

**THE ATTORNEY-GENERAL, MINISTRY OF WORKS AND SUPPLY, ROSE MAKANO VS
JOSEPH EMANUEL FRAZER, PEGGY SIKUMBA FRAZER**

SUPREME COURT
SAKALA, CHIRWA JJS AND MAMBILIMA AJS.
19TH JUNE 2001 AND 29TH NOVEMBER, 2001
(SCZ JUDGMENT No. 14/2001)

Flynote

Land law-

Headnote

This was an appeal against a judgment of the Lands Tribunal entered in favour of the first and second appellants. In that judgment the Tribunal made the following orders:

- (a) The certificate of title No. 2.3424 issued in favour of the 3rd respondent by the registrar of Lands and Deeds on 12th May, 1999 be cancelled in relation to stand No. 3350 Lusaka (House No. 405 Independence Avenue, Lusaka).
- (b) The Committee on the sale of govt. Houses do proceed to process the 1st Appellant's application and the necessary approval sent to the relevant authorities so that title deeds for Stand No. 2250 Lusaka may be processed and issued to the 1st appellant within the next 60 days.
- (c) Costs of and incidental to the appeal be borne jointly by the respondents which costs may be taxed in default.

There was a cross appeal by the appellants asking for the variation of the judgment to the extent that it should include the second appellant's eligibility and or right to purchase the Govt. pool house in issue. The cross appeal was however, abandoned at the hearing of the appeal. There was no appearance on behalf of the 1st and 2nd respondents at the hearing of the appeal.

Held:

- (i) The Lands tribunal has no jurisdiction to order cancellation of certificate of title in land matters. The jurisdiction to order the cancellation of certificate of title deeds lies with the high court and not the Lands Tribunal. The lands tribunal can only recommend cancellation.
- (ii) The introduction of the lands book made it very clear that the empowerment was to Zambians to purchase govt. pool houses.
- (iii) A non-Zambian who is a permanent resident can own land in Zambia. Under the Resident's consent in writing under his hand.

Case referred to:

1. Adetayo Oduyeni and Two Others Vs Atlantic Investments Ltd SCZ Appeal No. 130 of 2000.

For the First Appellant - N/A.

For the Second Appellant - N/A

For the Third Appellant - Mr. E. Mwansa of Ernest Mwansa and Partners
For both Respondents - Mr. P. Chisi of Chifumu Banda and Associates.

Judgment

Sakala, J.S., delivered the judgment of the Court.

For convenience, the first appellant will be referred to as the first respondent, the second appellant will be referred to as the second respondent and the third appellant will be referred to as the third respondent while the first and second respondents will be referred to as the first and second appellants which designations they were before the Lands Tribunal.

This is an appeal against a judgment of the Lands Tribunal entered in favour of the first and second appellants. In that judgment the Tribunal made the following orders:

- “(a) The Certificate of Title No. L.3424 issued in favour of the 3rd Respondent by the Registrar of Lands and Deeds on 12th May, 1999 be cancelled in relation to Stand No. 2250 Lusaka (House No. 405 Independence Avenue, Lusaka).**
- (b) The Committee on the Sale of Government Houses to process the 1st Appellant’s application and the necessary approval sent to the relevant authorities so that title deeds for Stand No. 2250 Lusaka may be processed and issued to the 1st Appellant within the next 60 days.**
- (c) Costs of and incidental to this appeal be borne jointly by the Respondents which costs may be taxed in default of agreement.”**

There was a cross-appeal by the appellants asking for the variation of the judgment to the extent that it should include the second appellant’s eligibility and or right to purchase the Government Pool House in issue. The cross-appeal was, however, abandoned at the hearing of the appeal. There was no appearance on behalf of the first and second respondents at the hearing of the appeal.

The history of this appeal is common cause. The first appellant, Mr. J.E. Fraser, a Guyanese born, and holder of an entry permit number 34910, was employed in the Civil Service of the Government of the Republic of Zambia from 1971, working at Zambia National Broadcasting Corporation and then at the Ministry of Communications and Transport in the Meteorological Department. The second appellant, a Zambian, is his wife.

