

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2018/HP/A030

BETWEEN

CHRISTINE MUYEBA

AND

MARGRET MUNDIA



APPELLANT

RESPONDENT

Before the Honorable Lady Justice C. Lombe Phiri in Chambers

For the Appellant: Ms. M. Kamangu--Paul Mwikisa & Co

For the Respondent: Mrs. L Z. Musonda – Legal Aid Board

JUDGMENT

CASES REFERRED TO:

1. Kuruma v The Queen 1955 AC 197
2. R v Kilbourne 1973 1 ALL ER 440
3. Akatama Nyambe and Others v Steven Chansa and Others 2017 ZMHC 44
4. Justine Chansa v Lusaka City Council 2007 ZR 2562
5. Tembo v Mapumba and Lusaka Water and Sewerage Company 2011/HP/603 page 10
6. Zulu v Avondale Housing Project
7. TNT Management PTY Ltd v Brooks (1979) 23 ALR 345
8. Tembo Mapuma and Lusaka Water and Sewerage Company 2011/HP/ 603 Page 10

9. *DPP V Kilbourne (1973) AC 729*

INTRODUCTION

This is an appeal against the Judgment of the Kaoma Subordinate Court delivered on 12th January, 2018 at Kaoma, upholding the Respondents claim that the Appellant illegally encroached into the Respondents Plot No. 2501 situate in Mulambwa Compound of the Kaoma District of the Western Province of the Republic of Zambia.

BACKGROUND

The brief background of the matter as deciphered from the facts on the lower courts record is that the Respondent filed a Writ of Summons before the Subordinate Court of the Second Class for the Kaoma District wherein she claimed for trespass and ejection of the Appellant from Plot 2501 in Mulambwa Compound of Kaoma District. The Magistrate found as a fact that the Appellant trespassed on the Respondent's land by encroachment and entered Judgment in her favour and further ordered the Appellant to move out of the land.

It was against this background that the Appellant appealed to this Court advancing three grounds of appeal:

1. *That the trial court misdirected itself on a point of law and fact when it adjudged in favour of the Plaintiff against the weight of evidence.*
2. *The trial court fell in grave error when it held that the Defendant trespassed on the Plaintiff's land contrary to the evidence canvassed by the Defendant at trial of the matter.*

3. *The trial court wrongly rejected evidence and Site Plan which was produced and properly prepared and approved by the Planning Authority.*

APPELLANTS HEADS OF ARGUMENT

In the heads of argument filed for the Appellant in support of this Appeal. It was stated that the lower court ought to have taken the initial site plan as evidence into account and should not have overlooked it. The court was referred to the cases of **Kuruma v The Queen 1955 AC 197⁽¹⁾** and **R v Kilbourne 1973 1 ALL ER 440⁽²⁾**, on the test to be applied in considering evidence, the relevance of evidence and admissibility of evidence. It was further submitted, with reference to the cases of **Akatama Nyambe and Others v Steven Chansa and Others 2017 ZMHC 44⁽³⁾** and **Justine Chansa v Lusaka City Council 2007 ZR 2562⁽⁴⁾**, that the process of obtaining title by the Appellant was still ongoing, as the Appellant had paid for the surveyor to come and survey the land and had paid the sum of K5000 for the same. As regards ground two and three it was submitted that in order for the Lower Court to find that the Appellant trespassed on the Respondent's land, the lower court ought to have addressed its mind to the question of whether the Respondent's claim can be characterized as trespass. It was submitted that the Lower Court did not address its mind to what trespass entails. The Court was referred to the cases of **Tembo v Mapumba and Lusaka Water and Sewerage Company 2011/HP/603 page 10⁽⁴⁾**, **Zulu v Avondale Housing Project⁽⁶⁾**. Further reference was made to **Phipson on Evidence 8th Edition paragraph 6.06at page 151**. It was submitted that in the case in casu the Respondent in the Lower Court needed to prove that the Appellant did not have a claim to the Land in question. It was further submitted that the Appellant was the owner of Plot 3172 and she acquired the land before the Respondent. It was stated that the Court below erred

when it concluded that the Appellant had trespassed on the Respondent's land when there was a site plan which showed the boundaries on her land.

