

IN THE SUPREME COURT OF ZAMBIA

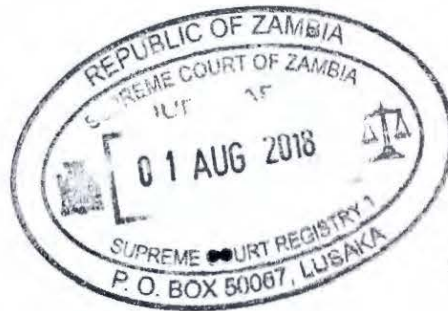
APPEAL NO. 186/2015

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

BENSON MUNGANAMA



APPELLANT

AND

FRIDAH NGOMA

RESPONDENT

THE ATTORNEY GENERAL

THIRD PARTY

Coram: Mambilima, CJ, Wood and Kaoma, JJS.

On 10th July, 2018 and 31st July, 2018.

For the Appellant: Mr. Chifumu Banda, SC – Messrs Chifumu Banda & Associates on behalf of Dr. O.M.M Banda –Messrs O. M. M Banda and Company.

For the Respondent: Mr. H. H Ndhlovu, SC – Messrs H.H Ndhlovu and Company

For the Third Party: Mr. F. Imasiku – Attorney General’s Chambers

JUDGMENT

Wood, JS, delivered the judgment of the Court.

Cases Referred to:

1. *Eustace Spaita Bobo and Annessie Banda Bobo v Kabinga 2005/HP/1108.*

2. *Zambia Consolidated Copper Mines Limited v Eddie Katalayi and Max Chilongo (2001) ZR 28.*
3. *Audrey Kafwa Gondwe v Supa Baking Company Limited (In Liquidation) and V.U. Akubat SCZ Judgment No. 9 of 2001.*
4. *Nyimba Investments v Nico Insurance Zambia Limited Appeal No. 130/2016.*

Legislation Referred to:

1. *Section 22 (1) and 23 of the Lands and Deeds Registry Act Cap 185.*

This is an appeal against a decision of the High Court dismissing the appellant's claim for a declaration that he is the lawful owner of Plot No. 24419, Libala South, Lusaka.

The facts giving rise to this appeal are quite easy to discern. The appellant who was the defendant in the court below is an Inspector of Taxes with the Zambia Revenue Authority. He is also a deacon at a Church where he worships. He needed a plot and so he asked one of his Church members to help him find a plot. One such member of his congregation by the name of John Mwamba saw an advertisement in the Post Newspaper sometime in November, 2008 for the sale of a plot and informed the appellant. The appellant talked with the agent and upon verification that he was registered, viewed the plot and liked it. He asked to meet the

owner by the name of Christine Nsama Chitalu. When they met, she produced her National Registration Card together with the title deeds which reflected her name. At the time he was transacting, he also verified the title deeds relating to Stand No. 24419, Libala South, Lusaka with the Ministry of Lands and he was informed that the title deeds were genuine. After satisfying himself with the due diligence he had conducted at the Ministry of Lands, he engaged a lawyer with the Legal Aid Board to prepare the contract of sale and other documents pertaining to the sale. The contract was in the name of Chitalu Christine Nsama. Both the contract and assignment were executed and witnessed. The vendor was paid the purchase price of K34,000.00 and the respondent was later issued with title deeds relating to Stand No. 24419, Lusaka in his name. The appellant then proceeded to develop the property by building a house valued at K290,000.00 in 2009.

After he had started construction, the appellant was approached by the respondent who protested at the fact that he was constructing on her plot. He did not take her seriously but stopped constructing after he was served with an injunction. The injunction

was later discharged. The appellant told the court below that he obtained copies of Christine Nsama Chitalu's details but did not give them to the police to trace her.

