

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO.55/2006

HOLDEN AT LUSAKA

**(CIVIL JURISDICTION)**

**BETWEEN:**

**H. P. GAUFF K.G.** - **APPELLANT**

**AND**

**BALVANT POPATLAH POPAT - 1<sup>ST</sup> RESPONDENT**

**AMRAT NARAN BHAGA - 2<sup>ND</sup> RESPONDENT**

**Coram: Lewanika, DCJ, Mumba and Chitengi, JJS  
on 10<sup>th</sup> April, 2007 and 17<sup>th</sup> October, 2008**

For the Appellant: - Mr. M. Kabesha of Messrs M. Kabosha &  
Company, standing in for Mr. M. Mubonda  
of D. H. Kemp & Company

For the 1<sup>st</sup> Respondent: - Mr. M. N. Ndhlovu of Messrs Chifumu Banda  
and Associates.

For the 2<sup>nd</sup> Respondent - No Appearance (In Person)

---

**JUDGEMENT**

---

**Mumba JS**, delivered the Judgment of the Court.

At the hearing of the appeal, the late Deputy Chief Justice, Mr. Justice D. M. Lewanika was a member of the panel but he passed on before the Judgment was ready for delivery. This Judgment is, therefore, a Judgment of the majority of the panel that heard the appeal.

This is an appeal against the High Court Judgment of 15<sup>th</sup> November 2005.

For convenience, the appellant will be referred to as the defendant. The 1<sup>st</sup> respondent will be referred to as the plaintiff, and the 2<sup>nd</sup> respondent will be referred to as the 3<sup>rd</sup> party, designations they held in the court below.

Briefly, the facts are that the plaintiff and the 3<sup>rd</sup> party purchased property in 1979 from joint resources and decided to build 2 flats at S/DF, Stand No. 3515 Rhodes Park, Lusaka. At the time of purchase of the said property, the plaintiff was mistaken on the law of entitlement to property as he was a British citizen. On that mistaken understanding of the law, the plaintiff and the 3<sup>rd</sup> party agreed that the Certificate of Title issue in the name of the 3<sup>rd</sup> party only. By so doing, the plaintiff did not diversify himself of his share of interest in the property because it was understood by both the plaintiff and the 3<sup>rd</sup> party that they had equal shares. In an earlier action by the plaintiff against the 3<sup>rd</sup> party, this court, in its Judgment of Appeal 104 of 1999, found that the plaintiff and the 3<sup>rd</sup> party were tenants in common with equal interest in the property. That Judgment was from the civil action prompted by an attempt by the 3<sup>rd</sup> Party to sell the whole property to the defendant holding out the Certificate of Title which was issued in the sole name of the 3<sup>rd</sup> party. After the purported sale of the whole property to the

defendant, the defendant went ahead to restructure the property into offices, totally ignoring the plaintiff's interest. The defendant also ignored the caveat which the plaintiff had entered on the property to protect his interest. The plaintiff's advocates had written to the defendant on the plaintiff's interest but the defendant ignored all that. In that same Judgment of appeal No. 104 of 1999, by this court, the Certificate of Title that was issued in the sole name of the 3<sup>rd</sup> party, was ordered cancelled: rectification of the register at the Lands and Deeds Registry was ordered so that a Certificate of Title in the names of the plaintiff and the 3<sup>rd</sup> party could be issued.

In the court below the plaintiff's claim against the defendant was, *inter alia*, for rentals with interest due and payable on the said property, being a share of the plaintiff as part owner of the said property. The plaintiff also claimed restoration of the property by the defendant to its original plan of two flats. The plaintiff claimed the flat facing Great East Road which was originally his share of the property. He also claimed mesne profits and damages.

The court below found that the defendant acted in breach of the law and, in particular, in total disregard of this court's Judgment in appeal No. 104 of 1999, apportioning ownership of the property to the plaintiff and the 3<sup>rd</sup> party. The court below recast this court's Judgment in appeal No. 104 of 1999 on entitlements of the plaintiff and the 3<sup>rd</sup> party, granted the claim for share of the rentals based on the plaintiff's

interest in the property, ordered restoration of the plaintiff's flat to its original plan before the defendant entered the property following the purported sale and assignment by the 3<sup>rd</sup> party which was found to be null and void. The plaintiff's claim for mesne profits was refused.

