

THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 32/2017

BETWEEN:



ANGELA MUTABALE

APPELLANT

(Administratrix of the estate of the late
Jonas Mutabale)

AND

PASCAL MWANGO

1ST RESPONDENT

ATTORNEY GENERAL

2ND RESPONDENT

CORAM: Mambilima, CJ, Kajimanga and Kabuka JJS

On 11th August 2020 and 15th April 2021

For the Appellant:

Mr. C. M. Mukonka, Messrs Caristo
Mukonka Legal Practitioners

For the 1st Respondent:

Mr. C. M. Chilufya, Messrs D M K Legal
Practitioners

For the 2nd Respondent:

Ms D. M. Mwewa, Principal State Advocate

J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Cases referred to:

1. *Anti-Corruption Commission v Barnet Development Corporation* (2008) Z.R. 69
2. *Sablehand Zambia Limited v Zambia Revenue Authority* (2006) Z.R. 109
3. *Nkhata & Others v Attorney General* (1966) Z.R. 124

4. *John Chipawa Sakulanda v Ramji Bhimji Men and Khuti & Attorney General – Selected Judgment No. 20/2019*
5. *Edward Jack Shamwana & Other v The People (1985) Z.R. 41*
6. *Sailas Ngowani & Others v Flamingo Farm Limited – SCJ No. 5/2019*
7. *Still Water Farms Limited v Mpongwe District Council & Others – SCZ Appeal No. 90 of 2001*

Legislation referred to:

Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia

Introduction

- [1] This is an appeal by Jonas Matabale (“the deceased”) who was the plaintiff in the court below against the judgment of the High Court (Chembe, J), dismissing the deceased’s claims against the first respondent. By a consent order dated 11th August 2020 we granted an amendment to the record of appeal by substituting the deceased with Angela Mutabale, the Administratrix of the deceased’s estate.
- [2] The appeal discusses the procedures for buying a government pool house and the consequences of acquiring a certificate of title relating to such a house without following the procedures.

Background

- [3] The facts giving rise to this appeal are these. The deceased was employed by the Zambia Police Service in 1968 and he worked

until 1998 when he retired having attained the statutory retirement age. During the course of his employment, he had been allocated House No. 45 Chisokeni Avenue (Stand 1382) Luanshya ("the house"). In 1996 the Government decided to sell its pool houses and the deceased applied to the local housing committee to purchase the house he occupied. His application was rejected at a meeting held on 14th May 1999 on the basis that the house he occupied was classified as an institutional house.

- [4] The first respondent who was also employed by the Zambia Police Service was allocated the house after the deceased had been evicted. He took possession of the house on 13th May 2006.
- [5] In 2011 the Government decided to sell some of its institutional houses to sitting tenants after they had been declassified into pool houses. During the same period, the deceased was issued with an offer letter relating to the purchase of the house at the price of K5,760,000.00 (unrebased) by the Ministry of Lands. At the time the letter of offer was issued, the plaintiff had been in retirement for about 14 years and was not in occupation of

the house. The deceased paid the purchase price on 12th November 2012 and obtained a certificate of title in 2014.

- [6] The first respondent applied to purchase the house in dispute in 2011 and was given an allocation slip on 11th December 2012 following the recommendation by the house committee that he be offered the house to purchase. Whilst his application was being considered, the deceased commenced an action in the Subordinate Court. The matter was subsequently transferred to the High Court.

Pleadings in the court below

- [7] The deceased's claims in the court below were for a declaratory order that the deceased was the rightful and legal owner of the house; an order for the first respondent to yield vacant possession and surrender the house; an order restraining the first respondent and or his agents from interfering with the deceased's occupancy and use of the house; and costs.
- [8] The basis of the claims was that the deceased was a retired police officer who had been in employment when the Government made the decision to sell its houses to sitting tenants. On 23rd August 2012 the Government offered to sell

him the house. He accepted the offer and upon payment of the full purchase price he was issued with a certificate of title number 300180 in respect of the said house. Before he obtained the certificate of title, the first respondent with the help of some police officers illegally evicted him from the house and attempts to regain possession failed.

