R. R SAMBO N.N. SAMBO AND LUSAKA URBAN DISTRICT COUNCIL v PAIKANI MWANZA

Supreme Court
Sakala, ADCJ, Chaila and Lewanika, JJS
4th November, 1998 and 6th April, 2000
(SCZ Judgment No. 16 of 2000.)

Flynote

Land Law – Certificate of title – Fraudulently procured – Effect.

Headnote

The brief facts of the case are that the respondent worked for a company called Bonaccord Limeworks Limited in the 1960's. In 1970, the company gave the respondent as a sign of gratitude a house and the two buildings of Plot number MT 3093, Chinika, Lusaka. The respondent took up possession of these properties. In 1971, the respondent went to live in Kitwe and left the premises under the care of his friend, the first appellant. The respondent intended to obtain title deeds to the properties but he was restrained by the first appellant who advised him that the owners of the premises who were in South Africa were coming back. The respondent later came back to Lusaka from Kitwe and requested the first appellant to leave the premises. However, the first appellant refused and indicated that he himself had applied for title deeds to the property. The respondent was shocked to learn about this.

The property in question which was previously number MT 3093 Chinika, Lusaka, was later numbered 6133 Lusaka and finally Plot Number 11057, Lusaka. The learned trial judge held that the appellants could not have obtained the stand legitimately. The appellants appealed.

Held:

(i) The first appellant was granted title to the Stand under circumstances which were not only bordering on fraud but that were fraudulent

(ii) It is trite law that costs normally follow the event.

Cases referred to:

1. *Bater* v *Bater* [1950] 2 ALL ER 458.
2. *Hornal* v *Neuberger Products Limited* [1957] 1 QB 247.
3. *Sithole* v *The State Lotteries Board* (1975) Z.R 106.

E.B. Mwansa of EBM Chambers for the appellants.
M.V Kaona of Nakonde Chambers for the respondent.

Judgment

CHAILA, JS, delivered the judgment of the court.

We wish to apologise for the delay in delivering this judgment, but this has been due to circumstances beyond our control.

In this appeal the argument mainly centers on the cancellation of the title deeds and related orders made by the learned trial judge, as a result of the cancellation of the title deeds given in favour of Paikani Mwanza, hereinafter called the respondent, who was the plaintiff in the lower court, against R.R. Sambo, N.N. Sambo and Lusaka Urban District Council, hereinafter referred to as 1st appellant, 2nd appellant and 3rd appellant, respectively.

The brief facts of the case as found by the High Court (B.M. Bwalya, J), are that the respondent took out an Originating Notice of Motion against the appellants and claimed for an Order that:

(a) the Certificate of Title No. L480 relating to stand No. 11057 Mumbwa Road, Lusaka, in the name of the 1st and 2nd respondents and issued by the 3rd respondent be changed in the name of the applicant;

(b) rent received by the 1st respondent from renting out the building on the said stand from 1980 to date, be surrendered to the applicant;

(c) in the alternative: the applicant claims compensation.

The matter was determined by affidavits of both sides and viva voce evidence. The evidence on record showed that the respondent (applicant) worked for a company called Bonacord Limeworks Limited in the 1960s and in 1970 the company gave the respondent a service award which in the lower court was shown as exhibit *"MP 1"*. This document was produced fully in the judgment of the learned trial judge. This document showed that the respondent was given as a sign of gratitude a house and the two buildings at Plot No. MT3093, Chinika, Lusaka. The respondent took possession of these properties. In 1971, the respondent went to live in Kitwe and left the premises under the care of his friend, the 1st appellant. The respondent intended to get title deeds to the properties but he was restrained by the 1st appellant who advised him that the owners of the premises in South Africa were coming back. The respondent later came back to Lusaka from Kitwe and he asked the 1st appellant to leave the premises but the 1st appellant refused by responding that he himself had applied for the title deeds. The respondent was shocked to learn that information. The respondent attempted to file a caveat on 5th July 1985, for the property in question but that caveat was not entered. The respondent carried out several correspondences with the 1st appellant on the matter but to no avail and the 3rd appellant went ahead to approve an application of the 1st appellant in spite of the caveat he filed and in spite of his occupation and ownership of the structures in the 1960s.

The property in question which was previously No. MT3093 Chinika, Lusaka, was later numbered 6133 Lusaka and then finally the plot was numbered 11057. The evidence on record showed that the respondent visited the Civic Centre of Lusaka and saw the Town Clerk Mr Kabimba, DW3 on the matter but he was told that the property in question had been given to the 1st appellant because there was nobody occupying that land at that time.