There are 10 grounds of appeal by the defendant as follows:

- 1) **The Learned Trial Judge misdirected herself in Law in adjudicating and deciding on issues or questions raised for the first time in the Plaintiff's submissions but not raised in the pleadings.**
- 2) **The Learned Trial Judge erred in Law in holding that the Supreme Court Judgment in Cause No. SCZ Appeal No. 104 of 1999 had already settled the facts as regards ownership of the property in question even in relation to the Appellant who was not a party to that litigation.**
- 3) **The Learned Trial Judge misdirected herself in law in holding that the Deed of Assignment was invalid, null and void and of no legal effect.**
- 4) **The Learned Trial Judge erred in law in holding that Amrat Bhaga 2<sup>nd</sup> Respondent herein and tenant in common of the of the property could not effectively transfer title as he did not have title to transfer.**

- 5) **The Learned Trial Judge was wrong in law in holding that the Certificate of Title was of no legal effect and could not be relied upon by the Appellant.**
- 6) **The Learned Trial Judge erred in law in holding that the Appellant took illegal possession of the 1<sup>st</sup> Respondent's property and converted it to its own use.**
- 7) **The Learned Trial Judge erred in law in holding that the 1<sup>st</sup> Respondent was entitled to damages for wrongful conversion and trespass.**
- 8) **The Learned Trial Judge erred in law in holding that the 1<sup>st</sup> Respondent was entitled to the Flat facing Great East Road.**
- 9) **The Learned Trial Judge misdirected herself in law in holding that the Applicant's Counter-claim for damages for wrongful eviction and trespass failed.**
- 10) **The Learned Trial Judge erred in law in holding that the Appellant's claim against the Third Party should be pursued separately from the action.**

Both Parties filed written heads of argument which are on record. Mr. Kabesha who stood in for Mr. Mubonda informed the Court that Mr. Mubonda was relying entirely on the written heads of argument. Mr. Ndhlovu informed the court that he too relied on the written heads of

argument. There was no appearance for the 3<sup>rd</sup> party Amrat Naram Bhaga, he did not appear in the court below either.

This appeal hinges on the ownership of the property and consequential entitlements. The court below found that the Judgment of this court in appeal No. 104 of 1999, had already decided ownership and had already settled entitlements for the plaintiff, having found that the plaintiff and the 3<sup>rd</sup> party were tenants in common. The trial Judge correctly asserted this court's Judgment in the earlier action between the plaintiff and the 3<sup>rd</sup> party. The learned trial Judge correctly rejected the defence by the defendant to the effect that as the defendant was not a party to the earlier proceedings between the plaintiff and the 3<sup>rd</sup> party, the defendant had no opportunity to assert its entitlements. Clearly, that Judgment of appeal No. 104 of 1999, of this court was final and its orders were final. The defendant ignored the Judgment at its own peril. It appears that the facts of this case and the evidence on record including this court's Judgment in appeal No. 104 of 1999 was ignored by the defendant, that was why the defendant continued to defy plaintiff's entitlements, hence this appeal.

In view of the fact that the main issues of ownership and entitlements over the property were settled, and the court below correctly made the consequential findings, we do not find it necessary to discuss any grounds of appeal and submissions of the parties which we have duly considered together with the evidence on record and the Judgment

appealed against. The defendant ignored this court's Judgment in appeal No. 104 of 1999, on the basis that defendant was not a party to those proceedings when in fact, evidence on record shows that defendant was given sufficient notice by the plaintiff. Worse still, the defendant ignored the caveat duly entered on the property by the plaintiff, without pursuing any action to determine the interests behind the caveat. Such conduct demonstrated the defendant's total disregard of the law. The defendant in so doing acted to its detriment.

We find no basis upon which to interfere with the Judgment of the court below, which we confirm. This appeal is devoid of merit. It is dismissed with costs to the plaintiff, to be taxed in default of agreement.



-----  
**F.N.M. MUMBA**  
**SUPREME COURT JUDGE**



-----  
**P. C. CHITENGI**  
**SUPREME COURT JUDGE**