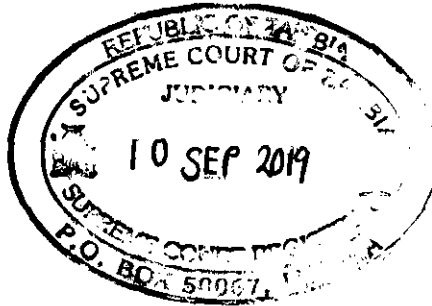


IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

APPEAL NO. 200/2016
SCZ/8/239/2016

BETWEEN:



ELIAS TEMBO
AND
FLORENCE CHIWALA SALATI
ATTORNEY GENERAL
LUSAKA CITY COUNCIL

APPELLANT

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT

CORAM: MUSONDA, DCJ, KAOMA and KAJIMANGA, JJS
On 3rd and 10th September 2019

For the Appellant: Mr. R. Mainza, Mainza & Co.,
For the 1st Respondent: Mr. D.M. Chakoleka, Mulenga, Mundashi & Co.,
For the 2nd Respondent: Ms. D.M. Mwewa, Acting Senior State Advocate
For the 3rd Respondent: Ms. B. Bulaya, Director of Legal Services

J U D G M E N T

MUSONDA, DCJ, delivered the Judgment of the Court.

Cases Referred to:

- 1. Kenny Phiri -v- Yusuf Anthony Filamba : SCZ Appeal No. 61 of 2013**
- 2. Nora Mwaanga Kayoba and Alizani Banda -v- Eunice Kumwenda Ngulube and Andrew Ngulube (2003) ZR 132.**
- 3. Justin Chansa - v - Lusaka City Council (2007) ZR 256**

4. ***Yengwe Farms Limited -v- Masstock Zambia Limited, the Commissioner of Lands and the Attorney-General (1999) ZR. 65.***
5. ***Maurice Chilanga - v - Chrispin Kangunda (1999) ZR 166***
6. ***The Anti-Corruption Commission- v - Barnet Dev. Corp. Ltd (2008) ZR 69***
7. ***Sailas Nzowani & Others - v - Flamingo Farm Limited:Selected Judgment No. 5 of 2019***

Legislation referred to:-

1. ***The Lands and Deeds Registry Act, CAP 185 of the Laws of Zambia***

1.0. INTRODUCTION

1.1 This appeal, which is arising from the judgment of Mulongoti, J (as her Ladyship then was) had its genesis in a dispute, between the appellant and the 1st respondent, over a residential piece of land known as stand No. 13308, Lusaka.

1.2 As has become all too familiar in this country (Zambia) these days, the piece of land in question became the subject of two rival offers which, however, had been separated by time.

1.3 Following the institution of legal proceedings at her instance in the Court below, the 1st respondent successfully asserted her legal right to the piece of land

in question. It is that success by the 1st respondent in the lower Court which the appellant now seeks to impugn in this Court.

2.0. HISTORY AND BACKGROUND

- 2.1. Although the litigation to which the present appeal relates yielded a voluminous record of appeal characterized by extravagant Heads of Argument which, as originally filed, had embodied 16 grounds of appeal, the real issue which ignited the underlying dispute in the court below revolved around legal ownership of the piece of land which we identified a short while ago.
- 2.2. The history and background facts surrounding the contest which has now been escalated to this court was that, on 11th February, 1997, the 1st respondent was offered the piece of land in question by the Commissioner of Lands.
- 2.3. By a letter dated 14th March, 1997, the 3rd respondent requested the 1st respondent to pay a sum of K1,415,748.80 by way of service charges for the piece of

land in question. In the said letter, the 1st respondent was cautioned that the offer which had been made to her in respect of the subject piece of land would be withdrawn by the Commissioner of Lands in the event of her failure to pay the said service charges within 30 days from the said date.

- 2.4. It is worthy of note that by the time the demand referred to in 2.3 was being made, the 1st respondent had, on 21st February, 1997, paid the relevant annual ground rent and lease charges totaling K48,000.00.
- 2.5. By a letter dated 2nd September, 1998 and, in reference to its earlier letter in 2.3 above, the 3rd respondent requested the 1st respondent to furnish it with copies of receipts evidencing full settlement of service charges relating to the piece of land in question, within a period of 14 days from the said date failing which the 3rd respondent was going to cause the land in question to be repossessed from the 1st respondent.
- 2.6. It appears from the record that the 1st respondent did not positively act on the letter referred to in 2.5 above.

Consequently, by a letter dated 26th September, 1998, the 3rd respondent advised the 1st respondent that the offer in respect of the plot in question had been revoked and her plot repossessed. The 3rd respondent also informed the 1st respondent that, following the revocation of the said offer and consequential repossession of the plot, the 3rd respondent was at liberty to offer the same to any suitable developer.

- 2.7. By a letter dated 24th May, 2000, the 3rd respondent advised the Commissioner of Lands that the 1st respondent had settled service charges totaling K1,415,748.80 relating to the plot in question by way of instalments between October, 1998 and 5th May, 2000.
- 2.8. On 17th August, 2000, the 1st respondent was issued with a certificate of title in respect of the land in question.
- 2.9. In the meantime, by a letter which was dated 15th January, 2000 and which was addressed to the 3rd respondent, Bongani Mbewe applied for a residential plot in Libala South, Lusaka.

