

**IN THE COURT OF APPEAL OF ZAMBIA**  
**HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**APPEAL NO. 79/2021**  
**CAZ/08/84/2021**

**BETWEEN:**

**GOSPEL POWER TABERNACLE**  
**(PASTOR INAMBWAE STEPHAN SITWALA)** **APPELLANT**



**AND**

**SALANGWA SHOP (MAKALI)**  
**HEADMAN METHOD MWEEMBA**  
**ACKSON MIYOBA**

**1<sup>ST</sup> RESPONDENT**  
**2<sup>ND</sup> RESPONDENT**  
**3<sup>RD</sup> RESPONDENT**

*Coram: Makungu, Ngulube and Sharpe-Phiri, JJA*  
*On the 23<sup>rd</sup> day of February, 2023 and 21<sup>st</sup> day of July, 2023*

*For the appellant: Mr. O. Hatimbula of Messrs A.C. Nkausu & Co*  
*For all the respondents: Mr. S. Mweemba of Mweemba Swiz Associates*

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## **JUDGMENT**

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**Makungu JA, delivered the judgment of the Court**

Cases Referred to:

1. *Wilson Masauso Zulu v Avondale Housing Project Limited SCZ Judgment*  
*No. 31 of 1982*
2. *Y.B. and P. Transport v Supersonic Motors Limited (2000) ZR 22*
3. *Khalid Mohamed v. The Attorney General (1982) ZR 49*

## **1.0 INTRODUCTION**

1.1 This appeal is against the judgment of K. Mulife J of the High Court dismissing the appeal for lack of merit.

## **2.0 BACKGROUND**

2.1 The appellant, as plaintiff, commenced an action before the Subordinate Court of the first class for the Monze District by way of writ of summons and statement of claim seeking the following reliefs:

1. An order for the respondents to vacate the plaintiff's church plot no, 722 Monze.
2. An order to stop the respondents from continuing to develop the land.
3. An order for demolition of illegally existing structures.
4. Costs and any other relief the court may deem fit.

2.2 The appellant claimed that he had legally acquired the subject property from Monze Municipal Council in the year 2000. At the time, the property was described as subdivision 1647 of Plot No. 447, Monze.

2.3 The appellant claimed that the respondents had illegally encroached on part of the property where they had built some structures.

2.4 The documents relied upon by the appellant to prove his case were inter alia as follows: An application for allocation of land completed by the appellant himself marked as GPT11, a receipt for the application fee marked GPT1, a letter dated 6<sup>th</sup> November, 2000 signed by J.N Hangomba, Council Secretary for the Monze District Council, inviting the appellant to attend an interview for purposes of acquiring a church plot (GPT2), a letter dated 7<sup>th</sup> December, 2000 signed by the said Mr. J.N Hangomba to the effect that the Council had resolved in its meeting held on 27<sup>th</sup> November, 2000 to recommend the appellant for an offer of the subject piece of land to the Commissioner of Lands, on condition that the appellant pays survey costs and a sum of K 550.00 to the Monze District Council as service charges (GPT4) and the receipt for the sum of K550.00 dated 6<sup>th</sup> March, 2001 (GPT3).

2.5 Other documents relied upon include extracts of Minutes of the Plans, Social Works and Development Committee Meeting dated

27<sup>th</sup> November, 2000 approving the appellants application for the same piece of land marked exhibit GPT13. A letter dated 25<sup>th</sup> November, 2013 signed by Tryson Y, Chunga - Council Secretary for the Monze District Council: recommending that the appellant be offered the subject land by the commissioner of lands. The letter is marked GPT14. There was also a receipt dated 19<sup>th</sup> March, 2019 marked GPT19 for K1146 paid by the appellant as ground rent for the subject property.

2.6 The appellant further placed reliance on a letter written by the Council Secretary to Headman Beenzu about the encroachment of plot no. 722 marked exhibit GPT24, to show that the respondents had encroached on his land.

2.7 Mr. J.N Han'gomba who was employed as Monze Council Secretary between 1995 to 2001 stood as a witness for the respondents. He recognized the signatures appearing on exhibits GPT3 and GPT4 as his, but disputed having authored the two documents contending that the date stamps thereon were forged and that there was no interview that was conducted by the Council relating to the subject land. According to him, the land was not alienated as it was a closed cemetery.

2.8 The respondents through the evidence of the 3<sup>rd</sup> respondent claimed that the land which they occupy is customary land which was formally a grave yard. That the customary land falls under the jurisdiction of Chief Monze and only he or his headman could allocate it.

2.9 They further alleged that plot no. 722 Monze, did not extend to the grave site, and that the documents from the Monze District Council which were produced by the appellant were fabricated.

