

## **GIBSON TEMBO v ALIZWANI (1996) S.J. (S.C.)**

SUPREME COURT  
GARNER, CHAILA AND CHIRWA, JJ.S.  
(S.C.Z. JUDGMENT NO. 6 OF 1996)

### **Flynote**

Purchase of land - Constructive notice by the purchaser - Equitable interest in land - Whether it can be enforced

### **Headnote**

The appellant had constructive notice of the respondent's interest in the land before he attempted to purchase the subject land. The respondent was a purchaser in possession under an earlier contract of sale of which the appellant had constructive notice. The question for the court's determination was whether, in light of the appellant's notice of the respondent's interest in the land, the respondent had a right to enforce his rights in respect of the property.

### **Held:**

- (i) At the time of the attempted purchase by the appellant, the property was subject to the respondent's equitable right under the earlier contract of sale, of which the appellant had constructive notice

### **Cases referred to:**

- (1) Sundi v Ravalia L.R.N.R. (1949-54)
- (2) Upto v Walker (1971) Z.R. 192
- (3) Lake Kariba Boating v Kariba Norhtbank Company Limited (1982)
- (4) Sithole v State Lotteries Board (1975) Z.R. 106

For the appellant: Mr. K. Maketo, Christopher Russell Cook and company  
For the respondent: V.A.L. Kabonga, Director of Legal Aid

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### **Judgment**

**GARDNER, A.J.S.:** Read the judgment of the court.

I have read the judgment of my learned brother Chirwa and I respectfully concur with his final decision in this appeal. I should like to comment on the argument put forward by Mr. Maketo. Mr. Maketo on behalf of the appellant argued that the property was in a recognised Improvement Area, and as such the relevant section of the Housing (Statutory Improvement Area) Act, Cap.444, applied by virtue of Regulation of the Housing (Statutory and Improvement Areas) Regulations. There was no dispute as to this. It was then argued that the appellant was the holder of a Certificate of Title in respect of the property, which, by virtue of s.8 of the Act, could only be challenged on grounds of fraud, Misrepresentation or mistake. It was further argued that any fraud referred to in the section must be found to be on the part of a purchaser and not of a vendor. He argued that any fraud referred to in the section must be found to be on the part of a purchaser and not of a vendor. He argued that the appellant was an innocent purchaser, and even if the vendor, Mukoba, had been guilty of fraud such fraud was irrelevant to the appellant's title. I shall indicate later that in my view the question of fraud does not apply in this case, but I should comment that, were section 8 to apply, then the fraud referred to must be the fraud of the purchaser - the holder of the impugned Certificate of Title. If a wholly innocent purchaser acquires a Certificate of Title his right to the property is not affected by any fraudulent conduct of the vendor unless such conduct had resulted in a third party's acquiring rights of which the purchaser has notice. In the latter case the purchaser would not, of course, be wholly innocent. In general however, the intention of the Act is to simplify conveyancing and to make it safe for Certificates of Title to be relied upon. The conduct of former vendors is therefore not material to the validity of an owner's Certificate. It is, however, material to the question of whether or not the owner's title is subject to an overriding interest of a third party.

When considering the possible rights of the respondent in this case it is useful to refer to the

English Land

Registration Act 1925. Although that Act does not apply in Zambia it is a guide to the Law that does in fact apply. Section 70 sets out the overriding interests which apply whether or not they appear on the register or whether or not the registered proprietor knows of them. One of these rights under s.70(1) is as follows:

"(9) The rights of every person in actual occupation of the land or in respect of the rents and profits thereof, save where enquiry is made of such person and rights are not disclosed."

Cheshire's Modern Real Property (Ninth Edition) at p. 527 contains this comment:

"An equitable owner in possession e.g. a purchaser under a contract of sale, would be protected under this heading even though he had caused no entry to be made in the Register."

In Zambia, so far as this particular property is concerned, we have our own legislation, that is to say, Cap.441, but the rights of the respondent in priority against the appellant are not specifically dealt with. There is section 16 which provides as follows:

"16. Any document which is required to be registered under the provisions of this Act and is not registered shall be null and void: Provided that nothing herein contained shall apply to the case of any person who has notice of any such document."

