

IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT NDOLA

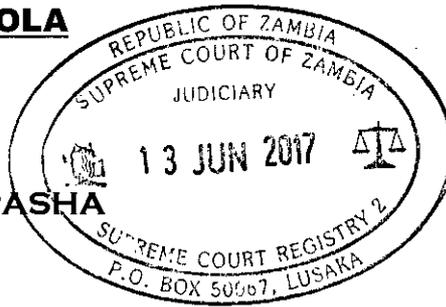
(Civil Jurisdiction)

BETWEEN:

JAMESON CHIPASHA

AND

SILOLE ZULU



APPEAL NO. 105/2014

SCZ/8/365/2013

APPELLANT

RESPONDENT

CORAM: Mwanamwambwa D.C.J., Kajimanga, Kabuka, J.J.S
On 6th June, 2017 and 13th June, 2017

For the Appellant:

*Mr. T. Shamakamba, of Messrs.
Shamakamba and Associates*

For the Respondent:

*Mr. V. K. Mwewa, of Messrs. V. K. Mwewa
and Company, acting as Caretaker for
Messrs. Peter Mwale and Company*

JUDGMENT

Mwanamwambwa D.C.J., delivered the Judgment of the Court.

Cases Referred to:

1. **Justin Chansa v Lusaka City Council (2007) ZR 256**
2. **Roland Leon Norton v Nicholas Lostrom (2010) ZR 358**
3. **Nevers Mumba v Muhabi Lungu (suing in his capacity as National Secretary of the MMD) Appeal No. 11 of 2013**
4. **Anort Kabwe, Charity Mumba Kabwe v James Daka, Attorney General and Albert Mbazima (2006) ZR 12**
5. **Shadrack Wamusula Simumba v Juma Banda, Lusaka City Council (2013) 2 ZR 178**
6. **Wilson Masauso Zulu v Avondale Housing Project Ltd (1982) ZR 172**

Legislation Referred to:

- (1) **Section 25 of the Town and Country Planning Act, Chapter 283 of the Laws of Zambia**
- (2) **Section 13 of the Lands Act, Chapter 184 of the Laws of Zambia**

This appeal is against the decision of the High Court to dismiss the appellant's action, in which he sued the respondent, for encroaching on his commercial plot at Kasompe Township in Chingola.

The appellant is the registered owner of Plot No. 208, Kasompe Township, Chingola. He brought this action alleging that the respondent had illegally built a structure on his plot without his consent or approval. He claimed that this had greatly inconvenienced him because his intended expansions on the plot had been halted. The appellant further stated that the respondent had no legal authority to build on his land because he had not subdivided or sold the plot to the respondent. It was the appellant's claim that since the respondent illegally built on his plot, the respondent's illegal structure should be demolished. The appellant was seeking the following reliefs:

- (1) A declaration that he is the legal owner of Plot No. 208, Kasompe Township, Chingola;**
- (2) An order against the respondent for vacant possession of part of Plot 208, Kasompe Township, Chingola;**
- (3) An order for demolition of the illegal structure built by the respondent on Plot 208, Kasompe Township, Chingola;**
- (4) Damages for inconvenience caused and interest; and**
- (5) Costs.**

On the other hand, the respondent claimed that he was entitled to build on the land in dispute, as he was allocated Plot No. 207A, Kasompe Township, by Chingola Municipal Council in

2002. He stated that Chingola Municipal Council had in fact given him a building permit to develop the said piece of land.

The matter was heard by the High Court which received evidence from the parties. It went to Kasompe Township for a site visit. After evaluating the evidence, the learned trial Judge dismissed the appellant's case, after she found that the respondent had documents to prove how he was allocated Plot No. 207A by Chingola Municipal Council.

She noted that the respondent produced minutes of a Council meeting at which the Director of Engineering Services reported that he had received applications for various land use and one of them was from the respondent, who had applied for Plot No. 207A, Kasompe Township. That the respondent also had a letter from Chingola Municipal Council which informed him that his application for Plot No. 207A had been approved. That the respondent had a building permit dated 10th November, 2003, and it was renewed on 8th June, 2009, by the Acting Director of Engineering Services. She stated that although the site map did not indicate the creation of Plot No. 207A, the respondent had sufficiently demonstrated that he had documents to prove that the plot was duly allocated to him by Chingola Municipal Council officials, specifically by Mr. Teleshi, the Director of Engineering Services.