2.10. On 30th May, 2000, the 3rd respondent authored a letter in terms of which Bongani Mbewe was advised that his application in 2.8 had been successful and that, in consequence, the 3rd respondent had made a recommendation to the Commissioner of Lands to consider allocating plot 13308, Lusaka to him (Mbewe).

2.11. By a letter dated 24th August, 2001 which was addressed to Bongani Mbewe, the piece of land in question was formally offered to Bongani Mbewe. In the same letter, Mbewe was requested to settle the relevant fees which he settled on 15th March, 2002.

2.12. By a letter dated 30th November, 2003, the 3rd respondent requested Bongani Mbewe to settle the sum of K591,200.00 being the relevant service charges failing which the 3rd respondent was going to recommend to have the Commissioner of Lands withdraw the officer in question.

2.13. Sometime in or about November, 2004, the 1st respondent discovered that the appellant had entered upon the piece of land in question and had even started

carrying out some construction works on the piece of land.

2.14. On 6th January, 2005, Mbewe settled the K591,200.00 referred to in 2.12 above.

2.15. On 26th February, 2006 planning permission to construct a dwelling house on stand No. 13308, Chilenje South, Lusaka was granted by the 3rd respondent.

2.16. On 28th August, 2007 the 1st respondent's advocates unsuccessfully sought to have the appellant stop carrying out works at the plot in question. Consequently, the 1st respondent's advocates instituted legal proceedings in the High Court of Zambia seeking a variety of relief.

3.0. THE COURT ACTION AND THE PARTIES' RESPECTIVE PLEADINGS

3.1. On 2nd June, 2010 the 1st respondent instituted legal proceedings in the court below against the appellant seeking the following relief:-

3.1.1.*“an injunction restraining the appellant - then defendant- whether by himself, his servants or agents or otherwise from carrying out any further construction works on the 1st respondent (then*

Plaintiff's property known as stand No. 13308, Lusaka;

- 3.1.2. an order requiring the [appellant] to demolish the structures already erected on the [1st respondent's] property or to meet the cost of [demolishing] the structures;**
- 3.1.3. damages for trespass;**
- 3.1.4. interest on the amounts being claimed**
- 3.1.5. any other relief the court may deem fit; and**
- 3.1.6. costs"**

3.2. In her statement of claim, the 1st respondent asserted,

inter alia, that she was the legal owner of the real property known as stand No.13308, Lusaka and held a certificate of title No. L 4754 in respect of the said piece of land which was issued in her favour on 17th August, 2000.

3.3. The 1st respondent further asserted that she had made attempts to have the appellant stop carrying out works at the said piece of land but that such attempts did not yield any positive results.

3.4. In his amended defence and counter-claim the appellant asserted that the 1st respondent ceased to hold interest in the subject piece of land when the offer to her lapsed on

account of non-observance of the terms of the offer letter including those terms which were set out in clauses 1.2 and 4(1) of the offer letter and that, following the withdrawal of the subject offer from the 1st respondent, the piece of land in question was offered to the appellant.

3.5. The appellant further asserted that he was the owner of the piece of land in question and possessed the requisite planning permission to undertake the construction works which were being undertaken thereon.

3.6. In his counter-claim, the appellant averred that he had been the attorney of Bongani Mbewe having been appointed as such in a power of attorney which had been executed between the said Bongani Mbewe and the appellant as the then intending purchaser of the piece of land in question.

3.7. It was the appellant's further assertion in his counter-claim that the piece of land in question had been the subject of an advertisement sometime in January, 2000 at the instance of the third respondent and that it was on account of the said advertisement that Bongani Mbewe

had lodged an application for a residential plot on 15th January, 2000.

3.8. The appellant also asserted in his counter-claim that he purchased the residential plot in question from Bongani Mbewe who had been offered the same and that all the applicable fees and charges both to the 2nd respondent as well as the 3rd respondent were duly settled.

3.9. The appellant further averred that, on the strength of the offer letter to Mbewe in respect of the stand in question, building plans were submitted to the 3rd respondent which subsequently issued the relevant planning permission. The appellant further asserted that he proceeded to build a structure upon the piece of land in question at a cost of K400,000.00 which structure was put on rent.

3.10. The appellant also averred in his counter-claim that the offer which had formed the basis of the purchase transaction which he entered into with Bongani Mbewe was neither withdrawn nor revoked. He further asserted that the certificate of title which was issued in favour of

the 1st respondent in respect of the piece of land in question was fraudulently issued, allegedly because the 1st respondent never applied for this piece of land.

3.11. The appellant also averred in his counter-claim that he could not properly or constitutionally lose his property which he had lawfully constructed under circumstances which suggested that the 2nd and 3rd respondents had failed to discharge their duties properly in that the duo had been guilty of misplacing files, as well as making multiple allocation of plots.

3.12. The appellant accordingly sought to have the lower court pronounce the following relief and make declarations to the following effect:

- (a) that he was the lawful owner of the piece of land in question,*
- (b) that the offer letter which had been issued to the 1st respondent was null and void on account of fraud, errors and mistakes at the instance of the 1st and 2nd respondents as well as the Registrar of Lands and Deeds;*

- (c) a declaration that the structure which had been constructed on the piece of land in question was legal and, consequently, not amenable to demolition on account of illegality;*
- (d) an order to compel the Registrar of Lands and Deeds to issue a lease and certificate of title in favour of the appellant in respect of the piece of land in question;*
- (e) damages for loss of materials and for inconvenience; and*
- (f) costs.*

3.13. In its defence to the appellant's counter-claim, the 3rd respondent asserted that the plot in question was lawfully owned by the 1st respondent who alone had been the holder of the certificate of title relating to the piece of land in question.