The evidence on record and from the respondent further showed that some other two workmates were also granted awards by the same company that granted the respondent the two buildings and one of them was called as a witness to support the respondent's claim. The evidence on record further showed that the buildings were used as a lime factory by the company that granted the buildings to the respondent. The record further showed that the defence by the appellant was that the 1st appellant bought land from a Mr Musonda. The 1st appellant denied getting land or property from the respondent. The City Council, through the Town Clerk, maintained that there was nobody occupying the properties in question and that when the 1st appellant approached the Lusaka City Council, they accepted his application and granted him the land in question. The Lands Department acted on the recommendation of the

City Council and granted the 1st appellant the Certificate of Title.

The learned trial judge considered the evidence placed before him and he concluded that from the evidence, the respondent occupied the buildings on the stand in dispute after they were given to him by the Manager of Bonaccord Limeworks Limited as a reward of his long service with them. Those buildings were left under the care of the 1st appellant Mr Sambo. It must be noted that Mr Sambo denied that claim and maintained that he bought the building from a Mr Musonda who has not been traced. The learned trial judge asked himself after analysing the evidence whether the 1st appellant obtained the stand legitimately in the circumstances of the case. He further wondered whether or not the recommendation and granting authority, i.e., the 3rd appellant and the Commissioner of Lands, investigated the title of the stand in question to legitimise their actions. The learned trial judge concluded that on the face of it, there appeared to be no dispute on the application for title deeds by the 1st appellant to the Council and their recommendation to the Commissioner of Lands who granted the title deeds to the 1st appellant. However, on the evidence placed before the court, the evidence showed that the respondent wanted to own the properties by title. The evidence from the appellant showed that there were structures/buildings but that the 3rd appellant, the Town Clerk, avoided telling the truth on that matter. The learned trial judge had similar views on the evidence of the witness from the Lands Department. The learned trial judge concluded that the witnesses, DW1, DW2 and DW3's evidence on the state of the stand before demarcation of the same was devoid of the truth. The learned trial judge doubted the evidence of the 1st appellant when he claimed that he purchased the building from a Mr Musonda for about K3,500 which he got from his friend but this witness had not taken the trouble to confirm this piece of evidence or indeed to trace this vendor. The learned trial judge castigated the Lusaka District Council and the official of the Commissioner of Lands on the way they handled the matter and the learned trial judge concluded that it was clear that the Lusaka Urban District Council and the Commissioner of Lands did not investigate the history of title to the property in dispute and as to who owned the structures. In the opinion of the learned trial judge, it was very clear that the land was not virgin or vacant land. The land was inhabited by the respondent and other people who claimed ownership of some buildings left to them by Bonaccord Limeworks Limited. The learned trial judge further concluded that the evidence on record left him with one conclusion that someone in the organisations, i.e. Lusaka Urban District Council and Lands Department, was out to dispossess the respondent of the award from Bonaccord Limeworks Limited. The learned trial judge further concluded that the respondent was not given an opportunity to get title deeds as an occupant of those buildings. The respondent made efforts to acquire title to the property but his efforts were brushed aside in favour of the 1st appellant. The learned trial judge concluded, that the case bordered on fraud and the learned trial judge further concluded that the appellants could not have obtained the stand legitimately at all.

The learned trial judge having found that the 1st appellant was granted title to the stand under circumstances bordering on fraud or in short, that the 1st appellant cheated his friend, the title deeds could not be sustained in law and he declared the title deeds null and void and he consequently ordered Certificate of Title No. L480 for Stand No. 11057 issued in the names of Rabbi Ronald Sambo (1st appellant), Mildred Rabbi Mwambazi Sambo (wife to 1st appellant) and Nsuku Rabbi Sambo (2nd appellant), to be cancelled and ordered the Registrar of Lands and Deeds to do so. The learned trial judge further ordered that the respondent should be given title deeds without delay. The learned trial judge further ordered that the 1st appellant was entitled to a refund of expenses for any improvements made to the buildings, rates paid during his occupation of the respondent's buildings. Those should be paid by the respondent. The learned trial judge further ordered that the respondent was entitled also to the rentals and mesne profits by the 1st appellant when the 1st appellant was in occupation of the buildings. The learned trial judge further gave costs in favour of the respondent. Counsel for both parties have mainly relied on their written heads of argument. They have, however, highlighted some areas in their oral arguments.

The appellants have appealed upon the following grounds:

1. That the lower court misdirected itself in law and fact to have held that the 1st and 2nd

appellants were granted title to Stand No. 11057 under circumstances bordering on fraud or that the 1st appellant (the 1st respondent in the court below) cheated his friend (the respondent) in getting the said stand and as such the court declared the whole process null and void and further cancelled the certificate of title No. L.480 for stand No. 11057 which is in the name of the 1st and 2nd appellants.

