IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 92/2017**
HOLDEN AT NDOLA
(Civil Jurisdiction)

B E T W E E N:

ABDUL RWIGARA SIMWAYA **APPELLANT**

AND

COMMISSIONER OF LANDS **1ST RESPONDENT**

HATEMBO HIMBALA **2ND RESPONDENT**

TRADE ZONE LIMITED **3RD RESPONDENT**

CORAM: **CHASHI, SIAVWAPA AND NGULUBE, JJA.**
On 22nd August and 21st December, 2018

For the Appellant: *No appearance*
For the 1st Respondent: *No appearance*
For the 2nd Respondent: *No appearance*
For the 3rd Respondent: *No appearance*

JUDGMENT

NGULUBE, JA delivered the Judgment of the Court.

Cases referred to:

1. *Shadreck Wamusula Simumba vs. Juma Banda (2013) ZR Vol.2 178.*
2. *Isaac Kalumbwa and 4 Others vs. Gregory Ndubula Mpenga and 4 Others (2013) ZR 209.*
3. *Anort Kabwe and Charity Mumba Kabwe vs James Daka, the Attorney General and Albert Mbazuma (2006) ZR 122.*

Legislation referred to:

1. *The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.*
2. *The Town and Country Planning Act, Chapter 283 of the Laws of Zambia.*
3. *The Land Acquisition Act, Chapter 189 of the Laws of Zambia.*
4. *The Land Act, Chapter 184 of the Laws of Zambia.*

This is an appeal from the Judgment of the Lands Tribunal which was delivered on 12th May, 2017. The background of the matter is that, the appellant filed a notice of complaint to the Lands Tribunal against the respondents, seeking a declaration that he is entitled to property number LUS/11029 situated in Industrial area, Lusaka. The appellant further sought an order directing the 1st respondent, the Commissioner of Lands to cancel certificate of title number 286230 issued to the 2nd respondent and that the said land be offered to him. In the alternative, the appellant demanded to be paid the sum of ZMW1,860,250-00 as compensation for the existing developments on property number LUS/11029, with costs and any other relief the Tribunal would deem fit.

In his affidavit in support, the appellant averred that he acquired the piece of land, property number LUS/11029 situated in the Industrial area of Lusaka in 2006 on a 99-year lease between him and the President of the Republic of Zambia. He averred that he was duly issued with a Certificate of Title Number 55176 for the property and that he made substantial developments on the land. On or about March, 2014, he conducted a search at the Ministry of Lands and discovered that his property was re-entered by the 1st respondent and assigned to the 2nd respondent. Upon making representations to the

Commissioner of Lands to challenge the re-entry, the 1st respondent informed him that he had failed to develop the property within twenty-four months from the date of the offer and proposed to give him compensation in the sum of ZMW137,100 for the existing developments on the property.

However, the appellant contends that registered property consultants valued the property at ZMW1,850,250=00. He contended that the 1st respondent should not have re-entered the property as there were substantial infrastructure developments and he was not served with a notice of re-entry, making the same illegal.

In objecting to the appellant's application, the 1st respondent stated that there was only a one roomed structure on the property on 16th April, 2013 and that a notice of intention to re-enter was sent to the appellant by way of registered mail on 26th July, 2013 as he failed to develop the property within the stipulated period of eighteen months and did not make any representations to the 1st respondent within the specified time. It was later re-allocated to the 2nd respondent who sold the piece of land to the 3rd respondent.

The Lands Tribunal ruled in favour of the 1st respondent and declared that the Commissioner of Lands followed the law when re-entering the property. The Tribunal further found that at the time the

complainant re-entered the appellant's property, there were developments on it and that as such, the appellant was entitled to compensation. The Tribunal found that the 3rd respondent was a bonafide purchaser for value without notice of any encumbrances. Regarding the exact value of the development, the Tribunal referred the issue to the Registrar for assessment of the value of the developments.