3.14. For his part, the 2nd respondent averred in his defence that the 1st respondent was the sole legal owner of the piece of land in question for which she alone held the certificate of title relating to the plot.

3.15. The 2nd respondent further asserted that it never re-entered upon the piece of land in question nor was the same the subject of any fresh offer to any other person.

3.16. It was further averred in the 2nd respondent's defence that as the appellant had no title to the land in question he could not have lawfully procured building permission to build on a piece of land which he did not legally own.

3.17. In his reply to the 3rd respondent's defence, the appellant asserted that the 3rd respondent demanded service charges in respect of the land in question which were duly paid as were fees for building plans.

4.0 TRIAL IN THE COURT BELOW AND EVIDENCE MARSHALLED

4.1 Following the closure of the parties' respective pleadings, the matter was tried in the usual way.

4.2 Aside from herself, two other witnesses testified on the 1st respondent's behalf. The appellant-then 1st defendant-testified on his own behalf while the 2nd and 3rd respondents, then 2nd and 3rd defendants respectively,

elected to rely on evidence on record, particularly the 1st respondent's evidence. The duo did not also call any witnesses to testify on their behalf.

4.3 In his evidence, Paul Kachimba, who testified on behalf of the 1st respondent, then plaintiff, as "PW1", informed the trial court that, at all material times, he was serving as a Legal Officer in the Ministry of Lands. In this capacity, it was part of PW1's responsibilities to ensure compliance with legal procedures in all matters of land allocation, administration, repossession etc.

4.4 PW1 further testified that, sometime in 2013, he was approached by the 1st respondent who was seeking to establish whether or not she was still the legal owner of stand No. 13308, Lusaka.

4.5 The witness went on to inform the lower court that, following the above query, he proceeded to secure the physical file relating to stand 13308, Lusaka which he examined and that, upon such examination, he confirmed to the 1st respondent that, as at September, 2013, she was still the legal owner of the plot in question.

PW1 also confirmed to the 1st respondent that the latter was issued with a certificate of title in respect of the said plot sometime in 2000 and that this piece of land had never been the subject of repossession by the Commissioner of Lands.

4.6 Upon being cross-examined, PW1 told the trial court a number of documents which the appellant was relying upon to assert his purported legal entitlement to the land in question had not legitimately originated from the office of the Commissioner of Lands.

4.7 PW1 further testified under cross-examination that, when he examined the Lands Register relating to stand No. 13308, Lusaka, he established that no notice or certificate of re-entry had been entered in relation to the same. The witness also confirmed that the 3rd respondent did not have the power or authority to repossess the land in question.

4.8 The 1st respondent's second witness ("PW2") in the trial court was Mabuku Malumo, a Legal Assistant in the 3rd respondent who informed the trial court that the only file

which the 3rd respondent maintained in relation to stand 13308, Lusaka was in the name of the 1st respondent.

4.9 As earlier noted, the 1st respondent also testified on her behalf as PW3.

4.10 In her evidence in chief, PW3 told the trial court that, sometime in February, 1997 she applied for a residential stand in an area known as South of Chilenje, Lusaka and was offered stand No. 13308, Lusaka.

4.11 PW3 further testified that she was asked to pay service charges which she did (in instalments) over a period of time. According to this witness, she paid a total sum of K1,415,748.80 and that she was subsequently issued with a certificate of title sometime in 2000.

4.12 This witness also testified that when she was ready to commence her building works on her plot she visited the same only to discover that there were some people she did not know who were undertaking some works on the land. Consequently, she proceeded to report the matter to the police.

- 4.13 Under cross-examination, PW3 told the trial court that he applied for the plot which he was eventually offered after seeing an advertisement in a newspaper.
- 4.14 The witness further testified that he received a letter from the 3rd respondent requesting her to settle service charges in respect of the piece of land in question and that she settled these in instalments.
- 4.15 Following the closure of the 1st respondent's case, the appellant opened his case by testifying as DW1.
- 4.16 DW1 started his evidence by telling the trial court that, sometime in 2002, he was approached by Bongani Mbewe who informed him that he had a plot in an area known as South of Chilenje which he was desirous of selling. The plot was described as stand No. 13308, Lusaka. DW1 was further informed by Mbewe that he was offering the plot to him at K4,000.00 (rebased).
- 4.17 DW1 went on to testify that Mbewe produced his application letter to the 3rd respondent for the plot in question, an offer letter from the Ministry of Lands as well as receipts evidencing the payment which he had

made to the Ministry of Lands in respect of the subject plot.

4.18 The witness further testified that, having expressed his desire to purchase the plot from Mbewe he undertook further actions in pursuance of his intended purchase. In particular, DW1 informed the trial court that he executed a contract for the sale of the plot in question by Mbewe to himself. He also secured the preparation of building plans for a house which were subsequently approved by the 3rd respondent.

4.19 The witness further testified that he began undertaking construction works and that, as at 8th January, 2013, he had constructed a structure valued at K240,000.00 at the plot in issue. The witness produced a valuation report relating to the structure he had constructed as part of his evidence.

