**IN THE SUPREME COURT FOR ZAMBIA Appeal No. 175/2009**

**HOLDEN AT KABWE**

(Civil Jurisdiction)

**BETWEEN:**

**CATHERINE M. KABIKA APPELLANT**

**AND**

**BEN MUBIANA MALAMO RESPONDENT**

***Coram:*  CHIBESAKUNDA, PHIRI and MUYOVWE, JJS**

**On the 10th August, 2011 and 2nd August, 2012**

For the Appellant: Mr. K. Simbao, Messrs Mulungushi Chambers

For the Respondent: Mr. Locha, Messrs Mweemba & Co. on behalf

of Messrs MAK Partners

**J U D G M E N T**

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

**Cases referred to:**

1. **Pacific Motor Auctions Pty Limited vs. Motor Credit (Hire Finance) Limited (1965) 2 All E R 105**
2. **Nora Mwaanga Kayoba and Valizani Banda vs. Eunice Kumwenda Ngulube and Andrew Ngulube (2003) Z.R. 132**
3. **Jane Mwenya and Jason Randee vs. Paul Kapinga (1998) Z.R. 17**
4. **Kitwe City Council vs. William Ng’uni (2005) Z.R. 57**

This is an appeal against the judgment of the Livingstone High Court which found that the Respondent was the rightful owner of House No. DB 98 Dambwa Livingstone.

 This matter commenced in the Local Court at Livingstone. The Local Court found in favour of the Respondent. However, on appeal to the Subordinate Court, judgment was passed in favour of the Appellant. It was then that the Respondent appealed to the High Court.

 The facts of the matter were that on 7th June, 1972 the Respondent was allocated House No. DB98 by the Livingstone City Council. He, later, married Catherine Simunji, the sister to the late Mr. Simunji, the man at the centre of this dispute. When Mr. Simunji relocated from Ndola, he moved in with his sister and the Respondent at House No. DB98. Mr. Simunji was employed by the Livingstone City Council and when the Council decided to offer houses to sitting tenants, he agreed with the Respondent to buy the house using his unpaid leave days and that his brother-in-law, the Respondent, would refund him his money in due course. Mr. Zaaza who was then based at the Housing Department of the Council and who witnessed the agreement confirmed its existence. Following the agreement attested to by Mr. Zaaza, the house was ‘allocated’ to Mr. Simunji on 20th May 1996 and he was issued with a tenancy card showing that the house was allocated to him on 7th June 1972. Mr. Simunji paid for the house as per agreement and he was later refunded his money by the Respondent and evidence was produced to this effect.

 On the other hand, the Appellant conceded that when she bought the house from Mr. Simunji there was a tenant, a Mr. Mweemba who informed her that the house was for Mr. Simunji. That, however, the Respondent continued to collect rentals from the tenant even after she bought the house. As far as the Appellant was concerned the house belonged to Mr. Simunji and that records at the Council confirmed this.

In his judgment, the learned Judge found that although Mr. Simunji showed her documents to prove ownership of the house before she purchased it from him, this was not true. He found that one of the documents purporting to prove that the house belonged to Mr. Simunji showed that it was allocated to him in 1972 yet this was the time the Respondent took occupation of the said house. The learned Judge after considering the facts found that Mr. Simunji did not own the house and therefore could not pass good title to a purchaser. The learned Judge held that the Appellant was not a purchaser for value without notice. He held that the Appellant should pursue her claim with the estate of the late Mr. Simunji as she had ignored the signs that indicated to her that Mr. Simunji did not own the house in dispute.

The learned Judge was satisfied that the Respondent had a right to the house in issue and found in his favour and set aside the judgment of the Subordinate Court.

 In her appeal, the Appellant advanced the following grounds of appeal namely:

1. **The learned trial Judge did not take into account the Appellant’s submission despite the same having been filed in Court on 22nd May, 2009 in accordance with directions.**
2. **The Learned trial Judge erred in law and fact when he found that Mr. Simunji had no right to sell the house and pass good title to a purchaser and that he did not own the house.**
3. **The facts on record do not support the Judgment delivered in the matter.**

Neither the Appellant nor his Counsel appeared at the hearing of this appeal but we were advised that they would rely on the submissions filed in the lower Courts.

