IN THE COURT OF APPEAL FOR ZAMBIA APPEAL NO. 145/2017

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

BETHEL BAPTIST CHURCH **APPELLANT**

AND

EVANS NGUBAI **RESPONDENT**

CORAM: **Mchenga DJP, Mulongoti and Lengalenga, JJA**

On 24th April 2018 and 4th October 2018

For the Appellant: *Mr. H. Chizu, Chanda Chizu & Associates*

For the Respondent: Mr. M.L. Mukande, M.L. Mukande& Co.

J U D G M E N T

MULONGOTI,JA, delivered the Judgment of the Court

Cases referred to:

1. **Mazoka v. Mwanawasa (2005) ZR 138 (SC)**
2. **Mbewe v Mwanza (2012) ZR 87**

3. **Gilcon Zambia Limited v Kafue District Council and another SCZ Appeal No. 10/2010**
4. **Hilda Ngosi (suing as administrator of the estate of Washington Ngosi) v The Attorney General and another SCZ Appeal No.145/2010**
5. **Nkata and others v Attorney General (1966) ZR 124 (SC)**
6. **William Masautso Zulu v Avondale Housing Project Ltd (1982) ZR 172 (SC)**
7. **Attorney General v Marcus Achiume (1982) ZR 1 (SC)**
8. **Frank Malichupa v Tanzania-Zambia Railway Authority (2008) 2 ZR 112 (SC)**
9. **Raphael Ackim Namang'andu v Lusaka City Council (978) ZR 358 (H.C)**

This is an appeal against the Judgment of the High Court dated 28th April, 2017 which found that the appellant built a house on a piece of land, namely, Stand No. P74/1C5 (the property), that did not belong to it, at its own peril and that the respondent was an innocent purchaser of the property for value.

At this stage, it is necessary to say a little about the background of this appeal. The respondent was employed by Kafue Textiles Zambia Limited (KTZ), in 1980 and occupied the property as an incident of his employment from 1996. Sometime in March 2004, the respondent and other employees were retrenched following the

decision to privatize KTZ. The house on the property which the respondent occupied was listed as one of the assets of KTZ transferred to Zambia Privatization Agency (ZPA) for sale purposes. The respondent was later offered the property by the government to purchase at a price of K44,550.00, which was subsequently reduced to K9,000.00, on 15th March 2016 following government intervention. The respondent accepted the offer and paid towards the purchase price.

Prior to the respondent's occupation of the house, the appellant had applied for a plot to build a house for its pastor in 1971. It was allocated the property in question by INDECO and completed constructing the house in 1972 and one of its pastors took occupation. When the pastor was transferred in 1979, the appellant entered into an arrangement with KTZ to let the house to the company (KTZ). Later, the appellant sought to yield vacant possession of the house for it to be occupied by one of its pastors. The appellant, however, ended up with another arrangement with the company where it allowed the company to use the house as a guest house while the company rented another for the appellant's

pastor. The appellant out rightly stated that it had been allocated the property by INDECO under the mistaken belief that the property did not belong to anyone. There is also a series of correspondence on record showing that the INDECO admitted that it erroneously allocated the property to the appellant. Notably, the printout of the Lands Register shows that the property was not at any time registered in the name of the appellant.

There is also correspondence showing that the company wrote to the appellant on 30th March, 2005 attempting to allocate another house to the respondent and have him vacate the property. Several attempts were made to remove the respondent from the house by the company. This prompted the respondent to seek legal redress. He sued the company as 1st defendant and the appellant as 2nd defendant in the High Court seeking a declaration that the decision by the company to re-locate him to another house was wrongful, null and void and a declaration that he was lawful tenant of the house and was entitled to purchase it.

The trial court found that the appellant built a house on land that did not belong to it and negotiations to rectify the anomaly failed. That the appellant was misled by INDECO into believing that it had been properly granted a piece of land and the agreement of mutuality of an honest mistake does not aid the appellant's case. The agreement to rent the house by the company from the appellant was purely on the understanding that the appellant erected the house but there was no transfer of ownership of the property to the appellant. The trial court concluded by stating that the respondent was an innocent purchaser for value. Accordingly, Judgment was entered in favour of the respondent with costs to be taxed in default of agreement.