Dissatisfied with the said Judgment, the appellant filed a memorandum of appeal with four grounds couched as follows-

1. That the Lands Tribunal misdirected itself in both law and fact when it held that the Commissioner of Lands strictly followed the law when re-entering the appellant's property;
2. That the Lands Tribunal erred both in law and in fact when, having held that LUS/11029 situated in Industrial area, Lusaka was developed to the extent allowed by law did not order that the said land reverts to the appellant having been re-entered by the respondent.
3. That the Lands Tribunal erred both in law and fact when, contrary to the evidence before it, declared that the 3rd respondent qualified as a bonafide purchaser for value without notice of any encumbrance.

4. In the alternative, that the Lands Tribunal erred both in law and in fact when it held that the Registrar of the Lands Tribunal should only assess the value of the developments on the land as compensation to the appellant.

At the hearing of the appeal, the Learned Counsel for the appellant and the 3rd respondent filed a consent notice of non-appearance and prayed that the Court considers the heads of argument filed on record.

In arguing ground one, the appellant's Counsel submitted that the reasons advanced by the 1st respondent for repossessing the appellant's property were that he was in breach of clause 2(1) and 2(5) of the lease agreement with the President in that he failed to develop the property within the stipulated period of twenty-four months from the date he was issued with the certificate of title. Counsel submitted that the 1st respondent had no basis for re-entering the appellant's property as the appellant was not in default since the developments on the property were valued at ZMW137,100 in a valuation report that was commissioned by the 1st respondent.

Counsel contended that the appellant did not fail to develop the land as the property had structures on it valued at over ZMW500,000. Counsel submitted that the facts of this matter did not call for or

necessitate the issuance of a notice of re-entry as the property was already developed. We were referred to the case of **Shadreck Wamusula Simumba vs. Juma Banda, Lusaka City Council**[1] on the issue of what amounts to development. In this matter, the Supreme Court stated that-

> ***"the construction of a concrete slab or even digging a foundation and not necessarily a footing would fall within the meaning of a building or development as they change the character of the building or land."***

Counsel contended that the 1st respondent breached the spirit of the rules that govern re-entry and accordingly prayed that ground one succeeds.

On ground two it was argued that having held as a fact that LUS/11029 was developed to the extent allowed by law, the Lands Tribunal should have proceeded to order that the re-entry by the 1st respondent was illegal and void abinitio. Counsel referred to **Section 22(4) of the Town and Country Planning Act**[1] with regards to development which provides that –

> ***"(4) In the Act, "development" means the carrying out of any building, re building or other works or operations on or under land or other works or operations on or under land, or the making of any material changes in the use of land or buildings."***

It was submitted that the appellant conformed to the development threshold prescribed by the law as the physical character of the land was changed. Counsel urged the Court to uphold ground two so that the property reverts back to the appellant.

On ground three, it was submitted that the 2nd respondent was not an innocent purchaser for value as he ought to have been on notice due to the existence of substantial developments on the land he was purportedly offered to buy. It was further submitted that as such, the 2nd respondent could not have passed perfect title to the 3rd respondent.

It was submitted that a certificate of re-entry was registered on 6th December, 2013 but it was argued that there is no evidence to show that the piece of land was advertised before it was allocated to the 2nd respondent. Further, a certificate of title was issued to the 2nd respondent on 26th of February, 2014 and the property was subsequently, assigned to the 3rd respondent on 29th April, 2014, with a certificate of title being issued on the same day. It was submitted that the 3rd respondent had constructive notice of the appellant's interest, as there were developments on the land.

We were referred to the case of ***Isaac Kalumbwa and another vs. Gregory Ndubula Mpenga and 4 others*** [2] were it was held that –

"a bonafide purchaser without notice is one who purchases property in good faith and without notice. He must act in good faith. He must purchase for value without notice of the equity. Notice may be actual, constructive or imputed"

It was submitted that the 3rd respondent did not purchase the property innocently and in good faith. We were urged to uphold ground three for the foregoing reasons.

