

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 8/2013

HOLDEN AT KABWE

SCZ/8/310/2012

(COMMERCIAL JURISDICTION)

BETWEEN:

RACHEL SHANKWAYA

APPELLANT

AND

LUBINGA DEMETRIA NANG'ANDU

1ST RESPONDENT

BARCLAYS BANK ZAMBIA PLC

2ND RESPONDENT

ATTORNEY-GENERAL

3RD RESPONDENT

CORAM: Wood, Malila and Kaoma, JJS.

On 4th November, 2014 and 26th May, 2015.

For the Appellant:

In Person.

For the 1st and 2nd Respondents:

Mr. A. Tembo- Messrs Tembo Ngulube and Associates.

For the 3rd Respondent:

Ms. M. Nzala- Assistant Senior State Advocate.

JUDGMENT

WOOD, JS, delivered the Judgment of the Court.

CASES REFERRED TO:

- 1. Admark Limited v Zambia Revenue Authority (2006) Z.R. 43.*
- 2. Magic Carpet and Tours Limited v Zambia National Commercial Bank Limited (1999) Z.R. 61.*

3. *Gibbs v Messer* (1891) AC, 248.
4. *Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa and another* (2005) Z.R 138.
5. *Wilhelm Roman Buchman v Attorney General* (1994) Z.R. 76.

LEGISLATION REFERRED TO:

1. *The Rules of the Supreme Court, 1999.*
2. *The Lands and Deeds Registry Act, Chapter 87 of the Laws of Zambia.*
3. *The High Court Act, Chapter 27 of the Laws of Zambia.*

This is an appeal from a decision of the High Court which declared the 1st respondent a *bona fide* purchaser for value without notice, of Stand No. 192 Kabwe.

The brief facts relating to this appeal are these. The appellant was an employee of the now defunct Lima Bank from February 1988 to March, 1997 when the bank went into liquidation. By virtue of her employment, the appellant was accommodated at Stand No. 192 Kabwe from 1992 to 1997. The liquidators of Lima Bank offered the property to the appellant as sitting tenant, for the sum of K19, 000,000.00(un-rebased) but the offer was withdrawn after she failed to purchase the property. In November of 2000, the liquidators subsequently sold the property to a Mr. Kasanga John

Mukoma. The appellant later discovered that at the time Lima Bank went into liquidation, Stand No. 192, Kabwe had been re-entered by the State and did not form part of the assets of Lima Bank. Armed with this information, she applied to purchase the property directly from the State as a sitting tenant on 9th January, 2001. On 18th October, 2001, the Commissioner of Lands offered Stand No. 192 Kabwe to the appellant for the sum of K114, 978.00 (un-rebased). She paid the purchase price in full and was issued with Certificate of Title Number 7099 on 22nd April, 2002.

Upon realising that the re-entry was in error, the Commissioner of Lands cancelled the certificate of re-entry on 8th May, 2002. Thereafter, the appellant's offer was withdrawn and the Certificate of Title issued to her was cancelled on 14th August, 2002. Despite the cancellation of her certificate of title, the appellant continued to assert legal ownership of the property and refused to yield vacant possession. Her refusal to vacate the property was based on a Supreme Court order dated 29th June, 2007, which stated that she was not a trespasser on the property because she

had purchased it from the State, having paid the purchase price in full.

At the time the appellant failed to purchase the property from the liquidators, the liquidators sold and subsequently assigned the property to Mr. Kasanga John Mukoma sometime in November of 2000. By a contract dated 28th November, 2005, Mr. Kasanga John Mukoma sold the property to the 1st respondent for the sum of K115, 000,000.00(un-rebased). The property was subsequently assigned to the 1st respondent on 13th December, 2005 after which she was issued with Certificate of Title No. 44337. The purchase of Stand No. 192 Kabwe was financed by the 2nd respondent by way of a legal mortgage, which was registered at the Lands and Deeds Registry on 20th June, 2006. The 2nd respondent's complaint was that it was unable to enforce its rights under the mortgage executed with the 1st respondent on account of the appellant's conduct.

Driven by the appellant's refusal to vacate the property, the 1st and 2nd respondents commenced an action against the appellant and the 3rd respondent, claiming *inter alia* a declaration that the 1st respondent was a *bona fide* purchaser for value without notice,

having duly purchased Stand No. 192 Kabwe from Mr. Kasanga John Mukoma, an order for vacant possession and an order against the 3rd respondent for rectification of the Lands Register.

