**IN THE SUPREME COURT OF ZAMBIA** **APPEAL No. 52A/2009**

**HOLDEN AT NDOLA AND LUSAKA SCZ/8/47/2009**

**(CIVIL JURISDICTION)**

**BETWEEN:-**

**PRUDENCE CHILUFYA MULENGA APPELLANT**

**(Suing as the Administratrix of the**

**Estate of the late John S. Mulenga)**

**AND**

**SERIOES (1998 LIMITED) 1ST RESPONDENT**

**STEPHEN CHUNGU 2ND RESPONDENT**

**MUMBA CHULUMANDA 3RD RESPONDENT**

**PAUL NSOFWA AND 4TH RESPONDENT**

**MARY MUSHASHU NSOFWA 5TH RESPONDENT**

**CORAM: SAKALA, CJ., CHIBOMBA AND MUSONDA, JJS.**

 **ON THE 7TH JUNE, 2011 AND 10TH MAY, 2012**

**FOR THE APPELLANTS: MS. P. C. MULENGA**

**IN PERSON**

**FOR THE RESPONDENTS: MR. V. K. MWEWA OF**

 **MESSRS V. K. MWEWA AND CO.**

**JUDGMENT**

**Sakala, CJ., delivered the Judgment of the Court.**

This is an appeal against the Ruling of the Industrial Relations Court setting aside the ***Writ of Eligit*** and ordering the Under-Sheriff to release the properties in issue to the 2nd, 3rd, 4th and 5th Respondents on the ground that the Respondents had a valid claim to the said properties as against the Under-Sheriff.

For convenience, the Appellant will be referred to as the Complainant, while the 1st Respondent will be referred to as the Respondent and the 2nd, 3rd, 4th and 5th Respondents will be referred to as the Claimants, respectively, which designations they were in the Court below.

The brief facts leading to this appeal are that on 22nd July, 2005, the Complainant obtained a Judgment on assessment in the amount of K144,133,400.00 against the Respondent. The Respondent was given three months within which to pay the Judgment sum.

In a move to satisfy the judgment, on 16th January, 2006, the Complainant caused a ***Writ of Fieri Facies*** to be issued for the recovery of the sum in issue. On 15th March, 2006, the Complainant took out a ***Writ of Eligit*** for the recovery of the same amount. However, on 4th May 2006, the ***Writ of Eligit*** was stayed following an application by the Claimants.

On 20th March, 2008, the Sheriff took out the ***Inter Pleader*** summons to determine the rightful owners of the properties taken possession of under the ***Writ of Eligit***. The Claimants filed affidavits in support of their claims and exhibited copies of certificates of title in their names against the seized properties. The Complainant also filed an affidavit in opposition to the claims with exhibits showing that the said properties were never sold or were fraudulently sold to the claimants.

The Complainant also gave evidence on oath. He testified that he relied on the letter by the Receiver/Manager of the Respondent dated 30th May, 2005 exhibited in Court; that according to the letter, the houses in issue were Mortgaged to the Zambia National Commercial Bank, but handed back to the Respondent following the discharge of the Mortgage; that the Ministry of Lands print out of the 20th February, 2006 indicated that the house claimed by the 2nd Claimant, after being handed over to the Respondent on 17th August, 2000, was taken over by Access Financial Services under a Mortgage Deed; which was discharged on the 8th of January, 2002, in respect of the properties claimed by the 1st and 2nd Claimants and on the 11th February, 2002, in respect of the 3rd Claimant.

The Complainant pointed out that according to the letter from Messrs Cave Malik and Company, dated 8th August, 2002, the name appearing on the Certificate of Title was different from the name of Manda Mumba Chulu as opposed to Mumba Chulumanda, the 2nd Claimant’s name

The Complainant testified to the disparities in the dates of purchase and the assignments; that the disparities suggest that the Certificates of title were obtained fraudulently; and that since the Claimant had failed to exhibit receipts on which they bought the properties as well as The Property Transfer Tax receipts from the Zambia Revenue Authority, the sales were doubtful.

The Court, after considering the evidence and the submissions, accepted the submission on behalf of the Claimants that a Certificate of Title was ***Prima Facie*** evidence of ownership of property, unless proved that it was obtained by fraud, forgery or mis-representation; but that the onus was on one who alleges.

The Court noted that the Claimants had exhibited letters of offer from the Receiver/Manager of the Respondent, which stood unchallenged by the Complainant. The Court found no illegality in Messrs Cave Malik and Company acting on behalf of the Receiver/Manager.

On the issue of the name of the 2nd Claimant, the Court examined a print out from the Ministry of Lands, a letter of offer from the Receiver/Manager and the Certificate of Title and concluded that apart from the names, the other details were similar and that the two versions of the 2nd Claimant’s name referred to one and the same person; and that the print out from the Lands Registry got the name wrong by splitting ***“Chulumanda”*** into ***Manda Chulu***; and that all the other documents have the name as ***Mumba Chulumanda***. The Court accepted this as the correct version of the 2nd Claimant’s name.