- [9] In his defence, the first respondent averred that at the time of sale of the house to the deceased, the latter was not a sitting tenant as he had been paid his terminal benefits. The deceased's application to purchase the house was rejected in 1999 as it was classified as an institutional house and therefore not available for sale. The offer to sell the house to the deceased was made in error and had since been revoked. Further, that the first respondent was offered the house on 11th December 2012 after a further Government decision to sell some institutional houses and he was issued with an allocation slip. He denied that the deceased was the lawful owner of the house.
- [10] In his counterclaim, the first respondent sought a declaratory order that he was the bonafide sitting tenant of the house and was entitled to purchase it. He also sought an order for the

cancellation of the certificate of title number 300180 issued to the deceased in respect of the house.

- [11] The second respondent denied that the deceased was entitled to any of the claims sought. It was averred that the deceased retired on 1st November 1998 and vacated the house on 13th July 2006 after being paid all his terminal benefits. The offer to sell the house to the deceased was made in error and a recommendation was made to revoke it on the ground that he did not follow proper procedures. The deceased was evicted from the house by the Zambia Police for purposes of allocating it to a serving officer.

Evidence of the parties in the court below

- [12] The deceased's evidence was that he had served as a police officer from 1968 until 1998 when he retired. His last working station was Luanshya where he was allocated the house in dispute which he occupied for 20 years. Following the Government's decision in 1996 to sell its houses to sitting tenants, he was invited to purchase the house. He made the necessary application and the house was evaluated. Whilst he was away, he was evicted and the house was allocated to the

first respondent. He later went to the Ministry of Works and Supply in Lusaka where he was offered the house as a sitting tenant. He paid the full purchase price and subsequently obtained a certificate of title in April 2014.

[13] The deceased also stated that he continued to occupy the house after being paid his dues on the basis of the offer letter. He admitted that at the time of his eviction, he had retired; the house was not listed as one of the houses which was earmarked for sale; his application to buy the house was rejected in 1999 by the committee tasked to look into the sale of Government houses; and that he had refused to move out of the house because he had been given a letter of offer. He was unable to explain why the offer letter was made to him in 2012 when he had applied in 1998. He confirmed that he received the letter of offer from the Ministry of Lands and that no other government institution was involved in considering his application.

[14] The first respondent's evidence was that he was a Chief Inspector in the Zambia Police Service and the house was allocated to him by virtue of his employment after the deceased had been evicted. In 2011, following the presidential directive

that institutional houses be sold to sitting tenants, he applied to purchase the house through the Luanshya Housing Committee and his application was successful. He was entitled to purchase the house because he was the lawful owner having received an allocation slip. At the time the deceased applied to purchase the house in 1998 he was a sitting tenant and still in employment but his application was rejected because it was classified as an institutional house for the Ministry of Home Affairs. When the second directive was made in 2011, the deceased had retired and was no longer a sitting tenant. He had also been paid all his terminal benefits and did not even apply to purchase the house. The first respondent admitted that he was given an allocation slip in 2012 but that he had been in occupation of the house since 2006. He had not received a formal letter of offer to purchase the house and that he had not paid the purchase price. He finally stated that the Permanent Secretary had recommended that the offer which was made to the deceased be revoked.

- [15] The first respondent's witness was a District Works Supervisor in the Ministry of Works and Supply. His testimony was that

he was the Secretary of Luanshya Pool Housing Committee and by virtue of that position it came to his attention in 2014 that the house had been sold to the deceased. The deceased had taken documents to the District Administrator for Luanshya claiming that he had purchased the house and a query was raised regarding the purchase price which was much lower than the going price for similar houses which were valued at about K240,000.00. Questions were asked about how he acquired his certificate of title. A meeting was convened by the housing committee at which the purchase of the house was discussed. A decision was made to recommend that the offer made to the deceased by the Ministry of Lands be revoked as he had not followed the proper procedures. A letter to that effect was written to the Permanent Secretary for Copperbelt who had agreed that the offer should be revoked.

