**IN THE SUPREME COURT FOR ZAMBIA APPEAL NO.99/2011**

**HOLDEN AT LUSAKA**

(*Civil Jurisdiction*)

**BETWEEN:**

**DOROTHY LIMULA LUNGU Appellant**

**VS**

**KASHMO LIMITED Respondent**

**AND**

**THE ATTORNEY GENERAL Third Party**

**Coram: Mumba AG DCJ, Chibomba and Wanki JJS.**

**On 22nd May 2012 and 2nd August 2012**

For the Appellant : Mr. W. Mweemba of Messrs Mweemba & Company

For the Respondent : Mr. J. Banda of A. M. Wood & Company

For the Third Party : Mr. M. Ndlovu, Assistant Senior State Advocate

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**JUDGMENT**

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**Mumba, Acting DCJ., delivered the Judgment of the Court.**

**Cases referred to**

(1) Wilson Masauso Zulu vs Avondale Housing Project Limited (1982) ZR 175

(2) Raphael Ackim Namung’andu v Lusaka City Council (1978) Z.R 358

(3) Sichote v The People (1975) ZR 32

(4) Zambia Seed Company Limited and Chartered International (PVT)

Limited (S.C.Z Judgment No. 20 of 1999)

This is an appeal against the Judgment of the High Court dated 21st June, 2011 whereby judgment was granted to the respondent.

The brief history of this appeal is as follows:- the respondent, Kashmo Limited were allocated stand No. 9113/M Lusaka, in 2002. This property is next to stand No. 9114/M Lusaka, which was allocated to the appellant, Dorothy Regina Limula Lungu, in 1999. Later, property No. 9114/M Lusaka, was re-entered in 2003 by the Commissioner of Lands and was re-assigned to Marina Nsingo Malokota in 2004. Kashmo Limited held certificate of title No. 6679 for property No. 9113/M Lusaka, issued in March, 2002. Marina Nsingo Malokota obtained certificate title No. 24726 as of 15th January, 2004. In December 2006, the appellant started construction on property No. 9113/M Lusaka believing that that was her property, 9114/M Lusaka. At the material time, the appellant was working and residing in Arusha, Tanzania. In 2008, the respondent brought an action against the appellant demanding vacant possession, claiming ownership of property No. 9113/M Lusaka, on which the appellant was building. Whilst in Lusaka, attending to the case, but before the trial commenced, she was assured by the Commissioner of Lands that property 9114/M Lusaka, was her property. When she inquired about Malokota’s title to the same property, the Commissioner of Lands referred her to the Surveyor-General. The appellant demanded rectification of the problem so that it could be verified on whose property she was building, whether it was 9113/M or 9114/M as she was facing constant claims by the respondent, Kashmo Limited. In January, 2009, the Surveyor-General informed the appellant that she was building on the wrong property and not on 9114/M Lusaka, that she was actually building on 9113/M Lusaka, which property belonged to the respondent, Kashmo Limited.

When the proceedings commenced in the court below, judgment in default of appearance was obtained by the respondent. Later, the judgment in default was stayed and both parties agreed to have the Attorney-General joined to the proceedings as Third Party on the allegations that there was default on the part of the officials from the Ministry of Lands in the manner they had handled the appellant’s property. The Consent Order was obtained and the Attorney-General was joined to the proceedings as Third-Party and against whom was also a claim for indemnification by the appellant who demanded that she be re-allocated alternative property or, that property 9114/M Lusaka be restored to her. At the commencement of the trial, the parties, that is, the appellant and the respondent agreed that the Surveyor-General should re-survey the properties in issue, in particular, the boundaries of the disputed property, the location of the structures by the appellant and file a report into court. By a Consent Order, it was agreed by both parties that they would abide by the findings of the Surveyor- General.

The trial court issued the relevant orders and the Surveyor- General conducted the survey and filed a report into court in February, 2011. When the proceedings resumed on 30th May, 2011, the only witness, Jonathan Kaoma, the then Surveyor-General, produced the report in his evidence, without contest. According to his evidence, property 9113/M Lusaka, belonged to the respondent, having been obtained in 2002 with certificate of title No. 6679. Property 9114/M Lusaka, belonged to Marina Nsingo Malokota, with certificate of title No. 24726. On Kaoma’s evidence, and according to the report he filed, property No. 9114/M Lusaka, was assigned to the appellant in 1999, it was re-entered by the Commissioner of Lands in 2003 and was later assigned to Marina Nsingo Malokota in 2004. His evidence was also that the appellant had constructed her dwellings on property No. 9113/M, the property of the respondent.