The learned trial Judge noted that the appellant owns Plot No. 208, which he desired to extend. That he had written to Chingola Municipal Council stating that he wanted to extend his building but was surprised to find that another person had been allocated Plot No. 207A, which he said, was an encroachment on his plot. She found that the appellant mistakenly believed that he owned Plot No. 207A when in fact not. She wondered why the appellant had applied to the Council for the extension of Plot No. 208, if he indeed owned the said piece of land. She took the view that there was no evidence that the land which the respondent occupied was acquired through fraud or misdirection of boundaries or that the appellant was the owner of the land that was allocated to the respondent. She observed that the appellant never led evidence on which she could have ordered the re-planning or re-surveying of Plot No. 207A. She pointed out that the land in dispute was unoccupied and the appellant had no legal right to claim it, albeit by way of extending his plot. She, therefore, held that the respondent was entitled to the ownership of plot No. 207A as he had documents to prove how he was allocated the said plot by the Council.

The appellant was dissatisfied by the lower court's decision. He appealed to this Court, advancing five grounds of appeal. These read as follows:-

- 1. That the learned Honourable Judge in the court below erred in law and fact when she held that the appellant**

- mistakenly believed he owns Plot No. 207A when in fact not;
2. That the learned Honourable Judge in the court below erred in law and fact when she held that there was no evidence that the land occupied by the respondent was acquired through fraud or misdirection of the boundaries or that the appellant was the owner of the land in dispute that was duly allocated to the respondent;
 3. That the learned Honourable Judge in the court below erred in law and fact when she held that the appellant never led evidence on which the court could have ordered the re-planning or re-surveying of the said Plot No. 207A;
 4. That the learned Honourable Judge in the court below erred in law and fact when she held that the land in issue was unoccupied and as such, the appellant had no legal right to claim it, albeit by way of extension of his plot and;
 5. That the learned Honourable Judge in the court below erred in law and fact when she held that the respondent was entitled to the ownership of Plot No. 207A as he has documentation to prove how he was allocated the said plot by the Council.

Counsel for both parties filed written heads of argument on which they relied at the hearing of this appeal. Both counsel argued all the five grounds of appeal together.

On behalf of the appellant, Mr. Shamakamba submitted that according to the submissions by Chingola Municipal Council, Plot No. 207A is not gazetted on the area plan for Kasompe Township and it is sitting on Plot No. 208. He argued that this evidence was not challenged and no reason was given by the trial court for not accepting it. He submitted that the site plan for Kasompe, which was on record, showed that there was no vacant land between Plot No. 207 and Plot No. 208. He wondered how the trial Court found that there was vacant land between them. Counsel

contended that there was no subdivision created by the appellant which allowed the respondent to acquire the land in dispute. He stated that neither did the Commissioner of Lands create any subdivision.

He contended that the respondent did not follow the right procedure when acquiring the land in dispute. He referred us to the case of **Justin Chansa v Lusaka City Council**⁽¹⁾ in which we held that where a member of the public opts to apply for land from the Council, the Council is mandated firstly, to advertise any land available, secondly, to receive applications from members of the public and thirdly, to make recommendations to the Commissioner of Lands, who has power to allocate land to successful applicants. Counsel submitted that even though the respondent in his evidence had testified that he applied for the plot from the Council, there was no such application as confirmed by his evidence in cross-examination. He argued that Chingola Municipal Council did not advertise and make recommendations to the Commissioner of Lands. He stated that this is supported by the evidence of DW2, the Legal Officer at Chingola Municipal Council, who testified that the allocation should have been reported to the full Council for approval and also that the general site plan did not show that there is Plot 207A between Plot No. 207 and Plot No. 208. It was counsel's argument that in light of the **Justin Chansa case**⁽¹⁾, the allocation of Plot No. 207A to the respondent was *void abninitio*.

Counsel submitted that according to section 25 of the **Town and Country Planning Act, Chapter 282** of the Laws of Zambia, every development or subdivision of land needs permission from the Ministry of Lands or the planning authority. He argued that in this case, there was no permission from both Chingola Municipal Council and the appellant, as land owner. It was counsel's further submission that Plot No. 207A does not exist. He pointed out that no reasons were given by the trial court for rejecting the evidence given by the Legal Officer for Chingola Municipal Council. That this in itself, was a good reason to interfere with the findings of the court below. He urged us to allow this appeal.

