NYAMBE MUKELABAI AND GUNTHER WIDMAIER (1999)

SUPREME COURT
NGULUBE, C.J., BWEUPE, D.C.J., AND CHAILA, J.S.
ON 29TH APRIL AND 29TH JULY,1999
(S.C.Z. APPEAL NO. 116 OF 1999)

Flynote

Land Law - Customary acquisition of land - Determining extent of land allocated.

Headnote

The appellant (plaintiff) claimed that the land given to the respondent (defendant) was an integral part of the plantiff's land which had been granted to him in 1975. In obtaining his land the plaintiff had fulfilled all customary requirements.The defendant also said that he had followed all the necessary procedures and obtained the land allocated to him with the blessing of both traditional and state authorities.

Held:

(i) Once the defendant is adjudged (as happened) not to be occupying the plaintiff's land, the plaintiff hardly has *locus standi* to complain about land that is not his.

(ii) The defendant had complied with the Orders in Council that required the satisfaction of all traditional and state requirements.

For appellant: Sachika Sitwala, of Lighthouse Chambers.
For respondent: N. Nchito, of Nchito Chambers.

Judgment

NGULUBE,C.J.: delivered the judgment of the court.

For convenience, we will refer to the parties by their designations at the trial; the appellant as the plaintiff and the respondent as the defendant. The plaintiff brought proceedings against the defendant in which he asked the court to nullify the grant of a piece of land in Mongu to the defendant by the Lozi Royal Establishment and to order cancellation of a Certificate of Title issued to the defendant in respect of the same land by the Commissioner of Lands. The plaintiff claimed that the piece of land granted to the defendant was infact an integral part of a ten acre plot of land which had already been granted to him in 1975. He had gone through all the necessary procedures under Lozi custom, culminating in making obeisance (Ku Showelela) to the Litunga.

He said he had applied for a Certificate of Title to part only of this piece of land to facilitate borrowing, leaving the rest of the plot unsurveyed and available should a lender take away the piece with the Certificate of Title. The plaintiff further claimed that it was contrary to the law applicable at the time, that is the Zambia (State Lands and Reserves) orders 1928 – 1964 to grant land in a Reserve to a non-native inhabitant. Another point raised (which it transpired was infact common ground) was that under Lozi Customary law, land granted to a subject by one Litunga cannot be taken away by a subsequent Litunga.

The defendant's case was that being desirous of procuring land on which to construct workers' houses for his carpentry and joinery business, he too went through all the requisite procedures starting with an approach to the Area Chief and culminating with a Certificate of Title with the blessings and consent of all the relevant traditional State authorities. At an early stage, the traditional authorities convened a meeting at the affected site with all the neighbours; the plaintiff attended and raised objection, claiming the piece of land as his and he was contradicted by two Indunas sent from the Royal Establishment who happened to have been present at the time when the plaintiff's own piece of land was demarcated.

The plaintiff sued and lost in the traditional courts. He then launched these proceedings and lost in the High Court. The learned trial Judge determined that the issues to be resolved were whether the land given to the plaintiff by the Litunga in 1975, included the disputed piece now occupied by the defendant; whether the present Litunga had not wrongfully dispossessed the

plaintiff, contrary to Lozi Customary land law; whether the plaintiff's land was clearly delineated ; whether the plaintiff had adduced sufficient evidence to establish that the land now held by the defendant was part of the land given to him by the Litunga in 1975; and whether it was contrary to law to grant land in a reserve to the defendant, a German national. The learned trial Judge found against the plaintiff who has appealed to this Court.

We heard elaborate arguments and submissions. We also received detailed written heads of argument. In the view that we take, the point was not what the Lozi Customary law of land acquisition is and about which there was no dispute as such. The true point was what land had been given to the plaintiff and whether this included in extent the piece of land subsequently given to the defendant. The learned trial Judge clearly recognized this. In analysing the evidence, the Judge observed that both the Litunga and the area Chief Libumbu who were involved in the grant to the plaintiff were decreased but that one at least of the Indunas sent to demarcate the plaintiff's land was still alive and had attended the meeting to demarcate the defendant's plot. This was Induna Inguu who contradicted the plaintiff's claim at the meeting. The defendant had deposed in his evidence that there were infact two Indunas at the meeting who had also participated in the earlier exercise of demarcating the plaintiff's land. The Court observed that apart from his own word, there was no one else and nothing else to support the plaintiff's claim to the defendant's land. The Judge concluded that the plaintiff had failed to satisfy the Court whether verbally or by documents that the land given to him in 1975 by the late Litunga included Lot 6020/m now occupied by the defendant.

In the grounds of appeal and in the submissions and arguments, many issues were raised. For example, the plaintiff criticised the Judge for expecting customary land to have survey diagrams and beacons. But infact, the learned trial Judge was commenting on the plaintiff's own evidence that a Mr. Ilukui of the Mongu Rural Council had surveyed his land. As Mr. Nchito submitted, the plaintiff cannot complain about a matter he himself had talked about. Another complaint was that the judge should not have required the plaintiff to call corroborative evidence. The learned trial Judge infact made observations well within his rights when he pointed out, in effect, that the plaintiff's claim rested solely on his own say so and that neither the documents he had produced nor the witness he called assisted his claim regarding the extent of his own land. There is nothing in the judgment to suggest that the learned trial Judge had categorised the evidence of the plaintiff – as one would expect in a criminal trial – as falling within the classes which require corroboration whether as a matter of law or as a matter of practice. Another ground was that the current area Chief Libumbu, gave hearsay evidence on the extent of the land. The learned trail Judge infact had before him the evidence of the defendant that a meeting was called which the plaintiff attended and where eye – witnesses to the fact demarcation were present to refute the plaintiff's claim. All these arguments were, in our considered view, red herrings. The problem infact reduced itself to sufficiency of proof, or perhaps more accurately insufficiency of proof. In other words, the plaintiff failed to prove his case on a balance. In truth, we have no pretex which we can use for reversing the learned trial Judge's determination on the facts and evidence before him.

That leaves the legal objection based on the Orders in Council. Once the defendant is adjudged – as happened – not to be occupying the plaintiff's land, the plaintiff hardly has *locus standi* to complain about land that is not his. The Orders in Council while generally restricting occupation by non-native inhabitants provided for exceptions in special cases and with the consent and approval of all the relevant traditional and State authorities. The learned trial Judge was satisfied that the defendant had the requisite permissions.The real dispute concerned the grant and ownership of the land and whether the defendant's land was not part of the plaintiff's land. To further discuss the technical and legal objection based on the Orders in Council in Vacuo is decidedly otiose.

The appeal fails. Costs follow the event and will be taxed if not agreed.
