

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE

APPEAL NO103/2005

B E T W E E N:

MONICA CHILALA CHULU	1 ST APPELLANT
GODFREY MALWELE	2 ND APPELLANT
MARTHA MUSHYANI	3 RD APPELLANT
ESTHER PHIRI	4 TH APPELLANT
GEORGE SAKALA	5 TH APPELLANT
JOB MUKUKA	6 TH APPELLANT

AND

CHRISTY LUMPA (As liquidator of UBZ)	1 ST RESPONDENT
DAR FARMS AND TANSPO INTERNATIONAL LIMITED	2 ND RESPONDENT

CORAM: LEWANIKA, DCJ, CHITENGI, SILOMBA, JJS
On 1st August, 2006 and 11th September, 2007

For the Appellants: F.S. KONGWA of Kongwa & Co.
For the 1st Respondent: C. MABUTWE of Mabutwe & Co.
For the 2nd Respondent: C. CHUULA of Chula & Co.

JUDGMENT

LEWANIKA, DCJ delivered the judgment of the Court.

1. LONDON NGOMA AND 3 OTHERS VS L.C.M. COMPANY LTD AND UBZ LIQUIDATORS SCZ NO. 91 OF 1997;
2. DEVELOPMENT BANK OF ZAMBIA AND OTHERS VS SUNVEST LIMITED, 1995 -1997 ZR 187.

This appeal is against the Ruling of a High Court Judge upholding a preliminary objection raised on behalf of the 1st and 2nd Respondents and dismissing the Appellant's claim as having been misconceived.

The short history of this matter is that the Appellants instituted proceedings against the 1st Respondent claiming for a declaration that the Plaintiffs are entitled to the occupation of the respective dwelling premises and an order for specific performance of a contract of sale between the 1st Respondent and the Appellants of the dwelling premises and for an order that the 1st Respondent do determine the book value of the respective dwelling houses.

On 11th March, 1999 the Appellants applied to the Deputy Registrar in Chambers to join the 2nd Respondent as a party to these proceedings and on 27th April, 1999, the Deputy Registrar made an order joining the 2nd Respondent to the proceedings. The 2nd Respondent appealed to a Judge in chambers against the Order of joinder and on 31st August, 1999 the Judge of the High Court delivered a Ruling dismissing the appeal against the order of joinder. There was no further appeal against the Order of joinder. When this matter came up for trial before another Judge of the High Court, Counsel for the 1st Respondent raised a preliminary issue to these proceedings on the ground that there had been previous proceedings under Cause No.

1996/HP/2248 which had been adjudicated upon by the High Court in respect of the same properties between the 2nd Respondent as Plaintiff and the 1st Respondent as Defendant whereby, by consent of the parties judgment was granted in favour of the said Plaintiff to purchase the said properties from the Defendant and to have vacant possession of the same. The said consent judgment was entered into on 2nd May, 1996. Counsel for the 1st Respondent had submitted in the court below that as the ownership for the properties had already been decided the Appellants should have applied to join the proceedings in which the consent judgment was granted and not start a fresh action. The learned Judge in the court below found that as the question of ownership of the properties in question had already been decided upon by the consent judgment in the proceedings between the 1st Respondent and the 2nd Respondent, these proceedings were misconceived and he dismissed them, hence the appeal now before us.

Counsel for the Appellant has filed five grounds of appeal, namely:-

1. that the learned trial Judge erred in law in deciding on the preliminary issue when the record showed that the same preliminary issue was raised and adjudicated upon by the Deputy Registrar and an appeal had been heard and determined by another Judge and there was no appeal against the Judge's Ruling;
2. that the learned Judge erred in law in holding that the consent judgment operated as estoppel against the Appellants who were not parties to the action;

3. that the learned Judge erred in law and in fact in holding that, ***“there was already another matter (Cause No. 1996/HP/2248)*** which dealt with the ownership of the property in issue”, when the consent judgment dealt with rights as between the parties in that action to which the Appellants were not parties;
4. that the learned trial Judge erred in law in holding that the Appellants should have taken action to set aside the consent judgment when they were not parties to it, and when, in any event, a consent judgment can only be set aside by another action;
5. that the learned trial Judge erred in law and in fact in holding that, ***“in spite of the existence of the 1996/HP/2248 the Appellants did nothing to intervene in the said consent judgment, and they had opportunity to intervene rather than sleep on their rights”*** when the evidence found by another Judge showed that the Appellants were not aware of the case between the 1st Respondent and the 2nd Respondent until after the execution of the consent judgment when the former liquidator of UBZ notified the Appellants of the consent judgment.

At the hearing of this appeal, Counsel for the Appellants, the 1st Respondent and the 2nd Respondent relied on their heads of argument which they augmented with oral submissions. In the view that we take of this appeal, we do not intend to restate those submissions suffice it to state that we have taken them into account in arriving at our decision in this matter.

From the evidence on record the Appellants were former employees of the 1st Respondent who were sitting tenants in the properties which are the subject of these proceedings. The Appellants had received offers from the 1st Respondent to purchase the flats at a price of K32,000,000.00 each being the market price. The Respondents wrote back to the 1st Respondent

requesting that the price be adjusted to book value in line with the government policy for the sale of government, parastatal and council houses to Zambian sitting tenants. It is not clear from the evidence on record as to what happened to those requests, but what emerges is that the 1st Respondent and the 2nd Respondent entered into a contract for the sale of the same flats to the 2nd Respondent. That contract was the subject of the proceedings in Cause No. 1996/HP/2248. These proceedings culminated in the consent judgment entered into by the 1st Respondent and the 2nd Respondent dated 2nd May, 1996 which was couched in the following terms:-

1. Judgment in favour of the Plaintiff is hereby granted for specific performance of the Law Association of Zambia contract and conditions of sale dated 26th February, 1996;
2. An order for vacant possession is also hereby granted to the Plaintiff and the Defendant is directed to hand over vacant possession of subdivision Nos. 66, 67 and 68 of Farm No. 284a, Bwinjimfumu Road, Rhodespark, Lusaka to the Plaintiff.

At the time that the 1st and 2nd Respondents were entering into this consent judgment, the Appellants were still in occupation of the flats and there is no evidence to suggest that the Appellants were aware of the proceedings between the 1st Respondent and the 2nd Respondent. If anything, the Appellants only became aware of these proceedings when they were evicted from the flats following the grant of a writ of possession to the 2nd Respondent on May 22nd, 1996. Thus the Appellants did not have the

opportunity to join these proceedings and it is not correct, as found by the learned trial Judge that they had slept on their rights. On the other hand both the 1st and 2nd Respondents were aware that the Appellants were in occupation of the flats and the 1st Respondent was aware that it had made offers to the Appellants to purchase the same flats. Thus, it cannot be said that these proceedings by the Appellants were an abuse of court process and the facts of this case do not accord with what we said in **DEVELOPMENT BANK OF ZAMBIA AND OTHERS VS SUNVEST LIMITED (2)**. For these reasons we would allow the appeal and set aside the order of the Judge in the court below and direct that the matter proceeds to trial. We also award costs to the Appellants to be taxed in default of agreement.

D.M. Lewanika
DEPUTY CHIEF JUSTICE

P. Chitengi
SUPREME COURT JUDGE

S.S. Silomba
SUPREME COURT JUDGE