On the year of sale, the Court pointed out that what was important was the date of the Certificate of Title.

The Court concluded that the evidence on record had established that the Certificates of Title exist and are in the names of the Claimants and that the Claimants had a valid claim against the Under-Sheriff’s seizure of the properties in issue.

Accordingly, the Court set aside the ***Writ of Eligit*** and ordered that the Under-Sheriff releases the properties in issue to the Claimants.

Aggrieved by this decision, the Complainant appealed to the Supreme Court and filed a memorandum of appeal containing ten (10) grounds:

These are: (**sic**)

1. ***“The learned judge erred in law and fact by refusing to recognize and declare that the 2nd and 3rd Respondents did not produce, file and show in court the Certificate of Title, assignment of property and receipts payment as evidence and proof of purchase of the house plot No. 736 also known as 36 Ghana circle, Luanshya and plot No. 743 also known as 22 Ghana circle Luanshya on the hearing of the matter on 24th August, 2007 and by making uniform ruling to the 3 Respondents.***
2. ***The court below erred in law and fact when it ignored the letter of the Receiver/Manager Mr. George Sichone dated 30th May, 2002 and the Ministry of Lands and Deeds print out dated 20th February, 2006 which both confirmed that the houses in question were handed back to Serioes (1998) Limited after ZANACO was paid off. And the Mortgage pressed on the houses was discharged on 8th January, 2002 and 11th February, 2002, by Access Financial Services Limited on the same date.***
3. ***The Court below erred in law and fact when it ignored the 4th Respondent did not produce and file letter of offer for sale, assignment of property, receipts of the payment as evidence and proof of purchase of plot No. 706 also known as 2 Mpulungu crescent, Luanshya on the hearing of matter on 24th August, 2007.***
4. ***The Court below erred in law and fact when it ignored 2nd Respondent default to file notice of claim to the property subject of the inter pleader summons from 2006 to July 2008 2 years and the ruling of discharge of stay of execution delivered on 24th August, 2007.***
5. ***The Court below erred in Law and fact when it ignored the 3rd Respondent forgery of Certificate of Title and assignment of property which were not certified by the Receiver/Manager produced and filed on 23rd May, 2008 which the Respondents legal counsel acknowledged and the affidavit in support of claim to the property subject of the inter pleader summons and certificate of exhibits were no commissioned by the commissioner for oaths.***
6. ***The Court below erred in law and fact when it ignored the 3rd Respondents’ failure to file reply or challenge the Appellant’s Affidavit in opposition of Respondents claim of property subject of the inter pleader summons filed on 30th May, 2008. The letters of offer of July, 2001 and August, 2001 of the 2nd and 3rd Respondents were over taken by the letter of the Receiver/Manager dated 30th May, 2002.***
7. ***The Court below erred in law and fat when it ignored the 3rd and 4th Respondents’ contradiction of evidence in their affidavits in support of claim to the property subject of the inter pleader summons filed in May, 2006 and May, 2008. No application for leave to court was made.***
8. ***The 3rd Respondent alleged bought the house two times in November, 2001 and 11th February, 2002 from the Receiver/Manager of Respondent company and obtained certificate of title on 11th February, 2001 before he bought the house in question. The 4th Respondent alleged bought the house two times in June, 2001 bought the same house from the Receiver/Manager of the Respondent company and obtained Certificate of Title on 8th January, 2002 when the Mortgage was discharged on this house by Access Financial Services Limited.***
9. ***The Court below erred in law and fact when it ignored the evidence by the 2nd Respondent he alleged bought the house No. 36 Ghana Circle, Plot No. 736 Luanshya from the Receiver/Manager of the respondent company way back in 2002 when in fact on 11th February, 2002 the house in question belonged to the Respondent company.***
10. ***The Court below erred in law and fact when it ignored the Respondent did not make an application for leave to court to be a part of his matter complaint No. 112/1999 which is between John Safeli Mulenga vs Serioes (1998) Limited.***

At this juncture, we would like to observe that the Complainant filed heads of argument in person. We also take note that the Respondent was not present at the hearing of this appeal and was not represented.

The gist of the written arguments on ground one, relating to the Court’s refusal to recognize and declare that the 2nd, 3rd and 4th Claimants did not produce in Court the Certificates of title, assignment of the property and receipts as proof of the purchase of respective properties, is that the Court made a blanket ruling that the claimants had title deeds and letters of offer, and that the properties were genuinely purchased, but that why were the relevant documents not produced in Court.

The summary of the written heads of argument on the combined grounds two and three, relating to the Court ignoring the letters of the Receiver/Manager and the print out from the Ministry of Lands, and that the 4th Claimant did not file the relevant documents, is that the evidence of the Receiver/Manager was that the houses were handed back to the Respondent.

On ground four, it was argued that all the Claimants, except the 2nd Claimant, filed claims to the property in relation to the ***Inter Pleader*** summons; but the court still ruled in favour of the 2nd Claimant.