- [16] The witness explained the following procedure which is followed before a letter of offer is issued. The application is considered by the Housing Committee which comprises all heads of department in [relevant] Government offices. An allocation slip is issued to a successful applicant and the matter is referred to

the Permanent Secretary for Copperbelt who in turn writes to the Permanent Secretary, Ministry of Works and Supply. The Permanent Secretary, Ministry of Works and Supply refers the matter to the Permanent Secretary, Local Government and National Housing to value and confirm availability. Thereafter, the matter goes to the appropriate ministry which makes a recommendation to the Ministry of Lands to issue a letter of offer. The letter of offer when issued is copied to all five departments. The Ministry of Lands cannot issue an offer letter without a recommendation from the relevant ministry and can only do so if underhand methods are used.

- [17] The second respondent opted not to call any witnesses as they felt that their defence was adequately covered by the first respondent and his witness.

Consideration of the matter by the High Court

- [18] According to the trial judge, the issue which fell for determination was whether the deceased was the rightful and legal owner of the property. That in determining this issue, the questions to be addressed were whether the deceased was eligible to purchase the property and whether he followed the

laid down procedure in acquiring the property. After considering the evidence, the trial judge found that the deceased was not eligible to purchase the house because it was classified as an institutional house and could therefore not be sold before being declassified; he had been paid all his retirement benefits; and was no longer a sitting tenant. She consequently found that there was no basis on which she could issue a declaratory order that the deceased was the rightful and legal owner of the property or grant any other reliefs sought. She further ordered that the certificate of title issued to the deceased be cancelled as it was obtained irregularly. The trial judge accordingly dismissed the deceased's claim with costs.

The grounds of appeal to this Court

[19] As expected, the deceased was not happy with the lower court's decision and he appealed to this court on the following four grounds:

[19.1] The trial court erred in law and fact when it refused to declare the plaintiff as the rightful owner of the house as the basis of the refusal was not supported by law and the evidence adduced during trial.

- [19.2] The trial court erred in law when it held that the house was not for sale and therefore, the plaintiff was not eligible to purchase [it] as evidence adduced in court clearly showed that the house was available for sale as early as 7th April 1998.
- [19.3] The findings of the trial court were perverse and made in the absence of any relevant evidence and on misapprehension of the facts and were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make.
- [19.4] The trial court erred in law by ordering that the certificate of title in respect of Stand No. 1382 Luanshya be cancelled as there was no evidence of fraud or impropriety in the acquisition of the said certificate of title.

The arguments presented by the parties

- [20] The appellant argued grounds one and three together. Mr. Mukonka, the learned counsel for the appellant submitted in the written heads of argument, that section 33 of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia provides

that a certificate of title is conclusive evidence of ownership of land by the holder and that it can only be cancelled in cases of fraud or impropriety in its acquisition. Reliance was also placed on the case of *Anti-Corruption Commission v Barnet Development Corporation Limited*¹. As at the time of trial, counsel contended that, the deceased was the holder of certificate of title number 300180 in respect of the house. The trial judge should therefore have declared him as the rightful owner of the property in line with the provisions of section 33 of the Lands and Deeds Registry Act and the *Anti-Corruption Commission*¹ case. The cancellation of the deceased's certificate of title by the lower court was therefore done in error.

- [21] It was also counsel's submission that in arriving at the decision to cancel the deceased's certificate of title, the lower court noted that the certificate of title issued to the deceased was irregularly obtained. However, the trial judge did not go further to establish how these irregularities in obtaining the certificate of title amounted to an act of fraud or impropriety for the certificate of title to be cancelled as required by section 34 of the Lands and Deeds Registry Act. According to counsel, there was

no evidence showing that the deceased engaged in fraudulent activities or impropriety in the acquisition of his title deed. Further, that if the respondents were alleging fraud, they should have clearly and distinctly pleaded it, led evidence and proved the allegation at the trial. The case of *Sablehand Zambia Limited v Zambia Revenue Authority*² was cited in support of this argument. Counsel accordingly urged us to reverse the lower court's judgment relating to the cancellation of the certificate of title.

