IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(CIVIL JURISDICTION)

2010/HP/579

BETWEEN:

MARTIN BWALYA — **PLAINTIFF**

AND

JOSEPHINE KATOBO & MWAKA LUGURU(sued as administrators of the estate of Jones Sinyinza) — **1st DEFENDANT**
LUSAKA CITY COUNCIL — **2ND DEFENDANT**

Before: E. M. Hamaundu, J

For the Plaintiff : Mr G.D. Chibangula, Messrs G.D.C. Chambers

For the 1st Defendant: Mr A.D.M. Mumba, Messrs A.D. Mwansa Mumba & Associates

For the 2nd Defendant: Mr M. Moono, Director of Legal Services

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JUDGMENT

The plaintiff in this action, essentially, challenges the re-entry that the 2nd defendant effected on his plot. Therefore, he also seeks a

declaration that he still remains the lawful owner of plot 2774/7417 Chilenje South by virtue of the certificate of title numbered 10180 that he holds. He further seeks an order cancelling the certificate of title that was issued to the 1st defendant after the re-entry which is now under challenge. The plaintiff, in the alternative seeks damages.

According to the statement of claim, the plaintiff was at the material time resident in Botswana. In 1997 he bought the plot in issue from one Andrew Luwisi Phiri. He was issued with a certificate of title. In September, 2000, he lodged with the 2nd defendant an application to erect a building wherein he disclosed his residential and postal addresses in Botswana. Upon approval of his building plans, he erected on the plot; a foundation wall, a slab and other structures. In 2000, the 2nd defendant issued a notice to re-enter the plot on grounds that the plaintiff had failed to develop it. The notice was not brought to his attention in Botswana, notwithstanding that he had provided the 2nd defendant with his addresses in Botswana. After re-entering the plot, the 2nd defendant went on to allocate it to the 1st defendant to whom it issued a certificate of title. The 1st defendant, for his part, went on to the plot and demolished the structures that the plaintiff had put up. Hence this action.

The 1st defendant's defence consisted of bare denials. The only fact that came out of that defence was that, indeed, he held a certificate of title over the plot and that in 2010 he moved on to the plot and started developing it. From those averments, the 1st defendant counter-claims damages for loss of 68 pockets, of cement and other damages for anxiety, mental distress and inconvenience.

The 2nd defendant did not file a defence.

The plaintiff's testimony at the hearing was the same as the averments in his statement of claim. The following were some essential aspects of his testimony: He started building in 2003. He poured concrete for the foundation and erected the foundation wall. He imported gravel for the slab. Then he put up the slab in some arears. As regards the structure, he built only up to knee height because he wanted to use external material from Botswana. Hence, up to 2005 he had spent about K85million on the structure. Otherwise, the brickwork was protruding from the ground and was visible to the neighbours. All this time, the 2nd defendant had always contacted him in Botswana. Before the final drawings were approved, the 2nd defendant used to contact him by phone to tell him what was wrong with the submitted drawings. Regarding the re-entry, he did

not receive any letter to inform him of the 2nd defendant's intention. He did not see the notice that was placed in the local Daily Mail newspaper. He did not receive any certificate of re-entry. He just received a phone-call, in May, 2010, from his brother-in-law who said that somebody was demolishing the structures on his plot. He came to Lusaka and found that, indeed, the structure had been broken down by the 1stdefendant.

Cross-examined by counsel for the 1st defendant the plaintiff said that he used to build something on the plot each time he came on holiday. He said that he last visited the plot in December, 2009. He denied that vegetation had grown on the plot. He also denied the suggestion that the boundary wall was destroyed by illegal miners of rocks outside the plot.

Cross-examined by counsel for the 2nd defendant, the plaintiff admitted that the deed of assignment that he signed with the seller of the plot showed his residential address as Lusaka but said that when he applied for planning permission he gave the 2nd defendant his current addresses in Botswana. He said that his caretaker did not inform him that he had received a notice of re-entry.

That was the case for the plaintiff.

Mwaka Luguru Sinyinza, the widowed wife of the 1st defendant who was also a co-administrator of the estate testified for the 1st defendant. Her testimony was as follows: The deceased used to work for LASF. The deceased obtained a loan from his employers to enable him build a house. This was after he had applied for a plot with the 2nd defendant. He started building. When the construction reached a certain level, the deceased said that someone had come to claim the property. She came to know the plaintiff as the person who had come to claim the property. The plaintiff then started court proceedings and obtained an injunction. Following that injunction, construction came to a standstill. At that time there were somecement blocks and sand at the plot, which were subsequently stolen. There was some cement which was contained in 68 pockets. The cement expired.