In the Subordinate Court, Mr. Simbao filed written submissions and these are at Page 113 to 114 of the Record of Appeal. It was submitted that there was no doubt that the house in question was offered for sale to Mr. Simunji and that the offer spoke for itself; that he made payments to the Council and the Appellant bought the house from him. Counsel contended that any person buying property under the Housing (Statutory and Improvement Areas) Act should investigate the title at the Council Registry. According to Counsel, it was admitted that in this particular case, anyone who made a search would have been left in no doubt that the property belonged to Mr. Simunji. Mr. Simbao argued that the note purportedly representing the agreement between Mr. Simunji and the Respondent was not helpful, adding that a record of this transaction was not on the Council records. That, therefore, the Respondent was guilty of failure to give effective notice and that this was fatal. That in the circumstances the Appellant was a purchaser for value without notice. Relying on the case of **Pacific Motor Auctions Pty Limited vs. Motor Credit (Hire Finance) Limited¹** it was submitted that any private transaction between Mr. Simunji and the Respondent should be disregarded. Mr. Simbao argued that the note was not at the Council Registry; that it was undated and cannot be ascertained when it was written. It was strongly argued that the house was legitimately purchased by the Appellant.

In his written submissions, filed in the High Court, Mr. Simbao submitted, inter alia, that the Subordinate Court evaluated the evidence. He referred to Page J3 of the Judgment where the learned magistrate stated that:

“**evidence has been adduced that there may have been an arrangement or agreement to the effect that the house would be bought on behalf of DW1, but the fact is that the evidence before me clearly shows that the house was offered to Mr. Simunji. Mr. Simunji paid for DB98 and later offered it to PW1”**

Counsel submitted that the documentary evidence pointed to the fact that Mr. Simunji owned the house in dispute. That the case of **Nora Mwaanga Kayoba and Valizani Banda vs. Eunice Ngulube and Andrew Ngulube²** could be distinguished from the present case in that there was an offer from the Council to Mr. Simunji and a contract of sale between Mr. Simunji and the Appellant. It was submitted that the Respondent had never owned the house as he was just a mere Council tenant who gave his rights as sitting tenant to Mr. Simunji who at law was the owner of the property. Citing the case of **Jane** **Mwenya and Jason Randee vs. Paul Kapinga³** Mr. Simbao argued that compensation cannot be adequate in this situation. It was submitted that the argument that the Appellant should have been put on inquiry by the presence of a tenant does not hold water adding that she could not make inquiries on the rights of strangers to the property. Counsel maintained that the documents on record supported the Appellant’s claim to the property.

On behalf of the Respondent, learned Counsel filed their Heads of Argument which are on record.

In response to ground one, it was submitted that although the Court below did not take into account the Appellant’s submissions, this was not fatal as submissions are meant to assist the Court in arriving at its judgment. They relied on the case of **Kitwe City Council vs. William Ng’uni.** It was argued that the Court below in its judgment evaluated the evidence in the Subordinate Court and found that the Appellant was not a bona fide purchaser for value without notice.

Coming to ground two, it was submitted that the Court below was on firm ground when it held that Mr. Simunji had no right to sell the house and that, therefore, he could not pass good title to the purchaser. Learned counsel referred to the agreement between the parties which appears at Page 57 of the record of appeal. It was pointed out that the agreement shows that Mr. Simunji was not a sitting tenant of the house in question and he was offered to purchase the house by the Livingstone City Council by virtue of the agreement between him and the Respondent. That it was clear from the agreement that the Respondent was required to refund Mr. Simunji the money he paid for the house and that the Respondent did pay back the money. It was submitted that the agreement ensured that ownership of the house remained in the Respondent. That, therefore, he had no right to sell the house and the Court below was on firm ground in holding that Mr. Simunji could not pass good title to anyone.

We have perused the Record of Appeal and considered the judgment of the Court below and the submissions by Counsel for the parties.

As earlier alluded to, the Appellant filed three grounds of appeal and relied on the submissions made in the Court below. However, the submissions did not specifically address each ground of appeal advanced before us. For this reason, we propose to deal with all the grounds of appeal together.

