

NDOLA CITY COUNCIL v WILLIAM KASONSO (1997) S.J. 58 (S.C.)

SUPREME COURT

B. BWEUPE DCJ, SAKALA AND MUZYAMBA, JJ.S.

4TH JUNE AND 11TH SEPTEMBER, 1997.

(S.C.Z. JUDGMENT NO. 13 OF 1997)

Flynote

Local authority - City council not following requirements of its own by-laws - Council liable for damages.

Headnote

Where a city council's by-laws require that a person who erects a building without obtaining a permit must be notified that the building may be

Held:

- (i) The defendant contravened By-law 67 of the Ndola Municipal Council By-Laws Cap 480 by demolishing the plaintiff's building. Although the requirement to obtain a building permit was mandatory, the plaintiff was entitled to begin construction of the building.

Legislation referred to:

1. Ndola Municipal Council By-Laws, Cap 480

For the Appellant: Major K.M. Kaunda, Director of Legal Service, Ndola City Council, Ndola.

For the Respondent: Mr. E. Chulu of Chulu and Company, Ndola

Judgment

SAKALA, J.S.: delivered the judgment of the court.

This is an appeal against a judgment of the High Court entered in favor of the respondent wherein the court held that the appellant contravened By-Law 67 of the Ndola Municipal Council By-Laws, Cap 480 by demolishing the respondent's building.

For convenience, we shall refer to the respondent as the plaintiff and the appellant as the defendant, which they were in the court below.

The facts of the case which were not in dispute were that, sometime in June 1994, the plaintiff applied for a residential plot at stand no. 8226, Ndola. He was offered the plot and accepted it. After paying for the necessary service charges, the plaintiff applied for a building permit in accordance with the Ndola City Council By-Laws. There was no response to the respondent's application for a building permit. Consequently, after a period of five months from the date of the application for a building permit, the plaintiff commenced building on the stand in question. On 3rd January, 1996, the defendant wrote the plaintiff, advising him to stop construction, as there was no building permit. Consequently to the letter the defendant demolished the building on stand No 8226. On the facts not in dispute and on the evidence before him and after reviewing the relevant By-Laws, the learned trial Judge found that the provisions of the By-Laws, were mandatory and prohibited any one from erecting or beginning to erect any building without a building permit. He found that in the instant case it was not in dispute that the plaintiff had commenced erecting the building without a building permit. The court accepted that the plaintiff had received a letter from the defendant over the house before being granted a building permit. The court further found that By-Laws of the defendant provided for an exception of when erection of a building can commence without a building permit. The court held that under the exception and on the facts not in dispute, the plaintiff was entitled to commence building his house without a building permit. The court concluded by setting out the steps that the defendant must follow before demolishing a building or structure constructed in contravention of its By-Laws as:

- (a) Notifying in writing, the person constructing the building or structure that he must demolish it within a specified period and that

- (b) If the structure or building were not demolished within a specified period, that Council would enter the site and demolish the structure or building.

The court held that from the evidence, the defendant council did not follow the procedure provided by its own By-Laws. The court also held that the letter written by the defendant council to the plaintiff advising him to stop the construction on the ground that he had not obtained a building permit did not comply with the provisions of the defendant's By-Laws. The court further held and found that the defendant council demolished the plaintiff's building in contravention of its own By-Laws and accordingly entered judgment in favor of the plaintiff and made an order for damages to be assessed by the District Registrar. This is the judgment the defendant council has appealed against. The memorandum of appeal consists of two grounds namely: that the learned trial judge misdirected himself in holding that the defendant and that the judgment was against the weight of the evidence.

On behalf of the defendant, Major Kaunda informed the court that he was adopting his submissions in the court below as part of his submissions in this court in addition to his brief written heads of arguments. In his oral arguments counsel pointed out that the court below overlooked certain provisions and sections relating to the Ndola City Council Town and Country Planning Act, Cap 475. He specifically drew the court's attention to the Ndola Municipal Council By-Laws 60 (3). In relation to the By-Law 67(1), counsel submitted that the plaintiff having been informed that the building permit had not been approved, he should not have commenced the construction of the building. He contended that By-Law 67(1), should be read in conjunction with section 28 (2) of Cap.475 as well as section 23 of Cap 475 relating to applications for planning permissions. According to counsel the letter of 3rd January, 1996, was adequate notice to the plaintiff pointing out that By-Law 67(1) is intended to cater for three situations namely; where a permit is not issued, where a permit is issued but the portion of the building is in breach of that permit, and where a permit is issued by the council but a different building has been erected. According to Major Kaunda the plaintiff fell into a category where a permit had not been issued although he had applied for it but proceeded to construct the structure. Counsel however conceded that as there was no communication before erecting the structure to foundation level, the plaintiff was entitled to start the building but contended that failure by the defendant council to inform the plaintiff within 30 days of the date of his application was not a justification for the plaintiff to have started the construction of the structure.