4.20 DW1 also testified that the certificate of title which the 1st respondent had secured in respect of the plot in question was procured under circumstances which pointed to fraud and underhand activities. In making this

assertion, DW1 informed the trial court that the searches which he had conducted in respect of the piece of land in question yielded nothing in the nature of an application by the 1st respondent for the piece of land in question.

4.21 Upon being cross-examined, DW1 informed the trial court that he started constructing the structure on the plot in question sometime in 2002. This, the witness said, was before his building plans were approved in 2006. According to him, his structure was not illegal because he received 'verbal' permission to build.

5.0 TRIAL COURT'S FINDINGS AND DECISION

5.1 Following the closure of the 1st respondent and the appellant's respective cases, the trial Judge invited submissions from Counsel for the parties.

5.2 Following her receipt of Counsel's submissions, the learned trial Judge proceeded to consider the evidence which had been laid before her in the context of the pleadings and Counsel's submissions and identified the

issues which that court felt had fallen for her determination as being:

5.2.1 who, as between the 1st respondent and the appellant, was the legal owner of the piece of land in question?; and

5.2.2 did the 1st respondent fraudulently obtain the land in question?;

5.2.3 was the appellant a bonafide purchaser of the subject piece of land? and

5.2.4 was the appellant entitled to compensation for the structure he had erected on the subject piece of land?

5.3. The trial Judge then considered the issues she had identified in the context of the evidence which had been deployed before her; the provisions of the Lands and Deeds Registry Act, Cap, 185 of the laws of Zambia, in particular, sections 33 and 54 of this statute, and a host of our decisions and came to the conclusion that, although the appellant had been misled by the 2nd and 3rd respondents' officials into believing that the land in question had been available for the purpose of being

offered to Bongani Mbewe, the same had not, in point of fact, been so available because it was lawfully owned by the 1st respondent. In this regard, the trial court noted that the appellant was not a bonafide purchaser without notice of the piece of land in question given that, had he conducted a search on the property in question he would have established its correct legal circumstances, namely that it was legally owned by the 1st respondent.

5.4 In reaching its conclusion in 5.3. above, the trial court observed that, contrary to the appellant's assertion and contention, the offer which had been made to the 1st respondent in respect of the piece of land in question had never been revoked nor had that piece of land been the subject of re-entry or repossession by the Commissioner of Lands. The lower court also noted that the appellant had failed to prove that the 1st respondent acquired the subject piece of land fraudulently.

5.5 The trial court also observed in its judgment that no act of trespass was committed by the appellant in respect of the piece of land in question because the appellant was

misled or duped by the 2nd and 3rd defendants' officials into believing that he had been validly and lawfully offered the piece of land in question and, consequently, was lawfully entitled to enter upon the subject piece of land. Accordingly, the lower court dismissed the 1st respondent's search for damages for trespass against the appellant.

5.6 Arising from the totality of its conclusions as highlighted above, the lower court noted that the appellant had illegally constructed a structure upon the 1st respondent's piece of land. In reaching this conclusion, the lower court was buoyed by the position we took in decisions such as **Kenny Phiri -v- Yusuf Anthony Filamba¹** and **Nora Mwaanga Kayoba and Alizani Banda -v- Eunice Kumwenda Ngulube and Andrew Ngulube²**. Accordingly, the trial court ordered the appellant not only to yield vacant possession of the piece of land in question to the 1st respondent but to demolish his illegal structures on that piece of land.

5.7 The trial court concluded its judgment by observing that, in the light of the fact that the appellant had been duped in the manner we alluded to above, he was at liberty to pursue the 2nd and 3rd respondents' officials for possible redress.

6.0 THE APPEAL AND THE GROUNDS THEREOF

The appellant was not satisfied with the 1st respondent's success in the court below and has now approached this court of ultimate resort on the following grounds:

6.1 The Court below having found as a fact that one Bongani Mbewe applied for a residential plot through a letter dated 15th January 2000 and that he was offered the property by the Commissioner of Lands on 24th August, 2001 ought to have declared the 1st Defendant as the legal owner of stand No. 13308, Lusaka.

6.2 The learned trial Judge misdirected herself in law and in fact when she stated in her judgment that one of the questions for determination was whether or not the 1st defendant was a bonafide purchaser of the land in

question as the same was not canvassed by any of the parties in their pleadings.

6.3 The learned trial judge seriously misdirected herself in law and in fact when she held that the onus of producing the plaintiff's application letter and recommendation letter lies on the 2nd and 3rd defendants.

6.4 That the holding by the Court below that PW1 and PW2 corroborated each other that the Council processed the Plaintiff's application and recommended her to the Commissioner of Lands and that the defence filed by the 2nd Defendant is clear that according to its records the plaintiff is the rightful owner of the property is not supported by documentary evidence.

6.5 The finding by the Court below that the 1st Defendant did not prove fraud as against the Plaintiff is against the weight of the evidence, oral and documentary, adduced by the 1st Defendant.

6.6 The Court below misdirected itself in law and in fact when she declined to accept the 1st Defendant's documentary evidence that the Plaintiff's offer letter was withdrawn

and that the property was re-allocated in preference for PW1's testimony that there was no notice or certificate of re-entry in the Plaintiff's file held by Ministry of Lands which evidence was not supported by documentary evidence and in particular by official certificate of search duly signed by the Chief Registrar of Lands and Deeds.