Firstly, in relation to the issue that the learned Judge did not take into account the submissions filed by the Appellant, Counsel for the Respondent cited the case of **Kitwe City Council vs. Willian Ng’uni** where we held that the Court is not bound to consider Counsel’s submissions because submissions are only meant to assist the Court in arriving at its judgment. While we note that indeed, the learned Judge did not consider the Appellant’s submissions which were filed in accordance with the Court’s directions, our holding in the **Kitwe City Council Case** speaks for itself andthe arguments on this point cannot be sustained.

On the Appellant’s argument that Mr. Simunji owned the house, that he had the right to sell the house and that the facts on record do not support the judgment delivered by the Court below, we have considered the arguments advanced. It is not in dispute that Mr. Simunji was never at any time a sitting tenant of the house in issue. That at the time the Appellant bought the house from Mr. Simunji, the Respondent’s tenant was in occupation of the house. We make this conclusion in spite of the Appellant’s evidence that the said tenant told her he was renting from Mr. Simunji. If this was so, why did Mr. Simunji fail to evict the tenant and give her vacant possession? Alternatively, she could have started receiving rentals from the tenant as the new owner of the property after transacting with Mr. Simunji.

There is evidence on record that Mr. Simunji paid the purchase price on behalf of the Respondent who was the sitting tenant. The Respondent’s witness, Mr. Zaza who was in charge of the Dambwa Housing Area during that period confirmed the agreement between the parties. In fact Mr. Zaza referred to himself as a relative to both Mr. Simunji and the Respondent and assisted in drafting the agreement. The Respondent not only produced the agreement but called Mr. Zaza who witnessed it. On this point, Counsel for the Appellant relied on the case of **Pacific Motor Auctions Pty Limited1**stating that ‘the private transaction’ between the Respondent and Mr. Simunji should be disregarded. In our view, Counsel should have elaborated further as to how the case of **Pacific Motor Auctions Pty Limited1** applied to this case. We hold the view that the case cited is not applicable to this case as the agreement between the Respondent and Mr. Simunji was witnessed by a Council official. Indeed, the fact that the agreement was not found in the Council Records cannot be the basis for us to disregard its existence or relevance to this matter. We take judicial notice of the fact that arrangements such as the one entered into between Mr. Simunji and the Respondent are quite common and we have encountered them in matters involving house disputes from time to time. In the present case, there was evidence to the effect that the Respondent refunded Mr. Simunji the money which he had paid to the Council for purchase of the house. We agree with Counsel for the Respondent that, the Appellant cannot be considered a purchaser for value without notice as she should have taken Mr. Simunji to task over the fact that he sold her a house which was occupied by a tenant renting from the Respondent. We said in **Jane** **Mwenya and Jason Randee vs. Paul Kapinga³** that:

**“The occupation of land by a tenant affects a purchaser of land with constructive notice”.**

We cannot accede to the argument by Mr. Simbao that a search at the Council was sufficient to discover the status of the property. We do not think that a prudent purchaser should restrict their search or investigation of title to the Council Records. In this case, the Appellant should have put herself on inquiry owing to Mr. Simunji’s failure to give her vacant possession of the house due to the continued occupation of the house by the Respondent’s tenant. The document which Mr. Simunji showed as proof of ownership had flaws which should have further put suspicion in the mind of the Appellant that she was not dealing with the owner of the house. All these factors should have alerted her that something was amiss. In the words of the lower Court, the Appellant adopted an indifferent attitude to the prevailing situation. Indeed, as we held in the **Nora Mwaanga Kayoba²** case purchasers of real properties must be more vigilant in making enquiries to establish whether or not the property in question has encumbrances. We find that the lower Court was on firm ground when it held that Mr. Simunji did not own the house in question and could not, therefore, pass good title to anyone.

We find no merit in the three grounds of appeal.

In conclusion, we uphold the judgment of the lower Court and confirm that the house rightly belongs to the Respondent. The Appellant must follow her claim with the estate of the late Simunji.

We find no merit in this appeal and we dismiss it with costs to the Respondent to be taxed in default of agreement.

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**L.P. CHIBESAKUNDA**

**SUPREME COURT JUDGE**

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**G.S. PHIRI E.N.C. MUYOVWE**

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