IN THE COURT OF APPEAL FOR ZAMBIA **App No. 77/2017**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

ALL ILLEGAL SQUATTERS ON FARMS **APPELLANT**
F/687/A/1/D/34 AND F/687/A/D/43

AND

BENNY CHUNDU **RESPONDENT**

Coram: Chisanga, JP, Chishimba and Sichinga, JJA
On 29th January 2018 and 18th September, 2018

For the Appellants: *Mr. L. K. Phiri- KBF and Partners*
For the Respondents: *No Appearance*

JUDGMENT

Sichinga JA, delivered the Judgment of the Court

Cases referred to:

1. *Anti-Corruption Commission v. Bernet Development Corporation Ltd (2008) ZR 69 (S.C.)*
2. *Hunt v. Luck (1902) 1 CH.D. 428*
3. *Nora Mwaanga Kayoba and Alizani Banda v. Eunice Kumwenda Ngulube And Andrew Ngulube (SCZ Judgment No. 19 of 2003)*
4. *Rajan Patel v. Attorney-General (SCZ Judgment No. 14 of 2002)*
5. *Anort Kabwe Charity Mumba Kabwe v. James Daka The Attorney General Albert Mbazima (2006) Z.R 12*

6. *David Nzooma Lumanyenda And Goodwins Kafuko Muzumbwa v. Chief Chamuka and Kabwe Rural District Council And Zambia Consolidated Copper Mines Limited (1988 - 1989) Z.R. 194 (S.C.)*
7. *Mark Chuunyu Chona v. Loveness Bwalya Musonda Augustine Musumali and Veronica Musonda Appeal No. 77A of 2007 (Unreported)*

Legislation referred to:

1. *The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia*
2. *The Court of Appeal Act, No. 7 of 2016 of the Laws of Zambia*

This appeal is against the Judgment of the High Court dated 28th September, 2016 declaring that the respondent is the registered proprietor of the properties known as F/687/A/1/D/34 and F/687/A/D/43 situated in Makeni, Lusaka (hereinafter called the subject properties), thereby granting the respondent an order of demolition of all illegal structures at the cost of the appellants. We note from the record that there were three defendants in the court below, namely; Christopher Mikosa and 27 others as 1st defendants, the appellants herein as the 2nd defendants and ZESCO Limited as the 3rd defendant. Since the 1st and 3rd defendants are not parties to this appeal, we shall refer to them as such in this appeal, that is, as they were in the court below.

According to his statement of claim, the brief facts that gave rise to the respondent's cause of action in the court below were that in April 2009, the 1st defendants entered the subject properties

armed with machetes and threatening violence in order to illegally demarcate and sell land to the appellants and in some cases occupying the land themselves. It was alleged further that the 1st defendants claimed to have authority to demarcate the subject properties by virtue of their membership of the Movement of Multi-Party Democracy (MMD) party, although the party refused having given them such authority as the property does not belong to the party. The respondent further alleged that the 1st defendants in the court below and the appellants herein illegally built houses on the subject properties and the 3rd defendant connected electricity to the illegal structures built thereon. That despite the respondent having correspondence with officials of the 3rd defendant to the effect that the 3rd defendant had caused to be connected electricity to more than 40 illegal houses on the subject properties, the 3rd defendant continued to connect power to more houses. The respondent sought the following reliefs, *inter alia*, before the High Court:

i) An order for an interim injunction restraining the defendants from interfering with the plaintiff's peaceful and quiet enjoyment of his ownership of the properties until determination of the matter or until further order of court.

ii) An order that any sale or purchase of the properties was at the party's own risk.

iii) An order to compel the defendants to restore his properties to its original status or state, in default the plaintiff be allowed to carry out the exercise and costs to be borne by the defendants.

iv) Damages for illegal occupation of his properties and for installing electricity to his properties.

On the basis of ***Section 33 of the Lands and Deeds Registry Act*** [1] and the respondent's certificates of title whose authenticity was unchallenged, the trial court found that the respondent had proved that he was the owner and registered proprietor of the subject properties. Also, on the premise that there can be no adverse possession of land that is on title, the court below found that even if the appellants had letters of offer from the Council, as occupants of the subject properties, they are merely squatters and have no legal claim to the property. The trial judge accordingly granted the respondent an order to evict the said squatters from the subject properties and to demolish the structures built thereon. As regards the respondent's claim for damages against the appellants, the trial court declined to grant

the same on the basis that the respondent did not sufficiently prove such damage, and that the order of possession and demolition with the attendant costs were sufficient.

As for the respondent's claim against the 1st defendants, the trial court found that only one Christopher Mikosa was identifiable among the 1st defendants, and that in this regard, the respondent's evidence did not prove the allegations that he was apportioning and selling portions of the respondent's land to other people or that he was himself occupying some portion of the respondent's land. These claims against the 1st defendants were therefore dismissed by the trial court for failure to meet the required standard of proof, and so was the claim for damages for loss of revenue from farm produce.