The appellant, in dissatisfaction of the High Court Judgment lodged an appeal to this Court and raised the following grounds of appeal:

1. ***The court below erred in fact and law by holding that the appellant had constructed a house on a piece of land that did not belong to it and the anomaly was not regularized regarding the transfer of the piece of land thereby disregarding the historical background of the issue as supported by the evidence on record.***

2. ***The court below erred in law by disregarding the 1st defendant's pleadings which confirmed that the appellant had been recognized as the legal owner of the property known as P74/1C5.***
3. ***The court below misdirected itself by ignoring the appellant long vested interest in the propertyand instead relied on the offers and documents which were created after the court matter had commenced.***
4. ***The court below misdirected itself in law and fact by holding that having received and accepted an offer to purchase the house by the owner, the plaintiff as a sitting tenant, had a sitting claim that superseded that of the appellant over the house in issue.***
5. ***The court below erred in law by deciding that the plaintiff was an innocent purchaser for value who was entitled to complete the conveyance with the seller while disregarding the appellant's interest.***
6. ***The court below erred in law in failing to adjudicate on the issues of counter-claim and compensation of the appellant for the house it built when the Government which the court has recognized to be the owner of the land had also been made a party to proceedings.***

In support of the grounds of appeal, the appellant filed Heads of Argument.

Mr. Chizu, who appeared for the appellant, argued in grounds one to four that the pleadings which were in the court below and specifically from Kafue Textiles Zambia Limited (KTZ)'s defence and correspondence show that the appellant was entitled to the house

notwithstanding the fact that at time of privatization KTZ's title had not yet been separately issued to the appellant. It is argued that the history of the house clearly favours the appellant and KTZ recognized it as the owner.

By the time the respondent was being allocated the house, the appellant who had built it in 1971 had a strong interest and affinity connection to it. Therefore, the letters of offer of 2014 and 2016 came after the facts upon which the dispute had already been brought to court.

It was the very reason why the respondent sued so that the Court could determine whether he was entitled to be offered or not. This was an issue for determination by the Court as at the time of instituting the action. The respondent's pleadings were never amended to accommodate the new turn of events. The case of **Mazoka v. Mwanawasa**[1] was relied upon that:

> ***"The function of pleadings, is to give a 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".

Thus, the Court erred and allowed the respondent to depart from the pleadings despite an objection by the appellants.

The offer, acceptance and payment of the house came well after the appellant had shown that it was the ligitimately interested party in the house since 1971. The Court failed to appreciate that while KTZ was still in existence, it had never offered the house to the respondent for purchase and that at sometime KTZ rented a house for the appellant's pastor in exchange for the house in question. The swapping of a house for the pastor, is what led the respondent to take advantage and claim to be a sitting tenant thereby displacing the appellant. The respondent also took advantage of the privatization of KTZ to consolidate his stay in the house KTZ was renting from the appellant. Thus, the decision to deprive the appellant of the house they had built and giving it to the respondent was tantamount to unjust enrichment of the respondent and a clear misapprehension of facts by the trial court.

It is further argued that the respondent in fact gave untrue statement concerning the scheme of arrangement as there is nowhere in the scheme of arrangement where it stated that 50% of employment benefits would go towards the house.

Ground five was argued on the basis that the respondent was not an innocent purchaser for value without notice as held by the trial court. The respondent was very much aware of the appellant's interest in the house and of the dispute over it which had even led him to proceed to court. The case of **Mbewe v Mwanza**[2], was cited as authority on the doctrine of bonafide purchaser for value without notice as follows:

> ***"the first requirement is that a purchaser needs to satisfy or prove that he acted in good faith. Any sharp or unconscionable conduct may forfeit the privilege of a purchaser in the eyes of equity in accordance with the general principles. The second requirement is that the person relying on the plea must be a purchaser for value. The words "for value" are included to show that value must be given because "purchaser" in its technical sense does not necessarily imply this. Value does not necessarily mean full value. It however means any consideration in money or money worth. The third requirement is that "of a legal estate". This element is very important because the immunity from equity enjoyed by the***

purchaser without notice is founded on equity's differences to the legal estate.

The last requirement relates to notice. This is the most difficult and perhaps most controversial requirement to fulfil. There are three kinds of notice. Actual, constructive and imputed notice.

First, a person be regarded as having notice of fact not because he knows it, but because of legal purposes he is taken to know it.

Second, purchasers are required to inquire about equitable interest with no less diligence than about legal interest, which they ignore only at their own peril".

In counsel's view, the respondent failed to meet the requirement of having had no notice of the adverse interest by the appellant. He knew of the appellant's historical equitable and legal interest in the property.