6.7 The learned trial Judge misdirected herself in law and in fact when she assumed that by the letter dated 26th September, 1998 the 3rd Defendant was re-entering stand No. 13308, Lusaka when in fact the said 3rd Defendant was merely withdrawing the offer and re-allocating the property to a suitable developer following the Plaintiff's failure to perform her obligation set out in the offer letter in line with its mandate as an agent for the Commissioner of Lands.

6.8 The learned Trial Judge misdirected herself in law and in fact when she held that the plaintiff is the rightful owner of the land in question and that she was the holder of a valid certificate of title which is conclusive evidence of ownership in the face of evidence that the plaintiff failed to

comply with the procedure set out in circular No 1 of 1985 when acquiring the certificate of title in question.

- 6.9 The learned trial judge misdirected herself in law and in fact when she held that the letter of withdrawal was overtaken by events because the plaintiff subsequently paid the necessary fees and charges and was issued with a certificate of title in the absence of evidence that the plaintiff contested the withdrawal and an express letter withdrawing the revocation.*
- 6.10 The Court below misdirected itself in law and in fact when it held that the 1st Defendant built illegally on stand No. 13308, Lusaka in the face of undisputed evidence that one Bongani Mbewe applied for a residential plot through a letter dated 15th January, 2000 and that he was offered the property by the Commissioner of Lands on 24th August, 2001 which offer letter obliges the offeree in Clause 4(1) to construct a structure with a minimum value of K500,000.00 within eighteen (18) months from the date of the offer and in the face of evidence that the 1st Defendant obtained planning permission from the 3rd Defendant.*

- 6.11 *The Court below misapprehended the status of the 1st Defendant in its Judgment when it refers to his as purchaser as opposed to attorney for Bongani Mbewe the bonafide offeree on whose behalf he has at all material times been acting and as such not legally obliged to conduct searches to establish whether or not the said property was lawfully offered to the said Bongani Mbewe.*
- 6.12 *The learned trial Judge misdirected herself in law and in fact when she held that the developments made by the 1st Defendant on the property were undertaken at his own risk for which he cannot be compensated by the plaintiff in the absence of any finding against him that he committed a fraud and in the face of evidence that he obtained planning permission.*
- 6.13 *The learned trial Judge misdirected herself in law and in fact when she failed to adjudicate upon the question whether or not the 2nd and 3rd Defendants were obliged to compensate the 1st Defendant for the developments made by him on the property.*

6.14 *The learned trial Judge misdirected herself when she held that the plaintiff retained legal possession of the property at all material times when the 1st Defendant entered and built on the property in the face of evidence that by letter dated 26th September, 1998 the 3rd Defendant withdrew her offer letter and subsequently recommended Bongani Mbewe to be offered the property prior to the plaintiff obtaining the certificate of title.*

6.15 *The learned trial Judge misdirected herself in law and in fact when she held that the 1st defendant was duped by the 2nd and 3rd Defendants' officials.*

6.16 *The learned trial Judge misdirected herself when she ordered the 1st defendant to yield vacant possession to the plaintiff and further ordered that the structures erected on the property by the 1st Defendant be demolished in the face of evidence that one Bongani Mbewe was lawfully offered the property in question by the Commissioner of Lands and that the structures were constructed with the consent of the 3rd Defendant."*

7.0 PRELIMINARY MOTION

7.1 Prior to the hearing of the appeal, our attention was drawn to the fact that the 2nd respondent had filed a Notice of Motion pursuant to Rules 19(1), 48 (1, 5 and 7) and Rule 58(1) and (2) of the Rules of this court, in terms of which the 2nd respondent gave notice to move our court for the purpose of securing an order to strike out all but two of the grounds of appeal upon which appellant founded this appeal.

7.2 In terms of the said Notice of Motion, the grounds alluded to in 7.1 were alleged to be of the nature and character of arguments and narratives and, consequently, offended Rule 58(2) of the Rules of this Court.

7.3 On the basis of the matters in 7.2, the 2nd respondent questioned the competence and viability of the appeal.

7.4 For completeness, the Notice of Motion in question was supported by an Affidavit as well as some authorities and arguments.

7.5 For his part, the appellant filed Arguments contesting the motion.

7.6 At the hearing of the appeal, Ms. D. M. Mwewa, Acting Senior State Advocate, appeared for the 2nd respondent and informed us that she desired to have the Notice of Motion heard in the way of a preliminary objection to the hearing of the appeal.

7.7 In arguing the motion, Ms. Mwewa posited that, out of the 16 grounds of appeal which had inspired the appellants' appeal, only two were compliant with the rules of this court as cited above.

7.8. According to Ms. Mwewa, only grounds 3 and 5 were compliant with the rules. The rest of the grounds were in the nature of arguments and narratives and, consequently, offended the Rules of this court as earlier cited.

7.9 Upon being questioned by the court as to how some of the individual grounds which were alleged to have been non-compliant with the Rules of this court offended the Rules, the learned Counsel was demonstrably unconvincing in her arguments and failed to sustain her position with

respect to a number of the grounds of appeal which were being alleged to offend the Rules of this court.