The lower court misdirected itself in law and fact to have held that Stand No. 11057 is only occupied by the applicant (respondent herein) and as such the applicant should be given priority to acquire or legitimise his occupation and ownership of the said stand. And the court further misdirected itself in law and fact to have held that the applicant was not given the opportunity of priority to get title deeds as an occupant of the said buildings;

The lower court misdirected itself in law and fact to have held that the applicant was entitled to the rentals and mesne profits received by the first respondent (appellant herein) when he remained in occupation of the building.

4. the lower court misdirected itself in law and fact to have held that the 3rd appellant and the Commissioner of Lands failed to investigate the history of title stand No. 11057 and as such they could not have legitimately granted title to the 1st appellant over and above the interests of the respondent in the stand in dispute;

5. The lower court misdirected itself in law and fact to have condemned the appellants in costs when the respondent did not pray for them in his Originating Notice of Motion. It is conceded that costs are discretionary for the court but the discretion must be exercised judiciously and in appropriate cases. It is well known that litigants make specific prayers for any relief desired by them in their pleadings. Whatever they do not plead must be left out by the court unless special reasons to the contrary exist which I submit was not the
case here.

On ground one, Mr. Mwansa has argued that fraud is a serious criminal offence which must always be proved strictly whenever alleged. He submitted that although this is a civil case and normally the standard of proof is on the balance of probabilities, it is however trite law that where a criminal element is alleged in a civil case, it must be proved by cogent evidence which requires a much higher standard than ordinary civil cases. He drew our attention to the case of *Bater* v *Bater(1),* where Lord Denning observed:

"A civil court when considering a charge of fraud will naturally require for itself a higher degree of probability than that required when asking if negligence is proved."

He further drew our attention to another case of *Hornal* v *Neuberger Products Limited (2*) where Hodson L.J observed as follows:

"No responsible counsel undertakes to prove a serious accusation without admitting that cogent evidence is required. And Judges approach serious accusations in the same way without necessarily considering in every case whether or not there is a criminal issue."

Mr Mwansa submitted that in the present case, the court did not ask counsel for the respondent to lead any evidence to prove that the respondent had indeed been tricked or cheated as he alleged. Mr Mwansa has maintained that there was an allegation which was not supported by any cogent evidence that the respondent had been tricked by the 1st appellant by not applying for a certificate of title. Mr Mwansa submitted that there was not sufficient evidence to conclude that this is a case bordering on fraud and that the allegation of a trick should be disregarded.

In reply, Mr Kaona, counsel for the respondent submitted that the question of standard of proof required in a matter where fraud is made was discussed in the case of *Sithole* v *The State Lotteries Board(3)* where Baron, DCJ stated as follows:

"If a party alleges fraud the extent of the onus is greater than a simple balance of probabilities".

In Bater v. Bater Denning L.J, said:

"A civil case may be proved by a preponderance of probabilities but there may be a degree of probability within that standard. The degree depends on the subject matter. A civil court when considering a charge of fraud will naturally require a higher degree of probability than that which it would require if considering whether negligence was established. It does not adopt so high a degree on a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."

Mr Kaona argued that from that passage, it was clear that fraud is not strictly as was argued by the appellants nor is it a standard required beyond reasonable doubt. He submitted that there was compulsive evidence on record to show that the appellant was aware of the respondent's occupation and claim to the property. He argued further that the record showed that the appellant in his own testimony stated that when he applied for a certificate of title the respondent had been living on the property for over 10 years. To the counsel that suggested that the appellant did not obtain title legitimately.

On fraud or trickery, counsel argued that the allegation was pleaded and that was contained in the affidavit supporting the Notice of Motion. He further stated that even if it was not pleaded, there was no objection raised to the admission of such evidence.

On ground two, Mr Mwansa submitted that there was evidence on record that the property in question was occupied by the 1st and 2nd appellants and they were still being occupied by the appellants. The evidence further showed that the appellants did not prevent the respondent from applying for the certificate of title. The respondent has failed, according to Mr Mwansa, to prove that he was tricked or cheated into not applying for the title. Counsel argued that the respondent did not exercise his right which he slept on until the appellants obtained title. Counsel ended up by submitting that the respondent had ample opportunity to exercise his right.

In reply to the arguments in ground two, counsel for the respondent submitted that the Registrar of Lands under Section 38 of Lands and Deeds Registry Act, did not make all necessary and proper investigations and inquiries into the title to the land in question. Counsel submitted that if the Registrar of Lands had made proper inquiries, the Registrar was going to find that there were other people in occupation of the land. He defended the finding of the learned trial judge.

The arguments on ground two cover ground four which deals with the investigation as regards the Stand No. 11057.

As regards ground three, Mr Mwansa submitted that it was wrong for the learned trial Judge to order the appellant to pay rent or mesne profits to anyone. Counsel maintained that the appellants occupied the premises firstly as squatters because title to the same was not vested in any individual owner other than the state and then later to the appellants as legal owners, having applied for and obtained Certificate of Title No. L.480 and the respondent remained a squatter. Counsel argued that the learned trial judge could not order the appellants to pay rent to somebody who was a squatter.

