IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 181 OF 2010

HOLDEN AT NDOLA

(Civil Jurisdiction)

B E T W E E N:

 **LYDIA GRETEL ZIMBA** 1ST APPELLANT

 **FRED LUKULU MWIYA** 2ND APPELLANT

 AND

 **KB DAVIES AND COMPANY LIMITED** 1ST RESPONDENT

 **ZCCM INVESTMENTS HOLDINGS PLC** 2ND RESPONDENT

CORAM: **CHIRWA, AG. DCJ, CHIBOMBA AND WANKI, JJS**

 On the 6th December, 2011 and 14th March, 2012

For the Appellants: Mr. D. Mazumba of Messrs. Douglas and Partners

For the 1st Respondent: Mr. L. Zulu of Messrs. Malambo and Company

For the 2nd Respondent: N/A

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

CASE REFERRED TO:-

1. **Zulu -Vs- Avondale Housing Project, (1982) ZR. 172.**

The appellants being dissatisfied with the Judgment of the High Court delivered at Kitwe on 22nd July, 2010 as it decides that Subdivision 6 and 7 of Lot 542/M are part of Subdivision H and were sold to KB Davies, appealed to the Supreme Court against the said Judgment.

The appellants and others took out a Writ of Summons in the Kitwe District Registry against the respondents claiming for:-

1. Declaration that the appellants are the legal purchasers of Subdivision 6 and 7 of Lot No. 542/M and Subdivision 1 to 21 of “C” of Lot No. 10/M of the former ZCCM Nchanga Farm in Chambishi;
2. An order of injunction restraining the 1st respondent by itself or through its directors, shareholders or servants from entering any of the aforesaid properties;
3. An order that the 2nd respondent gives title deeds to the appellants;
4. Damages occasioned by the 1st respondent’s activities in relation to the said farms;
5. Any other relief which the Court may deem fit to grant;
6. Interest at the rate of 30% per annum on all moneys found due from date of the writ up to date of payment; and
7. Costs.

 The Writ of Summons was supported by a Statement of Claim which shows that: the appellants and others who appear on the attached list are lawful owners of S/D No. 6 and 7 of Lot No. 542/M and 1 to 21 of S/D “C” of Lot No. 10/M Chambishi; the 2nd respondent sold farms 3155, 2557, 2082 and S/D No. A to K of Lot No. 542/M of the former ZCCM Nchanga farms in Chambishi to 1st respondent; the 2nd respondent Subdivided pieces of land adjoining to the land sold to the 1st respondent and numbered them Subdivisions 6 and 7 of Lot No. 542/M and Subdivisions 1 to 21 of Subdivision “C” of Lot 10/M and sold the said pieces of land to the appellants; on average each appellant bought 20 hectares; in the year 2000, the 1st respondent unlawfully encroached and without ‘Legal right began to fence the pieces of land which were sold to the appellants by the 2nd respondent; the 2nd respondent commenced an action under Cause No. 2000/HK/439 against the 1st respondent to restrain the 1st respondent from trespassing and sought other relief outlined in the Statement of Claim which was filed in the Kitwe High Court; the 1st respondent in its defence claimed that the piece of land sold to the appellants had earlier been sold to it by the 2nd respondent and made a counter claim; before the matter could be settled in Court, upon the appointment of Enock P. Kavindele who is Chairman of the 1st respondent as Republican Vice President, the 2nd respondent instructed its Counsel to discontinue the proceedings against the 1st respondent; the ruling of the High Court under Cause No. 2000/HK/439 dated 11th December, 2000 ordered that the 2nd respondent should not transfer title to any other person; as a result of the ruling of the Court dated 11th December, 2000, the appellants have not obtained title from the 2nd respondent and were unable to carry out any developments on the pieces of land; and the appellants claimed the reliefs outlined in the Writ of Summons.