7.10 When Mr. Mainza, the learned Counsel for the appellant was invited to address us upon the motion in question, he briefly submitted that the 2nd respondent's Counsel had lamentably failed to demonstrate the manner in which the grounds which were being alleged to offend the Rules of this Court actually offended the Rules of the Court, as asserted by his colleague. Accordingly, Mr. Mainza urged us to dismiss the motion with costs.

7.11 In our short Ruling, we confirmed having examined the motion and the opposing positions which the two protagonists had taken and ruled that we did not find anything in the grounds which the 2nd respondent had complained about which materially offended the Rules of this Court. Accordingly, we dismissed the motion and indicated that we would give our detailed reasons in our main judgment.

7.12 As we embarked upon the task of preparing this judgment and, upon further reflection, it became

eminently clear to us that the 2nd respondent's counsel had rashly mounted her preliminary motion seeking to impugn nearly all the grounds which had inspired this appeal. Indeed, we reasoned that the objection which learned counsel for the 2nd respondent had taken to almost all the grounds of appeal were no more than a scarecrow as there was not much in the way of some tangible basis upon which the objections could be properly sustained. Our view was, indeed, evidently borne out by counsel's unconvincing reactions to the specific questions which were put to her during the hearing of the motion. It was, in short, on account of the foregoing reasoning that we felt encouraged to dismiss that preliminary motion.

8.0 THE PARTIES' RESPECTIVE ARGUMENTS/CONTENTIONS ON APPEAL

8.1 At the hearing of the appeal, learned Counsel for the appellant and the 1st respondent confirmed having filed their respective Heads of Argument to support the

positions which they had respectively taken in the appeal.

We must momentarily pause here to observe that, in opposing the appeal, learned counsel for the 1st respondent adopted a rather unconventional way of reacting to the appellant's Heads of Argument in the sense that he did not react seriatim to the individual grounds of appeal as buttressed by the specific contentions in the appellant's Heads of Argument. Instead, the 1st respondent's counsel adopted a thematic or subject matter approach in the way of projecting broad themes which supported different aspects of the judgment of the trial judge. For this reason, we will flash the 1st respondent's counsel's position as briefly projected in the 1st respondent's arguments in relation to the relevant issues in contention in the appeal before pronouncing our decision on the relevant grounds of appeal.

We must confirm, however, that no Heads of Argument were filed on behalf of the 2nd and 3rd respondents. In

this regard, we indicated to the two defaulting Counsel that we were not going to entertain any application seeking to file Heads of Argument out of time. Additionally, we informed Counsel for the 2nd and 3rd respondents that, as they had not filed their respective Heads of Argument, the duo had automatically disqualified themselves from being heard.

8.2 In opening his arguments, Mr. Mainza, learned Counsel for the appellant, informed us that the Heads of Argument which he had originally filed were amended with leave of a single member of this court on 27th August, 2019 and that it was the appellant's desire to rely on those Heads of Argument as amended.

8.3 In terms of those amended Heads of Argument, Counsel indicated to us that grounds 1, 2, 3, 4, 5 and 14 had been argued under one cluster while grounds 2 and 11 had been argued together as had been grounds 10 and 12. Grounds 9 and 15 had been argued on their own as separate grounds while grounds 6, 7, 8 and 16 had been abandoned.

Barnet Development Corporation. Ltd⁶, that a certificate of title could be vitiated on account of such factors as fraud, impropriety in its acquisition or failure to adhere to the procedure prescribed in Circular No. 1 of 1985. In this regard, Counsel quoted our holding in **Barnet Development Corporation⁶** to the effect that:

“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. However, under section 34 of the same Act, a certificate of title can be challenged and cancelled for fraud or reasons of impropriety in its acquisition.”

8.7 Learned Counsel drew further inspiration from our very recent decision in **Sailas Nzowani & Others - v - Flamingo Farm Limited⁷** where we said:

“We agree that fraud as specified in section 33 of the Lands and Deeds Registry Act does not provide the only path way by which a certificate of title may be cancelled. Other transgressions of the law such as circumvention of procedure prescribed in the law which would render null and void the allocation of land, would be just as fatal [It is not merely on account of fraud that cancellation of a

certificate of title can be sought]... the appellants did not need to plead and prove fraud for them to succeed in an action premised on failure to follow procedure which could render the whole land acquisition process null and void The effect of such a finding is that the certificate of the title is liable to be cancelled."

8.8 Counsel accordingly submitted that, unlike the 1st respondent, Bongani Mbewe had complied with all the prescribed procedures and was allocated the piece of land in question at a time when it was unencumbered and available for allocation and that, accordingly, the lower court ought to have declared the appellant as the legal owner of stand No. 13308, Lusaka.

8.9 According to the appellant's Counsel, the 1st respondent failed to produce her letter of application for the piece of land in question and that, under these circumstances, the issuance of a certificate of title to her was 'fraudulent'.

For his part, Mr Chakoleka, learned counsel for the 1st respondent, supported the approach, reasoning and

conclusion by the trial judge as regards each one of the issues raised in the grounds of appeal as clustered above.

8.10 We have keenly examined the five grounds which the appellant's Counsel strenuously argued as a cluster and feel sufficiently comfortable to give our reactions and reflections in the paragraphs which follow.

8.11 With respect to the first ground of appeal, we do find ourselves in great difficult to embrace the reasoning which this ground projects.