In his judgment, the learned trial Judge found in favour of the 1st and 2nd respondents. He held that the Supreme Court order dated 29th June, 2007, which the appellant was relying on did not determine the dispute as to ownership of the property and should not have been registered in the first place. The effect of the order was to quash the proceedings of the High Court on grounds that the matter was wrongly commenced under *Order 113 of the White Book* and grant the parties liberty to commence fresh proceedings. He also found that the property was properly assigned to Mr. Kasanga John Mukoma because the State subsequently cancelled the re-entry on the property as well as the Certificate of Title issued to the appellant. The learned trial Judge adjudged that the 1st respondent was a *bona fide* purchaser for value without notice because the property was unoccupied when she viewed it before purchasing it and only became aware of the appellant's claim in 2007. Another reason was that at the time the 1st respondent contracted to

purchase the property, it was free from any encumbrances as the caveat lodged by the appellant was cancelled by the High Court order which granted possession of the property to Mr. Kasanga John Mukoma. The learned trial Judge refused to determine whether or not the High Court order was null and void on grounds that the issue was not raised in the appellant's pleadings or during trial. He subsequently ordered the appellant to vacate the property on grounds that she was aware that it had been sold to Mr. Kasanga John Mukoma after she refused to purchase it from the liquidators and was aware that the Certificate of Title issued to her had been cancelled and was never re-instated.

The appellant was not satisfied with this Judgment and has filed in three grounds of appeal. We will deal first with ground two of the appeal after which we will deal with grounds one and three.

Ground two of the appeal was that the learned trial Judge erred in law when he dismissed the argument that the High Court order which discharged the caveat placed by the appellant was null and void, on grounds that the issue was never pleaded or raised in evidence at trial.

In this ground, the appellant argued that the learned trial Judge erred when he refused to accept that the High Court order was null and void on grounds that it was registered out of time. The appellant accepted that the issue of the order being null and void was neither pleaded nor raised during trial. She, however, contended that going by the provisions of *Order 18 Rule 11 of the Rules of the Supreme Court, 1997* it is not mandatory to raise a point of law in the pleadings. To support this argument, the appellant cited the case of *Admark Limited v Zambia Revenue Authority*¹ in which we held that:

"A party may at the trial raise a point of law, even though it was not pleaded in his defence".

In response, both Mr. Tembo and Ms. Nzala agreed with the learned trial Judge's holding regarding this ground of appeal, on the basis that the issue of the High Court order being null and void was never canvassed at trial by the appellant.

We have considered the arguments in respect of ground two of the appeal. In her submissions at the close of the case, the appellant submitted that the respondent was required to register the High Court order within 30 days from the date of the document

as prescribed under Section 5 (2) (a) of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia which reads as follows:

(2) All other documents, except probate of a will, required to be registered as aforesaid shall be registered:

(b) In the case of a document executed at the place where it is registered, within thirty days from its date;

She submitted that the High Court order was null and void on grounds that it was registered seven months from the date of the document. In this regard, she relied on the provisions of Section 6 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia which states that:

“Any document required to be registered as aforesaid and not registered within the time specified in the last preceding section shall be null and void.”

The learned trial Judge held as follows on this issue:

“I have considered the argument advanced by counsel for the first defendant that the High Court order was registered out of time and as such of no effect and null and void. Although I agree with the authorities she has referred to, I cannot make a determination on the issue because it was not pleaded by way of a defence or counter claim and neither was evidence led in that respect. The evidence is therefore, being canvassed for the first time through submissions which does not afford the plaintiffs an opportunity to respond to it.”

We do not agree with the finding of the learned trial Judge on this issue. Our view is that the argument raised by the appellant in her submissions was a point of law, based on facts that were already before the court. It was not a departure from the evidence adduced during the hearing. At trial, all the parties relied on the Lands Register which outlined the history of the property in issue. Entry No. 20 on the Lands Register showed that the High Court order granting possession of the property to Mr. Kasanga John Mukoma was registered on 28th November, 2005. The entry also showed that the High Court order was dated 5th April, 2005. The Lands Register clearly showed that the High Court order was registered seven months after it was delivered. The learned trial Judge had the Lands Register before him, to assist him determine whether or not the High Court order was filed outside of the prescribed time, even though the issue was not raised in the pleadings. Further, *Order 33 Rule 3 of the Rules of the Supreme Court* states that:

“The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter;.....”

In the case of *Admark Limited v Zambia Revenue Authority*¹ which the appellant has cited, we stated the following at page 49 in relation to *Order 18 Rule 11 of the Rules of the Supreme Court*:

“The effect of this rule is that if a party intends to raise a point of law on the facts as pleaded, it is convenient course to do so in the pleadings. This course of action is desirable as it would ensure that the issues in dispute are defined at the earliest opportunity and might even have the effect of avoiding a trial. However, this requirement is not mandatory and in the case of Independent Automatic Sales Limited v Knowles and Forster [1962] 3 ALL ER 27, it was held that a party may at the trial raise a point of law open to him even though it was not pleaded in his defence.”