In the alternative, Major Kaunda submitted that a double storey building which the plaintiff was constructing was in conflict with the house plan because the plot did not cater for a double storey building or house as it was too small to accommodate such a building. According to counsel, the defendant had fulfilled the requirements of By-Law 67 by a letter dated 3rd January, 1996, which by implication amounted to a notice which brought the nature of breach to the attention of the plaintiff and was within 28 days supposed to comply with that notice which he failed to do and the defendant was therefore entitled to demolish the structure.

On behalf of the plaintiff Mr. Chulu informed the court that he was relying on his written heads of arguments. In his oral arguments he submitted that the appeal had not disclosed any ground upon which this court could safely interfere with the judgment of the court below. He submitted that the defendant had never complied with By-Law 67 even if section 23 extended the period. He urged the court to dismiss the appeal with costs.

From the submissions in support of the appeal it is quite clear to us that there is only one ground of appeal which was actually argued before us. The other ground in the memorandum, as framed, did not amount to a ground of appeal at all.

As a result we observed that the salient facts in this appeal are common cause and the most significant fact is that the plaintiff conceded that he commenced erecting the building without obtaining a building permit. The plaintiff's explanation, accepted by the learned trial judge, was that he started erecting the building because of the delay, he submitted. The issue for determination centers on the interpretation of the defendant's By-Laws cap 430 specifically By-Laws 57(1)(c), 60(3), and 67(2).

Major Kaunda invited us to read these By-Laws together with section 23 and 28 (2) of the Town and Country Planning Act Cap 283. We have examined these sections. Section 23 deals with development and subdivision orders by the Minister. In our view, this section is irrelevant to the facts of the appeal before us. Section 28 (2) does not help the defendant either because it specifically deals with an application for subdivision. This was not the issue here and even if it had been the issue the section also makes the point that if within a

specified period of ninety days after receipt of an application for subdivision, the planning authority fails to serve a notice on the applicant as to how the application has been dealt with, "then the application shall be deemed to have been approved..." This provision does not take the case of the defendants any where either.

By-Law 57 (1)(c) reads:

"57.(1) No person shall erect or begin to erect any building until:
(c) a written permit to be called a "building permit" has been obtained from the council to erect the building, together with a signed copy of the plan approved by the council as hereinafter provided."

The court found that the provisions of By-Law 57(1)(c) are mandatory and prohibit any person from erecting or beginning to erect any building without first obtaining a building permit. We agree with the learned judge's finding.

Having made this finding the court proceeded to consider By-Law 60(3) which reads:

"if within thirty days of the receipt of any plans or application..... delivered in accordance with these By-Laws the Council shall fail to intimate to the person submitted such plans its disapproval or the fact that it has not yet approved of the building or work which the said person intends to erect, the person submitting the plans may proceed with such building or work in accordance with the plans, but not so far as to contravene any other of the provisions of these By-Laws."

The learned judge found that the provisions of By-Law 60(3) are an exception to By-Law 57(1)(c) since they allow a person to begin erecting the building if within thirty days he has not been informed of the decision of the council on the building plans submitted. The learned judge further accepted that By-Law 60(3) entitled the plaintiff to commence building council of its decision. We agree with the learned judge on all these findings and take note that the delay here was of five months.

On the evidence on record the court accepted that the plaintiff received the letter dated 3rd January 1996 despite having denied in evidence that he did not receive it. To complete the story we set out here that letter. The letter reads:

"January 1st, 1996 CONF/P.8226

William Kasonso,
P.O BOX 23001,
Ndola.

Dear Sir,

PLOT NO. 8226 Petauke Road Kansenshi

You are carrying out construction works to build a residential house on the above said plot without obtaining a building permit from Ndola City Council. This action is a serious contravention of the applicable by-law 57(1)(c) Part III Cap 480 of Ndola Municipal by-law.

Therefore, I am requesting you to immediately stop construction until you obtain a building permit for the same. Failure to comply with my request will compel me into recommending your plan to be disapproved and all the work you carried will be deemed illegal and liable for demolition. This is the final warning.

Yours faithfully
J.W. Wamulume, Director of Engineering Services

c.c. Director of Legal Services.”

Having found that the Plaintiff received the letter, a finding with which we agree, the learned judge proceeded to consider By-Law 67(2) which reads:

“If any person erects or begins to erect any building without having obtained the permit required by these By-Laws ...the Council may in addition to any other proceedings that may be taken for breach of these By-Laws, require, by written notice, such person to demolish or remove such building or any part thereof or to make such alteration in such building as it may prescribe within a time to be specified in the said notice. Further, in the same or another notice, the council may notify that person, that if such requirement is not complied with within the specified time, the Council will itself enter upon the premises and carry out such demolition, removal or alteration.....”

The court found that there was no written notice specifying a period within which the plaintiff had to demolish his building. Further the court found that there was no written notice informing him that if he did not comply it would enter the premises and carry out such demolish itself. The defendant demolished the building without following his or her own By-Law 67. The letter they wrote did not amount to a notice as required by By-Law 67. The learned judge’s conclusion was inevitable. We are more than satisfied that on the evidence on record there can be no basis of disturbing the learned trial judge’s finding.

This appeal reveals no merit at all. It is dismissed with costs to be taxed in default of agreement.

Appeal dismissed