The witness was not cross-examined by counsel for the 2nd defendant.

Cross-examined by counsel for the plaintiff, the witness replied as follows: She did not know when the building material was bought by her husband. The deceased did not explain to her why he did not remove the material from the plot.

That was the case for the 1st defendant.

The 2nd defendant called a witness. This was Reuben Chipisani Lungu, an Acting Senior Legal Assistant. His testimony was as follows: He had worked in the second defendant's Deeds Registry from September, 2010. When a registered owner wished to change their residential address, they were required to write to the Registrar of Deeds and notify him of that change. The addresses that were provided on the application for planning permission did not reflect in the Deeds Registry because planning permission was granted by a different Department.

Cross-examined by counsel for the 1st defendant, the witness said that he had not looked at the record concerning the plot in dispute.

Cross-examined by counsel for the plaintiff, the witness maintained that he knew nothing concerning the plot.

That was the case for the 2nd defendant.

The facts giving rise to this dispute are not in dispute and are as follows:

(i) That, in 1997, the plaintiff bought the plot in dispute from the previous owner, whereupon the 2nd defendant issued a certificate of title to him:

(ii) In 2009, the 2nd defendant issued a notice of its intention to re-enter the plot for lack of development; a notice which the 2nd defendant published in the Daily Mail newspaper: and,

(iii) That the 2nd defendant subsequently re-entered the plot and then allocated it to the 1st defendant who, then, moved on to the plot; thereby sparking this dispute.

I find the foregoing as facts.

The main issue that needs to be resolved in this case is the re-entry. The rest of the claims will either stand or fall depending on what the resolution on the re-entry will be.

The certificate of title that was issued to the plaintiff was so issued under the provisions of the **Housing (Statutory and Improvement Areas) Act, 1974**. That **Act** is currently referred to as **Chapter 194** of the **Laws of Zambia**.

There is no power under the main body of the **Act** for the 2nd defendant to effect a re-entry of plots. However, the **Standard Lease** in the **Third Schedule** of the **Housing (Statutory and Improvement Areas) Regulations** makes a proviso for re-entry on the part of the lessor, in this case the 2nd defendant. This is at **Proviso 12**. This

allows the lesser to re-enter the premises where the lessee has failed to pay rent or has breached or not performed any of the covenants contained in the **Standard Lease**. The **Standard Lease** does not contain a condition regarding the development of the plot. However, **Regulation 29** under which the standard lease is introduced in the **Act** provides that the parties may introduce to the standard lease additional conditions or even state that certain provisos in the **Standard Lease** may not apply.

In this case, the plaintiff's certificate of title provided in the memorials that title was subject to the terms of the lease made pursuant to the **Act**. It is not in dispute that among the additional terms to the **Standard Lease** were the requirement that the plaintiff completes constructing a building or buildings to a minimum value of K35million in not later than 18 months. This term required the plaintiff to build a complete structure of at least the value indicated. It did not refer to the cost of the incomplete structure. It is not in dispute that the plaintiff did not complete any structure from 1997 to 2009- a period of well over 18 months. The 2nd defendant, therefore, did have power and reason under the lease to re-enter the plot.

The lease does not make provision as to how the 2nd defendant should notify the owner of a plot of its intention to re-enter. In this case, the 2nd defendant advertised its intention in the Daily Mail newspaper. The plaintiff contends that the 2nd defendant had in its possession the postal and residential address in Botswana but did not send to him the notice.

The Deed of transfer from the previous owner to the plaintiff stated that the plaintiff was resident in Lusaka. There is no evidence that the plaintiff provided details of his changed address to the Deeds Registry. I, indeed, agree with the 2nd defendant that the addresses that the plaintiff gave on his application for planning permission did not suffice because the application went to a different department, altogether. Therefore, the 2nd defendant was entitled to assume that the plaintiff was still resident in the country. On that ground, the 2nd defendant was on firm ground in relying on the advertisement as sufficient notification to the plaintiff. I am, therefore, satisfied that the 2nd defendant exercised its right to re-entry properly. It follows that the cancellation of the plaintiff's certificate of title and the issuance of another to the 1st defendant were all properly done. The plaintiff's claims must, therefore, fail.

As for the 1st defendant's counterclaim, it is clear that the 1st defendant was stopped from continuing with his building by the injunction that was granted. The 1st defendant cannot recover damages from the plaintiff because the injunction was issued by the court.

All in all, the plaintiff's action is dismissed, with costs to the defendants.

Dated the ....12th.... day of ....May.... 2018

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E. M. Hamaundu

JUDGE