Sometime in December 1991, the first appellant was allocated house number 405 Independence Avenue, Lusaka. In September, 1998, pursuant to Clause 2.1 of the Government Policy on purchase of pool houses, he applied to purchase this house number 405, Independence Avenue, Lusaka. He did not receive any response to his application. In June, 1998, while both appellants were occupying house number 405, Independence Avenue, Lusaka, the Lusaka Housing Committee allocated the same house to the third respondent, Mrs. Rose Makano. On 27th December, 1998, the Committee on sale of Government Pool Houses made an offer to Rose Makano, the third respondent to purchase house No. 405, Independence Avenue. The offer was followed by a letter of 28th December by the same Committee to the Permanent Secretary, Ministry of Communications and Transport, directing that the first appellant, who was then the current tenant in the house in issue, be found alternative accommodation to rent in order to pave way for the third respondent, Mrs. Rose Makano, a Zambian Civil Servant, who had been allocated to purchase the house. On 20th July, 1999, Mrs. Rose Makano paid the full purchase price of the house in issue, while the Certificate of Title for the same property is dated 20th May, 1999. On 25th August, 1999, the first appellant presented a complaint to the Lands Tribunal against the three respondents. The grounds on which the complaint was founded were that, his house number 405 Independence Avenue had been wrongly recommended for sale by the Ministry of Works and Supply to Mrs. Rose Makano. The appellant sought the reliefs that the recommendations for the sale of his house to Mrs. Rose Makano, the third respondent, be nullified; and that the Ministry of Works and Supply be ordered to recommend him or in the alternative his wife to purchase the house

in issue.

The Tribunal considered the documentary, oral and affidavit evidence. It examined the relevant provisions in the Handbook On the Civil Service House Ownership Scheme which sets out persons eligible to purchase Government Houses. The Tribunal also examined the relevant provisions on eligibility to purchase Government Pool Houses as set out in Cabinet Circular No. 129 of 1996. The Tribunal further considered the provisions of Section 3 (2) and (3) of the Lands Act.

The Tribunal found that the second appellant, Mrs. Peggy Musakindwa Sikumba Fraser, though a Civil Servant in the Civil Service, who qualified to purchase a Government Pool House, did not apply for the purchase of the house in issue. Her appeal was dismissed for lack of merit. In relation to the first appellant, the Tribunal found that the first appellant was eligible to purchase the house at No. 405, Independence Avenue, Lusaka for the following reasons:-

He is a Civil Servant in the Civil Service and a legal sitting tenant in Accordance with Clause 2.1 (a) of the Handbook on the Scheme to purchase Government Pool Houses; and he is a Civil Servant who qualifies to own land in Zambia under the provisions of Section 3 (3) (a) of the Lands Act No. 29 of 1995 in accordance with Clause 2.1 (e) of the Handbook on Civil Service House Ownership Scheme.

The Tribunal found no reason why the first appellant's appeal could not be allowed. The first appellant's appeal was allowed. The respondents have appealed against all these findings.

Mr. Mwansa on behalf of the third respondent filed written heads of argument based on three grounds. These are: that the Tribunal misdirected itself in fact and in law by holding that consent is not a pre-requisite in matters of alienation of land; that order to cancel the certificate of title No. L. 3424 issued to the third respondent is a negation of the contract between the state and the purchaser; and that the Tribunal erred by ignoring the stated policy of empowering Zambians in interpreting the provisions in the Handbook on civil Service House Ownership Scheme.

We heard arguments and submissions on behalf of the third respondent in support of these grounds that Presidential Consent was a pre-requisite in matters relating to alienation of land under certain circumstances; that the Tribunal misdirected itself when it held that consent is only required under Section 3 (c) of the Lands Act and not a prerequisite under the remaining circumstances; that Section 5 of the Lands Act was very clear in making consent a prerequisite in dealing with land; that Section 3 of the Lands Act gives priority to Zambians in acquiring land; and that subsection 3 gives priority to non Zambians in certain circumstances.

The other arguments on behalf of the third respondent were that the cancellation of the Certificate of Title No. L.3424 issued to the third respondent was a negation of the contract of sale between the State and the Purchaser since the purchase price had already been paid. It was also argued that the Tribunal had no power to cancel the Certificate since such powers are vested in the High Court. Further arguments were that the Tribunal misinterpreted Government Policy as expressed in the Handbook on Civil Service House Ownership Scheme which policy is to empower Zambians to own houses.

The response to these arguments and submissions by Mr. Chisi on behalf of the appellants was that the prerequisite of State Consent did not apply where the State is itself the vendor; that since the Government (The President) was the vendor in this transaction, the provisions of Section 5 (1) of the Lands Act, Cap 184 of the Laws of Zambia, did not apply because, implied, the President consented when the decision was made to sell government houses; that purchasers of government houses do not require presidential consent and that the provisions of Section 5 (1) of the Lands Act only applied where the President was not the vendor and that in any other situation, such as under section 3 (3) of the Lands act, a non-Zambian must obtain the President's consent in writing under his hand before alienation of land to a non-Zambian can be made. Mr. Chisi supported the cancellation of the Title Deeds issued to the third respondent on the ground that the third respondent was not a legal sitting tenant as required under the eligibility provisions under clause 2.1 in the Handbook on the Civil Service Home Ownership Scheme.

