

SCZ APPEAL NO. 172 OF 1999

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE

(CIVIL JURISDICTION)

BETWEEN:

W.R. WILLIS

Appellant

and

UMBRIA COMPANY LIMITED

Respondent

CORAM: Sakala, Ag. DCJ, Chirwa and Chibesakunda,
JJS at Kabwe on 10th August and
September 2000

For the Appellant: In Person

For the Respondent: Mr. F.S. Kongwa, Kongwa & Co.

J U D G M E N T

Chirwa, J.S. delivered judgment of the Court: -

This case arises from a dispute of farm boundary. The appellant's farm shares a common boundary at some point with the farm belonging to the respondent. This dispute has been exacerbated by the construction of a dam by the respondent as a result the beacons

are usually submerged in water especially during the rain season. The respondent says that the appellant has installed his water pumps on their land, which assertion the appellant disputes.

During the trial the Court and the parties visited the scene in dispute. Nothing conclusive could come out of the visit because the place was flooded as it was during the rain season. The parties and the Court agreed that the place be visited during the dry season with surveyors with their equipment. After the visit at the scene the surveyors promised to file their report before the learned trial judge wrote the judgment. However, this was not to be. The judge wrote the judgment without the benefit of the surveyors report. In his judgment the learned trial judge does confirm, after a visit to the scene, that beacons could not be seen because of the floods; also that at the time of writing the judgment he was not sure whether the parties and the surveyors had visited the site and whether anything useful came out as when the matter was adjourned on 24th November 1997 it had been raining very heavily and that the dam ought to have been flooded again and the problem of seeing the beacons in the affected area still remained unresolved.

At the hearing of the appeal, the appellant who appeared in person, was more or less giving evidence at the bar to the effect that the surveyors report was ready, which report was made after a visit to the site during the dry season and that the report was available but he had not paid for it. He basically asked for a re-trial.

Mr. Kongwa for the respondent retorted that although where justice demands a re-trial can be ordered, he submitted that this was not one of those cases where a re-trial can be ordered. He submitted that the evidence of the surveyors is very clear that the appellant installed his equipment on the respondent's farm and that the appeal should be dismissed.

We have looked at the evidence in the Court below. The submission by Mr. Kongwa cannot stand in the face of the learned trial judge's lamentations in his judgment. Some of these we have already referred to in our judgment. The learned trial judge further laments at page J3 of his judgment that: -

"The surveyor, Mr. Mangambwa promised to investigate from the Works and Supply Ministry as to who fitted the pipes in the middle of the river and who did the construction of the dam, whether the government or the farmers themselves. This information has not been given to the Court. In the absence of all this information I have no alternative but to base my judgment on available evidence, and mainly on the surveyor's report."

Looking at this quoted passage and read with the earlier lamentations, there was no available evidence to conclusively determine the boundaries between the farms. The learned judge himself visited the site in issue together with the parties and the surveyors. They were not able to determine the location of the beacons because of the floods. Beacons are very important in determining the extent of any real property.

: J4 :

As the judgment was based on inconclusive evidence of the extent and boundary of each farm, this is a proper case to order retrial. We therefore, allow the appeal, quashing all the findings of the lower Court and order a re-trial before another judge. We further direct that the Court and the parties make deliberate and concerted effort to conduct the hearing during this dry season so that the site in dispute is visited by all concerned. It may be advisable to visit the site in the course of the surveyor's evidence so that on visiting the site, he physically points out to features that may come out in his report. Costs of this appeal will abide the out-come of the re-trial.

E.L. SAKALA

SUPREME COURT JUDGE

D.K. CHIRWA

SUPREME COURT JUDGE

L.P. CHIBESAKUNDA

SUPREME COURT JUDGE