The evidence in the *Admark Limited v Zambia Revenue Authority*¹ case clearly showed that the appellant did not follow the provisions of *Section 164(3) and 164(4) of the Customs and Excise Act, Chapter 322 of the Laws of Zambia* which made it mandatory for a plaintiff to give statutory notice and proof of the intended action to the Commissioner General of Zambia Revenue Authority. A plaintiff was also required to commence an action within three months of the act complained of. In that case, we agreed with the decision of the learned trial Judge to allow the respondent raise a point of law in their submissions at the close of the case.

Clearly, the High Court order was registered seven months after it was made and was, therefore, filed outside of the time prescribed under *Section 5(2) (a) of the Lands and Deeds Registry Act*. The order was, therefore, null and void in terms of *Section 6 of the Lands and Deeds Registry Act*, since there was no leave of court to file it outside of the prescribed time. It follows that the caveat placed by the appellant was not discharged by the High Court order. This ground of appeal has merit.

Ground one of the appeal was that the learned trial Judge erred and misdirected himself in law and fact by holding that the 1st respondent was a *bona fide* purchaser for value without notice.

In this ground of appeal, the appellant submitted that, had the 1st respondent conducted a search prior to the contract of sale, she would have discovered that the appellant had placed a caveat on the property on 30th June, 2004. This caveat, it was observed, was purportedly discharged by the High Court order, which order was registered on the day the contract of sale was registered. It was contended that the 1st respondent had constructive notice of the encumbrance on the property because her lawyers were aware of

the existence of the caveat. In that respect, the 1st respondent was not a *bona fide* purchaser for value without notice, having proceeded to sign a contract of sale despite the caveat on the property. In support of her argument, the appellant cited the case of *Magic Carpet Travel and Tours Limited v Zambia National Commercial Bank Limited*² in which Silomba, J, as he then was, held that:

“A person who acquires title to land in the absence of any encumbrances and who does so without having notice of a prior fraudulent transaction acquires good title to the land.”

The appellant contended that having had notice of the encumbrance, the 1st respondent was not a *bona fide* purchaser.

In response to ground one of the appeal, Mr. Tembo contended that the 1st respondent was a *bona fide* purchaser for value without notice. The basis for his argument was that at the time the 1st respondent purchased the property from Mr. Kasanga John Mukoma, there was nothing on the Lands Register to suggest that it was encumbered. The history of the property showed that Mr. Kasanga John Mukoma purchased it from the Liquidators of Lima Bank, after which it was sold to the 1st respondent. The Lands

Register also showed that the Certificate of Title issued to the appellant was cancelled by the Commissioner of Lands on 14th August, 2002. This meant that at the time the 1st respondent purchased the property, the legal and registered owner of the property was Mr. Kasanga John Mukoma. Mr. Tembo also added that the 1st respondent was not aware of any adverse claims by any third party because the house was vacant when she viewed it before purchasing it. In any event, the caveat was subsequently discharged by the High Court order.

Ms. Nzala's response to ground one of the appeal relates to the arguments raised in ground three of the appeal. We shall, therefore, deal with them under that ground.

We have considered the arguments in respect of ground one of the appeal. We have accepted that the High Court order that purportedly discharged the caveat was null and void on account of late registration of the document and a search by the 1st respondent should have revealed this fact. We, however, hold the view that this aspect does not affect the 1st respondent's title to the property. We say so in view of the fact that at the time the 1st respondent

purchased the property, the appellant did not have a legal right or claim to the property. The Lands Register on which the parties relied showed that both the Certificate of Re-entry and the appellants Certificate of Title were cancelled in 2002. The cancellation of the two entries showed that the State re-entered the property in error and therefore, did not have the right to assign the property to the appellant in the first place. In any event, the appellant did not challenge the decision of the Commissioner of Lands to cancel her Certificate of Title as provided for under *Section 87 of the Lands and Deeds Registry Act*, which allows a party that is not satisfied with a decision of the registrar to appeal to the High Court. This ground of appeal lacks merit and is accordingly dismissed.

Ground three of the appeal, was that the learned trial Judge glossed over the evidence surrounding the purchase of the property by the appellant from the State when he did not take into account the fact that the appellant was an innocent purchaser who should be compensated by the State.