The respondent's evidence on the other hand was that on 24th March, 2004, she bought Stand No. 24419 Lusaka from Christine Nsama Chilatu for K8,000.00 in the presence of Mwamba Kusangwa her agent. An agreement for the sale of the plot was signed by the respondent Christine Nsama Chilatu and Mwamba Kusangwa. After signing the agreement, Christine Nsama Chilatu surrendered the title deeds, the letter of offer from the council and the receipt for charges paid to the council. The respondent then proceeded to build a foundation box based on the vendor's house plan. She filled up the foundation box partially and then went back to Livingstone and fell ill until she had an operation in December, 2005. She had a second operation in 2007. She stopped developing the plot because she used the money for developing the plot for her hospital treatment. She however kept checking on her plot. The last time she checked on it was on 3rd November, 2008 and found it intact. On 13th March, 2009 when she wanted to continue building,

she found that the plot had been built on by somebody else who turned out to be the appellant. The respondent reported the appellant to Police. The Police then apprehended Christine Nsama Chilatu and took her to Chilenje Police Station. The appellant went to the Police Station the following day but failed to identify Christine Nsama Chilatu as the person who sold him the plot. The respondent obtained an injunction against the appellant but he continued building. Eventually the appellant produced title deeds which he said he obtained in May, 2010. The respondent testified that the City Council and the Commissioner of Lands never informed her nor was the land repossessed and that she did not know how the appellant had obtained title as the Commissioner of Lands had never asked her to surrender the certificate of title which she obtained from Christine Nsama Chilatu.

The respondent's evidence was corroborated by Christine Nsama Chilatu who testified that she was a Senior Court Reporter and that she had applied for Stand No. 24419, Lusaka in Libala South. A certificate of title relating to the said stand was issued in her name by the Ministry of Lands as evidenced by certificate of

title No. 23165. She further testified that in March 2004 she sold Stand No. 24419, Libala South, Lusaka to the respondent for K8,000.00 and that she had signed an agreement to that effect and released the certificate of title and other documents to the respondent after receiving payment in full from her. In 2009 she received a query from the respondent who went to see her in the company of police officers claiming that she had sold Stand No. 24419 Lusaka, Libala South, Lusaka to two different people. The police officers picked her up and took her to Chilenje Police station where they threatened to lock her up on allegations that she had collected money from the respondent and from a man they named but whom she did not know. She told the court below that she had never met the man before then and denied ever receiving money from him for the disputed stand.

The learned judge considered the evidence adduced by the parties and found as a fact that Christine Nsama Chilatu of Lusaka was initially the registered owner of Stand 24419, Libala South Lusaka as was evidenced by certificate of title No. 23165 dated 29th October, 2003 which was issued in her name. The judge in the

court below found that even though the respondent did not have a certificate of title issued in her name, she was claiming Stand No. 24419, Lusaka as belonging to her by virtue of the contract of sale she had entered into with Christine Nsama Chilatu and the purchase price she had paid to her. The learned judge accepted the respondent's testimony and that of her witness regarding their dealings with Stand No. 24419 Libala South, Lusaka. She was not however impressed by the demeanor of the appellant and his two witnesses who according to the judgment, appeared to suffer from selective memory lapses. She accordingly declared the respondent to be the rightful owner of Stand No. 24419, Libala South, Lusaka and ordered that certificate of title No. 86004 dated 13th May, 2009 which is in the appellant's name be cancelled and that the Lands Register be rectified accordingly to restore the certificate of title relating to Stand No. 24419, Libala South, Lusaka in the name of Christine Nsama Chilatu. The learned judge further directed that the conveyancing should be concluded in the name of the respondent. She dismissed the claim for compensation by the appellant as he had built on the plot at his own risk. She also declined to award the appellant any damages and compensation for

inconvenience because his interest in the land at the Lands and Deeds Registry was unregistered. She also found that there was no claim proved against the Attorney General as third party and as such dismissed all claims against the Attorney General. The learned judge dismissed the claim for a declaration that the appellant was an innocent purchaser for good value without notice of any encumbrance on the property in dispute as the evidence showed that the transaction was presided over by Conus Musonda who claimed that he was an estate agent.