On ground four, it was submitted that the value of the subject land should not be restricted to the developments on it, as the market value of the entire portion of land should be the consideration. We were referred to Section 12(b) of the **Land Acquisition Act**[3], which provides that –

"(b) the value of property shall, subject as hereinafter provided be the amount which the property might be expected to realise if sold in the open market by a willing seller at the time of publication under section seven of the notice to yield up possession."

It was submitted that the compensation must be of the market value of the property as provided under the Lands Acquisition Act. Counsel urged us to uphold ground four for the foregoing reasons.

The 3rd respondent's Counsel filed heads of argument on the 25th of July, 2018.

On ground one, it was submitted that the Lands Tribunal was on firm ground when it held that the Commissioner of Lands followed the law strictly when re-entering the appellant's property as he had breached the lease agreement. Our attention was drawn to **Section 13(1) of the Lands Act**[4] which provides that –

> ***"13(1) Where a lessee breaches a term or a condition of a covenant under this Act, the President shall give the lessee three months' notice of his intention to cause a certificate of re-entry to be entered in the register in respect of the land held by the lessee and requesting him to make representations as to why a certificate of re-entry should not be registered in the register."***

It was submitted that the opportunity for the appellant to argue the illegality of the notice of re-entry was availed to the appellant by virtue of the law, within three months of the certificate of re-entry being issued. It was submitted that the appellant did not do so, and that the certificate of re-entry was then registered on 6th December 2013. It was further submitted that the appellant did not appeal to the Lands Tribunal within thirty days for an order that the register be rectified. It was contended that the appellant failed to demonstrate that the re-entry was done in total disregard of the law as he was given an opportunity to challenge the re-entry but failed. Counsel urged the Court to dismiss ground one for lacking merit.

On ground two, it was argued that the Lands Tribunal made a sound Judgment in ordering that the appellant is entitled to compensation as opposed to ordering that the property be returned to him. It was submitted that the 3rd respondent as a bonafide purchaser has since made various improvements on the land and that ordering the return of the land to the appellant would have adverse effects on the 3rd respondent. It was submitted that the property passed to the 3rd respondent after the re-entry, as it had no encumbrances on it.

On ground three, it was submitted that the Land Tribunal made a sound Judgment in holding that the 3rd respondent was a bonafide purchaser for value without notice.

We were referred to **Section 23(3) of the Lands and Deeds Registry Act**[1], which provides that-

> ***"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 on negatively, as the case may be."***

It was submitted that the 2nd respondent conducted a search at the Lands and Deeds Registry which indicated that the property was free from encumbrances and that the 2nd respondent investigated the

property to the level accepted by law and qualified as a bonafide purchaser for value without notice. It was submitted that the 2nd respondent passed good title to the 3rd respondent. The 3rd respondent prayed that this ground be dismissed for lack of merit.

On ground four it was submitted that the Lands Tribunal made a sound Judgment in holding that the Registrar of the Lands Tribunal should only assess the value of the developments on land as compensation to the appellants. It was submitted that a re-entry and a compulsory acquisition are two different mechanisms which are mutually exclusive to each other. It was submitted that the provisions of the Lands Acquisition Act cannot be referred to in circumstances where the Commissioner of Lands has re-entered a property on grounds that the land owner has breached the provisions of a 99-year lease. Counsel urged the court to dismiss ground four for lacking merit.

We have considered the arguments by the parties together with the judgment being impugned.

On ground one, the issue is whether the re-entry by the 1st respondent was valid at law. We refer to **Section 13 of the Land Act**,[4] which affords the lessee the opportunity of either making representations or amends of the alleged breach. It is mandatory that

On ground two, it was argued that the Lands Tribunal made a sound judgment in ordering that the appellant is entitled to compensation as opposed to ordering that the property be returned to him. It was submitted that the 3rd respondent as a bonafide purchaser has since made various improvements on the land and that ordering the return of the land to the appellant would have adverse effects on the 3rd respondent. It was submitted that the property passed to the 3rd respondent after the re-entry, as it had no encumbrances on it.