Equally, as against the 3rd defendant, the trial court found that the respondent herein had not proved to the required standard the claim for damages for illegally installing electricity on the subject properties. The learned trial judge did, however, find that although the 3rd defendant connected electricity to some squatters, this in itself does not amount to illegality but makes the 3rd defendant responsible to disconnect supply, on the premise that although the structures were built on land which has been found to have been illegally acquired, the 3rd defendant

had no means of conclusively verifying ownership of the land by its potential customers. The trial judge accordingly granted an order compelling the 3rd defendant to disconnect power supply to all the illegal squatters on the subject properties at its own cost but which cost should be reimbursed by the said squatters.

Dissatisfied with the judgment of the court below, the appellant now appeals before this court on the following grounds;

Ground One:

The learned trial judge erred in law and fact when it held that the respondent was a registered proprietor of properties known as F/687/A/1/D/34 and F/687/A/D/43 situated in Makeni, Lusaka, having in possession Certificates of title to the properties entitled to demolish and evict the appellants from the properties in dispute and having disregard to the appellant's equitable relief of having legal interest in the properties through the Occupancy Licenses from Lusaka City Council which evidence the respondent admitted, and further the evidence was not tested either from the Appellants or Lusaka City Council.

Ground Two:

The learned trial judge erred in law and fact in proceeding with trial and delivery of judgment in the absence of the appellants when there was no proof of service letter for court process (Writ of Summons and Statement of Claim and Notice of Hearing) on the appellants, who were of known address and fixed abode.

Ground Three:

The learned trial judge erred in law and fact in holding that the title deeds for property No. F/687/A/1/D/34, Lusaka was for the respondent whilst the said title is believed to have been obtained fraudulently as the said property is being claimed by Muslim Women Trust Fund whilst the title for property No. F/687/A/1/D43 Lusaka was cancelled according to Notice of Re-entry placed by the Commissioner of Lands on 23rd December 2002.

The appellant has opted to argue grounds one and two together, and the gist of counsel's arguments thereunder is that the trial court erroneously concluded that the appellants were squatters without having an opportunity to hear from them, nor from the

Lusaka City Council, which offered the appellants occupancy licenses. Secondly, the appellants submit that there was no proof of service of court process on them, even though the respondent knew their physical address, as he testified that they were occupying his farm. Instead, the notice of hearing was served by substituted service pursuant to a court order, which the appellant submits was irregularly issued because the respondent knew the appellants' physical address.

Our attention is drawn to the notice of hearing that the appellant contends to have been irregularly issued, whose return date was 10th July 2015. Furthermore, no fresh notice was ever issued subsequently and the matter proceeded without the attendance of the appellants. On this basis, the appellant implores us to set aside the judgment of the lower court and hold that a new trial be held, pursuant to ***Section 24(1)(c) of the Court of Appeal Act.***[2]

In support of the third ground of appeal, the appellant refers to the testimony of the respondent in the lower court, where he stated that he bought property No. 43 from his brother and that property No. 34 was exchanged to him by the Muslim Association in about 2005, although he did not produce the relevant documentation before the court, as he claimed to have been

unaware that they would be needed as exhibits. In this vein, counsel contends that seeing as there was no proof before the trial court to this effect, impropriety or fraud in acquisition of the subject properties cannot be ruled out, and relies on the case of ***Anti-Corruption Commission v. Bernet Development Corporation Ltd*** [1] wherein it was held that a certificate of title deed can be cancelled for impropriety in its acquisition. Counsel has also cited ***Section 34 of the Lands and Deeds Registry Act,*** [1] which states that a certificate of title can be cancelled for fraud in its acquisition. It is counsel's prayer under the third ground of appeal that since all the parties involved in the acquisition of properties no. 34 and 43 were not called to testify, the matter should be sent for retrial.

The respondent equally filed heads of argument dated 2nd November, 2017. Grounds one and three are opposed as one. In this regard, counsel for the respondent submits that the respondent presented all the relevant documents to establish its ownership of the subject properties. To rebut the appellants' allegations of fraud, the respondent submits that he has in his possession all the original certificates of title and deeds of transfer and that the occupancy licence offered to the appellants was without consent from the respondent as title holder, as

issuance of the said occupancy license does not entitle the squatters to be legal owners.

As regards his acquisition of the subject properties, our attention is drawn to two deeds of gift on record; one relating to the property known as F/687/A/D/43 dated 1st March 1989 for the transfer of title from the respondent's relative Charles Kandala to the respondent, and one relating to property known as F/687/A/D/43 dated 4th October, 2005 for the transfer of title from Lusaka Muslim Women Trust Fund (LMWTF) to the respondent.