8.12 In her judgment, the trial judge noted the following at page J32 (p.41 of the Record);

"I am thus not persuaded by the first defendant (now appellant)'s argument that he followed the procedure for land acquisition and has applied for a certificate of title which the Commissioner of Lands has neglected to issue. The first defendant ought to have conducted a detailed search at the Lands and Deeds Registry to ascertain that the property belonged to Bongani Mbewe before purchasing it. The land record would have shown him that the plaintiff (now 1st respondent) obtained a certificate of title on 17th August, 2000 under a 99 year lease from 1st February, 1997. The record shows that Bongani

Mbewe was offered the property on 24th August, 2001. The first defendant who purports to have been acting for the said Bongani Mbewe ... would have established that the property was held by the plaintiff under a certificate of title before it was offered to Bongani Mbewe...."

8.13 Having regard to the learned trial Judge's disposition as captured in the passage which we have reproduced at paragraph 8.12 above, it is, with great respect, distinctly idle for the appellant's counsel to have expected the same judge to declare the 1st defendant (now appellant) as the legal owner of stand No. 13308, Lusaka. We outrightly dismiss the first ground.

8.14 Under the third ground, the appellant attacks the trial judge for having expressed the view that the letter which the 3rd respondent had written to the 2nd respondent recommending the 1st respondent for the piece of land in question could have been produced by the 2nd and 3rd respondents.

8.15 While we accept that it is an elementary rule of evidence that he that asserts or alleges must affirm and, equally,

that the burden of proof does not shift and consistently remains with the party that ought to establish a particular fact, the evidential burden can and does shift during the course of a trial.

8.16 In the context of the grievance embodied in the third ground of appeal, it is common knowledge that, as part of the agency arrangement in land matters which often subsists in the Republic of Zambia between a local authority and the Commissioner of Lands, the role of the former is to make a recommendation to the latter whenever it is proposed to have a piece of land allocated to a prospective developer by the Commissioner of Lands.

8.17 In our view, the trial Judge's legitimate expectation that the letter of recommendation which the 3rd respondent had originated for the benefit of the 2nd respondent could have been produced by either of the two was far from being off the mark. Accordingly, we find the third ground unmeritorious.

8.18 Under ground 4, the appellant seeks to assail the judgment of the trial court for espousing the position

that, in their evidence, PW1 (Paul Kachimba) and PW2 (Mabuku Malumo) being officers in the Ministry of Lands and the 3rd respondent respectively ***“corroborated each other [when they respectively testified] that the [3rd respondent] processed the [1st respondent’s] application and recommended [the 1st respondent] to the Commissioner of Lands”***.

8.19 Ground 4 also attacks the learned trial judge’s observation in her judgment that:

“even the defence filed by the second defendant is clear that, according to its records, the plaintiff is the rightful owner of the property” in question.

8.20 We have considered this (4th) ground and the arguments which were canvassed around the same by the two primary protagonists in this appeal. Quite aside from being in agreement with the learned trial judge with respect to the assertions and observations which are attributed to her in the context of this ground of appeal, the evidence on record and the trial court’s findings

thereon made it abundantly clear that the 1st respondent was the rightful owner of the property in question. We also totally agree with the learned trial judge that the evidence of PW1 and PW2 corroborated each other on the issue of the 1st respondent's ownership of the plot in question. This position was, indeed, supported by the 2nd and 3rd respondents in their respective pleadings.

Ground 4 stands dismissed.

8.21 Under the fifth ground of appeal, the appellant contends that the lower court's finding to the effect that he, the appellant, did not prove fraud as against the 1st respondent was against the weight of both the oral and documentary evidence which had been laid before the lower court.

8.22 We have noted from the appellant's arguments around the fifth ground of appeal that this ground was pitched against the 1st respondent's apparent failure to produce in evidence the application letter which the 1st respondent wrote to the 3rd respondent seeking to be allocated a residential plot.

8.23 It can also be scarcely doubted indeed that the absence of the 1st respondent's application letter represented the highest point in the appellant's arguments upon which has been perched the appellant's ringing contention that the manner in which the 1st respondent procured her certificate of title to the piece of land in question was 'fraudulent'.

8.24 The appellant's counsel went to great length, extravagantly citing and quoting extensively from numerous decisions of this court for the purpose of demonstrating the commission of fraud or other impropriety on the part of the 1st respondent.

8.25 In the view which we have taken, which is generally supported by the 1st respondent's counsel, no evidence was placed before the trial court which suggested, even mildly or remotely, that the manner in which the 1st respondent acquired the piece of land in question, let alone, her certificate of title in respect thereof, was tainted with fraud or any other form of impropriety. Indeed, the appellant's counsel failed to demonstrate that

the trial court's findings of fact, in terms of which she discounted the existence of fraud, were perverse or in any way unsupported by the evidence which that lower court had the benefit of examining. Under these circumstances, ground five cannot possibly stand. It is dismissed.

8.26 As regards the ninth ground of appeal, it was the appellant's contention under this ground that the learned trial judge misdirected herself in law and in fact when she held that the letter of withdrawal [of the offer in respect of the plot in question to the 1st respondent] was overtaken by events because the plaintiff [now 1st respondent] subsequently paid the necessary fees and charges and was issued with a certificate of title in the absence of evidence that the plaintiff [had] contested the withdrawal and an express letter withdrawing the revocation.