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We have considered the arguments by the parties together with the judgment being impugned.

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the lessee is served with the notice of intention to cause a certificate of re-entry to be entered. We are of the view that apart from ensuring that the notice is served on the lessee, there should be proof of such service. After the expiry of the three months' notice period, considerations can then be made on whether there have been any representations to ascertain whether the breach was intentional or beyond the lessee's control. It is accepted that the notice should be by registered post to the lessee's last known address and the Commissioner of Lands must prove such service.

We refer to the case of **Anort Kabwe and Charity Mumba Kabwe vs James Daka, the Attorney General and Albert Mbazuma**[3] where the Supreme Court gave guidance on the conditions that must be satisfied for a repossession to be valid. The Court held inter alia that-

> **"(2)** ***If the notice is properly served, normally by providing proof that it was by registered post using the last known address of the lessee from whom the land is to be taken away, the registered owner will be able to make representations, under the law to show why he could not develop the land within the period allowed under the lease."***
>
> **"(4)** ***A repossession effected in circumstances where a lessee is not afforded an opportunity to dialogue with the commissioner of Lands with a view of having an***

extension of period in which to develop the land cannot be said to be a valid repossession"

Further, the reasons that the 1st respondent advanced for repossessing the appellant's property were that he had failed to develop the property within the stipulated period of twenty-four months from the date he was issued with a certificate of title.

However, the 1st respondent commissioned the preparation of a valuation report which was dated 18th December, 2013, and appears on page 63 of the record of appeal. It stated that the market value of the three roomed house on site was K137,100=00. We are therefore of the view that the 1st respondent had no reason to re-enter the appellant's property as there were some developments on it. We are of the view that the Lands Tribunal misdirected itself when it held that the 1st respondent followed the law when he re-entered the appellant's land. We find merit in ground one of the appeal and it succeeds.

On ground two, whether the Lands Tribunal erred in law and in fact when, having held that LUS/11029 situated in the Industrial area, Lusaka was developed to the extent allowed but did not order that the said land reverts back to the appellant, there is sufficient evidence on record to show that the appellant developed the land to

the extent allowed by the law as the development were found to be worth over K137,000 as valued by the 1st respondent. We are of the view that the Lands Tribunal should have found the 1st respondent's re-entry of the property was not justified and ordered that it reverts to the appellant. We find merit in this ground of appeal and it succeeds.

On ground three, whether the Lands Tribunal erred both in law and fact when it declared the 3rd respondent qualified as a bonafide purchaser for value without notice of any encumbrance, we are of the view that the 2nd respondent was a subsequent purchaser. He ought to have been on notice and he ought to have made inquiry into any other rights or interests that were on the property. Had the 2nd respondent made an inquiry, he ought to have noticed the developments that were on the property. Be that as it may, we are of the view that the 3rd respondent was an innocent purchaser as he purchased the piece of land from the 2nd respondent and acquired good title to it. We do not find merit in this ground of appeal and we accordingly dismiss it.

On ground four, whether the Lands Tribunal erred in law and fact when it held that the Registrar of the Lands Tribunal should only assess the value of the developments on land as compensation to the

appellant, we are of the view that the value of the developments ought to include the value of the land. This is because the value of the property as sold in the open market shall constitute the value of the land as well as the developments on it. We are of the view that the Lands Tribunal misdirected itself when it held that the Registrar of the Lands Tribunal should only assess the value of the developments as compensation to the appellant. We find merit in this ground of appeal and it succeeds.

Having found merit in grounds one, two and four, the appeal substantially succeeds and we hereby award damages to the appellant, payable by the 1st respondent upon assessment by the Registrar of the Lands Tribunal, of the current value of the land and improvements. We also award costs to the appellant, to be taxed in default of agreement, payable by the 1st respondent.

J. CHASHI
COURT OF APPEAL JUDGE

J.M. SIAVWAPA
COURT OF APPEAL JUDGE

P.C.M. NGULUBE
COURT OF APPEAL JUDGE