### **3.0 DECISION OF THE SUBORDINATE COURT**

3.1 At the end of the trial, the court of first instance rendered a judgment on 10<sup>th</sup> September, 2019. The court found that the offer documents were forged. The appellant's case was dismissed on the ground that the application for a church plot was not valid and therefore there was no proof that the appellant was genuinely offered the land in issue.

### **4.0 APPEAL TO THE HIGH COURT**

4.1 The appellant herein appealed against the Subordinate Court judgment to the High Court which heard the matter *de novo*.

4.2 Below is a recap of the grounds of appeal raised before the High Court:

- i. *The learned Magistrate erred in law and fact by failing to evaluate the evidence placed before it.*
- ii. *The learned Magistrate erred in law and fact in deciding that there was procedural impropriety on the part of the Monze District Council regarding the creation and allocation of plot number 722 contrary to the evidence in totality on record.*
- iii. *The learned Magistrate erred in law and fact when he decided that the action by the Monze District Council was not valid in approving our application for a church plot when the defendants or even their witnesses did not give or bring evidence to show that the Ministry of Lands through Monze District Council acted negligently in the whole transaction and Mr. Han'gomba conceded that the Monze District Council minutes filed in this matter were a true copy.*
- iv. *The learned Magistrate erred in law and fact by failing to understand that it is common knowledge that since Mr. Tandabala and Mr. Hang'ombe are retired and if one wants*

*a second copy of a document from Council, the current Council Secretary has to sign.*

*v. The learned Magistrate erred in law and fact by failing to address our prayer that the defendants vacate plot 722, Monze, stop further construction and to pull down, demolish and remove the remaining illegal structures existing on the plot. Hence as registered owners of plot No. 722 Monze, we are entitled to its quiet possession and enjoyment.*

*vi. The learned Magistrate erred in law and fact in relying on the evidence of Mr. Hang'omba and Mr. Tandabala that the documents given to us by Monze District Council did not seem original as the stamp was manipulated and tampered with and that I did not bring evidence to the contrary when it was their duty to show that to the court because even the current Council Secretary said the documents were genuine.*

4.3 The evidence adduced by the witnesses was materially the same as that adduced in the Subordinate Court. The High Court Judge deciphered that the issues to be determined were twofold as follows:

1. *Whether the appellant had sufficiently proved that he has a legitimate claim over plot no. 722.*
2. *Whether the said plot has been encroached upon by the respondents.*

4.4 In determining the first issue, the learned Judge found that plot no. 722 Monze, is a subdivision of plot no. 447 Monze. That it is state land and not customary land. Therefore, it is not amenable to alienation by traditional authorities but by the Commissioner of Lands or the Monze District Council acting as an agent of the Commissioner of Lands.

4.5 That the appellant applied to the Monze District Council for the piece of land on 28<sup>th</sup> September 2000. The Council considered the application and recommended that the Commissioner of Lands offers the plot to the appellant.

4.6 The Court further found that the impugned exhibits GPT2 and GPT4 on which the respondents anchored their opposing testimonies, did not need to be endorsed with a date stamp in order for them to be authentic. That the allegation that the documents were forged was unsupported by expert or



independent evidence from a serving officer of the Monze District Council.

4.7 The High Court further held that the invitation made by the council to the appellant to attend interviews exhibit GPT2, and exhibit GPT4 the receipt for survey charges paid by the appellant, were both corroborated by other documents which were generated by different officers of the Monze District Council on different occasions. The court drew an inference that all the said documents were genuine. It was therefore held that the appellant had followed the correct procedure in acquiring the plot.

4.8 For the reasons mentioned above, the court held that despite having not yet been offered the plot by the Commissioner of Lands, the appellant had locus standi to seek legal redress against adverse claims of land and therefore grounds 2, 3, 4 and 6 of the appeal succeeded. The court made no pronouncements relating to ground 1 of the appeal because according to the Judge, it was general and applied to the rest of the grounds of appeal.

4.9 As regards the second issue, the Judge took the view that it was not enough for the appellant to allege that his land had been encroached upon without providing evidence of the dimensions of the plot which is alleged to have been encroached. That exhibit GPT24 the letter from the Monze District Council Secretary dated 24<sup>th</sup> January, 2019 to Headman Beenzu of Chief Monze's Chieftom on encroachment of the subject plot was not sufficient to rebut the respondents' claim that their developments are on customary land. On this basis, ground 5 of the appeal failed.

4.10 The court finally found that the appellant had failed to adduce sufficient evidence to prove the case. That the trial court was on firm ground when it dismissed the action albeit on a different ground. Thus, the entire appeal was dismissed for lack of merit with costs to the respondents. Leave to appeal was granted.

