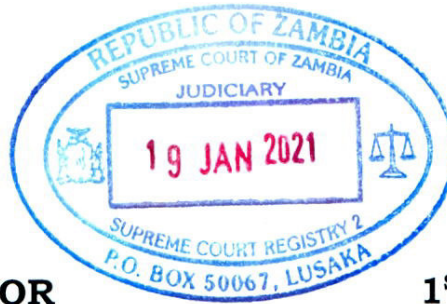


IN THE SUPREME COURT OF ZAMBIA

Appeal No. 202/2016

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

HAJRABEN YUSUF PANDOR

1ST APPELLANT

STAR BEEF COMPANY LIMITED

2ND APPELLANT

JANAKBANI LALABHAI PATEL

3RD APPELLANT

ISMAIL ADAM ALLI SULEMAN

4TH APPELLANT

AND

BRANDINA NYENDWA BANDA

(Sued in her capacity as Administratrix
of the Estate of **SELIANO JINJA BANDA**)

1ST RESPONDENT

ELIJAH MISHECK MACHARA

2ND RESPONDENT

CORAM: Malila, Kajimanga and Kabuka, JJS.

On 5th November 2019, 17th January 2020 and 19th
January, 2021.

FOR THE APPELLANTS:

Mr. F. Mudenda, Mr. G. Pindani of
Messrs. Chonta, Musaila & Pindani
Advocates.

FOR THE RESPONDENTS:

N/A

JUDGMENT

KABUKA, JS, delivered the Judgment of the Court.

Cases referred to:

1. Erlax Properties (Pty) Limited v The Registrar of Deeds Johannesburg & 9 Others, 1992 (1) SA 897.
2. Oribel Properties 13 (Pty) Limited and Another v Blue Dot Properties 271 (Pty) Limited & Others 454/2009 [2010] ZASCA 78.

Legislation and Other Works referred to:

1. The High Court Rules Cap. 27 Order 30 rule 11 (c), (i), (j).
2. The Common Leasehold Schemes Act Cap. 208 s. 3, 3 (4), 4 (5), 7 (1), 7 (3) (a), 20.
3. The Lands and Deeds Registry Act, Cap. 185, s. 33, 34.
4. The Lands and Deeds Registry Schedule (Section 5 and 11) By-Laws of a Body Corporate, Mandatory By-Laws, Rule 4 (d), (e), 5, 15.
5. Supreme Court Practice (Whitebook) 1999 Edition, Order 15/16/2.
6. Meggery and Wade: The Law of Real Property, 7th Edition, Sweet & Maxwell
7. Burn, E.H. and Cartwright J, Cheshire and Burns: Modern Law of Real Property, 17th Edition, 2006, Oxford University Press

[1] Introduction

[1.1] The appellants own individual units in a double storey commercial building under the Common Leasehold Schemes Act of 1994, now Cap. 208 of the Laws of Zambia (“the Common Leasehold Act”).

[1.2] On the 7th of July, 2011 the appellants commenced proceedings in the High Court, seeking to restrict the 1st respondent from disposing of a portion of land that was created out of the common area or space, located at the back of the commercial building, without their consent.

[1.3] In its judgment, the High Court found that the 1st respondent could not be restricted in the manner canvassed by the appellants, as she was the registered owner of the portion of land in contention, described as Stand No. LUS/3243/CL/O/CP. This appeal by the appellants is directed against that finding.

[1.4] In the main, the appeal interrogates individual and collective rights of owners of property held under common leasehold tenure *inter se*. It also interrogates their rights to parts, areas or spaces between the units that are held in common ('common property') such as staircases, drive ways, car parking areas or guard and caretaker houses located thereon.

[2] Background

[2.1] As earlier alluded to at paragraph [1.1], the property in dispute is a double storey commercial building that is located in the Kamwala Trading area of Lusaka. The building was previously held under a 99 year leasehold tenure on Stand No. LUS/3243 in respect of which a

Certificate of Title was issued to one Seliano Jinja Banda in February of 1986. The ground floor of the building consists of a number of adjoining shops that are accessed at the back, through an open area or space used as a car park and delivery bay. In the far right corner of this open space is a stand-alone structure.