The learned trial Judge found that property 9113/M was originally assigned to Anna Songolo, later in 2002, it was assigned to the respondent while property No. 9114/M Lusaka was first leased to Stanilus Lombe in 1996, later it was assigned to the appellant in 1999, re-entered in 2003 and finally assigned to Marina Nsingo Malokota in 2004. Basing her findings on the report of the Surveyor-General, which was not contested, the learned trial Judge entered judgment for the respondent. There was no discussion regarding the issues between the appellant and the Third Party, the Attorney-General.

The appellant filed two grounds of appeal as follows:-

**“(1) That the learned Judge in the court below erred in both law and fact when she failed to determine all the issues in dispute as the judgment does not make reference to the issue between the Appellant and the Attorney General who was joined to the proceedings as a Third Party.**

**(2) That the Learned Judge in the court below erred in both law and fact when she determined the matter solely based on the evidence of the Surveyor General without hearing other witnesses or the parties”**

In support of the first ground of appeal, it was submitted that the issues between the appellant and the Attorney-General had a bearing on the respondent and were defined in the Third-Party Notice filed in the court below on 14th July, 2010. Citing part of the Third-Party Notice which reads as follows:-

**“The Defendant hereby claims that if the court shall determine that the Defendant is infact occupying Stand Number 9113/M (which is not assumed), then you indemnify her by relocating the Plaintiff to Stand Number 9114/M since the Defendant has fully developed the stand she occupies in the honestly mistaken belief that it was Stand Number 9114/M Lusaka, which she legally owns. Further, the Defendant shall claim that the Commissioner of Lands restores her certificate of Title in relation to Stand Number 9114/M and corrects the Lands Register in that regard.”**

The appellant submitted that these issues were not pronounced upon by the trial Judge when it was incumbent upon the court below to conclude all issues between the parties. In support of the submission, the case of **Wilson Masanso Zulu vs Avondale Housing Project Limited1** was cited wherein this court stated as follows:-

**“the trial court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality. A decision which, because of uncertainty or want of finality leaves the doors open for further litigation over the same issues between the same parties can and should be avoided.”**

It was submitted that according to the Surveyor-General’s report, the appellant had not only built on the wrong property but had her property re-entered and allocated to other people by the Commissioner of Lands. In the result, it was submitted by the appellant, that she stood to lose not only her property but also the value of her developments on the land she genuinely believed to be hers, property 9113/M Lusaka. It was contended that the property on which she had started construction was shown to her by officials from the office of the Surveyor-General.

In response to the first ground of appeal, the respondent submitted that the learned trial judge was on firm ground when she rendered judgment for the respondent and granted all the claims as per Writ of Summons. The respondent submitted that all the claims were addressed and that other issues claimed by the appellant did not affect the respondent at all. It was submitted that the appellant wrongly entered the respondent’s property and assumed the position of a trespasser and a squatter. In support of this submission, the case of **Raphael Ackim Namung’andu v Lusaka City Council**2 was cited. In that case, this court observed that:-

**“Squatters build at their own risk and if the owners of the land withdraw their permission or licence or if they decide to demolish a structure built in the absence of any permission or other lawful relationship, the squatters’ loses, though very much regrettable, are not recoverable in a court of law.”**

With these submissions, the respondent urged the court to dismiss the first ground of appeal.

On the other hand, the Attorney-General, as Third-Party, agreed with the appellant on the first ground of appeal and submitted that the learned trial Judge should have determined the issues between the appellant and the Third-Party. In support of the submission, they cited the same case of **Wilson Masauso Zulu v Avondale Housing Project Limited1,** in particular, where this court said:-

**“A decision which, because of uncertainty or want of finality, leaves the doors open for further litigation over the same issues between the same parties can and should be avoided. In the circumstances of this case I believe that it is the view of all the members of this court that the ends of justice will be met by remitting the claim in relation to the goods back to the High Court with the direction that the learned trial commissioner do made all the necessary findings and thereupon do make all the necessary orders and awards. I would, accordingly, so order.”**

It was finally submitted that the case be referred back to the court below for determination of the issues between the appellant and the Third-Party only.