## **5.0 THE APPEAL BEFORE THIS COURT**

5.1 Dissatisfied with the judgment of the Court below, the appellant has appealed to this Court on four grounds of appeal framed as follows:

- 1. That the learned Judge erred both in law and fact when he held that there was no (survey diagram or) evidence relating to boundary verification.**
- 2. The learned Judge erred both in law and fact when he held that exhibit GPT24 alone is not sufficient in the wake of the respondent's assertion that the impugned developments were made on customary land and not on plot no. 722.**
- 3. The learned Judge erred in law and fact when he awarded costs to the respondents who are the defaulting parties.**
- 4. The learned Judge erred when he dismissed the entire appeal when on the other hand grounds 2, 3, 4 and 6 of the appeal succeeded.**

## **6.0 APPELLANT'S HEADS OF ARGUMENT**

6.1 The appellant filed heads of argument on 23<sup>rd</sup> April, 2021 wherein grounds 1 and 2 were argued together as follows:

6.2 The court below misdirected itself when it held that the appellant had failed to produce a survey diagram for plot No.

772 Monze as the appellant had not yet been offered the plot by the Ministry of Lands. That the appellant only had a recommendation letter from the Monze District Council (GPT14) dated 25<sup>th</sup> November, 2013, which appears at page 88 of the record of appeal.

6.3 The appellant endeavored to show that there was sufficient evidence that the land in issue is state land. Since the lower court found that the plot in issue is indeed state land, the submissions in this regard are irrelevant and will not be recounted in this judgment.

6.4 The appellant further contended that there is no customary land next to the plot. That the respondents did not demonstrate that the land they have developed and occupied was ever allocated to them by the state. We were urged to reverse the lower court's finding of fact that the full extent of the plot in issue was not revealed. Reliance was placed on the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**<sup>1</sup> where it was held that:

***“The appellate court will only reverse findings of fact made by the trial court if it is satisfied that***

*the findings in question were either perverse or made in the absence of evidence or upon a misapprehension of facts.”*

6.5 The appellant thus prayed that the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal be allowed.

6.6 The 3<sup>rd</sup> ground of appeal challenges the award of costs to the respondents. The contention is that although costs are awarded at the discretion of the court, it is an injustice to award costs to defaulting parties, such as the respondents herein, who encroached on state land. That under the circumstances, costs should have been awarded to the appellant. To fortify this argument, the case of **Y.B and F Transport v Supersonic Motors Limited**<sup>2</sup> was cited.

6.7 On ground 4, the appellant argued that the lower court erred in dismissing the entire appeal for lack of merit, despite the fact that grounds 2,3,4 and 6 of the appeal had succeeded. We were therefore urged to allow grounds 3 and 4 of the appeal as well.

## **7.0 RESPONDENT'S HEADS OF ARGUMENT**

- 7.1 In response, the respondents filed their heads of argument on 27<sup>th</sup> May, 2021. On grounds 1 and 2, they submitted inter alia that the lower court did not require the appellant to produce a survey diagram for plot No. 722 Monze.
- 7.2 That the lower court found no proof of encroachment.
- 7.3 Counsel submitted that a survey diagram or report of the location of a given piece of state land can be obtained even when there is no offer letter from the Ministry of Lands contrary to the appellant's argument that a survey diagram could not be obtained as there was no letter of offer.
- 7.4 In order to show that the extent of plot 722 Monze was unclear, counsel proceeded to refer us to the appellant's evidence at page 44 of the record of appeal line 11 to 13: under cross examination, the appellant stated as follows:

***"As to none availability of beacons I said the land was entered into. Yes I pointed to a beacon we referred to but original beacons were removed and surveyors are needed to re-locate the land."***

7.5 Counsel also referred us to the appellant's evidence at page 44 of the record of appeal; lines 23 to 28 that; ***"The open space indicated 722 and the surveyor estimated that along Umfwa road 95 meters. To Salvation Army it is 85 meters and then 35 meters, I said over this they needed a surveyor. Yes council never gave meters. When I went to Lusaka, they gave me approximate meters and the document does not show meters"***.

7.6 We were also referred to the 2<sup>nd</sup> respondent's evidence at page 52 of the record of appeal lines 1 to 8 where he stated inter alia that ***"On the side where it was said we encroached into land for the church we never saw any beacons, we continued checking the land and afterwards we said it can be allocated since it was once a grave yard and it can be occupied."***

7.7 In light of the foregoing, we were urged to dismiss the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal for lack of merit.

7.8 On the 3<sup>rd</sup> ground of appeal, the respondents' counsel stated that the lower court was on firm ground in awarding costs to the respondents. He also cited the case of **Y.B and F**

**Transport v Supersonic Motors Limited** supra and submitted that costs are awarded in the discretion of the court and normally follow the event so that the successful party would, in the absence of factors justifying a special order, be awarded costs of the suit. He submitted further that since the appellant's case was dismissed, the respondents deserved costs.