- [22] Grounds two and four were also argued together. It was submitted that the trial judge rightly observed that at the time the decision to sell government houses was made and implemented in 1996, the deceased was a sitting tenant. However, she fell into error by holding that the deceased was not eligible to purchase the house as it was [not] categorized as a pool house available for sale. According to counsel, this finding was wrong as the evidence before the lower court clearly indicated that the house was a government pool house available for sale. He referred us to letters dated 7th April 1998 and 13th October 1998 in the record of appeal, written by the Officer-in-

Charge Ministry of Works, Luanshya which described the house as a government pool house. It was therefore submitted that the trial judge's finding that the property was an institutional house and could not be sold to the deceased was not supported by evidence and should be disturbed by this court.

[23] In response to grounds one and three, Mr. Chilufya, the learned counsel for the first respondent submitted in the respondent's heads of argument, after extensively quoting excerpts from the judgment of the trial judge, that there was sufficient evidence demonstrating impropriety in the manner the certificate of title of the house was obtained. He argued that the deceased was not privy to the detailed processes because as evidence on record showed, his application to purchase the house was rejected in 1999 on the basis that at the time he attempted to purchase the house it was an institutional house. The deceased was also not privy to the detailed process for acquisition of the house because he did not follow the same processes as the first respondent. The procedure for acquisition of government houses, counsel argued, was set out in paragraph 3.1 of the Handbook on Civil Service Home Ownership scheme and

Circular No. 12 of 1996.

- [24] It was also contended that at the time the house was being offered for sale, the deceased had retired and paid his terminal benefits rendering him ineligible to purchase the house. Further, the deceased was not a sitting tenant. It was further argued that the first respondent never alleged fraud in the deceased's acquisition of the certificate of title but impropriety. We were therefore urged to dismiss these grounds of appeal.
- [25] In responding to grounds two and four, counsel began by citing the case of *Nkhata and Others v Attorney General*³ on the principle that an appellate court will only disturb the findings made by a trial court where such findings are perverse and not supported by the law. According to counsel, there was sufficient evidence adduced in the court below to warrant the court's finding that the deceased was not eligible to purchase the house. In analyzing the whole evidence, counsel contended, the trial court took into account and considered the evidence from the standpoint of whether the deceased's right to purchase the house depended on whether the house was categorized as a pool house and secondly, whether the deceased was eligible in terms

of paragraph 2(2) of Circular No. 12 of 1996 ("Circular No. 12"). He submitted that the letters dated 7th April 1998 and 13th October 1998 describing the houses as pool houses relied on by the deceased make no reference to the house in issue. We were accordingly urged to also dismiss these grounds.

[26] In response to grounds one, two and four which were argued together, Ms. Mwewa submitted in the second respondent's heads of argument, that the trial court was on firm ground when it declined to declare that the deceased was the rightful owner of the house and also by holding that he was not eligible to purchase the house as these findings were supported by the evidence on record and the law. The learned counsel contended that the starting point before considering the eligibility of the deceased to purchase the house or his alleged ownership thereof, should be to consider the legal status of the house vis-à-vis Circular No. 12. We were referred to paragraph 2 of the circular which states:

"2. In order to implement these directives, this office has published a Handbook on the Civil Service Home Ownership Scheme. The Handbook outlines in detail the procedures to

be followed by all applicants and supervising officers on matters relating to this Home Ownership Scheme.”

[27] It was submitted that it was imperative that the guidelines and procedures espoused in the Civil Service Home Ownership Scheme (“Handbook”) are considered in deciding this matter, particularly the legal status of the house at the time when the deceased was in occupation up until he vacated it. Although the Handbook was not produced in the lower court, counsel argued, it must be read in tandem with Circular No. 12. In this regard we were invited to take judicial notice of the records in our recent case on the issue of sale of government pool houses namely, *John Chipawa Sakulanda v Ramji Bhimji Menand Khuti & Attorney General*⁴ where the Handbook was part of the record. The case of *Edward Jack Shamwana & Others v The People*⁵ was cited on the principle that a judge has power to look at records of another court and take judicial notice of their contents. We were then referred to our judgment in the *Sakulanda* case⁴ (supra) where we stated at paragraph 72 that:

“It is against the background evidence, that we will now consider clauses 1.2 (b) and 2.1 (e), which are the parts of the Government circular on the implementation of the Civil Service Home Ownership

Scheme, relevant to determining the issues in this appeal. These clauses read as follows:

1.2 (b) Institutional Houses to be Sold

Institutional houses purchased or constructed by an institution using Government/Donor funds and are located within ordinary residential areas but not ancillary to the operations of the institution concerned will be sold...."