We agree that the learned trial Judge did not deal with the issues between the appellant and the Third-Party, the Attorney- General, they were left hanging. The learned trial Judge simply concentrated on the report of the Surveyor-General. It was incumbent upon the parties during the proceedings, especially the appellant to raise the matter in the court below before judgment was delivered so that the learned trial judge would have been reminded about the Third-Party Order which she had granted. We find that the first ground of appeal does not concern the respondent, and as against the respondent, the first ground of appeal cannot succeed, it fails, but succeeds as against the Third- Party, who, in any case, has conceded.

On the second ground of appeal, it was submitted that although the Surveyor-General’s report was not contested, the proceedings should not have been closed without hearing other witness or indeed the parties themselves on the other aspects of the case. It was contended on behalf of the appellant that the learned trial judge should have allowed her to give evidence and call witnesses on the Third-Party claims and, generally, to hear evidence from her on how she found herself building on property 9113/M Lusaka. It was submitted that the Attorney-General, as Third- Party, should have also called witnesses from the office of the Ministry of Lands to give evidence on the appellant’s claims and those of the respondent as well as those of the Third-Party. It was submitted that the trial was closed prematurely while crucial aspects of the case between the parties were left unresolved.

In response to the second ground of appeal, the respondent submitted that before the final determination of the matters before the trial Judge, there was a Consent Order upon which the court based its decision having accepted the report of the Surveyor- General on which the parties had agreed that that would be the sole basis for the court’s determination. It was pointed out by the respondent that Counsel for the appellant in the court below, declined to cross-examine the Surveyor-General because of the nature of the evidence. It was contended that the evidence remained uncontested and that it was not for the court to call witnesses but rather that Counsel in the court below should have informed the court that the appellant intended to call witnesses and should have actually called the witnesses. In support of this submission, the case of **Sichote v The People3** was cited. In that case, this court stated as follows:-

**“while different judges might have different views as to the extent to which a judge should enter the arena, so to speak, it can hardly be said that a judge should in effect take over the defence whenever counsel for the defence is in his opinion inexperienced.”**

It was submitted that it was not the duty of the trial Judge to call witnesses or, indeed, the parties to give evidence. It was finally submitted that the appeal lacked merit as against the respondent and that it should be dismissed.

The Attorney-General as Third-Party, responded to the second ground of appeal by submitting that the learned trial judge did not err in law or fact when she determined the matter solely on the evidence of the Surveyor-General without hearing other witnesses or, indeed, the parties. It was submitted that the parties had signed a Consent Order in which it was agreed that the Surveyor-General’s office would survey the properties and file a report which would enable the court to determine the issues in dispute. It was pointed out that indeed the Surveyor-General did prepare a report which was produced in court and the particulars given in that report allowed the court to make the findings on record. It was submitted that the evidence of the Surveyor-General was not challenged by the appellant and that in any case, the appellant was bound by the findings of the Surveyor-General because the Consent Order entered into by the parties, stated that the report would be admitted as evidence by the parties to enable the court to determine the issues between the parties. It was pointed out that at no time did the appellant challenge the Consent Order, she was, therefore, bound by the judgment which was based on that Consent Order. In support of these submissions, the case of **Zambia Seed Company Limited and Chartered International (PVT) Limited4**  was, cited in particular, where the court stated that:-

**“By law the only way to challenge a judgment by consent would be to start an action specifically to challenge that consent judgment.”**

With these submissions the court was urged to dismiss this ground of appeal.

In our view, the default by the court below, that of not determining issues between the appellant and the Third-Party was precipitated by the parties themselves. In particular, the appellant’s own Counsel failed to raise the matter before judgment was delivered. The record shows that both parties were mute when the court decided to adjourn for judgment. Even after judgment, there was no application for review. All in all, this ground of appeal succeeds as against the Third-Party. As for the respondent, nothing can be held against them in the circumstances of this case. We are of the view that the court was in error by not determining the issues between the appellant and the Third-Party when the trial court’s Order against the Third-Party implied that the appellant’s claims were triable issues which required adjudication. Thus, the case was completed only half way, the appellant was left to incur further expenses in order to pursue her claims against the Attorney- General.

In the final analysis, we allow the appeal against the Third- Party, we order that the appellant’s claims against the Attorney-General should proceed before the same trial judge and be adjudicated upon.

There is no merit in the main appeal against the respondent, it is hereby dismissed. On costs, because of the circumstances in which the appellant finds herself, we order that each party shall bear their own costs.

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F. N. M. Mumba

**ACTING DEPUTY CHIEF JUSTICE**

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H. Chibomba M. E. Wanki

**SUPREME COURT JUDGE SUPREME COURT JUDGE**