It is further argued on behalf of the respondent that as purchasers, the appellants were under an obligation to investigate the status of the property they were purchasing and approach the transactions seriously, and that there is no evidence on record that the appellants investigated the status of the subject properties before purchasing them. On this premise, the respondent calls in aid the case of ***Hunt v. Luck*** [2] and submits that the same principal was followed by the Supreme Court in the case of ***Nora Mwaanga Kayoba and Alizani Banda v Eunice Kumwenda Ngulube and Andrew Ngulube*** [3] where it held that:

"In purchasing real properties parties are expected to approach such transaction with much more serious inquiries to establish whether or not the property in question has encumbrances."

In view of these authorities and the case of ***Rajan Patel v. Attorney-General***[4] *inter alia*, it is the respondent's contention that the appellants purchased portions of the respondent's properties at their own risk and the only remedy available is to pursue the persons who sold them the properties they are occupying. To support the position that there can be no adverse possession of property on title, the respondent relies on ***Anort Kabwe Charity Mumba Kabwe v James Daka The Attorney General Albert Mbazima*** [5] and ***David Nzooma Lumanyenda and Goodwins Kafuko Muzumbwa v Chief Chamuka And Kabwe Rural District Council And Zambia Consolidated Copper Mines Limited***. [6]

In response to the second ground of appeal, counsel for the respondent submits that the trial court was on firm ground in not proceeding to deliver judgment in this protracted matter until being satisfied during trial that substituted service was executed on the squatters who opted to sit on their rights by staying away from giving evidence at trial. Counsel submits further that

substituted service of court process was necessary because most of the illegal squatters are not residing on the subject properties but have left tenants, who even though served with court process have no legal authority to come to court to appear in court on behalf of their landlords to challenge the title held by the respondent. As to how the substituted service was effected, counsel asserts that the record shows that in the court below, this matter was adjourned during trial in order to allow for an application for substituted service to be heard before the Deputy Registrar, who subsequently granted an order for leave to serve court process by substituted service, that is; notice of hearing for commencement of trial, as evidenced by the newspaper cuttings exhibited to the affidavit of service on record.

We have considered all the evidence on record, the judgment appealed against and the authorities and submissions by learned counsel for both parties. For reasons that will become obvious later, we will start by addressing the second ground of appeal, wherein the appellants contend that there was no proof of court process on them.

We note from the record that trial in the court below commenced on 5th February 2015. On this date, the respondent herein testified, was cross examined by the 1st defendant and closed his

case. The 1st defendant also testified the same day and he was equally subjected to cross examination. The matter was then adjourned to 10th July 2015. The record also reveals that there was indeed an application and an order for substituted service dated 18th March 2015. Accordingly, on 30th June 2015, the appellant caused to be served a notice of hearing in the Times of Zambia, returnable on 10th July 2015. The record also shows that the 1st and 3rd appellants subsequently appeared for hearings, whereas the appellants made no appearance either before or after commencement of trial. No further notice of hearing was issued to the appellants either in person or by way of substituted service.

It is evident and not in dispute that the application and order for substituted service was in respect of a notice of hearing and not originating process, that is; amended writ of summons and statement of claim. In any event, the said application was made long after trial had commenced, that is; after the plaintiff had already closed its case. The plaintiff in a civil action is obligated to serve originating process on all parties in accordance with the applicable rules. In this regard, the Supreme Court in the case of ***Mark Chuunyu Chona v. Loveness Bwalya Musonda Augustine Musumali and Veronica Musonda*** [7] allowed an

appeal on the premise that the appellant was not properly served with the writ of summons. The Supreme Court in the said case went ahead to set aside the judgment and ordered that the matter be retried before another judge of the High Court.

In the circumstances in *casu*, our view is that the trial court fell in error when it failed to satisfy itself before commencement of trial that the plaintiff in the court below had accordingly served process on all the defendants. Instead, trial was commenced without the appellants' knowledge that an action had been commenced against them. Only after the plaintiff had closed its case did the respondent then apply to serve a notice of hearing by substituted service. In our view, this conduct of the respondent was not only irregular but also unfair on the respondents herein, as it goes against the appellants' fundamental right not to be condemned without being given an opportunity to be heard. On this premise, we find merit in the second ground of appeal and in light of the order we propose to make, we deem it unnecessary to consider the other two grounds of appeal.

We allow the appeal and set aside the Judgment appealed against. Further, we find that the circumstances of this case are befitting of the exercise of our discretion to order a retrial pursuant to ***Section 24(1) (c) of the Court of Appeal Act*** [2] and

we accordingly so order. This matter shall be retried before another High Court Judge.

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F. M. CHISANGA
JUDGE PRESIDENT

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F.M. CHISHIMBA
COURT OF APPEAL JUDGE

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D. L.Y. SICHINGA
COURT OF APPEAL JUDGE