The section does not apply in this case because a contract for the sale of land may be registered, but is not required to be registered. Mr. Maketo argued that the first contract of sale should have been registered, failing which it was null and void within the terms of the decision in the case of *Sundi v Ravalia* (1) L.R.N.R. (1949-54) Vol. V p.345. That case related to a lease for a period of over one year, which was not registered within the due time required by the provisions of the Lands & Deeds Registry Act. It was held to be null and void for all purposes. By s.48 of Cap 441, there is provision that Cap.287 shall not apply to any land to which any part of Cap 441 applies. Section 37 of Cap.441 provided that, so far as Improvement Area are concerned, sections 6 and 7 of Cap 441 shall apply together with such other sections as the Minister may prescribe. In the regulations made by the Minister, Regulation 35 provides that there should be applied to Improvement Areas sections 8 to 25 and sections 33 to 36 of Cap.441. There is no reference to section 48, but, as some parts of Cap.441 apply to the land in question, Cap.287 is effectively excluded. There is no provision in Cap.441 that documents must be registered within a specified time, nor is there any requirement that a prior contract of sale must be registered in order to be effective. Mr. Maketo's argument, that the contract should have been registered and that in default the contract is null and void, cannot succeed. It is necessary, therefore to consider what is the position of the parties with regard to their possible equitable rights under the contract of sale when applying the provisions Cap. 441.

The facts of this case are that the appellant had constructive notice of the respondent's interest in the land. Cheshire's Modern Real property (Ninth Edition), at p. 65, contains the following passage:

"One object of investigating title is to discover whether the land is subject to rights vested in persons other than the vendor, and the equitable doctrine of notice orders that a purchaser is bound by any right which he would have discovered had he made the ordinary investigations as sketched above. Again, if he fails to make inquiries of third persons who happen to be in possession of the land. he is affected with notice of all equitable interests held by them, as, for example, an option to purchase the fee simple that has been granted to a lessee already in possession."

Because of this constructive notice, if the land were not registered land there is no doubt that the appellant's title would be subject to whatever equitable right was vested in the respondent. Under the provisions of Cap 441 the situation is no different. As already indicated, there is no provision in the Act similar to that in Cap 287, that if such a right is not registered it is null and void. The only such provision relates to documents which are required to be registered, and even then, in the circumstances of this case, the respondent's rights would be protected because the appellant had constructive notice. The situation is therefore that the respondent has a right to enforce whatever right he has in respect of the property. This does not affect the statement in s.8 of Cap. 441 that the Certificate of title cannot be challenged. The title is however subject to the rights of which the holder has had constructive notice in the same way

as the title would be subject to any right entered on the register. Mr. Maketo argued that there had been no fraud in respect of which the Certificate of Title could be challenged. I have already indicated that in my view the question of fraud does not arise in this case. The only enforceable right.

In the course of his argument Mr. Maketo said that Mukabo had, or thought he had, rescinded the first contract of sale. The question of what Mukabo thought he had done might be relevant to the issue of fraud, but, the respondent's equitable right depends upon whether or not such rescission was valid. When the respondent, in February, 1988, sent a telegram to Mukabo, calling on the latter to attend at Lusaka to complete the sale of the house, there had been no notice making time of the essence of the contract. At that period there was severe and rapid inflation in Zambia and, Mukabo would have been justified in calling for early completion long before February, 1988, in default of which a right to rescission could have arisen. However, as found by the learned trial judge, no such action was taken and time was never made of the essence.

The fact that no further action was taken by the respondent did not affect his rights, because, as he was a purchaser in possession, all that was required was the formality of completion at the original purchase price. (see Snell's Equity (27th Edition) at p. 596). I would find, therefore, that, at the time of the attempted purchase by the appellant, the property was subject to the respondent's equitable right under the earlier contract of sale, of which the appellant had constructive notice.

I would dismiss this appeal with costs to the respondent. Chirwa, J.S., - This matter was commenced by way of originating summons in which the appellant prayed for a declaration that property known as House No. 21 Block 37 George Compound, Lusaka was his, vacant possession of the same and fair rent to be paid by the respondent up to vacating and giving vacant possession of the same. The background of the matter is that the property in question is in an area declared as "The Housing (Statutory Improvement Area)" under Cap.441 and was owned by one Stephen Mwila Jukoba. In 1984, the respondent became a tenant to part of this house. In 1986, the said Stephen Mwila Muloba decided to sell the house and this intention was known to the respondent who expressed his willingness to purchase the same. The then owner wrote a letter acknowledging the offer from the respondent to buy the property at K5,000.00. To this effect the respondent made the first payment sometime in September, 1987 of K2,000.00 which was acknowledged by the seller who was at this time in his village in Kasama District having retired in Lusaka.