Page 1 of the Handbook under 1.0 describes the categories of houses the Government decided to sell. Clause 1.2 provides as follows:

"Institutional Houses

These are dwelling houses which are attached by use, construction and/or location, to a specialised institution, such as hospitals, schools, colleges, police, camps, research stations, military barracks, road camps, immigration and custom posts and used or occupied by an officer of such institution for the benefit and convenience of the institution.

Institutional houses not be sold

Institutional houses described above will not be sold because this would deprive user institutions of the facility for attracting and retaining qualified staff at the station where they are serving"

- [28] Counsel submitted that the 11th August 1998 letter proves that the contents of the 7th April 1998 letter were not accurate as it confirms that there was uncertainty as to the status of the Luanshya houses being occupied by the police officers including the subject house more so, that in the letter dated 7th April 1998

the author indicated that his office had no objection unless to the contrary. The 'contrary', according to counsel, being that the houses were institutional houses and not available for sale. It appeared, counsel contended, that there was still uncertainty as to the status of the house because in the letter dated 8th February 2013 addressed to the Permanent Secretary, Ministry of Home Affairs by the Permanent Secretary, Ministry of Transport, Works and Communication then, appearing in the record of appeal it was stated that: *"In view of the above I would like to request your office in consultation with the Commanding Officer, Luanshya Police Division to ascertain the status of this matter as to whether this house is still an institutional one belonging to the police or it is a pool house"*. The Permanent Secretary, Ministry of Home Affairs asked the same question to the Inspector General of Police in a letter dated 13th February 2013 in the record of appeal. The letter from the Deputy Officer commanding in the record of appeal dated 14th March 2013 shows that the house was not a government pool house.

[29] It was counsel's argument that at the time the deceased was living in the house, it was an institutional house and not

available for sale to the sitting tenant until authority was sought to begin the declassification process. Therefore, as a direct consequence of this, counsel contended, the deceased could not reasonably have been declared as the rightful owner of the house.

- [30] Regarding the eligibility to purchase a government house such as the one in issue, counsel submitted that this was provided for under Circular No. 12 appearing in the record of appeal which states in clause 2.2 as follows:

"2.2 Eligibility to purchase government pool house

(a) Eligibility

In the process of identifying civil servants who are bona fide sitting tenants, the following criteria shall be used:-

- (i) a civil servant who retired or was retrenched but was not paid his/her terminal benefits or severance packages and is a legal sitting tenant in government pool house shall be offered the house as part of his/her package and should follow the procedure outlined in paragraph 3.1 of the Handbook on Civil Service Home Ownership Scheme when applying to purchase the house.*

(b) ...

(c) Ineligibility

- (i) a civil servant who retired or was retrenched and was paid his/her terminal benefits or severance package but did not vacate the government pool house shall*

not be eligible to purchase the house he/she has continued to occupy illegally.”

[31] It was contended that as observed by the trial court, a handwritten document which appeared to be from the Zambia Police Service dated '2006' in the record of appeal shows a list of retirees and widows indicating whether they had been paid their terminal benefits or not and those awaiting repatriation. That serial No. 3669 related to Ex-Chief Inspector Mutabale (the deceased) and confirmed that he retired on 1st December, 1998 and was paid his terminal benefits. Counsel submitted that at the time the first respondent was taking occupation of the house, the deceased had not only retired but had been paid his terminal benefits and given his repatriation allowance in form of transport to Choma, otherwise he could not have been evicted had his dues not been paid by the state. This position, counsel went on, is confirmed by the oral evidence on record and the letter in the record of appeal dated 14th March 2013 from the Deputy Commanding Officer to the Director Administration – Zambia Police Service Headquarters which clearly states that the deceased was 'cleared by Pensions Board'. Therefore, it was argued, the deceased's argument that he was eligible to

purchase the house and the findings of the trial judge were perverse as they were made in the absence of any relevant evidence is without merit. According to counsel, the deceased did not meet the requirements under Circular No. 12 and the evidence on record confirms the findings of the court. We were accordingly urged to dismiss grounds one, two and four.

