IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 08/2017**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

EMELDAH CHILANGA **APPELLANT**

AND

ISAAC SIMUTE **1ST RESPONDENT**

NDOLA CITY COUNCIL **2ND RESPONDENT**

Coram: Hamaundu, Wood and Mutuna JJS.

On 12th December, 2019 and 9th January, 2020.

For the Appellant : *No Appearance*

For the 1st Respondent : *In Person*

For the 2nd respondent : *Mrs. M. D. Phiri – In House Counsel*

JUDGMENT

Wood, JS, delivered the judgment of the Court.

Cases referred to:

1. *Hildah Ngosi v The Attorney General and Lutheran Mission SCZ Judgment No. 18/2015.*

2. *Shadrick Wamusula Simumba v Juma Banda and Lusaka City Council Appeal No. 12 of 2013.*

Legislation referred to:

1. *The Housing (Statutory Improvement Areas) Act Cap 194 of the Laws of Zambia.*
2. *The Lands Act Cap 184 of the Laws of Zambia*

This is an appeal against a decision of the High Court sitting as an appellate court in a matter involving competing interests to a piece of land.

The appellant commenced an action against the respondents in the Subordinate Court of the First Class at Ndola claiming possession of Plot No. 1983 Pamodzi, Ndola. The Magistrate dismissed her claim. She appealed to the High Court at Ndola which also dismissed her appeal. She has now appealed to this court.

The background leading to this appeal is that the appellant purchased Plot No. 1983 Pamodzi, Ndola from a Mr. Singambwa in November, 2008 and obtained a certificate of title from the 2nd respondent in June, 2009. The 2nd respondent repossessed Plot No.

1983 Pamodzi, Ndola on the ground that the appellant had failed to develop it. A notice of repossession was issued on 3rd August, 2012 asking the appellant to show cause why the plot should not be repossessed within one month. By letter dated 3rd October, 2012, the 2nd respondent offered Plot No. 1983 Pamodzi, Ndola to the 1st respondent. The 1st respondent then commenced construction by erecting a boundary wall.

When the appellant became aware of the activities on the plot, she moved onto the plot and erected a wooden cottage and sunk a well. She also commenced legal proceedings against the 1st appellant in the Subordinate Court and later joined the 2nd respondent to the proceedings.

The first argument in the court below related to the length of notice given by the 2nd respondent to the appellant. The appellant had argued that she was entitled to three months notice in accordance with section 13 of the Lands Act Cap 184 of the Laws of Zambia and not the one month notice she received from the 2nd respondent. The learned Judge rejected this argument on the

ground that section 13 of the Lands Act did not apply as the land in issue was under the Housing (Statutory Improvement Areas) Act, Cap 194 of the Laws of Zambia and was granted by the council. The learned Judge also rejected an argument in connection with service of the notice to repossess on the ground that there was evidence of service of the notice on the appellant. Lastly, the learned Judge found that the appellant had not developed the plot at the time the 2nd respondent had issued and served the notice to re-possess the plot. She found that the evidence showed that the appellant started to develop the plot after it had been allocated to the 1st respondent. She accordingly dismissed the appellant's appeal.

The appellant has now appealed to this court on essentially the same grounds as follows:

1) **GROUND ONE**

That the Judge below erred in law and fact when she found that sufficient notice of repossession was given to the appellant by accepting the oral evidence of the Senior Administrative Officer of the 2nd respondent which was not supported by any evidence.

2) **GROUND TWO**

That the Judge below erred in law and fact when she failed to consider the legality of the procedure for the purported re-entry in this matter.

3) **GROUND THREE**

That the learned Judge erred infact by finding that the appellant failed to develop Plot No. 1983 Pamodzi Ndola.

The first and second grounds of appeal were argued together. The appellant has contended that the purported re-possession was null and void as the procedure was not properly followed. The appellant further contended that the notice of re-possession was never served on the appellant to allow her an opportunity to make representations in her defence.