 The 1st respondent’s defence showed that: the lots of land pleaded in paragraph 1 aforesaid were and are still part of a larger piece of land purchased by the 1st respondent from the 2nd respondent at the price of K495,938,500.00; as to the land described as Subdivision “C” of Lot No. 10/M Chambishi, in extent 397 hectares, the same was expressly included as part of the land purchased by the 1st respondent as herein fore pleaded in a letter addressed to the 1st respondent by the 2nd respondent on 3rd September, 1997; as to the land described as portion “N” of Lot No. 542/M Chambishi in extent 692 hectares, the same was offered to the 1st respondent by the 2nd respondent on the 9th July, 1998 at the price of K45,938,500.00 and the 1st respondent’s payment therefore was confirmed by the 2nd respondent on the 17th December, 1998; the 1st respondent denies that there exist any lawful Subdivisions on the said land numbered 6 and 7 of Lot No. 542/M and 1 to 21 of S/D “C” of Lot No. 10/M Chambishi as pleaded in the Statement of Claim or at all and will aver that the appellants who are mostly ex-employees of the 2nd respondent’s predecessor company are seeking to unlawfully create and allocate to themselves Subdivisions on land sold to the 1st respondent by their ex-employers; the 2nd respondent also sold and the 1st respondent purchased Subdivision “C” of Lot No. 10/M Chambishi farm aforesaid; the 1st respondent admitted fencing off the property comprising the total hectarege of land purchased from the 2nd respondent but denied the said action was unlawful, an encroachment at all.

 The 1st respondent’s counter claim showed that: the 1st respondent is the lawful owner and is entitled to unencumbered and vacant possession of all that land in extent 397 hectares known as S/D “C” of Lot No. 10/M Chambishi and all that piece of land in extent 692 hectares known as portion “N” of Lot No. 542/M Chambishi; the appellants, since about the year 2002 have without the permission or authority of the 1st respondent been in unlawful occupation or possession of parts of the said land; the 1st respondent counter claimed:

1. An order for the forcible eviction of the appellants.
2. Mesne profits at the rate of K100,000.00 per hectare per annum from January, 2000 until possession be delivered up.
3. Interest on the said mesne profits at such rate and for such period as the Court may think just.
4. Costs of this action.

 The 2nd respondent’s defence showed that; the 2nd respondent denied the allegation contained in paragraph 1 of the 1st respondent’s defence that Subdivision “C” of Lot No. 10/M and portion “N” of Lot 542/M was sold to it by the 2nd respondent and will aver that only farms 2082, 3155, the remaining extent of farm 2557 and Subdivisions A, B, C, D, E, F, G, H, J and K (collectively known as Subdivision H) of portion “N” of Lot 542; the 2nd respondent denies the allegation contained in paragraph 2 of the 1st respondent’s defence and will testify that Subdivision “C” of Lot 10/M was not part of the three Chambishi farms which were advertised for sale by tender in the press which the 1st respondent responded in philanthropic language through its Executive Chairman Enock Kavindele and an offer was made to it of the three farms. The 2nd respondent will further aver that the letter of 3rd September, 1997 did not offer Subdivision “C” of Lot 10/M Chambishi to the 1st respondent but was merely explaining the farms and their total area when the Executive Chairman of the 1st respondent attempted to unilaterally extend the extent of the farms sold to the 1st respondent to include Subdivision “C” of Lot 10/M; the 2nd respondent denies the allegation contained in paragraph 3 of the 1st respondent’s defence and will testify that only Subdivisions A, B, C, D, E, F, G, H, J, K of portion “N” of Lot 542/M were sold by the 2nd respondent to the 1st respondent leaving out Subdivisions 6 and 7 which were sold by the 2nd respondent to the 1st and 2nd appellants; the 2nd respondent denies the allegations contained in paragraph 4 of the 1st respondent’s defence that Subdivision 6 and 7 of portion No. 542/M and Subdivision 1 to 21 of Subdivision “C” of Lot No. 10/M do not exist and will aver that these Subdivisions exist and 1st respondent through its Executive Chairman tried to use his political clout on the 2nd respondent as a parastatal to annex all the land that once belonged to the 2nd respondent; the 2nd respondent denies the allegations contained in paragraph 5 of the 1st respondent’s defence and repeats that the 2nd respondent did not sell or offer for sale Subdivision “C” of Lot 10/M and Subdivision 6 and 7 of portion “N” of Lot 542/M to the 1st  respondent; the 1st respondent attempted to fence off land sold to the appellants and only stopped when an action was commenced against it by the 2nd respondent under Cause No. 2000/HK/439 which action was discontinued following telephone instruction from the then Company Secretary upon Enock P. Kavindele, the Executive Chairman of the 1st respondent being appointed the Vice President of the Republic of Zambia to discontinue the case; following negotiations between the 2nd and 1st respondent contracts of sale were executed on 20th February, 2000 in respect of Subdivisions A, B, C, D, E, F, G, H. J. K (later all together numbered Subdivision H of Lot 542/M and 11th November, 2003 in respect of farms 2082, remaining extent of farm 2552 and 3155.

 The appellants filed a defence.