- [32] In response to ground three, counsel submitted that the evidence on fraud was not exhaustively led at trial. In the event that the court so finds, it was argued in the alternative, that what is clear is that there was evidence of irregularities in the manner the deceased obtained title for the house. This is because there was an already laid down procedure as to how one was to not only obtain a house as a sitting tenant, but also how the actual paper work for ownership was to be processed. According to counsel, the evidence of the first respondent explained this process while DW2 who was the secretary of the Luanshya pool housing committee explained the procedure which the deceased clearly did not follow as he never possessed an allocation slip. Further, the said committee was not even aware of the offer made to the deceased. Moreover, she

continued, when the deceased was questioned at trial, he simply had his oral testimony with little documentary evidence to corroborate his claims.

[33] Relying on our recent judgment in the case of *Sailas Ngowani & Others v Flamingo Farm Limited*⁶, counsel contended that the irregularities and procedural errors are crucial in this case because this was not a regular land or property acquisition. It was an acquisition that required the Handbook and Circular No. 12 to be strictly adhered to. From the process and steps listed under clause 3.2 of the Handbook, the deceased only had evidence of sub paragraphs (i) and (j) - the offer letter and proof of payment. Furthermore, counsel argued, the minutes on record prove that the committee responsible for the sale of Luanshya pool houses expressed ignorance and had no record as to how the deceased obtained the certificate of title.

[34] It was argued that what can be ascertained to have transpired is that the deceased applied to purchase the house in 1999. His application was rejected owing to the fact that the house was an institutional one and not available for sale. Thereafter when the house became declassified, the deceased was no longer eligible

to purchase it. It thus begs the question, counsel contended, as to how the deceased was able to obtain an offer if the committee responsible for considering applications had rejected his application. We were also urged to dismiss ground three.

[35] At the hearing, counsel for the respective parties orally augmented their written heads of argument. We shall not reproduce them here as they were substantially a repetition of their written heads of argument.

Consideration of the appeal and decision by this court

[36] We have considered the record of appeal, the judgment appealed against and the arguments of the parties. We shall consider all the four grounds of appeal together as they are intertwined.

[37] Ground one assails the trial judge for refusing to declare the deceased as the rightful owner of the house on the basis that the refusal was not supported by law and the evidence adduced during trial. The thrust of the deceased's argument is that a certificate of title is conclusive evidence of ownership and the trial judge should have declared him the rightful owner since he was the holder of a certificate of title number 300180 relating to the house.

[38] The first respondent's position is that there was sufficient evidence demonstrating impropriety in the manner the certificate of title was obtained by the deceased. That his application to purchase the house was rejected in 1999 on the basis that the house was an institutional one at the time the deceased attempted to purchase it. Further, that at the time the house was being offered for sale, the deceased had retired, had been paid his terminal benefits and he was no longer a sitting tenant thereby rendering him ineligible to purchase the house. The case for the second respondent is that at the time the deceased was occupying the house, it was an institutional one and not available for sale until authority was sought to declassify it. Consequently, the deceased could not reasonably have been declared as the rightful owner of the house.

[39] Ground two faults the trial judge for holding that the house was not for sale and therefore, the deceased was not eligible to purchase it as evidence showed that it was available for sale as early as 7th April 1998. The argument being that the letters dated 7th April 1998 and 13th October 1998 described the house as a government pool house.