RESPONDENTS HEADS OF ARGUMENT

The Respondent on the other hand argued that the Trial Court was on firm ground when it held that the Defendant trespassed on the Plaintiff's land by encroachment. It was submitted that in civil claim, the balance of probabilities is the requisite standard of proof by which a trier of fact must determine the existence of contested facts. Further that a balance of probabilities is reference to the likelihood of one party's version of events being more probable to have occurred than not. Reference was made to the case of **TNT Management PTY Ltd v Brooks (1979) 23 ALR 345⁽⁷⁾** and **Phipson on Evidence, 8th ED in paragraph 606 at page 151** over the standard of proof in civil matters. It was submitted that it was irregular for the Provincial Planning Authority to approve the Appellant's site plan disregarding the Surveyor Generals Survey Diagrams. It was stated that the Trial Court adequately addressed his mind to the Appellants evidence, in particular the site plan. The Respondent contended that the Trial Court stated that he took the Surveyor Generals work as the official position of the Ministry of Lands and council. It was further submitted with reference to the case of **Tembo Mapuma and Lusaka Water and Sewarage Company 2011/HP/ 603 Page 10⁽⁸⁾** that the Appellant did encroach on the Respondent's Plot No. 250.

ANALYSIS

In the first ground herein, the issue is whether or not the Magistrate adjudged in favour of the Plaintiff against the weight of evidence.

It is trite law that in civil matters the standard of proof is on a balance of probabilities and as it was held in the case of *DPP V Kilbourne (1973) AC 729*⁽⁹⁾ the court held that:

“Weight of evidence is the degree of probability (both intrinsically and inferentially) which is attached to it by the tribunal of fact once it is established to be relevant and admissible in law.”

It is the responsibility of the trier of facts to establish the existence of contested facts and determine the likelihood of one party's version being more probable to have occurred than not. The contention by the Appellant in the first ground of appeal lacks substance. The lower court gave reasons for deciding in favour of the Respondent. The Appellant has not pointed out the particular piece of evidence whose weight was misapplied by the Lower Court. This ground therefore fail.

As regards ground two and ground three the contention is that the Trial Court fell in grave error when it held that the Defendant trespassed on the Plaintiff's land contrary to the evidence canvassed by the Defendant at trial of the matter and that the Trial Court wrongly rejected evidence and a Site Plan which were produced and properly prepared and approved by the Planning Authority. The Appellant argued that the lower court did not address its mind to the question whether the Respondent's claim can be characterized as trespass. The Appellant argued that the he cannot be said to be a trespasser because according to her site plan the foundation was dug within the boundaries of her plot. The record will show that the Appellant was given the site plan by the Council which was not approved. She stated in her testimony in the lower court that at the time of hearing the matter in her land had not yet been surveyed. The lower court found as a fact that


the Appellant owned Plot 3172 while the Respondent owned Plot 2501. Furthermore, the trial court did not rush to conclude that Plot 2501 was encroached. The lower court called the District Planning Officer from Kaoma Town Council and a Surveyor from the office of the Surveyor General in Mongu. Both witnesses stated that part of the Appellant's building was in the Respondent's land. The assertion by the Appellant that the court should have considered the site plan which was issued to the Appellant by the local authority in 1995 is misplaced because the Surveyor General represents the Ministry of lands. Furthermore, it is clear from the evidence that the Appellant's land had not been surveyed. The Lower Court took it upon itself, following the dispute by the parties, to have the Surveyor determine the boundaries for the two plots. It follows therefore that the court did consider that the Appellant could have trespassed after addressing the question of boundaries adequately. These grounds equally fail.

In light of the foregoing, I agree with the decision of the Subordinate Court as it is clear that the Court addressed its mind to the evidence before coming up with the final decision. Consequently, I find no merit in all the three grounds of appeal.

Appeal dismissed. Costs for the Respondent.

Leave to appeal is granted.

Delivered at Lusaka this 29th day of September, 2020.



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C. LOMBE PHIRI
JUDGE