In acknowledging this first instalment the seller indicated that the balance was K3,000.00. In order to pay for the property, the respondent applied for a loan from his employers, AGIP (Zambia) Limited and this was granted subject to the production of title deeds. In February, 1988, the respondent sent a telegram to the seller that the balance of the purchase price was ready and asked him to come to Lusaka to collect it and, according to his evidence in court, to conclude the deal and sign deeds of transfer. The respondent's employer in May, 1988, also wrote the seller inviting him to come over to Lusaka to complete the deal and confirmed that they had given the respondent a loan. In June 1988 the seller acknowledged the letter and indicated that he was willing to finish the deal but that the balance was K2,000.00 and not K1,000.00 and that the same was to be paid before 15th July, 1988, or else he would increase the purchase price. The respondent's employers wrote the seller another letter in November, 1988, imploring him to come over to Lusaka to complete the deal and facilitate the change of ownership and intimated that if he failed they would have recourse to the law to change the ownership in view of his conduct. It does not seem that there was any response to this letter but in May, 1991, the respondent received a letter from Messrs Luangwa Chambers dated 29th April, 1991, in which they enclosed cheque in the sum of K6,000 purporting it to be a refund of the "deposit for purchase of the property" stating that those were their instructions from their client, the seller. The respondent refused to accept this cheque. On the part of the appellant, it was shown that in about March, 1991, he got involved in the property and he agreed to purchase the same at K160,000.00. He said this amount and all legal formalities were completed and change of ownership was completed from the seller to him and an occupancy licence was issued to him by the Lusaka City Council dated 19th March 1991 and he then asked the respondent to vacate the house as he wanted to occupy it and it was only then that he discovered that the respondent had also entered into a contract with the seller for the purchase of the same property. It should be noted that the appellant had visited the house before the purchase of the house and that although he did not inspect it he found that there were people in occupation. He never made any inquiries from the people he found at the house as to how they came to occupy it.

It is from these facts from both the appellant and the respondent that the appellant decided to seek the declaration already stated above. In arguing the appeal for the appellant, Mr Maketo submitted that the learned trial judge erred in that he made a decision over a matter that was

not before him, namely specific performance. He argued that the issue was not as between the vendor and purchaser as this was never pleaded but between two innocent parties and to decide as between them who was the lawful owner of the property innocent parties in the sense that both had different dealings with the vendor and were not aware of the other's transaction. The question was who was entitled to the property between the appellant and the respondent and he argued that the appellant had a superior claim over the property as against the respondent and that the obtaining of the certificate or occupancy licence under the Housing (Statutory and Improvement Areas) Act was prima facie evidence of ownership and under section 8 of the Act this cannot be challenged except on account of fraud, misrepresentation or mistake. It was submitted that here there was no fraud as the vendor had refunded the purchase price paid by the respondent and that if there is any cause of action it is for breach of contract between the respondent and the vendor and does not affect the good title obtained by the appellant. It was on this point that he further submitted that fraud had not been pleaded and proved and therefore the appellant's title cannot be challenged. In this regard Mr Maketo referred the court to a number of authorities amongst them were:

- (a) SUNDI v RAVALIA (1949) N.R.L.A. 345
- (b) UPTON v WALKER (1971) 192
- (c) LAKE KARIBA BOATING v KARIBA NORTHBANK COMPANY LIMITED (1982) Z.R. 35
- (d) SITHOLE v STATE LOTTERIES BOARD (1975) Z.R. 106

For the respondent the learned Director of Legal Aid submitted that statute law should be applied subject to equity. He submitted that here there was a valid contract between the respondent and the vendor and all that remained was to formally change ownership from the vendor to the respondent and the respondent did all in his power to facilitate this change but for the conduct of the vendor who negated without notice and good reason. He argued that at the time the vendor entered into contract with the appellant, the vendor had no title to transfer and that the purported transfer of title to the appellant was a fraud on the part of the vendor and no good title passed to the appellant and therefore it would be inequitable for the respondent to be denied title to the property. He conceded that both the appellant and the respondent are innocent purchasers of the same property but that the respondent had a cleaner title as he acquired it, although not registered, before the appellant. He therefore prayed that the decision of the lower court should be upheld and the appeal dismissed.

I have carefully considered the evidence before the trial court on record and also submissions by Counsel. As I have outlined already in the undisputed facts of this matter, there is no doubt that originally the property in question was registered in the name of Stephen Mwila Mukoba. That the said Mukoba entered into agreement with the respondent to sell the said property to the respondent and the respondent paid full price for it before March 1991 and that the said Mukoba was requested to come to Lusaka to effect change of ownership of the property from him to the respondent but never did. However, sometime in March, 1991 the said Mukoba agreed to sell the same property to the appellant and they proceeded and changed ownership certificate with the Lusaka City Council on 19th March 1991. On 29th April 1991 some advocates, purporting to be acting for the said Mukoba sent to the respondent a cheque of K6,000.00 as refund "paid to our client as deposit for the purchase of the above mentioned house" (underlining our own) (above house referred to the property in question).

Given this scenario, looking at the events and documents, I agree with the learned trial judge that to decide this matter one has to look at the titles to the property and sequence of dealings as between the appellant and Mukoba and the respondent and Mukoba.

