself, the 1st appellant, Yona Daka and Aaron Nonde.

10.16 By “subdividing” and selling portions of Stand No. 24946 to three other persons, Dausen Sinkala had purportedly rescinded the sale before the time set for completion; September, 2004. We also note that there is no evidence of Dausen Sinkala giving the 1st appellant notice to complete.

10.17 In **Mwenya & Randee v. Kapinda**⁶ the Supreme Court held that:

- (i) ***A sufficient note or memorandum existed of which time was not of essence. There was no unreasonable delay to complete and that no completion notice was issued. Therefore, there was no basis of rescinding the contract.***
- (ii) ***The law takes the view that damages cannot adequately compensate a party for breach of the***

contract for sale of an interest in a particular piece of land or of a particular house however ordinary.

10.18 In this case while time was of the essence, the seller fraudulently and baselessly subdivided and sold the property to other parties and purportedly sold one of the subdivisions to the appellant. There was no basis for him to rescind the contract and engage the 1st respondent to subdivide the property. We note that the 1st appellant protested against being offered a subdivision of the Stand by reporting the matter to the police.

10.19 In any case, when the Commissioner of Lands issued the offer letter of 16th April, 2004 to the 1st appellant, the seller Dausen Sinkala was estopped from dealing with the property any further.

10.20 Further, the affidavit in opposition sworn by Anna Mwitwa Mubanga a Legal Officer in the Ministry of Lands filed in the Lands Tribunal and appearing at pages 138 to 139 of the record of appeal, states in paragraph 4 that, the said subdivisions were illegal as they were done without the Lusaka City Council's authority.

10.21 The letter from the Commissioner of Lands dated 26th December, 2007 to the appellant indicates that subdivision

33462 was illegal. The letter from the Lusaka City Council dated 4th October, 2005 to Nondé Aaron reads that subdivisions 33461 and 33464 of stand 24946 were illegal plots as they were not created by the Council and the Council thus advised the Commissioner of Lands to cancel all ownership documents. The said letter was copied to the Commissioner of Lands, the Surveyor General, Yona Daka, the appellant and the 1st respondent. We find and hold that subdivision of Stand No. 24946, Lusaka was illegal as it was done without authority.

10.22 We further find and hold that the Commissioner of Lands acted lawfully in issuing the second offer letter dated 2nd June, 2011 to the 1st appellant. The learned trial judge misdirected himself in law and fact when he ordered the cancellation of the offer letter issued to the appellant on 2nd June, 2011.

10.23 Having found that the subdivision was illegal, we find that the 1st respondent cannot be the lawful owner of Plot No. LUS/33462. Consequently, we reverse the finding of the lower court that the 1st respondent is the lawful owner of Plot No. LUS/33462.

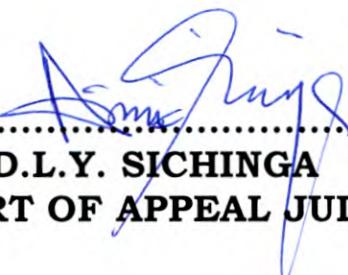
10.24 We are of the view that the 2nd respondent's claim only lies against the 1st respondent who sold him an illegal plot.

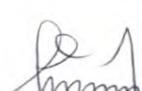
11.0 CONCLUSION

- 11.1 In sum, the judgment of the lower court is reversed and instead judgment is entered in favour of the appellant. The offer of the entire Stand No. LUS/24946 to the appellant on 2nd June, 2011 is valid.
- 11.2 We order that the appellant's costs be borne by the 1st respondent and the same be taxed in default of agreement. The 2nd respondent will bear his own costs.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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D.L.Y. SICHINGA
COURT OF APPEAL JUDGE

.....

A.M. BANDA-BOBO
COURT OF APPEAL JUDGE