[2.2] Seliano Jinja Banda, apparently, passed on sometime in 1998. Upon his demise, his widow, Brandina Nyendwa Banda who is the 1st respondent in this appeal, was appointed as administratrix of his estate.

[2.3] On or about 15th January, 2002 the 1st respondent caused her late husband's property Stand No. LUS/3243 to be converted to common leasehold tenure pursuant to the provisions of the Common Leasehold Act. Section 3 of that Act provides that:

“3. (1) A parcel of land registered in the Lands Register together with the buildings on it, or proposed to be built on it, may be divided into units by registering a common leasehold scheme in the manner provided in this Act.”

As a result of that conversion, each shop or flat comprising the double storey building was constituted into a separate unit capable of being allocated a separate Certificate of Title. The specific area comprising a single unit was also conferred with an undivided share in the *common property* proportional to the unit interest.

[2.4] **Section 2 of the Common Leasehold Act**, defines

'common property' to mean:

"So much of the land and buildings subject to a common leasehold scheme, as is not comprised in any one unit under the scheme." Each unit has a share in the *'common property'* which is expressed in percentage terms proportionate to the entitlement in the respective unit."

[2.5] Following the conversion of Stand No. LUS/3243 to common leasehold tenure, the 1st respondent embarked on an exercise of disposing of all the single units that were created. The appellants were amongst the purchasers who acquired separate Certificates of Title for their individual units, in which the unit interest was stated in square meters while the unit share in the common property was

expressed in percentage terms proportionate to the entitlement in the respective unit as follows:

NAME:	UNIT NUMBER:	UNIT AREA	UNIT SHARE IN COMMON PROPERTY
1. HAJRABEN YUSUF PANDOR	LUS/3243/CL/O/1	188 SQ. METRES	19.5%
2. STAR BEEF COMPANY LIMITED	LUS/3243/CL/O/3	131 SQ. METRES	13.62%
3. JANAKBANI LALABHAI PATEL	LUS/3243/CL/O/2	130 SQ. METRES	13.51%
4. ISMAIL ADAM ALLI SULEMAN	LUS/3243/CL/1/3	131 SQ. METRES	13.62%

[2.6] Relevant to this appeal, is the contract of sale between the 1st and 2nd respondents dated 26th June, 2010 relating to a portion of the *common property*, earlier referred to at paragraph [2.1] on which the stand-alone structure is sitting, in the delivery bay or car park area, described as Stand No. LUS/3243/CL/O/CP.

[2.7] The appellants questioned the legal capacity of the 1st respondent to alienate a portion of the *common property* to any person without their consent. In an attempt to have the proposed sale reversed, they unsuccessfully sought the intervention of the Commissioner of Lands and that of the Lusaka City Council. Left with no other option, they decided to escalate their protest by instituting proceedings before the High Court.

[3] Proceedings before the High Court

[3.1] The appellants launched the High Court matter by Originating Summons issued on the 7th of July, 2011 in which the relief they were seeking was stated as follows:

- (i) a declaration that all purchasers of LUS/3243 which is held on Common Leasehold title are beneficiaries of the common parts known as LUS/3243/CL/O/CP and none of them hold any title or can transfer the said part without the consent of all the other leaseholders.
- (ii) a declaration that the total percentage ownership of a property held on Common Leasehold, includes the common part that is available for the common use of all leaseholders.
- (iii) a declaration that the purported contract of sale for the common part known as LUS/3243/CL/O/CP between the 1st and 2nd respondents was ultra vires the Common Leasehold Schemes Act of 1994 and therefore null and void.
- (iv) an order for cancellation of the title deed for the common part known as LUS/3243/CL/O/CP.
- (v) damages for trespass.
- (vi) injunction and costs.