First I will deal with the dealings between the respondent and Mukoba. The sale agreement was entered into on 12th March, 1986, and the respondent made various payments and involved his employers in that he obtained a loan from them to complete the transaction. By May, 1988, the said Mukoba acknowledged various sums from the respondent and stated that the balance was K2,000.00 and that that was due and if not paid he would rescind the contract. The contract was not rescinded and by letter dated 5th November, 1988, the respondent's employers wrote Mukoba that he should travel to Lusaka to collect his balance and conclude the deal and facilitate the transfer of the property to the respondent failure to which they would apply to court to enforce the change. It is clear from the facts, as supported by the documents that the respondent by the end of 1988 had fulfilled his part of agreement and what remained was for the said Mukoba to facilitate the change of ownership. As between the transactions between the appellant and the said Mukoba, these started in March, 1991, and concluded the same month and change of ownership was effected at the Council registry.

As between the appellant and the respondent it is no doubt that they had no dealings between them. They both got involved in the purchase of the same property from the said Mukoba. I

agree that under Section 8 of the Housing (Statutory and Improvement Areas) Act, Cap.441 a Council Certificate of Title issued by the registrar to any transferee of land is not subject to challenge except on the ground of fraud, misrepresentation of mistake. In tackling this problem I have to consider the parties in these transactions involving offer and acceptance; consideration; capacity to contract and ability to transfer good title. From the facts of this case, there is no doubt that all ingredients to form valid contracts were present except for the ability to transfer good title and the learned trial judge correctly identified this as the main issue of the case. From the facts of the case the learned trial judge correctly concluded that as between the respondent and Mukoba, Mukoba has a good title to transfer to the respondent and that all formalities for a valid contract were present. It is no doubt that it was Mukoba who defaulted in completing the transaction by formally signing the assignment to enable the respondent to register the property in his name. This means that at the time the said Mukoba entered into agreement for the sale of the property to the appellant, he had no good title to the property to pass on to the appellant. He even misrepresented the facts to his advocate that the K6,000.00 he received from the respondent was a deposit towards the purchase price of the property. All his messages and writings were to the effect that the purchase price was K5,000.00 although later he increased it to K6,000.00 which increase the respondent did not object to but obliged and paid. The transaction between Mukoba that he had a good title to the property to pass on.

Further from the evidence of the appellant, I am satisfied that he visited the house in question and found some people in occupation. He never made any inquiries as to how those people were in occupation of a house he had purchased. He never inspected the inside of the house, he merely looked at it from outside. As a prudent man, he ought to have inquired from the people he found in occupation as to how they occupied the house and if he did he would have been told that the house had been bought from Mukoba so that any further dealings over the house was tainted, he ought to have been put on alert. This put him in a position of being not entirely innocent. He must have known of Mukoba's earlier dealings over the same house with the respondent and therefore any dealings by Mukoba with the appellant was a fraud and the appellant was aware of it and therefore Section 8 of the Housing (Statutory and Improvement Areas) Act, Cap. 441 cannot be relied upon by the appellant. The strong feeling that the appellant was aware of the sale between the respondent and Mukoba is strengthened by the unclear manner in which he got involved or how and when he got to know that the house was on sale. Since Section 8 of the Housing (Statutory and Improvement Areas) Act cannot be set up as statutory proof of ownership of this property under the circumstance of this case at common law the respondent has a better title to the property. Not only was he in possession but he in fact carried out improvements to the same after he paid the purchase price. It would even be inequitable to deprive him of this property on the facts of this case. Mukoba, through fraud, which fraud the appellant ought to have known, he fraudulently transferred the title to the property to the appellant after he consistently disregarded requests from the respondent to come to Lusaka to facilitate the change of ownership to the property. I note that unlike documents requiring registration under the Lands and Deed Registry Act which must be registered within a stipulated time, there is no similar provision under the Housing (Statutory and Improvement Areas) Act, Cap.441; therefore whatever documents were signed between Mukoba and the respondent can be registered if there is any need.

On the facts of this case, I am satisfied that the learned trial judge was correct in arriving at the conclusion he did and would dismiss this appeal. In dismissing the appeal I would order and direct the Registrar at the Lusaka City Council Lands registry to cancel the memorial entered in the register transferring property number 21/37 George compound from STEPHEN MWILA MUKOBA to GIBSON TEMBO and in its place to enter the transfer of the said property from STEPHEN MWILA MUKOBA to ALIZWANI WISIKESI. I award costs to the respondent both in this Court and the court below to be agreed, in default to be taxed.

Chaila, J.S. - I have had an opportunity to reading the judgement just delivered by my brother Chirwa, J.S. I am in complete agreement with the conclusion which my learned brother had reached and I have nothing useful to add. I would also dismiss the appeal with costs.

Gardner, A.J.S. - The order of the court is that the appeal is dismissed. It is further ordered that the Registrar at the Lusaka City Council Registry effects the change of ownership to property question to Alizwani Wisikesi, the respondent in this appeal. Costs to the respondent both in this court and the court below to be agreed, in default to be taxed.

Appeal dismissed

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