

**DAVID NZOOMA LUMANYENDA AND GOODWINS KAFUKO MUZUMBWA v
CHIEF CHAMUKA AND KABWE RURAL DISTRICT COUNCIL AND ZAMBIA
CONSOLIDATED COPPER MINES LIMITED (1988 - 1989) Z.R. 194 (S.C.)**

SUPREME COURT

GARDNER, AG.D.C.J., BWEUPE, AND CHAILA, AG.JJ.S.

4TH FEBRUARY, 1988, 18TH FEBRUARY, 1988 24TH MARCH, 1988 AND 19TH JANUARY, 1989.
(S.C.Z. JUDGMENT NO. 21 OF 1989)

Flynote

Land Law-Adverse possession- egistered land - Whether title can be obtained

Headnote

The appellants claimed title by prescription as occupiers of land to which the third respondent said it had a certificate of title. At the trial the respondent produced a certificate of title under a lease and upon that evidence the court found in their favour on the basis that title by prescription does not apply to leasehold land. The appellants appealed.

On the appeal the arguments were based upon adverse possession. The third respondent produced evidence which, inter alia, showed that it had a certificate of title in terms of a lease. It was argued that in terms of s.35 of the Lands and Deeds Registration Act adverse possession cannot be acquired against land to which there is a certificate of title.

The appellants argued that under s.32 of the Act any rights or benefits that existed at the time of the issue of a certificate of title still accrue and will override the issue of a certificate of title.

Held:

No rights by adverse possession can be acquired if land becomes the subject of a certificate of title.

Case referred to:

(1) American Cyanamid Company v Ethicon Ltd, [1975] 1 All E.R. 504

Legislation referred to:

1. Lands and Deeds Registration Act, Cap. 287
2. Land Registration Act, 1929 (U.K.)
3. Limitation Act 1939 (U.K.)

Works referred to:

Megarry and Wade Law of Real Property by (32 ed)
Supreme Court Practice of England (White Book)

For the appellants: H.H. Silweya, Silweya and Co.

For the respondents: E.M.S. Sifanu Legal Counsel, ZCCM.

Judgment

GARDNER, AG.D.C.J.: delivered the judgment of the Court.

This is an appeal from a judgment of the High Court refusing to grant an injunction in connection with possession of land.

The facts of the case are that the first and second appellants as occupiers of land forming part of Farm No. 836, Kabwe, and on behalf of other occupiers of similar land (such occupiers being known as the Mulungushi Committee) issued a writ claiming an injunction to prevent the defendants trespassing upon their property and destroying buildings thereon and in the alternative compensation and damages for such trespass and destruction of property.

At the hearing before this court it transpired that the appellants claimed that they and their neighbours had been in possession as farmers of the property in question for such a number of years that the third respondents, who claimed title under a lease dated 18 July 1929 (renewed in 1978), had lost their right to possession of the property. Before the trial court the appellants argued their case on the basis that they had acquired a right by prescription and the learned trial commissioner refused the application for an injunction on the ground that title by prescription does not apply to leasehold land. It appears that both counsel for the appellants and the respondents and the learned trial commissioner ignored the proper basis upon which this claim should have been made. It appears from the arguments by counsel for the appellants that what he in fact was claiming was a right by adverse possession, which right is governed by the Limitation Act 1939, and in relation to which a period of twelve years limitation applies. It was therefore necessary for the appellants to show that they or their predecessors in title had been in possession of the land they were presently occupying for a period of at least twelve years. In the event, when an adjournment was granted in order for the respondent to produce certificates of title and for the appellants to produce evidence of occupation of the land, the appellants were unable to produce evidence that they personally had occupied the land for more than at most six years.

Counsel on behalf of the respondents produced certificates of title showing the third respondents held a provisional certificate of title dated 6th of February, 1984, showing that it was the registered proprietor of Farm No. 836 and had held the land for a term of fifty years from 1st of July, 1949. He also produced a second provisional certificate of title dated 30th September, 1971, setting out the same facts as the first certificate. Finally he produced a full certificate of title dated 10 February 1988 showing that the third respondent was entitled to Farm 836 for a term of 99 years from 1st July, 1978. On production of these certificates Mr. Sifanu argued that, under section 35 of the Land and Deeds Registration Act (Cap.287), no right against the third respondent can be acquired by adverse possession. Section 35 of the Act reads as follows:

"35. If land had become the subject of a certificate of title, no title thereto, or to any right, privilege, or easement in, upon or over the same shall be acquired by possession or user, adversely to or in derogation of the title of the registered proprietor."

In reply Mr. Silweya drew our attention to section 32 of the Act which reads as follows:

"32. The issue of a provisional certificate shall confer upon the registered proprietor of the

land comprised in such certificate all rights, benefits and privileges under Parts III to VII of a registered proprietor holding a certificate of title except that the court may, at any time upon good cause shown at the suit of any person who claims that he had a better title, cancel or amend a

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provisional certificate and in any event may order the rectification of the register accordingly."

He argued that his clients were in the course of acquiring rights by adverse possession under the Limitation Act, and therefore they had a better right than the respondents. In this connection he drew our attention to comments to this effect in the 32 ed of *The Law of Real Property* by Megarry and Wade at p.578. Following this argument Mr. Silweya argued that the English law, which provides that at first registration certain rights continue to exist, should be applied in this case. Mr. Silweya also drew our attention to a government survey map of which we take judicial notice, indicating that in 1975, the property in question was referred to as being occupied by plantation owners. So far as English law is concerned, we are quite satisfied that section 70 of the Land Registration Act 1929 provides specifically that all registration of land shall be deemed to be subject to certain overriding interests which include rights acquired or are in the course of being acquired under the Limitation Act. However, we are satisfied that section 35 of the Lands and Deeds Registry Act equally specifically provides that such a law shall not apply in Zambia and no rights by adverse possession can be acquired if land becomes the subject of a certificate of title. In this connection in section 32 of the Act we construe 'certificate of title' as including a provisional certificate of title. It follows that it is our view that a person cannot continue to acquire a right under the Limitation Act by adverse possession once even a provisional certificate has been issued. In this case, therefore, the appellants would have to show that they or their predecessors in title had acquired rights by adverse possession for a period of twelve years prior to the granting of the provisional certificate on 5 February, 1948. This they have not done, nor have they shown that their predecessors in title had acquired such rights. The map dated 1975, indicates that the land in question may well have been occupied for planting crops by persons other than the third respondent at that date, and it is possible that the appellants have acquired rights from the previous occupiers who themselves may have obtained title by adverse possession for twelve years prior to the issue of the first provisional certificate of title. No evidence has been placed before us as to occupation by the appellant's predecessors and, although this evidence may be available at the trial of the action, we cannot accept, from the evidence adduced before the court, that there is a serious question to be tried in terms of the principles laid down in the case of *The American Cyanamid Company v Ethicon Ltd* (1).

We have said that it may be possible for the appellants to adduce more satisfactory evidence at the trial; we, therefore, do not intend to comment on the effect of the grant of a full certificate of title between the date of the lower court's decision and the date of the hearing of the appeal to this court. That is a matter for the trial court to decide. We would however comment that, with reference to the Supreme Court Practice (White Book 1988 ed) Order 15 Rule 12 note 4, the Mulungushi Farming Community does not come within the definition of numerous persons having the same interest in the proceedings. Each individual will have a claim for a different plot of land, and each will

presumably rely on different evidence to

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prove title by adverse possession. Certainly, no representative action could lie for the alternative claim for damages. The representative action was therefore wrongly instituted.

For the reasons we have given the appeal is dismissed. Each party will bear their own costs.