7.9 As regards ground 4, which attacks the lower court for dismissing the entire appeal notwithstanding that grounds 2,3,4 and 6 of the appeal had succeeded, counsel submitted that the lower court was on *tera firma* as the appellant had failed to prove his claim that his property was encroached on by the respondents. In sum, it was submitted that the entire appeal lacks merit and should be dismissed with costs.

## **8.0 OUR ANALYSIS AND DECISION**

8.1 Having prudently considered the record of appeal and the arguments by the parties, we hasten to state that the main issue to be determined by us is whether the respondents had



encroached upon the appellant's property known as plot no. 722 Monze.

8.2. The appellant's arguments in support of grounds 1 and 2 of the appeal are that the court below erred or misdirected itself by requiring him to adduce evidence in form a of survey diagram for the property in issue. Further, that the court's finding that exhibit GPT24 was insufficient evidence of encroachment of the property was also erroneous. We endorse the lower court's finding that there was no evidence of encroachment. The lower court aptly observed that the appellant did not produce evidence of the dimensions of the plot in issue and therefore the extent of the alleged encroachment was unknown. A survey diagram or report would have assisted the court to determine the question of encroachment. In the absence of such evidence, the court could not speculate and hold that the respondents had encroached upon the said property.

8.3. Exhibit GPT24 is a letter dated 24<sup>th</sup> January, 2019 written by the Council Secretary Mr. Benson N. Lweenje to Headman Beenzu on the talks about illegal developments at Salvation Army. The Headman was urged to inform the people offered

plots in that area to stop developing the same in order to pave way for due process. The writer also claimed that the developers had encroached on plot No. 722, Monze which is on offer.

8.4 We cannot fault the trial Judge for holding that the said exhibit was insufficient to prove the alleged encroachment as it merely states that the land had been encroached on but does indicate the extent of the encroachment. We say so in light of the claims by the respondents that they were in possession of customary land allocated to them by Chief Monze and that they did not intrude on plot 722.

8.5 Further evidence on record is that some of the original beacons on plot no. 722 had been removed and a surveyor was needed to indicate the actual boundaries of the plot. This is seen in the appellant's testimony in cross examination appearing on page 44 of the record of appeal which was referred to by the respondents' counsel:

***“Yes I pointed to a beacon we referred to but original beacons were removed and surveyors are needed to re-locate the land.”***

8.6 To simply claim that a piece of land has been encroached upon is not enough because he who alleges must prove. See the case of **Khalid Mohamed v. The Attorney General**<sup>3</sup>.

8.7 It was open to the appellant to call witnesses from the council to verify the boundaries of the plot in issue.

8.8 It is imperative for us to clarify that the appellant claimed encroachment of a piece of land that is not actually owned by him. He had not been offered the property by the Commissioner of Lands at the time that he commenced the court action in the Subordinate Court. The record does not show that the Commissioner of Lands offered him the plot later. He therefore has no vested interest in that property, or any title at all. However, he has an inchoate interest in the property which was recognized by the lower court. Thus he had the locus standi but had inadequate documentary evidence to prove his case.

8.9 In the premises, we find that both grounds 1 and 2 are bereft of merit.

8.10 We shall proceed to tackle grounds 3 and 4 together as they both relate to the question of whether the costs order was appropriate under the circumstances of the case. The main

remedy the appellant sought in the Subordinate Court was for an eviction order against the respondents on grounds that they had encroached upon his land. Having failed to obtain the desired remedy before that Court, he escalated the matter to the High Court.

8.11 Although the appellant succeeded with the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> grounds of appeal recapped under paragraph 4.2 hereof, the High Court rightly found that he had not proved that the respondents had encroached upon the plot in issue to the required standard and dismissed ground 5. It is our firm view that grounds 5 and 6 were the major grounds of appeal. Under ground 5, he challenged the Subordinate Court's finding that his documents from the Council were forged and under ground 6, he challenged the court for refusing to order that the respondents stop developing the land, their buildings be demolished and they be evicted. These two grounds were related. Under the circumstances, the lower court was on firm ground to dismiss the appeal and grant costs to the respondents as the appeal had substantially failed. We are fortified by the legal principle that as a general rule costs follow the event and

costs are awarded at the discretion of the court. Further, that the discretion must be exercised judiciously. (See the case of **Y.B and F. Transport Supersonic Motors**).

8.12 We find no reason to fault the lower court for its award of costs, as a result, the 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal fail.

## 9.0 CONCLUSION

9.1 In the final analysis, this appeal is bereft of merit and it is dismissed with costs to the respondents. The costs shall be taxed in default of agreement between the parties.



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C.K. Makungu

**COURT OF APPEAL JUDGE**



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P.C.M. Ngulube

**COURT OF APPEAL JUDGE**



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N.A. Sharpe-Phiri

**COURT OF APPEAL JUDGE**