The gist of the argument in ground five, is that the court ignored the 3rd Claimant’s forgery of the Certificate of Title and the assignment of the property which were not certified by the Receiver/Manager as per ***Section 115 of the companies Act, Chapter 388.***

Grounds six, seven, eight, nine and ten were combined and argued together. The summary of the written arguments on the combined grounds is that the court never considered the fact that the alleged purchases of the properties were a fraud as there were no supporting receipts, and that the three Claimants introduced new evidence through affidavits without the leave of the court.

Mr. Mwewa, in his written response on behalf of all the Claimants, responded to the complainant’s heads of argument under one ground, contending that this approach was because the complainant appeared to have misunderstood the nature of the proceedings which were before the court.

In his response, Mr. Mwewa set out the brief facts in the court below that the Complainant had obtained judgment against the Respondent. That in a move to satisfy the Judgment, the Complainant caused a ***Writ of Eligit*** to be issued against certain properties perceived to have been owned by the Respondent. And that the Claimants filed into court Notices of Claims to the seized properties. It was contended that in addressing the issue of the ***Inter Pleader*** summons, the Court accepted the submissions on behalf of the Claimants in relation to the relevant documents produced in Court.

It was submitted that the lower court was on firm ground, when it upheld the Claimants’ claims to the properties seized in execution, that there was abundant evidence on record to show that the Claimants were the owners of the properties in execution; that evidence included a number of documents, among them the Law Association of Zambia contract and conditions of sale and various letters from the Receiver/Manager to each of the Claimants.

It was pointed out that as rightly observed by the lower court, the Court’s role in the matter was not to determine the validity of the Certificates of Title, but whether on the evidence before the court, the Claimants had valid claims to the properties in issue.

It was submitted that there was no merit in the appeal and that it be dismissed.

We have carefully considered the oral and the documentary evidence on record, the ruling appealed against and the submissions.

We take note that the proceedings before the lower court were commenced by way of ***Inter Pleader*** summons issued by the Under-Sheriff to move the court to determine or ascertain as to who were the rightful owners of the properties in issue.

In determining the question of the rightful owners of the properties, the court proceeded as follows in its judgment: (**sic**)

***“The Complainant’s submission was to the effect that the transfer of the properties in issue was illegal because there was no evidence of Property Transfer Tax being paid. He further said that there was contradictory evidence as to when the properties were sold and from whom.***

***This is the evidence we received in this matter and it is not difficult for us to tell from the Complainant’s evidence and submission that he intends to persuade us that the properties in issue were sold fraudulently and or that the Certificate of Title exhibited by the claimants are forgeries. This is based on the claimants’ alleged failure to exhibit the purchase receipts and the Property Transfer Tax receipts as well as the fact that whereas some documents have 2001 as the purchase year, others have 2002.***

***The Claimants on the other hand, are relying solely on the fact that they have exhibited Certificates of Title in their names. We agree entirely with Mr. Mwewa’s submission that a Certificate of Title is prima facie evidence of property ownership unless it is proved that it was obtained by fraud, forgery or misrepresentation and the onus is heavy on the person alleging the element. The Claimants have exhibited letters of offer from the Receiver/Manager of the respondent which, in our view, stand unchallenged by the Complainant. We further find no illegality in Messrs Cave Malik and Company acting on behalf of the Receiver/Manager in the transaction. There is also an issue relating to the name of the 2nd Claimant. Is he Mumba Chulumanda or Manda Mumba Chulu or are those in fact two different individuals? A close look at exhibits JSM 5, a print out from the Ministry of Lands, SC 7, the Receiver/Manager’s letter of offer and the Certificate of Title reveal that apart from the names, the other details are similar. Some of the common features are, the Certificate of Title No. 4983, the purchase price of K28,000,000.00 the property No. 743, the extent of the land, 2044 square metres. From the above similarities we have safely come to the conclusion that the two versions of the 2nd Claimant’s name refer to one and the same person. We are further comfortable to say that the print out from the Lands Registry got the name wrong by splitting Chulumanda into Manda Chulu. All the other documents have the name as Mumba Chulumanda and we accept that as the correct version of the 2nd Claimant’s name. Regarding the year of the sale, we only wish to state that what is important is the date of the Certificate of Title”.***

We entirely agree with the approach taken by the Court in ascertaining the rightful owners of the properties. Thus, on record, there was sufficient documentary evidence establishing the rightful owners of the houses.

We are satisfied that the Claimants, on the evidence on record, had valid claims to the properties in issue. Indeed, the issue was not the validity of the Certificates of Title. But who were the rightful owners of the properties? We, therefore, find no merit in the appeal. It is accordingly dismissed. We make no order as to costs.

……………………………………

**E. L. Sakala**

**CHIEF JUSTICE**

……………………………. ……..…………………

 **H. CHIBOMBA P. MUSONDA**

**SUPREME COURT JUDGE SUPREME COURT JUDGE**