

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA**

APPEAL 170/2018

(Civil Jurisdiction)

BETWEEN:

-C- OF ZAAI'
F AP

JUDITH NSOFWA

1ST APPELLANT

MICHAEL MULENGA

2ND APPELLANT

VS

-2- fiOX 50cJL.

AGNESS MULENGA

RESPONDENT

CORAM: Chisanga JP, Majula and Ngulube JJA

On 21/08/2019, 20/11/2019, 26/02/2020 and 26/08/2020

For the Appellants

In Person

For the Respondent

In Person

JUDGMENT

MAJULA JA, delivered the judgment of the court.

Cases referred to:

1. *Base Chemicals Limited vs Attorney General SCJ No. 9 of 2011.*
2. *Honorius Maurice Chiuufya vs Chrispin Haluwa Kangunda (S. C.Z. Judgment No. 29 OF 7999).*

1.0 Introduction

1.1. This appeal emanates from a judgment of the High court (Mrs Justice C.B. Maka-Phiri) delivered on 10th May 2018 in which all the appellants claims were dismissed.

2.0 Background

2.1. The background to this matter is that the appellants commenced an action in the court below seeking, as their main relief, an order for the cancellation of a certificate of title issued to the respondent, relating to house number 1985 Kamitondo township of Kitwe. The allegation was that the same was obtained fraudulently and without following the correct procedure.

3.0 The Evidence in The Court Below

3.1 The case for the appellants was that Nelson Kwalila and Luciya Mwenya, the grandparents to Judith Nsofwa, were allocated house number 1985 Kamitondo by the Kitwe City Council in 1956. Nelson Kwalila was the registered tenant until his death in 1983. His widow, Luciya Mwenya continued to live at the said house with her daughter Brenda Bwalya who was accommodated in a cottage within the premises.

3.2 On 23rd May 1991, Adella Mwenya Nelson applied to the Kitwe City Council to have Brenda Bwalya as the new registered tenant for the property in issue. When Brenda Bwalya died in 1993, she left 7 children and a husband by the name of Mr. Raphael Matipa. The respondent got married to Mr. Raphael Matipa in 1996.

3.3 On 19th November 1996, the respondent wrote a letter to Kitwe City Council requesting for a change of tenancy on the basis that she was the biological daughter of the late Nelson Kwalila and the biological sister of the late Brenda Mwenya Bwalya. The

respondent was subsequently offered to buy the house by Kitwe City Council. The appellants contended that the respondent was not entitled to purchase the house as there was no consent from family members.

3.4 It was the appellants' assertion that the late Luciya Mwenya who occupied the house from 1956 to 2013 only became aware that the house was offered to the respondent in 2007. This was evidenced by a caveat that she placed on the property in 2007.

3.5 The case for the respondent in the court below was that the change of tenancy was done with the knowledge of the late Mwenya Nelson Andella who was the respondent's paternal Aunt. This was after the late Mwenya Nelson Andella married off the respondent to Mr. Raphael Matipa who was Brenda Mwenya's husband. In 1996, she was offered to purchase the house by Kitwe City Council with the blessing of the late Mwenya Nelson Andella.

4.0. The arguments in the Court Below

4.1. In the court below it was submitted on behalf of the appellant that the house in issue should not have been registered in the name of the respondent considering that it was a family property. It was argued further that the respondent did not comply with the procedure on acquisition of property from council as well as Government's directive on the sale of council houses which provided that; *'where a tenant dies, a spouse, son or daughter shall automatically be deemed as tenant'*. Counsel

pointed out that the respondent is not a daughter of the person who was a tenant hence the change of tenancy was irregular.

4.2. On behalf of the respondent it was submitted that although the appellant was alleging fraud on the part of the respondent, the same was not pleaded in the originating process. Counsel pointed out that the allegation of fraud was also not proved to a standard higher than a simple balance of probability. For this ***preposition the case of Base Chemicals Limited vs Attorney General***' was called in aid.

4.3 It was further argued that there was no illegality in the change of tenancy in that it was done with the blessings of Mwenya Nelson Andella. That by getting married to Mr. Rapheal Matipa the respondent took over the responsibilities of Brenda Bwalya's children. That in any event, Judith Nsofwa was neither a child nor a beneficiary of Brenda Bwalya Luciya Mwenya's estate.

Dispute

Was the change of tenancy and subsequent purchase done through fraud?

6.0. The findings of facts by the trial Judge

6.1. After analysing the evidence before her, the learned trial Judge found that Judith Nsofwa and Michael Mulenga were co-administrators of the estate of the late Mwenya Andella Nelson. This was supported by an order of appointment of administrator dated 22nd February, 2013.

is

6.2 The Court further found that Brenda Luciya Mwenya Bwalya was daughter of Nelson Kwalila who died 1983 and Mwenya Nelson Andella who died in 2013. That Nelson Kwalila was the registered tenant from 1956 to 1983 of the house in issue, while Mwenya Nelson Andella was not a joint tenant.

6.3 In 1991 Mwenya Nelson Andella surrendered the house in issue to Brenda Mwenya Luciya Bwalya via a letter to Kitwe City Council. The said Brenda Mwenya Bwalya Luciya subsequently became the registered tenant of the property in issue.

6.4 The court below was of the view that Mwenya Nelson Andella was never a registered tenant at plot 1985 Kamutondo Kitwe up until her death in 2013. Brenda Bwalya Luciya Mwenya died in 1995.