In ground three of the appeal, the appellant submitted that she was an innocent purchaser from the State which should compensate her for the property at the current market value. The appellant contended that when she applied for the property from the State, the Lands Register was showing that the property belonged to the State and she was not duty bound to inquire into the circumstances under which the State had re-entered the property. To support her argument, the appellant cited the case of *Gibbs v Messer*³ where the court stated the following at page 245 with respect to the Transfer of Lands Act:

“The object is to save persons dealing with the registered proprietor from the trouble and expense of going behind the register in order to investigate the history of their author’s title and to satisfy themselves of its validity.”

The appellant also relied on the provisions of *Section 13 of the High Court Act, chapter 27 of the Laws of Zambia* to argue that the evidence before the learned trial Judge was sufficient for him to use his powers to make an award in favour of the appellant against the State.

In response, Mr. Tembo observed that even though the claim for compensation was not against the 1st and 2nd respondents, the

appellant cannot be said to be a *bona fide* purchaser for value without notice. This was in view of the appellant's evidence admitting that she was aware that after she failed to pay for the property, it was subsequently sold to Mr. Kasanga John Mukoma. He argued that the appellant's evidence clearly showed that she was not a *bona fide* purchaser for value without notice because she did not act in good faith when she purported to buy the property from the State.

Ms. Nzala also disputed that the appellant was a *bona fide* purchaser for value without notice. Her submission was based on the fact that in her letter to the Permanent Secretary for the Ministry of Works and Supply dated 9th January, 2001, the appellant indicated that the liquidators offered her the property in issue, but she failed to purchase it on account of uncertainty over the legal ownership of the house. She also pointed out that the appellant admitted in her evidence that she was aware that the property was subsequently sold to Mr. Kasanga John Mukoma when she applied to the State to purchase it.

On the issue of compensation, Ms. Nzala submitted that the appellant never pleaded the issue of compensation in the court below and neither was the issue raised in evidence. As a consequence, she could not raise the issue on appeal. In support of her argument, Ms. Nzala relied on the case of *Anderson Kambela Mazoka and others v levy Patrick Mwanawasa and another*⁴ in which we held that:

“The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties are bound by their pleadings and the court has to take them as such.”

We have considered the arguments in respect of ground three of the appeal. We do not accept that the appellant was a *bona fide* purchaser for value without notice who should be compensated by the State. We take this view because the evidence in the record of appeal before us showed that Mr. Kasanga John Mukoma purchased the property from the liquidators of Lima Bank after the appellant failed to pay for the property. The evidence in the court below also showed that at the time the appellant asked to purchase the property from the State, she was fully aware that Mr. Kasanga

John Mukoma had already purchased it from the liquidators of Lima Bank. Clearly, the appellant had actual notice of the encumbrances on the property she asked to purchase and did not obtain good title to the property. While we accept the principle of law enunciated in the case of *Gibbs v Messer*³, our view is that this authority does not aid the appellant's case because she was aware of the existence of an adverse claim to the property. We therefore, concur with the learned trial Judge, that the appellant was not a *bona fide* purchaser for value without notice as she had actual notice of Mr. Kasanga John Mukoma's claim to the property.

Further, we cannot consider the appellant's claim for compensation from the State. This is in view of the fact that the appellant did not claim for compensation against the State in the court below and is raising this issue for the first time. We have stated in a number of authorities that it is incompetent for a party to raise an issue on appeal that was not raised in the court below. See for instance the case of *Wilhelm Roman Buchman v Attorney General*⁵ in which we held that:

"A matter that is not raised in the court below cannot be raised before a higher court as a ground of appeal."

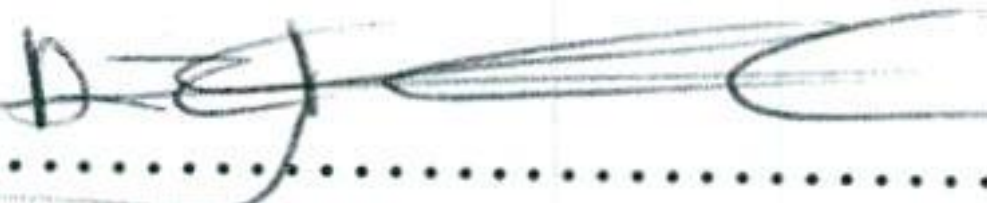
The net result is that this appeal lacks merit and is accordingly dismissed. Since the appellant succeeded on one ground of appeal, we order that the parties will bear their respective costs.



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A.M. WOOD
SUPREME COURT JUDGE



.....
M. MALILA
SUPREME COURT JUDGE



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R.M.C. KAOMA
SUPREME COURT JUDGE