On ground five which deals with costs, Mr Mwansa submitted that the respondent did not pray for costs in his original Notice of Motion. He has, however, conceded that the costs are discretionary for the court but the discretion must be exercised judiciously and in appropriate cases. He has urged the court to disallow costs awarded to the respondent. Mr Kaona in his reply on ground three has defended the decision of the learned trial Judge for awarding mesne profits to the respondent. He has argued that the appellants did not obtain title legitimately

and it was, therefore, right for the court to order them to pay mesne profits and rentals. On ground five, Mr Kaona maintained that his client was entitled to costs.

The learned counsel for both parties have drawn our attention to various authorities to support their arguments. We are greatly indebted to them for these authorities. We have read them and we have taken them into account in our judgment. We will first deal with ground five which deals with costs.

The appellant's counsel has himself conceded that costs are discretionary. It is also trite law that costs normally follow the event. There are several instances where the courts make orders as to no costs or in constitutional matters the courts normally do away with costs where issues are raised for the first time and the person raising the issue is a private person or an ordinary citizen. In this case, the learned trial judge ordered the appellants to pay costs after the respondent won his action. There was no special reason for the successful party to be denied costs. The appeal on costs would definitely be dismissed.

Grounds two and four talk about the same issue, which is the question of the learned trial judge finding that the respondent was not given priority to get the title deeds as an occupant of the said buildings. The evidence on record shows that the properties were left as gifts to the respondent by the employers. The learned trial judge was, therefore, on a firm ground when he found that the respondent should have been given priority. The evidence clearly supported the learned trial judge's finding that the Commissioner of Lands and the City Council were unfair to the respondent. The evidence further showed that the two institutions did not carry out thorough investigations and that if they had done so, they would have noticed that there were buildings on the premises. The appeal on these grounds cannot therefore, succeed.

We now turn to ground three. The appellants have complained that the learned trial judge should not have made an order that the appellants pay rent or mesne profits. The evidence on record shows that the buildings belong to the respondent. The respondents left the 1st appellant as caretaker. The 1st appellant obtained title deeds of that property, in addition, he obtained possession of the buildings and the evidence has further shown that the appellants were carrying out some business on the properties. The learned trial judge found that the properties belonged to the respondent and cancelled the title deeds and ordered that the properties be vested in the respondent. The evidence clearly supported the finding by the learned trial judge and the learned trial judge was right in ordering that the appellants pay rent and mesne profits to the respondent. The appeal, cannot therefore, succeed on this ground. We now turn to the first ground and this is on the cancellation of the certificate of title. The evidence on record which was carefully studied and considered by the learned trial judge proved that the respondent had been given the buildings as gifts by his previous employers. He wanted to apply for title deeds but he was stopped by his friend, the 1st appellant not to do so since the owners were coming back. The respondent later intimated to the 1st appellant that he was going to apply again for the title deeds, but he was told by the 1st appellant that he had already applied for title deeds. The evidence showed that the City Council was misled into believing that the land had been purchased by the 1st appellant from a Mr Musonda. The Lands Department was further misled by the City Council that the land was vacant and empty. Later the City Council came to know after the respondent had approached them and written to them about the land that the land was in fact not vacant and that the land belonged to the respondent, although he did not have title deeds. The City Council ignored the respondent's representations and proceeded to recommend the 1st appellant to Lands Department. The evidence on record proved that this land had been left in the hands of the 1st appellant by the respondent as a caretaker, but the 1st appellant denied all that and insisted or claimed that he bought it from a Mr Musonda. The facts, however, as found by the learned trial judge prove that the 1st appellant was lying. The learned trial judge described the behaviour and attitude on the part of the 1st appellant as bordering on trickery and fraud.

Learned counsel for the 1st appellant has argued that fraud was not proved and that the burden of proof required was very high and he relied on the authorities already cited to us.

The facts clearly showed that the 1st appellant's behaviour and action were fraudulent. He was left as a caretaker in charge of the property in question. He later cheated his friend the respondent that the people who had given him the gift were coming back and therefore, he should not apply for the title deeds. Later, the 1st appellant applied for the title deeds and misled the City Council that there was nobody in occupation on the land. He further cheated the City Council that he had bought the property from a Mr Musonda. We agree with the learned trial judge that all these were bordering on fraud and in fact, they were not only bordering on fraud but that they were fraudulent. We agree, therefore, with the finding of the learned trial judge that the title deeds were not genuinely obtained and that the actions were in fact fraudulent. The appeal cannot, therefore, succeed on this ground.

For the reasons we have given above, this appeal is dismissed with costs. *Appeal dismissed*