 The evidence for the appellants which was given by Fredrick Lukuku MWIYA, PW1 was that farm number 542 B in Chambishi has a Subdivision known as “C” of Lot 542 re-demarcated into a number of small holdings by ZCCM in 2000/1999 with a view of arranging those portions to its former employees who were retrenched. These were later approved by the Commissioner of Lands and were numbered after being surveyed. Upon the small holdings being numbered, ZCCM entered into contracts with its former employees; the appellants for assignments. This was for portion “N” of Lot 542. The portions are marked A to K on diagram 5673. Two portions known as Subdivisions 6 and 7 of Lot 542 were left.

 While ZCCM was working out modality of allocating the portion to its employees, the 1st respondent approached the 2nd respondent with a view of purchasing those portions. They were then offered to the 1st respondent. These were not same as Subdivision 1-21 of Lot No. 10/M. There was a subsequent contract with the 1st respondent. Portions A-K were consolidated with Subdivision H of Lot 542 which Subdivision was eventually contracted to be assigned to the 1st respondent. It should not be mistaken to be the same as other portions on Lot 10/M Subdivision H and excludes Subdivisions 6 and 7.

 PW2 was Bony KHUNGA. His evidence was that, on 15th June, 2000 he entered into the contract with the 2nd respondent for the purchase of Subdivision “C” of Lot 10/M as he was an employee of the 2nd respondent. The plots were sold to those employees of the 1st respondent who were retrenched. Following his application he was offered portion 19 and signed a contract of sale with the 2nd respondent after paying a purchase price. The same applied to the other plaintiffs (pages 6-43). He had had access to the land and had started to develop it. He wanted the Court to declare Subdivision 19 of Subdivision “C” of Lot 10/M as his land and this should apply to the other 20 plaintiffs.

 DW1 was Enock Percy KAVINDELE. His evidence was that the 1st respondent bought the piece of land, Subdivision 6 and 7 around August, 1997. The 2nd respondent advertised for sale three farms, farm 3155, 2082 and 2557. He responded by obtaining a tender document from the 2nd respondent upon payment of K100,000.00 He attended interviews and they did diligence which revealed that the farm had no water but there was a 2.5 kilometre pipe which brought water to Subdivision “C” to the farm on which there was a borehole. ZCCM said if they paid more money they could give them Subdivision “C” as well. KB Davies paid another K100 million in order to have access to Subdivision “C”. He was shown the boundaries of the farm for which he paid. Thereafter, the Manager for administration, Mr. CHISHIMBA wrote to KB Davies and offered Subdivision “C” to which was attached a drawing which showed that that Subdivision had been sold to KB Davies. They agreed to pay K450 million which they paid. They then went ahead to fence off the farm including Subdivision “C” of Lot 10/M.

 Surprisingly, later on they received a letter saying that they had encroached into other people’s lands. And yet they had been given a map for the whole farm. They were accused of being greedy. The letter which was signed by Mr. MWIYA (PW1) was copied to the President. ZCCM told him that they had made a mistake as they should not have offered him the farms as these had been offered to other people. ZCCM had not refunded him K100 million which he paid for Subdivision “C” of Lot 10/M. The Surveyor engaged by ZCCM said that a mistake was made by him.

 Davy CHIFULO, Assistant Registrar, Kitwe High Court produced the record of Cause Number 2000/HK/439.

 DW2 was Joseph MWANZA. His evidence was that ZCCM advertised Chambishi farm for sale by tender in 1997 and it came out in Daily Mail. Three farms were being sold. The numbers were not indicated. There were more responses and KB Davies also responded and an offer was made on 17th June, 1997. The offer letter identified 3 farms as 3155, 2082 and 1557. On 3rd September, 1997 Mr. CHISHIMBA wrote a letter to Mr. KAVINDELE enclosing the plan. Chambishi appear to include Subdivision “C” of Lot 10/M according to the letter. The Subdivision did not constitute Chambishi farm. There were meetings between ZCCM and KB Davies over the issue. On 29th October, 1992 Director of Human Resource wrote to KB Davies over the issue to correct the situation/mix-up. KB Davies applied for more land on 20th April, 1998 and ZCCM responded positively but he was not given everything he asked for. ZCCM applied some parcels of land which are identified as portion “N” with a total of 692.00 hectares at a total cost of K45,938,500.00. Contract dated 20th February, 2000 was drawn and signed. This was in respect of Subdivision H of Lot No. 542/M. This was the number given by the Surveyor General for portions A-K of Lot 542/M.

 There was contract between ZCCM and KB Davies dated 11th November, 2003. There was no contract in relation to Subdivision “C” of Lot No. 10/M. The land which was given to KB Davies was Subdivided and sold to ZCCM employees.