[3.2] The Originating Summons was supported by an affidavit deposing to facts that gave rise to the appellants' grievance. Substantively, these were as earlier set out, at

paragraphs 1.1- 2.4. Although there were no affidavits in opposition filed by the respondents, the trial court in determining the matter, did consider written arguments from counsel acting on their behalf.

[3.3] In resolving the issues in contention, Hamaundu, J, as he then was, observed that his power to grant declaratory judgments under **Order 15 /16/2 Rules of the Supreme Court (Whitebook) 1999 Edition** was discretionary. He, in that regard, noted that the provisions of **section 33** of the **Lands and Deeds Registry Act, Cap. 185 of the Laws of Zambia** presumes beneficial interest in favour of a title holder and the 1st respondent is a title holder in respect of the alleged *common property* in dispute.

[3.4] Accordingly, the learned trial judge found it was inappropriate for the appellants to mount a challenge to the 1st respondent's Certificate of Title in the manner they had done. The judge expressed the view that, an action seeking such a challenge ought to have been properly brought under the **Lands and Deeds Registry Act**. It

was on that account, that he dismissed the appellants' claims.

[4] Grounds of Appeal and Arguments before this Court

[4.1] Dissatisfied with that judgment, the appellants lodged an appeal to this Court seeking a reversal of the findings advancing two grounds of appeal that were couched in the following terms:

- 4.1.1 That the court below erred in law and in fact when it declined to grant the declaration that the 1st respondent cannot sale or deal with the common part of the property known as Stand No. LUS/3243/CL/O/CP which is held under common leasehold without the consent of all the appellants who own various shares in the common part as specified in their respective Certificates of Title.
- 4.1.2 That the court below erred in law and in fact when it ordered that the appellants ought to mount appropriate challenges to the title held by the 1st respondent under the Lands and Deeds Registry Act ignoring the 1st respondent's mandatory obligation to also transfer title to the common part to all the appellants who bought and own their own respective units and use the common part to access their units.

[4.2] In their written heads of argument, learned counsel for the appellants contended that the appeal is anchored on the interpretation and construction of the Common Leasehold Act. Counsel argued that *common property* in **sections 2 (3) and (4) of The Common Leasehold Act** is defined to

refer to the common areas or spaces between the units and specifically excludes all the parts that constitute the units. That under **section 4 (5)** all units are separately owned by various registered proprietors with Certificates of Title issued in their separate names.

[4.3] It was learned counsel's submission that the appellants in this appeal are the registered proprietors of the units they own and pursuant to **section 7 (1)** they are all tenants in common to the *common property* in shares proportionate to their unit entitlements, expressed in percentages as stated in their respective Certificates of Title.

[4.4] Counsel further submitted that **section 7 (3) (a)** prohibits the disposal of any share in the *common property* beyond the unit holder's entitlement. That a part of the *common property* cannot be disposed of, without the consent of all the unit holders, contrary to what the 1st respondent who was not even a unit holder at the material time had purportedly done. This is so, as beneficial interest in the

common property under common leasehold tenure attaches to interest in the respective units.

[4.5] On ground two, relating to the procedure adopted in the High Court proceedings, counsel cited **Order 30 rule 11 of the High Court Rules, Cap. 27** which prescribes for matters to be disposed of in Chambers; and, under **rule 11 (c)** includes claims asserting any legal or equitable right or for determination of whether or not the applicant is entitled to such right. Counsel further referred to **rule 11 (j)** contending that, it clothes the judge with discretion to dispose of, in Chambers, such other matters as may be deemed fit.

[4.6] Learned counsel argued that the question to be determined in this appeal revolves around the interpretation of provisions of the Common Leasehold Act. In particular, whether part of the *common property* constituting common leasehold tenure can be sold by an individual without the consent of all unit holders? That being the issue, whether the matter was properly commenced by Originating Summons?

[4.7] Counsel submitted that, what was at stake was to pronounce the rights of the parties in relation to the *common property*, which issue the trial court failed to adjudicate upon, and thereby misdirected itself.