8.27 The gist of the appellant's arguments around ground 9 was that the offer of the plot in question to the 1st respondent was withdrawn by way of a letter which had

originated from the 3rd respondent. This postulation by the appellant is strenuously contested by learned counsel for the 1st respondent.

8.28 For our part, we must stress that we have been at pains to appreciate the viability of the appellant's ninth ground of appeal in the light of the evidence which the trial court had the benefit of examining.

8.29 To start with, the appellant's 'withdrawal argument' was traceable to the 3rd respondent's letter to the 1st respondent which was dated 26th September, 1998. In that letter, the 1st respondent was advised that she had failed to settle service charges in respect of the plot which had been allocated to her and that,

"consequently, your plot has been repossessed and your offer letter revoked forthwith and the Lusaka City Council reserves [the] right to offer [the plot] to any suitable party... who could develop [it]."

8.30 There was documentary evidence which was laid before the trial court which reflected that, at the time when the 3rd respondent authored its letter in 8.29 above, the 1st

respondent had paid K285,5000.00 towards the fees/charges which were being demanded on account of the plot in question. Indeed, inspite of the 3rd respondent's letter of 26th September, 1998, the 3rd respondent continued to receive the subject fees and charges on 24th March, 1999, 20th January, 2000, 17th March, 2000, 11th April, 2000 and 24th May 2000 from the 1st respondent.

8.31 In point of fact, on 24th May, 2000, the 3rd respondent wrote to the Commissioner of Lands for the purpose of confirming that the 3rd respondent had received the total billed amount of K1,415,748.80 in service charges from the 1st respondent.

8.32 On 23rd June, 2009, the 1st respondent received a ground rent bill in the sum of K314,333.00 from the Commissioner of Lands which she settled on the same date.

8.33 As the trial court correctly noted, the 1st respondent was even issued with her certificate of title in respect of the piece of land in question on 17th August, 2000, that is,

over two years after the letter which had purported to revoke her offer and repossess her plot.

8.34 Clearly, the trial court's conclusion to the effect that the purported withdrawal of the offer in question had been superseded by the 2nd and 3rd respondents' conduct and actions as borne out by the evidence which was deployed before that lower court cannot seriously be contested.

8.35 In any case, and more importantly indeed, the evidence which was placed before the trial court on behalf of the Commissioner of Lands amply indicated that the 3rd respondent had no power or authority to revoke the offer which the 1st respondent received from the Commissioner of Lands in respect of the piece of land in question nor to repossess the said land from her. In all seriousness, the ninth ground of appeal must fail.

8.36 As regards the tenth and twelfth grounds of appeal, it was contended on behalf of the appellant under these two grounds that the lower court was not entitled to pronounce itself in the manner it did given that Bongani Mbewe was offered the land in question and was even

obliged to construct a structure of a minimum value of K1,500,000.00 upon that piece of land within a period of 18 months from the date when he was offered the same.

8.37 Additionally, learned counsel for the appellant argued that the trial court's pronouncement could not stand in the light of the fact that the appellant was granted planning permission by which he was lawfully entitled to construct the structure which the trial court ordered to be demolished.

8.38 We have given anxious consideration to the two grounds of appeal and Counsel's arguments thereon. We have also taken on board learned counsel for the 1st respondent's thematic arguments around these two grounds.

8.39 In her judgment, the learned trial judge noted that the piece of land in question was lawfully owned by the 1st respondent who was even issued with a certificate of title in August, 2000. In the light of this finding, the judge below concluded that the construction works which the appellant had undertaken on the piece of land after the 1st respondent had secured title to it were illegal.

8.40 In reaching her conclusion in 8.39, the trial judge observed that the appellant had failed or neglected to undertake the necessary due diligence before taking the risk which he took of erecting the structure in question. In the trial judge's view, had the appellant undertaken the necessary due diligence and made appropriate inquiries which are essential in all dealings in land, he would have discovered that the piece of land in question had been the subject of a certificate of title from as far back as 17th August, 2000, that is to say, well before Bongani Mbewe was purportedly offered the same piece of land on 24th August, 2001.

8.41 Having regard to the matters in 8.40, the trial judge found herself in no difficult but to order the appellant to yield vacant possession of the subject piece of land to the 1st respondent. The judge also ordered that the illegal structures on the piece of land in question be demolished.

8.42 We have considered the judgment of the court below in

the context of the arguments which Counsel canvassed around the tenth and twelfth grounds of appeal and feel sufficiently comfortable to embrace the trial judge's approach, reasoning and, indeed, conclusion. In the result, we dismiss grounds 10 and 12.

8.43 As regards the fifteenth and last ground of appeal, we really cannot help but agree with the trial judge that the appellant was duped by the officials of the 3rd respondent and the Ministry of Lands whose actions resulted in the predicament in which the appellant found himself. In saying this, we are encouraged by the fact that, unlike us, the lower Court had the advantage and benefit of listening to all the witnesses who were involved in that Court and observing their demeanor.

9.0 CONCLUSION

9.1 As all the grounds which were canvassed in support of this appeal have failed, the entire appeal fails and stands dismissed.

9.2 With regard to the issue of costs, we order that the

appellant shall meet the 1st respondent's costs in this Court which costs are to be taxed in default of agreement.



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M. MUSONDA
DEPUTY CHIEF JUSTICE



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



.....
C. KAJIMANGA
SUPREME COURT JUDGE