 The Court below after analysing the evidence adduced before it, found with regard to portion H of Lot No. 542/M, that there was a contract of sale which was signed between ZCCM, the 2nd respondent and the 1st respondent on 20th February, 2000 and that contract showed that the whole of Subdivision H of Lot No. 542/M was sold to the 1st respondent, and it did not see how two portions 6 and 7 of that Subdivision could have been sold to Lydia ZIMBA, and Fredrick MWIYA.

 The contract between ZCCM and ZIMBA was signed on 15th June, 2000 almost 4 months from the date the contract between the 1st respondent and ZCCM was signed. ZCCM knew or ought to have known that that land had already been sold to the 1st respondent. As for Mr. Fredrick MWIYA, the Court below found that there was no document which was produced in Court to show that he had bought a portion of Subdivision H of Lot No. 542/M as the contract exhibited in the bundle of documents is just a draft and it was not even signed. Mr. MWIYA had no basis upon which his claim could succeed.

 Finally, the Court below found that the appellant’s claim in relation to Subdivision 6 and 7 of Lot No. 542/M had no merit and dismissed it.

 The appellants have advanced two grounds of the appeal, namely:-

 **GROUND ONE:**

**The learned trial Judge erred in law and in fact in holding that Subdivision 6 and 7 of Lot No. 542/M were part of Subdivision H of Lot No. 542/M.**

**GROUND TWO:**

**The learned trial Judge erred in law and in fact on the evidence before him in holding that Subdivision 6 and 7 of Lot 542/M were sold to the respondent.**

 The appellants filed heads of argument which were augmented with submissions by Counsel at the hearing.

 In support of ground one of the appeal after reciting the evidence and the relevant pleadings, as it related to Subdivisions 6 and 7 of Lot 542/M, it was pointed out that the Court below at page J18 which appears on page 25 of the record of appeal had this to say:

**“With regard to portion H of Lot No. 542/M, there is a contract of sale which was signed between ZCCM, the 2nd defendant and the 1st defendant on 20th February, 2000 and this contract to me seems to show that the whole of Subdivision H of Lot 542/M was sold to the 1st defendant and I do not see how two portions 6 and 7 of that Subdivision could have been sold to Lydia Zimba and Fredrick Mwiya.”**

 It was contended that, Subdivisions 6 and 7 are not part of Subdivision H of Lot 542/M. If that were so; they should have been described as Subdivision 6 and 7 of Subdivision H of Lot 542/M. The pleadings and the evidence describe these properties as Subdivisions 6 and 7 of Lot 542/M which means they were cut off not from Subdivision H but from Lot 542/M.

 It was pointed out that, the evidence on record is that, ZCCM the 2nd respondent put up an advertisement in the press inviting tenders to purchase these farms, namely farm Numbers 3155, 2084 and 2557 and KB Davies, 1st respondent was the successful bidder.

 It was further pointed out that, following the bid, the 1st respondent applied for more land through their letters dated 9th December, 1997 and 20th April, 1998, and the 2nd respondent sold the 1st respondent portions of A-K which were consolidated and numbered Subdivision H of Lot 542/M.

 It was contended that there is evidence on record that, Subdivision 6 and 7 were not part of the Subdivision H. Even the testimony of DW1 at page 354 lines 2 to 5 reads:-

**“Diagram on page 45 is for Subdivision H of Lot No. 542/M but does not include Subdivision 6 and 7.”**

 It was finally contended that there were no arguments in the Court below, that Subdivision 6 and 7 were part of Subdivision H of Lot 542/M.

 It was submitted that this ground of appeal, succeeds for the reasons given above.

 In relation to ground two of the appeal, it was pointed out that, the evidence on record is that the 1st respondent applied for extra land by their letters dated 9th December, 1997 and 20th April, 1998.

 It was further pointed out that, the Court below at page J18 in the second paragraph stated that Subdivision 6 and 7 had been sold by the 2nd respondent to the 1st respondent.

 It was contended that, there is no evidence on record for the Court below to come to such conclusion. It was further contended that the error came about because the Court below thought that Subdivision 6 and 7 of Lot 542/M were part of Subdivision H of 542/M.

 At the hearing of the appeal, Mr. MAZUMBA on behalf of the appellants submitted that they have two grounds of the appeal, and they filed heads of argument. They would rely on the same.