[4.8] In their written arguments in response, learned counsel for the respondents on ground one of the appeal argued that, the 1st respondent acquired a separate Certificate of Title to the portion of the property in dispute in 2012. According to counsel, issuance of the separate title was done in accordance with the provisions of the Common Leasehold Act, which provides for variation of the Common Leasehold Scheme.

[4.9] Counsel submitted that, since the variation was effected before the disposal of the individual units that were created, the 1st respondent was not constrained by **section 7 (3) (a) of the Common Leasehold Act**, to procure the consent of the appellants, to dispose of her property as the appellants were not even unit holders at the time of such variation.

[4.10] Counsel for the 1st respondent countered ground two of the appeal with the argument that, since the 1st respondent had a separate Certificate of Title (as varied under the Act) the learned trial judge was on firm ground to hold, as he did, that the action that was open to the appellants was to challenge the said title under the provisions of the **Lands and Deeds Registry Act**. Counsel accordingly urged this Court to dismiss the appeal for lack of merit.

[4.11] At the hearing of the appeal, only counsel for the appellants were in attendance, despite the 1st respondent having appeared at the first sitting to request for an adjournment. We proceeded to hear the appeal upon confirming that all the parties were served with notices of the hearing. In addressing the Court, learned counsel for the appellants indicated they would be relying on their written arguments which they augmented in some considerable detail, orally.

[4.12] On ground one of the appeal, the gist of counsel for the appellants' submissions was to the effect that, when she converted the tenure of the property in dispute to common leasehold, the 1st respondent by operation of law ceased to have beneficial interest in the entire property, as the common parts automatically attached to the units.

[4.13] Counsel further submitted that, no variation to the *common property* could thereafter, be made by the 1st respondent acting alone, as unanimous consent of all the unit holders was required as mandated by **section 20 of the Common Leasehold Act**. In terms of that section, such consent may be solicited by way of a signed resolution or an agreement to vary the covenants and conditions in the common leasehold.

[4.14] On ground two of the appeal, counsel submitted that the Originating Summons was the appropriate mode of commencing the action for the specific relief that the appellants were seeking under the **Common Leasehold Act**. According to counsel, it was a gross misdirection for

the trial judge to exclusively place reliance on **RSC Order 15/16/2** so as to fetter his discretion to pronounce himself on the declarations sought by the appellants.

[5] Consideration of the issues and decision of this Court

[5.1] We have considered the arguments and submissions by learned counsel in light of the applicable law. For purposes of convenience, we propose to first deal with ground two of the appeal, following which we will proceed to consider ground one.

[5.2] In ground two of the appeal, the appellants fault the trial court below for having determined the fate of the proceedings on the basis of an erroneous finding that the mode of commencement of the action was inappropriate. The real question in this ground, as we understand it, is not that the appellants were challenging the 1st respondent's title to part of the *common property*, within the contemplation of **section 33 of the Lands and Deeds Registry Act**. The issue is rather, whether the appellants claims asserting their rights as unit holders under

common leasehold tenure, in terms of **section 20 of the Common Leasehold Act**, were of such a nature as could properly be disposed of in Chambers.

[5.3] **Order vi rule 1 of the High Court Rules, Cap. 27**, states in mandatory terms, that any matter which under any written law or Rules may be disposed of in chambers *shall* be commenced by originating summons; while **Order 30 rule 11 (c)** of the same rules (**as amended by Statutory Instrument No. 71 of 1997**) goes further to set out matters that may be disposed of in Chambers and thus amenable for commencement by Originating Summons, to include:

“11. (c) An application by any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of a statute, for the determination of such question of construction and for a declaration as to the right claimed.”

Rule 11(j) also reposes discretion in the judge to hear:

(j) Such other matters as a Judge may think fit to dispose of in chambers.