Further arguments and submissions on behalf of the third respondent were that the Tribunal adequately addressed the issue of the Government policy on empowering Zambians to acquire their own houses under the Civil Service Home Ownership Scheme but that the inclusion of clause 2.1 (e) in the Handbook on Sale of Government Houses meant that it was only wholly government's intention to exclude non-Zambians from the scheme. We finally heard

submissions that the stated government policy of empowering Zambians to acquire their own houses is a general policy statement, while clause 2.1 (e) is an exception to the general policy statement.

We have very carefully examined the judgment of the Lands Tribunal. We have also considered the submissions by both learned counsel. The facts of this appeal are not in dispute. The issues raised center on the interpretation and construction of the guidelines in the Handbook on sale of Government Houses and the Lands Act. The question of the Lands Tribunal's jurisdiction to cancel Certificates of Title for any reason has already been settled by this court in a number of cases emanating from the Lands Tribunal. One of the recent cases is that of **ADETAYO ODUYENI AND TWO OTHERS V ATLANTIC INVESTMENTS LTD (1)**. The appeal in that case was against a decision of the Lands Tribunal ordering that a Certificate of Title Deeds be cancelled. We said in that case:

"Our short answer to the submissions is that the Lands Tribunal has no jurisdiction to order cancellation of Certificate of Title in land matters. In terms of the Lands and Deeds Registry Act Cap 185, the jurisdiction to order the cancellation of Certificate of Title Deeds lies only with the High Court and not the Lands Tribunal. The Lands Tribunal can only recommend cancellation. This is what in effect we said in MWANGELA V NSOKOSHI AND NDOLA CITY COUNCIL (1). Although the Lands Tribunal was correct in doing substantial justice, their power is limited to recommending to the Commissioner of Lands as to what to do with a Certificate of title deeds in issue and not to order cancellation of the same."

That position has not changed. As regards the provisions in the Handbook on sale of Government pool houses, the relevant sections are part of the Introduction and Eligibility Clause. The Introduction to the Handbook in part read as follows:

"In the spirit of empowering Zambians to acquire their own houses, the Government has decided to sell some of its pool houses to sitting tenants who are civil servants. This section contains guidelines for the sale of government pool houses. These guidelines include information on the categories of houses, modes of payment and supervision of the sale. The guidelines are subject to review as and when the need arises."

We are satisfied that the introduction to the Handbook made it very clear that the empowerment was to Zambians to purchase the Government Pool Houses. In the same Handbook, there are guidelines on how these Government Pool Houses are to be purchased. The relevant guidelines on purchase of Government Pool Houses is Clause 2.1. This clause is couched in the following terms:-

2.1 Eligibility

In the process of identifying civil servants who are bona fide sitting tenants, the following criteria shall be used:-

- (a) a confirmed civil servant who is in service and is a legal tenant;**
- (b) a civil servant who retired or was retrenched but was not paid terminal benefits and is a legal tenant;**
- (c) a civil servant who retired but was re-appointed on contract/gratuity terms and conditions of service;**
- (d) a spouse or children of a civil servant who died but was not paid terminal benefits and was a legal tenant; and**
- (e) a civil servant who qualifies to own land under the provisions of section 3 (2) and (3) of the Lands Act, No. 29 of 1995.**

The Lands Tribunal examined this clause in great details. The Tribunal was satisfied on the evidence on record that the first appellant did satisfy Clause 2.1 (a) in that he was a confirmed Civil Servant who was a legal sitting tenant. We entirely agree with that finding. But the matter does not end with this finding alone.

There was evidence that the first appellant is a non-Zambian. The issue of the first appellant being a Zambian led the Tribunal to consider Clause 2.1 (e) of the eligibility criteria. The consideration of Clause 2.1 (e) also led the Tribunal to examine the provisions of the Lands Act. The Tribunal found that the first appellant, though a non-Zambian, qualified to own land in Zambia under the provisions of Section 3 (3) of the Lands Act in accordance with Clause 2.1 (e) of the Handbook on the Civil Service House Ownership Scheme.

At this juncture, it is necessary to examine the relevant provisions of the Lands Act to ascertain whether the first appellant, a non-Zambian, did qualify to own land in Zambia and under what circumstances. At the expense of repetition, we quote Clause 2.1 (e) of the Eligibility Criteria:

“In the process of identifying Civil Servants who are bona fide sitting tenants, the following criteria shall be used ((a) (b) (c) and (d) not relevant).