On behalf of the respondent, Mr. Mwewa opposed this appeal. He submitted that the issue of whether or not the respondent followed the right procedure in applying for the land in dispute was not raised in the court below. Therefore, it could not be raised on appeal before this court. Counsel referred us to the case of **Roland Leon Norton and Nicholas Lostrom**⁽²⁾, in which we held that matters which are not pleaded nor raised in the court below cannot be raised on appeal because doing so would be ambushing the other side. He also cited the case of **Nevers Mumba and Muhabi Lungu (suing in his capacity as National Secretary of the MMD)**⁽³⁾ for this proposition. It was counsel's submission that the appellant's argument that the respondent did not follow procedure should be dismissed.

On the decision made by the lower court, counsel contended that there was sufficient evidence on which the court found for the respondent. He observed that the appellant's argument appeared to be that, there was no evidence that the respondent had applied for a plot and that the allocation of the said plot was not reported to the full Council and also that Plot No. 207A did not exist. He drew our attention to the findings of the court below that the respondent produced documents to show that the plot in dispute belonged to him. He pointed out that the lower court's findings were based on the documents produced by the respondent, as contained in the supplementary record of appeal.

Mr. Mwewa submitted that the appellant's argument was also anchored on the evidence of DW2, a Chingola Municipal Council employee who suggested that Plot No. 207A did not exist and that the issue of Plot No. 207A was never tabled before the full Council. He contended that the evidence of DW2 flew in the teeth of the documents contained in the supplementary record, which showed that the Local Authority was aware of the existence of Plot No. 207A. He argued that if the evidence of DW2 were to be accepted, it would offend the celebrated legal principle of parol evidence rule. His submission was that this appeal lacks merit and we should, accordingly, dismiss it.

We have considered the issues raised in this appeal. It is not in dispute that the appellant is the registered owner of Plot No. 208, Kasompe Township. His claim is that the respondent

illegally built a structure on his land. The respondent on the other, denies the appellant's allegations stating that the plot on which he built a structure is his, as he was allocated Plot No. 207A by Chingola Municipal Council. It is abundantly clear to us that the dispute in this matter was triggered by the fact that both Plot No. 208 and Plot No. 207A are situated on or around the same area.

We looked at the site map for Kasompe Township which is on record. It shows that Plot No. 208 is adjacent to Plot No. 207, which is owned by Anderson Kanjele, who was PW2 in the court below. We also considered the evidence of DW2, a Legal Officer at Chingola Municipal Council, who testified that Plot No. 208 and Plot No. 207 have the same dimensions in width and length. This witness also indicated that the site map for Kasompe did not show that there is a plot between Plot No. 207 and Plot No. 208. The court below nevertheless held that the respondent had documents to prove how he was allocated Plot No. 207A, Kasompe Township, despite having found that Plot No. 207A was not on the site map for Kasompe Township.

We scrutinized the documents which the lower court relied on in arriving at its decision. These are contained in the supplementary record of appeal. We noted that the first document is a copy of minutes showing that the Director of Engineering Services at Chingola Municipal Council, Mr T. B. Teleshi, reported to the 8th Ordinary Meeting of the Council on 8th

August, 2002, that he had received applications for various land use and the respondent was listed as having applied for Plot No. 207A, Kasompe Township. We also noted that the second document is a letter written by Mr. T. B. Teleshi to the respondent, informing him that his application was approved by the Council and he was required to pay an application fee of K100.00. We further noted that the third document is a building permit issued on 10th November, 2003, by Mr. T. B. Teleshi to the respondent. We also noted that the fourth document is a renewal of the building permit dated 08th June, 2009, which was issued by a Mr. John Champemba, Acting Director of Engineering Services at the Council. It is apparent from all these documents, except for the renewal of the building permit, that Mr. T. B. Teleshi, the Director of Engineering Services, had a strong hand in the allocation of Plot No. 207A to the respondent.

Further, we considered the evidence from Chingola Municipal Council as adduced by DW2, the Legal Officer, as well as the report of the Town Clerk, which reveals a number of glaring irregularities in the manner Plot No. 207A was created and offered to the respondent. The report of the Town Clerk indicates, among other things, that the respondent did not pay for the plot and that the Area Improvement plan for Kasompe Township does not have Plot No. 207A; but it only has Plot No. 207. It further says that Plot No. 207A is wrongly sitting on Plot No. 208, as it does not exist. From the totality of this evidence, it would seem that the respondent colluded with Mr. T. B. Teleshi to obtain

documents for Plot No. 207A Kasompe, a piece of land which did not exist.

