HENRY MPANJILWA SIWALE, REVEREND EWEN SIWALE, KELVIN SIWALE, STEPHEN SIWALE, DR. SICHILINDI SIWALE, PEART SIWALE, MUSENGA SIWALE AND NTAPALILA SIWALE

SUPREME COURT
CHAILA, LEWANIKA, JJ.S.
2ND MARCH AND 1ST JUNE, 1999.
(S.C.Z JUDGMENT NO. 24 OF 1999)

Flynote

Land Law - Acquisition of Title - Customary tenure.

Headnote

The appellants and respondent were all children of the deceased, Donald Siwale. Sometime in 1928, the deceased was allocated about 400 hectares of land by th colonial authorities in consultation with the traditional chief. The deceased settled on this land and developed it and it became known as Isunda. The deceased never acquired formal title to property as it felll in customary land previously known as native trustland. But the property was known and accepted as the homestead of the deceased's family. The deceased died on 30th November, 1983. Proir to the deceased's death the respondent had received a letter in October,1977, requesting him to come and settle at Isunda which he did up to the death of the deceased. The respondent then formally applied for title deeds to the property and obtained title for only 200 hectares of the property. The appellants sued the respondent seeking a declaration that they be included in the title deeds.

The High Court found for the respondent and on appeal it was held;

Held:

1. **The appellants had as much right to the land as the respondent being all children of the deceased.**
2. **The appellants were persons who were affected by the grant of title deeds to the property and should have been consulted before this was done.**

For the Appellants: I.C.T. Chali of Chali, Chama & Co.
For the Respondent: B.M. Kangombe of B.N. Kangombe & Co.

Judgment

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

This is an appeal against a decision of a High Court Judge refusing the appellants' application for an Order that they be included on the Title Deeds of Farm No. 5032 Isoka, now Nakonde. The application was made under Section 11 of the Lands and Deeds Registry Act, now Cap. 185.

The brief facts before the learned trial Judge were that the appellants and the respondent are all children of the late Donald Siwale (hereinafter referred to as the deceased). Sometime in 1928 the deceased was allocated about 400 hectares of land by the colonial authorities in consultation with the traditional chief. The deceased settled on this land and developed it and it came to be known as Isunda. The deceased never acquired formal title to the property as it fell in customary land previously known as native trust land. But the property was known and accepted as the homestead of the deceased's family. The deceased died on 30th November, 1983. Prior to the deceased's death the respondent had received a letter in October, 1977, requesting him to come and settle at Isunda as he did not seem to be doing anything in Lusaka, the respondent was the deceased's youngest son. The respondent moved to Isunda in

November, 1977, where he settled and stayed with the deceased up to his demise. After the demise of his father the respondent decided to apply for title deeds in his own name for the property left behind by the deceased. He freely conceded in this evidence that he did not consult any of the appellants who are his elder brothers as in his view they had neglected the deceased and had not shown any interest in the land. From 1984 onwards he made application to the Isoka District Council and obtained authority from Chieftainess Nawaitwika for the issue of title deeds to himself. Although he had applied for title for 400 hectares only 200 hectares was approved and he was issued with a certificate of title for the same.

The case for the appellants as set out in the affidavit and viva voce evidence of the 1st appellant was that the land known as Isunda was a family property for all the children of the deceased. At no time were they consulted by the respondent before he made application for the title deeds in his own name and the 1st appellant only became aware that the respondent had obtained title deeds when on retirement from employment in August, 1987, he went to consult the department of Water Affairs in Isoka about sinking a bore hole at the Village. He convened a meeting of the family to discuss the situation but the respondent was not co-operative hence the litigation. The learned trial Judge after considering the evidence before him found that it would not be in the best interests of the family to include the appellants' names on the title deeds and dismissed the application.

Counsel for the appellants has filed five grounds of appeal namely:

1. That the learned trial Judge erred when he held that the late Mr. Siwale had not acquired title to the land in question.

In arguing this ground counsel said that the learned trial Judge had found that the deceased had not acquired title to the land in dispute. He referred to page 11 of the record where the learned trial Judge refers to the deceased's interest in the land as not being "individual rights or title" and as one which was "communal and one in common with the general members of the local community." He said that it was evident from the evidence on record that the deceased settled on the land in question as far back as 1928 when it was given to him by the colonial authorities. He submitted that this being at the time land falling within the traditional ruler's domain and having been established as a family place of residence for a long time, it was only fair for the learned trial Judge to have treated the deceased as the "owner" of the land on which the village was built and in that case he had title to the land under customary law. Counsel further submitted that if the deceased had acquired communal title, "one in common with the general members of the local community," it was contradictory for the trial Judge to allow one person out of the community to succeed to the whole or a substantial part of the land to the exclusion of other members of that community.

He further submitted that if this case were to be dealt with under the current Intestate Succession Act of 1989, the land in question would have easily fallen under the definition of either "family property" or "homestead property" under Sections 2 and 3 of the said Act. He submitted that this was a proper case where a cross section of a large family has an interest in the same land, that whole family ought to be protected by a ruling that no single member thereof ought to deprive others of their right to enjoy the land on which they have settled.

2. That the learned trial Judge further misdirected himself in fact when he found that the respondent had used "normal channels" to obtain the title deeds.

Counsel submitted that it was established in evidence that at the point when the chieftainess's permission was being sought by the respondent in support of his application for title deeds, the respondent had made misrepresentations to the chieftainess to the effect that he had the support of his family to acquire title to the family land. He referred to the evidence of P.W. 1 on pages 134 and 135. He further pointed out that the respondent had admitted in evidence that he did not consult his brothers when he was making the application and that he did not even go to the chieftainess with any of them, and that the deceased did not give him the farm to be held in his name. He said that all these matters indicate a fraudulent intention on the part of the respondent to deprive the other members of the family of their right to enjoy access to and living on the said land.