To support her argument, the appellant has relied on the 1st respondent's testimony who stated that *"The letter must have reached the intended person ."* and later on added that he did not *"... have a notice to re-enter after repossession was decided in this matter."*

In opposing the appeal, the 1st respondent argued that a letter dated 3rd August, 2012 for the repossession of Stand No. 1983 Pamodzi, Ndola was served on the appellant's advocates. This letter

was produced in the Subordinate Court. The appellant cannot therefore argue that the repossession was done orally. He also argued that the pictorial evidence showed that there was no development carried out on the plot at the time it was allocated to him by the 2nd respondent.

The 2nd respondent opposed the appeal on the ground that the appellant had breached the terms of the letter of offer by not developing the plot within the time of 18 months stipulated in the letter of offer. The plot was only repossessed four years after the appellant had acquired it. The notice of repossession was personally received by the appellant but she ignored to respond to it.

Further, the certificate of title which was issued to the appellant under the Housing (Statutory and Improvement Areas) Act has since been cancelled. In any event, the provisions of the Lands and Deeds Registry Act do not apply to any piece or parcel of land to which the Housing (Statutory and Improvement Areas) Act applies.

The 2nd respondent supported the 1st respondent's argument that the appellant had failed to develop the plot as she only attempted to do so after the plot had been repossessed. The wooden structure that was erected on the plot was an unauthorized structure which was contrary to section 40 (1) of the Housing (Statutory and Improvement Areas) Act which provides that:

> *"Every building erected and every improvement effected on any land to which this Act applies shall be in accordance with specifications approved by the Council in whose jurisdiction such land is situated"*

To summarize the 2nd respondent argument the appeal should be dismissed on the ground that notice was given, the appellant did not effect development and she breached the terms of the offer.

There is no dispute that the appellant only started developing the plot after it had been allocated to the 1st respondent. The pictorial evidence clearly points to the fact that there was no development on the property prior to the notice to repossess. The appellant only attempted to develop the plot after it had been offered to the 1st respondent. There is also no dispute that no

planning permission was ever granted to the 1st appellant to erect the wooden structure.

The issue however which is at the core of this appeal is whether or not there is proof of service of any notice to repossess.

It is quite evident from the record itself that even the respondent's own witness was not certain of the service of the notice when he stated that *"the letter must have reached the intended person"* and also when he stated that he did not have a notice to re-possess after re-possession was decided in the matter. Counsel for the 2nd respondent quite rightly concluded at the hearing of this appeal that service of the notice to repossess was uncertain. This testimony in our view points to the fact that service of the notice of repossession was far from certain. The importance of proof of service of a notice of re-entry whether under the Lands Act, or the Housing (Statutory Improvement Areas) Act cannot be overemphasized. It is imperative that notice is given and it is imperative that there is proof of service before a party is dispossessed of property. We emphasized this point in the case of *Hildah Ngosi v The Attorney General and Lutheran Mission*[1], when

we held that there was need to serve a notice on a lessee and that there must be proof of such service before the lessor can re-enter or repossess the property failing which the notice to re-enter or repossess the property will be invalid. This was also what we held in the earlier case of *Shadrick Wamusula Simumba v Juma Banda and Lusaka City Council*[2]. We, therefore, agree with appellant's argument that the record of appeal does not show that the appellant was indeed served with a notice of repossession. The evidence on record suggests that the witness was not even sure whether the appellant had been served with a notice of re-entry. Had that been the case he would not have assumed that the letter must have reached the intended person and the 2nd respondent would have proof in the form of a copy of a notice to re-possess on its file duly endorsed with proof service on the lessee.

We find no merit in the third ground of appeal in view of the pictorial evidence which supports the argument that the appellant had not developed the plot. This does not however negate the fact that the appellant was still entitled to be served with a notice to repossess.

For the foregoing reasons, we allow this appeal and set aside the decision of the lower courts. The parties shall bear their respective costs.

E.M. HAMAUNDU
SUPREME COURT JUDGE

A.M.WOOD
SUPREME COURT JUDGE

N.K. MUTUNA
SUPREME COURT JUDGE