We are satisfied that some officials at Chingola Municipal Council illegally demarcated the appellant's Plot No. 208 and created Plot No. 207A and offered it to the respondent. We wish to state that it is illegal for a Local Authority or the State to arbitrarily demarcate land belonging to someone and to offer it to another person, without following the due process of the law. In this case, we have not seen any evidence on record to show that Plot No. 208 was legally repossessed from the appellant to justify any demarcations and offers to other persons. Section 13 of the **Lands Act Chapter 184** of the Laws of Zambia sets out an elaborate procedure for re-entry, where land is to be legally repossessed from an individual. It provides that:

"13 (1) Where a lessee breaches a term or a condition of a covenant under this Act the President shall give the lessee three months' notice of his intention to cause a certificate of re-entry to be entered in the register in respect of the land held by the lessee and requesting him to make representations as to why a certificate of re-entry should not be entered in the register.

(2) If the lessee does not within three months make the representations required under subsection (1), or if after making representations the President is not satisfied that a breach of a term or a condition of a covenant by the lessee was not intentional or was beyond the control of the lessee, he may cause the certificate of re-entry to be entered in the register.

(3) A lessee aggrieved with the decision of the President to cause a certificate of re-entry to be entered in the register may within thirty days appeal to the Lands Tribunal for an order that the register be rectified."

In addition, this court held, in the case of Anort Kabwe, Charity Mumba Kabwe v James Daka, the Attorney General and Albert Mbazima⁽⁴⁾ that:

“The mode of service of the notice of intention to cause a certificate of re-entry to be entered in the register for a breach of the covenant in the lease, as provided for in Section 13(2) of the Lands Act, is cardinal to the validation of the subsequent acts of the Commissioner of Lands in disposing of the land to another person. We say so because if the notice is properly served, normally by providing proof that it was by registered post using the last known address for the lessee from whom the land is to be taken away, the registered owner will be enabled to make representations, under the law, to show why he could not develop the land within the period allowed under the lease. If the land is eventually taken over because of being in breach, despite the warnings from the Commissioner of Lands, the registered owner cannot successfully challenge the action to deprive him of the land. On the other hand if the notice is not properly served and there is no evidence to that effect, as was the case here, there is no way the lessee would know so as to make meaningful representations. It follows that a repossession effected in the circumstances where a lessee is not afforded an opportunity to dialogue with the Commissioner of Lands, with a view to having an extension of period in which to develop the land, cannot be said to be a valid repossession. In our view, the Commissioner of Lands cannot be justified in making the land available to another developer.”

It is clear from the law we have outlined that the procedure for repossessing land is not only elaborate, but also strict. In this case, there is no evidence that the appellant breached a term or condition of the lease which was granted to him. Assuming there was such a breach, there is no evidence to show that a notice was given to him or that a certificate of re-entry was entered in the register before a portion of his land was repossessed and given to the respondent. We have equally not seen any evidence to show that the appellant was accorded an opportunity to make representations, prior to the purported repossession. As we

indicated in the case of **Shadrick Wamusula Simumba v Juma Banda and Lusaka City Council**⁽⁵⁾, if a repossession is effected in circumstances where a lessee is not given an opportunity to make representations, such a repossession cannot be said to be valid. Accordingly, we find that the repossession of the appellant's land which was given to the respondent by the Director of Engineering for Chingola Municipal Council was invalid and therefore illegal. We take the view that the officer in question had no right to offer Plot No. 207A, Kasompe Township to the respondent, without following the due process of the law as outlined above.

We are of the considered view that the court below adopted a narrow approach when it arrived at the conclusion that the respondent was entitled to the land in dispute as he had documents to prove how he was allocated Plot No. 207A, Kasompe Township. This case, in our view, is an appropriate case in which this court can reverse findings of fact by a trial Court. In **Wilson Masauso Zulu v Avondale Housing Project Ltd**⁽⁶⁾, we held that:

“Before this court can reverse findings of fact made by a trial judge, we would have to be satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make.

We are satisfied in this case that the findings of the court below are findings which, on a proper view of the evidence on

record, no trial court acting correctly could reasonably make. Accordingly, we reverse the decision of the court below and declare the appellant legal owner of Plot No. 208, Kasompe Township, Chingola. We hereby declare the purported creation of Plot No. 207A Kasompe Township, Chingola and its allocation to the respondent, null and void. In the circumstances, we order the respondent to yield vacant possession and to demolish his illegal structure within 30 days and at his own cost. Should the respondent neglect to do so, we order that the appellant shall be at liberty to demolish the illegal structure at the respondent's cost.

We hereby allow this appeal. We order the respondent to pay costs to the appellant. These are to be taxed, in default of agreement.



M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE



C. KAJIMANGA
SUPREME COURT JUDGE



J. K. KABUKA
SUPREME COURT JUDGE