[5.4] Considering the provisions of the relevant procedural law as quoted above and the evidence on record, it is clear to

us, that the relief the appellants were seeking as unit holders in the court below, reproduced at paragraph [3], were anchored on the interpretation of their perceived rights, apparently conferred upon them by the **Common Leasehold Act**. They were also seeking for a declaration that they were entitled to the asserted rights in relation to the *common property*.

[5.5] We are satisfied that the determination of the question was indeed anchored on the construction of the relevant provisions of the **Common Leasehold Act**. In terms of **Order 30 rule 11 of the High Court Rules**, we find the nature of the matter was thus, fit for determination in Chambers and according to **Order vi rule 1**, the proper mode of commencing such proceedings is by Originating Summons.

Ground two of the appeal succeeds for those reasons.

[5.6] Having found that the action was properly commenced by way of Originating Summons, we now return to consider ground one of the appeal.

[5.7] The anchor argument by the appellants on this ground is that the 1st respondent is precluded from selling or disposing of any portion of the *common property* without the consent of all unit holders. The appellants contend that, by virtue of **section 7 (1) of the Common Leasehold Act**, all the unit holders are tenants in common of the *common property* in shares proportionate to their entitlements in the individual units, as indicated in each of their respective Certificates of Title. The appellants further rely on **section 20 of the Common Leasehold Act**, which explicitly requires consent of all the unit holders before variation of the interest in the *common property* can be effected.

[5.8] The 1st respondent counters the above propositions on the basis that variation relating to the portion in the *common property* in dispute being Stand No. LUS/3243/CL/O/CP, was effected long before the appellants acquired their individual units. Accordingly, that the individual titles that were subsequently, issued to the appellants were subject

to the restrictions that specifically excluded the disputed portion.

[5.9] In determining the issues in contention, we find it imperative to trace the background to common leasehold or “commonhold” ownership of property. Learned authors, **Meggary and Wade: The Law of Real Property, 7th Edition**, at paragraphs 33 and 104 illustrate the concept in the following observations:

1.1.1 “The purpose of commonhold was to provide an alternative to two systems of land tenure, leasehold and freehold, by establishing a system where land and buildings could be divided into separate units allowing their ownership by different persons, whilst the common part or areas are owned and managed by a commonhold association, whose members are the unit holders.”

[5.10] **Cheshire and Burns, Modern Law of Real Property, 17th Edition**, at pages 183 and 184, credit the Aldridge Working Group on Freehold Flats and Freehold Ownership of other Interdependent Buildings for introducing commonhold in the United Kingdom in 1987. Aldridge outlined the general scope of commonhold as follows:

“Like other condominium systems, [commonhold] would allow the freehold ownership of separate parts of a building. The problem of passing the benefit of positive obligations is

overcome by legislation laying down the content of mutual obligations and easements, and making them bind the owners for the time being of each unit for the benefit of the rest of the development.

There would be an incorporated management association, the members of which are the owners of the freehold units. It is responsible for repairs and services and any common parts are vested in it. That structure is of course familiar here for leasehold flat schemes. When the commonhold is brought to an end, the owners would cease to have an exclusive interest in their respective units. They would then become equitable tenants in common of the whole property in pre-determined proportions."

[5.11] In South Africa, common leasehold tenure has been in practice much longer than in this jurisdiction and referred to as 'sectional title scheme.' As such, their decisions on disputes aligned to the practice provide some useful judicial precedent of persuasive value. In the case of **Erlax Properties (Pty) Limited v The Registrar of Deeds Johannesburg and 9 Others**¹ the Supreme Court of South Africa opined as follows:

"Where a developer divests himself of ownership of all units comprised in a scheme, he ceases to have any share in the common property and would accordingly have no say in the affairs of the scheme."

[5.12] The case went on to state to the effect that, for a developer to retain a right in dealing with common property or sectional units of the scheme they have to reserve the

right of extension in their favour with the Registrar of Deeds, over a determinable piece of the sectional title scheme, as a real right in land and obtain a certificate of registration for such right. Such reservation is said to result in a reduction or diminution in the ownership by other unit holders in their joint shares of the *common property* in accordance with their respective participation. Once a body corporate is registered, the right to deal with the undivided share in the *common property*, reposes in the body corporate of the sectional unit holders.