6.5 The Court had no difficulty in finding that in 1996, there was a Presidential decree to sale council houses and on 19th November 1996 an application was made for¹ change of tenancy from Brenda Bwalya Luciya Mwenya to the Respondent. On 25th November 1996 the respondent Agness Mulenga applied to purchase the house in issue and she purchased the property and became the registered owner.

7.0 **The decision of the court below**

7.1 The long and short of the lower court's decision was that the appellants claim to have the property registered in her name and that of Remmy Mwenya as joint tenants was devoid of merit on account of the fact that the late Mwenya Nelson Andella whose

estate they are administering was never a registered tenant for the house in issue.

7.2 She dismissed the appellants claim that the respondent dishonestly purchased the house. Regarding whether the offer of the house by Kitwe City Council was irregular, she was of the view that the respondent did not hold the property in trust for the children. The respondent was granted vacant possession of the said house. The trial Judge further held that the forceful takeover of the house by the appellants was misconceived and unlawful.

8.0. **Grounds of Appeal**

1. In the Notice of Appeal there were 5 grounds. Basically, the appellants are aggrieved by the findings that Mwenya Nelson Andella was not the registered tenant and therefore not entitled to purchase the house.
2. They are also challenging findings that Mwenya Nelson Andella sanctioned the change of tenancy and subsequent purchase.
3. The ^{3rd} ground was that the Judge should have ordered joinder of the Kitwe City Council.
4. The ^{4th} ground is basically adducing evidence regarding whether or not the respondent was the biological sister to Brenda Mwenya Bwalya Luciya.
5. The ^{5th} ground is attacking the trial Judge's finding that no property rights evolved to Mwenya Nelson Andella's estate to be administered by the administrators.

ft Q. Memorandum of Appeal

1. In the memorandum of appeal the ^{1st} ground is basically that the appellant is not a co-administrator of the estate of the late Luciya Mwenya and that the late Brenda Mwenya Bwalya was one and the same person as Luciya Mwenya.
2. In the ^{2nd} ground they are challenging the fact that Mwenya Nelson Andella sanctioned the change of tenancy and subsequent purchase of the house by the respondent.
3. That the house does not belong to the estate of Brenda Luciya Bwalya. They contend that the house belonged to Nelson Mwenya Andella and the children and that they are the ones entitled to purchase.
4. In the ^{3rd} ground they are contending that the respondent was never appointed as administrator of Brenda Mwenya Bwalya and was never a sitting tenant of the house in issue. They are alleging that the respondent dishonestly acquired the property in issue.
5. The ^{4th} ground is also challenging the acquisition of title by the Respondent which they have repeatedly stated was fraudulently obtained.
6. In the 5th ground it is contended that the court below erred in law and fact when she relied on two letters dated 23rd May 1991 and 19th November 1996 in arriving at her decision.

7. In the 6th ground, they take issue with the finding that Mwenya Nelson Andella was never the registered tenant of the house in issue.
8. That the learned trial Judge erred in law and fact when she found that the late Mwenya Nelson Andella forfeited her right as surviving spouse to be deemed as legal tenant of the said house and opting for her daughter to take up the mantle.
9. The 8th ground is akin to a submission. In this ground the appellant again alleges dishonesty in the manner the tenancy of the property was acquired. That the respondent fraudulently obtained title and that the Judge erred in law and fact by failing to cancel the title to the appellant.

10. Appellant's Arguments

- 10.1 The gist of the submission by the appellant was that in order for the respondent to acquire proper title for the house in issue, she was supposed to prove that she was a daughter of a sitting tenant. For this proposition the appellant referred us to paragraph 11 of the Circular No. 2 of 1996 which provided that in the event of death of a tenant then the spouse or child of 18 years and above shall automatically become the legal tenant of the house. It was contended that the respondent, by not being an heir to the tenant of the property, fraudulently acquired ownership of the property.
- 10.2. It was further argued that the respondent acted dishonestly by not disclosing the actual relationship she had to the deceased

sitting tenant. We were referred to several authorities including ***the case of Honorius Maurice Chilufya vs Chrispin Haluwa Kangunda***² for the principle that fraud vitiates a certificate of title. We were accordingly urged to allow the appeal and set aside the judgment of the court below.

11. Respondent's Arguments

11.1 The respondeot did not file any heads of argument in response and at the hedring of the appeal, she entirely relied on the record of appeal.

11.2 On their part, the appellants also intimated that they would rely entirely on the heads of argument filed in support of the appeal.

12. Our Analysis

Looking at the claim that was before the court, the claim required leading of oral evidence in view of the disputes that had arisen on the originating process. The disputes were whether Agness Mulenga was properly registered as tenant of the property and whether or not as a result it could be sold to her. The allegation that the property was dishonestly registered in her name could not be resolved on affidavit evidence. This is a matter which should have been commenced by way of writ of summons so that oral evidence could be received from the parties.

12.1 The findings of fact made on contentious affidavit evidence by the trial Judge cannot stand. The trial Court was obligated, in light of contentious averments, to receive oral evidence, as she

could not resolve the issue on the same documents that were alleged to have originated from dishonest conduct. We thus allow the appeal and set aside the judgment of the court. We instead direct that the matter be dealt with as though it were commenced by writ of summons.

12.2 The parties may be directed to file amended pleadings. The matter is sent to the High Court to another Judge who will receive oral evidence from the parties on the issues.

12.3 We make no order as to costs in this court.

F.M. Chisanga
JUDGE PRESIDENT

|\ |
P.C.M. Ngulube
COURT OF APPEAL JUDGE

B. ajula
COURT OF APPEAL JUDGE