- [40] For his part, the first respondent's argument is that there was sufficient evidence adduced in the lower court to justify the court's finding that the deceased was not eligible to purchase the house. That the letter dated 7th April 1998 and 13th October 1998 describing the houses as pool houses on which the deceased placed reliance makes no reference to the house. According to the second respondent, the letter from the Deputy Commanding Officer dated 14th March 2013 shows that the house was not a government pool house. On the eligibility to purchase a government house such as the one in issue, it was contended that this was governed by Circular No. 12. According to the second respondent, the handwritten document which appeared to come from the Zambia Police Service dated '2006' confirmed that the deceased was retired on 1st December 1998 and paid his terminal benefits. Further, at the time the first respondent took occupation of the house, the deceased had not only retired but had been paid his terminal benefits and given his repatriation allowance in form of transport to Choma.
- [41] The grievance in ground three is that the trial judge was wrong to order the cancellation of the certificate of title when there was

no evidence of fraud or impropriety in its acquisition by the deceased. The argument being that in deciding to cancel the certificate of title, the trial judge noted that it was irregularly issued to the deceased without establishing how the irregularities amounted to an act of fraud or impropriety in the context of section 34 of the Lands and Deeds Registry Act.

[42] For his part, the first respondent contends that there was sufficient evidence demonstrating impropriety in the manner the deceased obtained the certificate of title, to wit, his application to purchase the house was rejected on the basis that the house was an institutional one at the time; he did not follow the procedure set out in the Handbook; he had retired and received his terminal benefits thereby rendering him ineligible to purchase the house; and he was not a sitting tenant. The second respondent's arguments on this ground are similar to those of the first respondent. The addition was that the minutes in the record of appeal prove that the committee responsible for the sale of Luanshya pool houses expressed ignorance and had no record of how the deceased acquired the certificate of title.

[43] The complaint in ground four is, in sum, that the findings of the

trial court were perverse and made in the absence of any relevant evidence. The brief argument being that the findings by the trial judge that the deceased was not eligible to purchase the house as it was an institutional one and could not be sold to the deceased was not supported by evidence and should be disturbed by this court.

[44] The first respondent's contention, on the other hand, is that there was sufficient evidence adduced in the court below to justify the court's finding that the deceased was not eligible to purchase the house. According to the second respondent, the deceased's argument that he was eligible to purchase the house and the findings of the trial judge were perverse as they were made in the absence of any relevant evidence is without merit. Further, the deceased did not meet the requirements under Circular No. 12 and the evidence on record confirms the findings of the lower court.

[45] As we see it, the main question for our consideration in determining this appeal is whether or not there was impropriety in the manner the certificate of title relating to the house was obtained by the deceased. From the outset, we have no

hesitation in answering this question in the affirmative. We start from the premise that the sale of the house, like other government houses, was governed by the Handbook and Circular No. 12 which set out the procedure for acquiring a government pool house.

[46] Notwithstanding that the Handbook was not produced in the court below, we take judicial notice that its application is in conjunction with Circular No. 12. Our judicial notice is informed by the various decisions of this court on similar disputes relating to the sale of government houses. See for example, the *Sakulanda* case⁴ in which, as can be noted from the excerpt at paragraph 27, we reproduced from the Handbook, the categories of institutional houses to be sold and those not to be sold. It is beyond doubt from the evidence deployed before the trial judge that at the time the deceased applied to purchase the house, it fell into the category of institutional houses not to be sold, hence the rejection of his application.

[47] Circular No. 12 sets out the eligibility criteria for purchasing government pool houses as reproduced at paragraph 30 above.

According to clause 2.2(c)(i) of Circular No. 12, '*a civil servant who retired or was retrenched and was paid his/her terminal benefits or severance package but did not vacate the government pool house shall not be eligible to purchase the house he/she has continued to occupy illegally*'. As we stated earlier, there is irrefutable evidence on record that the deceased's application to purchase the house was rejected in 1999, the basis being that it was an institutional and not a pool house available for sale. Even assuming that it was a pool house, it is also incontrovertible that the deceased had retired and was paid his terminal benefits. This is what prompted his eviction when he continued to illegally occupy the house, resulting in its allocation to the first respondent. There is also credible evidence on record that when the house was declassified as a pool house in 2011 and offered to the first respondent to purchase, the deceased had long been retired and was no longer a sitting tenant.