- [5.13] In yet another case, **Oribel Properties 13 (Pty) Limited and Another v Blue Dot Properties 271 (Pty) Limited & Others** ² the Supreme Court of Appeal of South Africa, was asked to determine on appeal, the competing interests under the sectional title scheme between a developer and the body of sectional unit holders. It was in that case held that:

“The right of a developer to extend the scheme involves a diminution of the rights of owners of sections otherwise attaching to the scheme, in particular their rights of ownership in an undivided share in the common property.

Should the developer fail to proceed with the extension or if no reservation was made, the right to extend the scheme rests in the body corporate which is entitled to obtain a certificate of real right in respect thereof.”

[5.14] Coming back to our own legislation, **section 7 (1) of the**

Common Leasehold Act provides that:

7. (1) “The common property under a common leasehold scheme shall be held by the unit-holders of the units as tenants in common in shares proportional to their respective unit entitlements.”

The above section is subject to the proviso in **section 7**

(3) (a) which underscores the position that, the only interest a unit holder can dispose of by way of sale in *common property* is the interest in the unit he owns. The section reads as follows:

“7.3 Except where a common leasehold scheme is varied in accordance with this Act-

(a) no share in the common property may be disposed of except as appurtenant to the unit of the unit holder concerned” (underlining for emphasis supplied)

[5.15] In that regard, **section 20 of The Common Leasehold**

Act provides that variation can only be effected:

“20. (1) On the passing of a unanimous resolution of the unit holders under a common leasehold scheme approving a specified variation to the scheme, together with, where the scheme is a phased development the agreement in writing of the Registered Proprietor of the remainder and of each

party to a registered contract for the purchase on completion of an uncompleted unit, the body corporate shall lodge an application for variation."

(underlining for emphasis supplied)

[5.16] Our understanding of the statutory provisions as quoted at paragraph 5.14 – 5.15 is that where property is held under a common leasehold scheme, each unit holder has, pursuant to **section 7 (1)**, a defined interest, expressed in percentage terms, in the *common property*. This interest is attached as an appurtenant easement to the particular unit. In terms of **section 20** the unit holders may by unanimous resolution elect to vary or adjust their respective unit interests in the common property and such specified variation is subject to registration with the Registrar. **Section 7 (3) (a)**, also provides that the only share in the common property that may be independently disposed of by a unit holder, is that attached to the particular unit.

[5.17] From that position of the law, the 1st respondent's argument that she acquired title to the common property before any of the appellants purchased their respective

individual units from her does not aid her case. We say so, as upon converting the property from leasehold to common leasehold tenure, the provisions of the **Common Leasehold Act** automatically kicked in. In terms of **section 2** of the said Act, the common parts or spaces known as *common property*, by operation of law attached as an appurtenant easement to the respective units, in shares proportional to the unit entitlement.

- [5.18] Accordingly, when the 1st respondent disposed of all the units by way of sale to, amongst others, the appellants, by operation of the law, she also divested herself of all interest in the *common property* which attached to the respective units as an appurtenant easement and was held by the unit-holders of the units, as tenants in common, in shares proportional to their respective unit entitlements. Any further variation or adjustment of the unit interest in the common property could thereafter only be effected in compliance with the requirements of **section 20**.

[5.19] We find ground one of the appeal equally has merit.

Having so found, we hereby order cancellation of the Certificate of Title issued to the 1st respondent in respect of the *common property*, described as LUS/3243/CL/O/CP.

[5.20] As both grounds of appeal have succeeded, we allow the appeal with costs to the appellants, both in this Court and in the court below. The costs are to be taxed in default of agreement.

Appeal Allowed.



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M. MALILA
SUPREME COURT JUDGE



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C. KAJIMANGA
SUPREME COURT JUDGE



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J. K. KABUKA
SUPREME COURT JUDGE