3. That the learned trial Judge further erred when he found as a fact that the appellants had no interest in the land belonging to their late father.

In arguing this ground counsel said that the learned and trial Judge had found that there was

substance in the respondent's assertion that the appellants did not show interest either in settling at Isunda or developing the village, and that had they been interested they would have acquired the title deeds to the land earlier than the respondent. The trial Judge further went on to hold that his finding was reinforced by the fact that it had taken a considerable time for the title deeds to be issued, such that the appellants ought to have taken steps to prevent the title deeds being issued to the respondent. Counsel submitted that from the evidence, it is clear that the appellants had an interest in the land. He said that the 1st appellant only discovered the fact that the respondent had obtained title deeds when he went to the village to try and sink a bore hole. Further, counsel submitted that the appellants could not have known of the respondent's application because it was not advertised in the media and the respondent did not tell them about his application. He further submitted that there was no evidence before the trial court to suggest that the family members of the deceased had no interest in continuing to hold the land together as a family.

4. That the learned trial Judge also erred when he held that the inclusion of the appellants on the title deeds to the land would bring about further problems or that it was not in the best interest of the family.
5. That on the totality of the evidence before the learned trial Judge it was wrong for him to refuse the application before him.

These two grounds were argued together by counsel for the appellants. In arguing them counsel said that the land in question was in the nature of "family village" set up and that the respondent in his own evidence had said that "Isunda was regarded as the home of my father's children." He said that excluding the appellants from the title to that land will create more problems than it will solve. Especially having regard to the respondent's attitude to his brother highlighted by the respondent's evidence on page 156 of the record where he stated that, "with the title deeds you are in control of the land and can use its resources. I have control of the land and can control who stays there." Counsel submitted that the respondent is specifically indicating his intentions to displace the other family members in advancing his personal interest and he was urging the court to stop him doing so.

In reply counsel for the respondent has submitted that it is not in dispute that the deceased settled on the land in question many years ago with the authority of the local chief and the colonial authorities. He said that the land in question cannot be said to be a village. He said that the evidence on record is that the deceased requested his children who include the appellants to settle on the land called Isunda but the only one who heeded the call was the respondent. Following the demise of the deceased the respondent took steps to obtain title deeds to the land. He went to see the chieftainess on two occasions and the District Council also approved his application. He said that the appellants had advanced the argument that the respondent misrepresented the facts to the chieftainess but that the evidence on record is to the contrary. He challenged the authenticity of the document on page 19 of the record and further said that the document on page 49 only refers to the respondent and not the whole family. He further submitted that although the appellant had applied for 400 hectares he was only allocated 200 hectares and that the appellants were at liberty to apply for title for the remaining 200 hectares and urged us to dismiss the appeal.

We have considered the arguments advanced by counsel for the appellants and for the respondent as well as the evidence on record. It is common cause that the land in question was given to the deceased by the colonial authorities with the approval of the local chief sometime in 1928. The deceased settled on this land and developed it for the benefit of himself and his family. This land was situated in a customary law area or what was then known as native trust land and although the deceased had no formal title to the land in question, it was generally understood that the land in question "belonged" to the deceased. The appellants and the respondent are all the children of the deceased, the respondent being the youngest. The appellants were all employed and did not stay with the deceased whilst the respondent who was not in gainful employment had settled on the land and stayed with the deceased till his demise. It is common cause that after the demise of the deceased the respondent decided on his own, without consulting his elder brothers, to apply for title deeds in his name for the land in question. He obtained the consent of cheiftainess Nawaitwika although there is some dispute as to whether or not he misled the chieftainess into believing that he was doing so on behalf of the family. However, that issue is not material for reasons that will become clear later. Suffice it to say that the respondent freely admitted that he did not consult his brothers and his motive in obtaining the title deeds in his own words are:

> "With the title deeds you are in control of the land and can use its resources. I have control of the land and control who stays there. My brothers are staying else where."

We have already made reference to the fact that this land when it was given to the deceased

was on what was then called native trust land. Tenure in these lands was governed by the Northern Rhodesia (Native Trust Land) Orders in Council, 1947 to 1963 as amended by the Zambia (Trust Land) Order, 1964 repealed and replaced by the Lands Act of 1995. These orders in Council provided for customary tenure of such land and the learned trial Judge was in error when he held that the deceased did not have title to the land in question at the time of his demise. Following from that is the fact that the appellants had as much right to that land as the respondent being all children of the deceased. Further there were restrictions in the alienation of land held under customary tenure in the Order 5 in Council which are now to be found in section 3 (4) (c) of the Lands Act which provides as follows:

> 3(4) Notwithstanding subsection (3), the President shall not alienate any land situated in a district or an area where land is held under customary tenure :
>
> (c) Without consulting any other person or body whose interest might be affected by the grant;

Quite clearly the appellants were persons who were affected by the grant of the title deeds to the appellant and they were not consulted before this was done.

The appellants had applied under section 11 of the Lands and deeds Registry Act that their names be included on the Title Deeds of Farm No. 5032, Isoka now, Nakonde. The 5th and 6th Applicants withdrew from the proceedings prior to the commencement of the trial. For the reasons we have given, we would allow this appeal and order and direct that the Register be rectified in terms of Section 11 (2) of the Lands and Deeds Registry Act by the inclusion of the names of the appellants on the certificate of title relating to Farm No. 5032, Isoka, now Nakonde. As the appellants and the respondent are brothers and will now own the property jointly as tenants in common and in order to promote harmony and reconciliation, we order that each party is to bear its own costs.

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