- [48] The procedure for acquiring a government pool house in the Copperbelt Province was elaborately illustrated by the first respondent's witness in these terms which are repeated for

emphasis: The applicant's application is considered by the Housing Committee comprising all heads of department in relevant government offices; an allocation slip is issued to a successful applicant and the matter is referred to the Permanent Secretary for Copperbelt who in turn writes to the Permanent Secretary, Ministry of Works and Supply; the Permanent Secretary, Works and Supply refers the matter to the Permanent Secretary, Local Government for purposes of valuation and confirmation of availability; and thereafter, the matter goes to the appropriate ministry which makes a recommendation to the Ministry of Lands for issuance of a letter of offer which is copied to all the relevant departments. According to this witness, the Ministry of Lands cannot issue an offer letter without a recommendation from the relevant ministry. His evidence, according to the record of proceedings, was not disputed by the deceased. The evidence deployed before the trial judge clearly demonstrates that the deceased did not comply with that procedure. The evidence shows that this notwithstanding, he however, suddenly sprang up with a certificate of title in 2014, more than 10 years after his

retirement, purporting to claim ownership of the house when he was not eligible to buy it in the first place.

[49] From the discourse in the preceding paragraphs, we are satisfied that the trial judge was on firm ground when she found that the certificate of title was irregularly obtained by the deceased. If we may add, its acquisition by the deceased was fraught with impropriety.

[50] We should also make the point that the trial judge did not base her finding on fraud as alleged by the appellant, as the pleadings clearly show that the respondents neither alleged fraud nor led evidence relating thereto at trial. In any event, we have stated in a plethora of our decisions that apart from fraud, impropriety or irregularity can also lead to the cancellation of a certificate of title. See for example, *Sailas Ngowani* case⁶ where we stated as follows:

“In this case before us, the core question is whether or not the procedure adopted by the current chief in allocating land to the appellant company without consulting the third and fourth respondent was a proper procedure. Our view is that the procedure adopted by the current chief was wrong and as such the allocation of the land to the appellant is null and

void. We agree therefore with counsel for the appellants that fraud as specified in section 33 of the Lands and Deeds Registry Act does not provide the only pathway by which a certificate of title may be cancelled. Other transgressions of the law such as circumvention of the procedure prescribed in the law which would render null and void the allocation of land, would be just as fatal.”

We further stated in the same case that:

*“We agree therefore with the appellants that they did not need to plead and prove fraud for them to succeed in an action premised on failure to follow procedure. We have already pointed out earlier that failure to follow procedure could render the whole land acquisition process null and void as we stated in *Still Water Farms Limited v Mpongwe District Council & Others*⁷. The effect of such a finding is that the certificate of title is liable to be cancelled.”*

[51] Since the deceased did not follow the procedure which was an indispensable requisite for purchasing a government house, we hold that his purported purchase of the house was null and void ab initio. It follows therefore that the trial judge’s order to cancel the certificate of title in the circumstances of this case was proper.

[52] Furthermore, there is no dispute that the deceased was a holder

of certificate of title number 300180 relating to the house. It is also trite that according to section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership. On the facts of this case however, we cannot fault the trial judge for refusing to declare the deceased as the rightful owner of the house as the evidence before her revealed that his acquisition of the certificate of title was not in accordance with the laid down procedure; it was tainted with impropriety. We also reject the deceased's complaint that the findings of the trial judge were perverse and made in the absence of evidence. To the contrary, we have demonstrated in the preceding paragraphs that there was sufficient evidence on which the trial judge based her decision to dismiss the deceased's claims. In the final analysis, we find no basis upon which the judgment of the trial judge cannot be upheld. In short, this appeal is doomed to fail in its entirety.

Conclusion

[53] All the four grounds of appeal having failed, the inevitable conclusion is that this appeal lacks merit and it is accordingly

dismissed. Costs follow the event and shall be taxed in default of agreement.



**I. C. MAMBILIMA
CHIEF JUSTICE**



**C. KAJIMANGA
SUPREME COURT JUDGE**



**J. K. KABUKA
SUPREME COURT JUDGE**