 Counsel further submitted that, they would highlight their main area of concern. He referred the Court to page 25 of the record, and pointed out that, that was the portion they were appealing against. He further referred the Court to the diagram at page 69 of the record which clearly showed that there is a remaining extent of plot 542/M where the appellants were sold.

 He finally submitted that, the Court below erred in holding that, Subdivision 6 and 7 were part of Subdivision H. He contended that if that was the case, it would have shown Subdivision 6 and 7 of Subdivision H. However, the two are independent.

 On behalf of the 1st respondent, Mr. ZULU informed the Court that, the record would show that the 1st respondent has not filed heads of argument due to problem of instructions, but would argue the appeal viva voce.

 Counsel pointed out that, the Court below made findings of fact. He further pointed out that, the Court has laid guidelines upon which it might interfere with findings of fact. Such cases include ***ZULU -VS- AVONDALE HOUSING PROJECT*** (1). He submitted that, the findings of fact made by the Lower Court were not perverse.

 He pointed out that, the diagram referred to at page 245, refer to portion “M” which was Subdivided and labeled as Subdivision H. He further pointed out that, initially there was portion “N”.

 He contended that, the issues in this appeal are findings of fact. He pointed out that, the evidence of DW1 at page 349 to 352 of the record was that, he had purchased “H” and later applied to purchase Lots 6 and 7. There was a counter claim for 6 and 7. The findings of the Court below were not misplaced.

 With respect to the grounds of the appeal, Counsel argued in the alternative that, the appeal is academic. He referred the Court to the claim as at page 29. They sought a declaration, and the grounds of appeal do not attack the Court below’s failure to make a declaration. The 1st appellant concluded that he had no contract of sale.

 He referred the Court to the contract at page 129. Further, the 2nd appellant had no evidence to back his claim. Counsel contended that, the Court below, particularly in respect of the 2nd appellant did not err when it did not make a declaration that he was a bonafide purchaser. The 2nd appellant admitted at page 348 that he did not pay for the property.

 In reply, Mr. MAZUMBA submitted that, his learned brother had laboured on issues which do not assist the 1st respondent. He pointed out that issues are guided by the pleadings. Counsel contended that ZCCM, the owners of the property did not in their defence, deny having sold the portions of land to the appellants.

 We have considered the grounds of appeal; the appellant’s heads of argument; and the submissions on behalf of the parties. We have also examined the judgment of the Court below that has been appealed against.

 In the 1st ground of appeal, the appellants have challenged the Court below for holding that Subdivision 6 and 7 of Lot No. 542/M were part of Subdivision H of Lot No. 542/M.

 We have analysed the evidence that was adduced before the Court below. The evidence as it stands, the Court below cannot be faulted for holding as it did, that Subdivisions 6 and 7 were part of Subdivision H of Lot No. 542/M.

 In the circumstances, we find no merit in the 1st ground of the appeal. It is, accordingly, dismissed.

 In the 2nd ground of appeal, the appellants have attacked the Court below, on the evidence before it, in holding that subdivisions 6 and 7 Lot 542/M were sold by the 2nd respondent to the 1st respondent.

 Having considered the evidence that was adduced before the Court below as contained in the record of appeal, we have found that the evidence as it stands, the Court below cannot be faulted for holding as it did that, Subdivisions 6 and 7 of Lot 542/M were sold by the 2nd respondent to the 1st respondent.

 Further, according to the undisputed evidence and the findings of the Court below, we are of the view that the portions of land in question having been offered and sold to the 1st respondent by the 2nd respondent earlier; the subsequent offer of the portions of land to the appellant was a mistake on the part of the 2nd respondent.

 In the circumstances, we find no merit in the 2nd ground of the appeal, and is dismissed.

 Last and not the least most of the arguments in the two grounds of appeal, attacked findings of fact by the Court below. As stated in numerous cases which include the case of ***ZULU -VS-*** ***AVONDALE HOUSING PROJECT LIMITED*** (1), this Court will not reverse findings of fact made by the trial Court, unless it is shown that the findings in question were either perverse; or made in the absence of any relevant evidence; or upon a misapprehension of the fact; or findings which on a proper view of the evidence, no tribunal acting correctly could reasonably make.

 In the current case, the appellants have not satisfied this requirement in order for us to depart from this well settled principle of law.

 For the reasons given above, this appeal fails as the same has no merit. It is dismissed with costs to the 1st respondent which will be subject to taxation in default of agreement.

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D. K. Chirwa,

**ACTING DEPUTY CHIEF JUSTICE**

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 H. Chibomba, M. E. Wanki,

**SUPREME COURT JUDGE SUPREME COURT JUDGE**