(e) A Civil servant who qualifies to own land under the provisions of section 3(2)(3) of the Lands Act, Chapter 184 of the Laws of Zambia.

Section 3(2) of the Lands Act read as follows:-

Subject to subsection (4) and to any other law, the President may Alienate land vested in him to any Zambian.

And Section 3(3) in paragraphs (a) and (c) reads:-

“Subject to any other provisions and procedures relating to alienation of land, the President may alienate land to a non-Zambian under the following circumstances:

(a) where the non-Zambian is a permanent resident in the Republic of Zambia;

(b) where the non-Zambian has obtained the President’s consent in writing under his hand;

According to the evidence on record, the first appellant did satisfy Section 3(3) (a) of the Lands Act in that, although a non-Zambian, he is a permanent resident. We agree with the Lands Tribunal on this finding. But this finding does not also conclude the appeal because Section 3(3) (c) of the Lands Act requires that for a non-Zambian who is a permanent resident to qualify to own land must obtain the President’s consent in writing under his hand.

To the extent that the Lands Tribunal found that the first appellant was a permanent resident in Zambia it can not be faulted. Further, to the extent that the Tribunal found that the first appellant was eligible to buy a Government House under Section 3(3) (a) it can not also be faulted. There was, in our view, overwhelming evidence supporting all these findings. On the other hand, the Lands Tribunal never made a specific finding on the question of the Presidential consent in writing under his hand. In other words, consent for a non-Zambian to acquire any land in Zambia and also to be eligible to purchase a Government Pool House is a Presidential Consent, we have examined the first appellant’s evidence. We find no suggestion in his evidence that he obtained the President’s consent in writing under his hand to purchase the house. On the issue of Consent the first appellant gave no evidence when he was under examination-in-chief. However, when being cross-examined the record shows as follows:-

“Q: Mr. Frazer, we are talking about accommodation and why you are not entitled. The other matter of sub-rule shows that you should obtain Presidential Consent and this Presidential Consent has not been obtained and this house therefore cannot be given to you for purchase. It is for this reason that Mr. Frazer you are not entitled to purchase this house. Have you read the Government circular on the sale of Government Houses?

A: I have.

Q: Mr. Frazer, I therefore put it to you that unlike the position of a person resident in Zambia, you are supposed to get such Consent but you have not done so up to now, and it is for this reason that you are not entitled to purchase the house.

A: I think you are wrong, I am still entitled because of my residential Status to purchase that house.”

We agree that the Lands Tribunal misdirected itself when it held that consent was not a prerequisite for the first appellant to buy a Government Pool House. There was on record no evidence that the appellant had obtained consent to purchase the house in issue.

In our view, while the first appellant met all the conditions in relation to purchase of a Government Pool House, he did not obtain Presidential Consent. On this ground alone this appeal succeeds. Accordingly, we set aside all the orders made by the Lands Tribunal. The appeal is therefore allowed.

Before leaving this appeal, we wish, in passing to make certain pertinent observations in relation to the unsatisfactory aspect relating to sale of Government Pool Houses as revealed by this appeal. The facts not in dispute in the present have clearly established that the first appellant is a Civil Servant in the Service who is a legal sitting tenant in accordance with Clause 2.1 (a) of the Handbook on Sale of Government Pool Houses. The first appellant is also a Civil Servant who qualifies to own land in Zambia under the provisions of Section 3(3) (a) of the Lands Act Chapter 184 of the Laws of Zambia and in accordance with cause 2.1(e) of the Handbook, he is entitled to purchase a Government Pool House in question. The further undisputed facts are that the third respondent Mrs. Rose Makano, who was not a legal sitting tenant, was hurriedly sold the house despite the fact that the relevant authorities had in their possession the first appellant’s application to purchase the house in issue. Instead of advising the first appellant to obtain Presidential consent as required by the law and by the guidelines, the authorities took up the wrong position in law that he did not qualify to buy that house when in law he qualified. Instead the authorities decided to allocate the house in issue and made an offer to purchase the house to the person who had never been a sitting tenant. This case, among many more others that have come before us in relation to sale of Government Pool Houses as well as sale parastatal houses, is a clear example of unfairness and injustice in the sale of Government Pool Houses as well as parastatal houses which the authorities concerned must rectify. The guidelines and the law are very clear. Non Zambians are entitled to buy land in Zambia and to purchase Government Pool Houses on certain conditions, among them the obtaining of Presidential Consent which on the facts, he would have obtained but the authorities decided to overlook this. Despite the outcome of this appeal, the authorities are urged to re-examine the issue.