The appellant has now appealed against the judgment of the court below raising five grounds of appeal. The five grounds are couched as follows:

- 1. The learned trial judge erred and misdirected herself in fact and law by ignoring the fact that the appellant investigated the status of the property in dispute through obtaining a Lands Register print out as provided for under Section 22 (1) of the Lands and Deeds Registry Act.*
- 2. The learned trial judge erred and misdirected herself in fact and law by ignoring the fact that the appellant was an innocent purchaser for good value and the court below erred and misdirected itself by ignoring the right of an innocent purchaser without basis.*

3. *The learned trial judge erred and misdirected herself in fact and law by entering judgment in favour of the respondent after finding that the respondent failed to prove an element of fraud in the manner the appellant purchased the property in dispute.*
4. *The learned trial judge erred and misdirected herself in fact and law by relying on the typing error of the name of the vendor in the transaction between the appellant and Christine Nsama Chilatu which error was committed by the respondent and the third party.*
5. *The learned trial judge erred and misdirected herself in fact and law by dismissing the appellant's claims against the third party when there is evidence revealing that the third party misled the appellant into believing that the property in dispute was not encumbered.*

When this appeal was heard, State Counsel Banda informed the Court that his brief was strictly limited to relying on the heads of argument and as such he was not in a position to answer questions which the Court wanted him to answer in connection with this appeal. This was most unfortunate because when an advocate accepts a brief whether from a client or as happened in this appeal from another law firm, he should be prepared to argue the appeal should the need arise and not hope to rely on the heads of argument alone. Addressing the Court on issues raised by the

Court helps to clarify issues being raised in an appeal. In this particular case the Court was denied the opportunity to interrogate various issues and was forced to rely on the heads of argument.

We must state early in our judgment that the prime mover of the transaction between the appellant and the lady he claims to have bought the property from was not brought to court as a witness to confirm that she had indeed sold her property to the appellant. Christine Nsama Chitalu did not also testify as vendor of the property. We are not surprised that the appellant failed to recognize Christine Nsama Chilatu at Chilenje Police Station as the person he bought the property from nor could Christine Nsama Chilatu identify him as having bought it from her. This is not uncommon in land swindles which are becoming rather prevalent and need to be stopped urgently. The usual *modus operandi* is that a property is identified, a search is conducted and then the fraudster applies for lost title deeds which once are issued are used to swindle an unsuspecting purchaser out of his money by purporting to sell a property which does not belong to the fake vendor. The purchaser only realizes the scam when it is too late by

which time the swindler has vanished. This in a nutshell is what happened in this appeal. We shall return to it in a little more detail when dealing with the grounds of appeal.

The appellant has argued in respect of the first ground of appeal that he conducted a search before purchasing the property as provided for under section 22(1) of the Lands and Deeds Registry Act and verified the ownership of the property. The court below therefore erred and misdirected itself in fact and law by ignoring the fact that the appellant investigated the status of the property by obtaining a Lands Register Printout. The appellant then relied on a High Court decision in the case of *Eustace Spaita Bobo and Annessie Banda Bobo v Kabinga*¹ which held that a computer printout from the Lands Department amounts to an official search.

We have read Dr. Banda's arguments in connection with the first ground of appeal and must say at once that there is no merit in the first ground of appeal because section 22(1) of the Lands and Deeds Registry Act Cap 185 which he has relied on as the basis for verifying ownership of the property is inapplicable since it refers to general searches of the Lands Register. A distinction needs to be

drawn between a general search under section 22 and an official search under section 23 as read with regulation 13 of the Lands and Deeds Registry Act. For a search to be valid it needs to comply with the provisions of section 23. Section 23 stipulates as follows:

- "23. (1) *Where any person requires search to be made at the Registry for entries of any matters or documents, whereof entries are required or allowed to be made in the Registry, he may, on payment of the prescribed fee, lodge at the Registry a requisition in that behalf.*
- (2) *The Registrar shall thereupon make the search required, and shall issue a certificate setting forth the result thereof.*
- (3) *In favour of a purchaser or an intending purchaser, as against persons interested under or in respect of matters or documents whereof entries are required or allowed as aforesaid, the certificate, according to the tenor thereof, shall be conclusive, affirmatively or negatively, as the case may be.*
- (4) *Every requisition under this section shall be in writing, signed by the person making the same, specifying the name against which he desires search to be made, or in relation to which he requires a certificate of result of search, and other sufficient particulars."*

Section 23 provides what information should be contained in the search certificate. One important characteristic about an official search is that the Registrar of Lands issues a certificate in accordance with section 23 after a requisition has been made in

accordance with Regulation 13. The general search made under section 22 does not qualify as an official search. It follows therefore that the case of *Eustace Spaita Bobo and Annessie Banda Bobo v Kabinga*¹ relied upon by the appellant was wrongly decided in so far as official searches under the Lands and Deeds Registry Act are concerned. The first ground of appeal is accordingly dismissed.

The second ground of appeal raises the argument that the appellant was an innocent purchaser for value without notice. The evidence from the record of appeal shows that the party who purported to transfer title to the appellant had no right to do so as she did not own the property. The evidence also shows that the respondent was still in possession of the original certificate of title and other documents relating to the property. In addition to that, the evidence shows that no official search was conducted as part of the appellant's due diligence. A perusal of the certificate of title would have revealed that the owner was Christine Nsama Chilatu and not Christine Nsama Chitalu. A closer look at the advertisement would have alerted the appellant that that the duplicate title deeds that were being applied for related to 7

hectares and not 851 square metres. The Gazette notice also shows the same error which should have put the appellant on notice. All these red flags were there for the appellant to take heed of but he chose not to. He cannot be said to be an innocent purchaser for value without notice. This case must therefore be distinguished on its facts with the cases of *Zambia Consolidated Copper Mines Limited v Eddie Katalayi and Max Chilongo*² and *Audrey Kafwa Gondwe v Supa Baking Company Limited (In Liquidation) and V.U. Akubat*³ on what amounts to a bona fide purchaser for value without notice. We find no merit in the second ground of appeal.

The appellant has relied on his arguments in respect of the second ground of appeal in arguing the third ground of appeal. We wish to point out that the learned judge in the court below did not rely on fraud as it was not specifically pleaded in accordance with the rules as there were no particulars of fraud given. The learned judge in fact found that the respondent had not discharged her burden to prove the allegation that the appellant fraudulently acquired the certificate of title to Stand No. 24419. Libala South, Lusaka. She instead relied on the respondent's unchallenged

evidence that she had bought the property from Christine Nsama Chilatu in accordance with an agreement dated 24th March, 2004 for K8,000.00. She also relied on her evidence that she started developing the property but failed to continue building due to her illness and that when she returned in March, 2009 she discovered that the appellant had built a house on her plot on the foundation box she had built. The learned judge also relied on the evidence of Christine Nsama Chilatu who denied ever selling the plot to the appellant as she had earlier sold the property to the respondent and had surrendered the original certificate of title and other documents to her. The learned judge also took a dim view of the vendor who sold the same plot for K34,000.00 but was not called to testify by the appellant. It cannot therefore be argued that since fraud was not proved then judgment should not have been entered in favour of the respondent as the learned judge had relied on other compelling factors which we have referred to above. For the reasons we have given in respect of the second ground of appeal and what we have said in respect of the third ground of appeal, we find no merit in it.

The fourth ground of appeal raises the issue of a typographical error having been caused by the respondent and the third party. We find this to be a feeble argument as all the documents beginning with the contract of sale, letter dated 23rd May, 2003 from the Lusaka City Council and certificate of title No. 23165 are all in the name of Christine Nsama Chilatu. It follows that the consent to assign dated 26th November, 2008 could only have been granted in the name of Christine Nsama Chilatu and not any other party. Transposing "Chitalu" for "Chilatu" as was done in the contract and assignment with the appellant does not alter the fact that the property was in the name of Christine Nsama Chilatu nor does it in anyway suggest that she had agreed to sell it to the appellant. It does not also help the appellant much by arguing that the respondent's own statement refers to the vendor as Christine Nsama Chitalu as the person mentioned in the documents is in fact Christine Nsama Chilatu. Quite apart from the fact that this issue was never raised in the court below and cannot now be raised on appeal, the typographical error which has also been repeated in the proceedings throughout the record can only be described as *de minimis*. We are of the view that it would be safe to rely on the

maxim of *de minimis non curat lex* in dismissing the argument that the pleadings refer to Chitalu and not Chilatu because the law does not concern itself with trifles. We also agree with the third party's arguments in relation to the fourth and fifth grounds that the appellant did not adduce any evidence to show that the third party misled him into thinking that there was no encumbrance relating to Stand No. 24419, Libala South, Lusaka. The third party has relied on the case of *Nyimba Investments v Nico Insurance Zambia Limited*⁴ in support of the argument that a misrepresentation must be material in nature and it should influence a prudent person to decide whether or not to take up a certain position which was not the case in this appeal. Quite clearly there is no merit in the fourth ground of appeal.

The fifth ground attacks the learned trial judge for dismissing the appellant's claim against the third party because according to the appellant, the third party misled him into believing that the property in dispute was not encumbered. The argument by the appellant is that he had faith in the system at the Ministry of Lands. Further, the appellant argued that the Ministry of Lands

had the correct names of the owner of the property long before the transaction between the appellant and Christine Nsama Chitalu in its system and the Ministry of Lands could have rejected the transfer of the property from Christine Nsama Chilatu into the appellant's names on the ground of the incorrect name of Chitalu.

We have considered this argument and are of the view that it is not supported by the evidence on record or indeed section 23 of the Lands and Deeds Registry Act which provides for a registrar's certificate for an official search. The evidence on record shows that the paper trail in respect of the earlier certificate of title issued in the names of Christine Nsama Chilatu all make reference to Chilatu and not Chitalu. The name was only changed to Chitalu after duplicate title deeds were issued but it is quite clear from the records at the Ministry of Lands that inspite of the apparent breach of security which led to the issuance of duplicate title deeds to Christine Nsama Chitalu (and which title deeds have since inexplicably disappeared), the primary records maintained the names of Christine Nsama Chilatu leading to the consent to assign being in Christine Nsama Chilatu's name. This was no doubt an

elaborate scheme to defraud as Chilatu and Chitalu can easily be mistaken if care is not taken to read or examine the names. A perusal of the record of appeal shows that the evidence of the respondent also refers to 'Chitalu' when in actual fact it should refer to 'Chilatu' which goes to show how easy it is to make an error. In any event, section 24 of the Lands and Deeds Registry Act gives indemnity to officers of the Registry. It states as follows:

"The Registrar shall not, nor shall an Assistant Registrar nor any person acting under the authority of the Registrar or an Assistant Registrar, or under any order or regulation made in pursuance of this Act, be liable to any action or proceeding for or in respect of any act or matter done or omitted to be done in good faith in the exercise or supposed exercise of the powers of this Act or any other regulation made thereunder."

There was no basis for attempting to make the third party liable in this matter. We sympathize with the appellant for the inevitable loss he will suffer as a result of not conducting a proper due diligence regarding the property but it was a risk he was prepared to take and so the loss should lie where it falls. The last ground is devoid of any merit.

It follows from what we have said above, that this appeal is dismissed with costs to the respondent and third party to be agreed or taxed in default of agreement.



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I.C. MAMBILIMA
CHIEF JUSTICE



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A.M. WOOD
SUPREME COURT JUDGE



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R.M.C. KAOMA
SUPREME COURT JUDGE