In ground six it is contended that it was made clear by the respondent's advocates in the court below, that the government was an interested party. A consent order joining the government to the case was executed and filed on 22nd July, 2016 and signed by the trial Judge on 9th November, 2016.

The government should therefore, be ordered to compensate the appellant should we uphold the Judgment of the court below.

The respondent also filed Heads of Argument. Mr. Mukande SC, who appeared for the respondent, argued in ground one that the trial court properly identified ownership of the property number 74/1C5 as the issue for determination.

It is counsel's opinion that reference to historical facts is irrelevant. The appellant conceded that the house was built on a land belonging to KTZ the respondent's former employer.

The appellant do not, in their arguments state who gave them the plot. They also failed to adduce any evidence of consent from KTZ for them to build the house on its land.

It is the further submission of State Counsel that there is no dispute that before construction of the house that by letter dated 18th October, 1971 a request was made on behalf of the appellant, to KTZ for surrender of a portion of the land to the church (appellant) for construction of their pastor's residence. However,

before approval could be given, the appellant embarked on construction. On 8th January, 1988 KTZ wrote to the appellants that:

> ***"Since no proper authority exists the house should be regarded as KTZ property".***

Consequently, the construction of the house without consent of KTZ was not only wrongful, but illegal. Then in 1995 the appellant thought they could circumvent the need for approval by applying for the same plot through INDECO as per letter at pages 61 and 62 of the Record of Appeal. INDECO had no *locus standi* in the matter, a fact they acknowledged. And that though INDECO appeared sympathetic to the appellant's dilemma, they also acknowledged in 1990 that the plot in issue was part of the land belonging to KTZ.

In 1996 KTZ again reminded the appellant that the transaction required board approval even after privatization. To date no approval has been obtained. The trial Judge took note of this and held that INDECO had no authority to allocate titled land of a third party to another without their consent.

It is contended that in the above circumstances the issue of history does not favour the appellants at all.

That even as late 2002, INDECO were still on their knees pleading their (appellant's) case with KTZ as the letters in the Record of Appeal reveal.

It is submitted that ground two is tantamount to asking for a ride from a dead horse. According to counsel KTZ was by 2004 privatized and its assets and liabilities moved to ZPA for final disposal, as held by the trial court:

> ***"At that point, the 1st defendant, as Kafue Textiles Limited, had ceased to exist and could not therefore; make any decisions through its former Chief Executive Officer in relation to the property of the company. It is also interesting to note that when the 2nd defendant wrote to the Ministry of Finance to ask Government to revoke or cancel the offer to the plaintiff, there was no response implying that the Government was either not satisfied with the explanation or it was not sympathetic with the 2nd defendant's predicament".***
>
> ***According to the document on record, the process of privatizing the 1st defendant started towards the end of 2003 and by 31st March, 2004, the employees were written to and told that they were all***

being retrenched as there was going to be privatization. Inevitably, an inventory of its assets was compiled and submitted to the Zambia Privatization Agency, the entity created and responsible for privatizing all Government owned entities including the 1st defendant which was a parastatal entity".

Thus, KTZ management had no authority to transfer assets of the company without authority from ZPA. Therefore, the actions of the caretaker manager of KTZ to attempt to transfer the property to the appellant were illegal and also yielded nothing. The caretaker manager intended to deprive the respondent of the right to purchase the property as a sitting tenant but was ignored by the Ministry of Finance and the house was sold to the respondent.

The respondent was therefore a bona fide sitting tenant by virtue of employment with KTZ.

Learned counsel argued grounds three, four and five together. Counsel stated that the trial court posed pertinent questions such as the one at page J10 that:

"does the developing of land that belongs to another on a mistaken belief that the owner has granted consent give rise to legal

alienation of that piece of land to the developer by the owner? The answer to the question resolved the dispute".

As determined by the trial court alienation of land in Zambia is strictly controlled by legislation. Additionally, that if the procedure is not followed, the whole transaction is null and void *ab initio.* And that the offer to purchase extended to the respondent by the government is legitimate and backed by the law.

Accordingly, grounds three to five are untenable and be dismissed.

In ground six, it is submitted that the whole counter-claim hinged on an illegality. It was pointless for the trial court to itemize rejection on each of the claims.

Reliance was placed on **Gilcon Zambia Limited v Kafue District Council and another**[3] and another where it was held that:

"where a claim has no reasonable ground of success, the court is at liberty under order 18 rule 19 sub rule 6 of the rules of the Supreme Court, to dismiss the claim summarily even if counsel is not heard".

It is argued, that in *casu*, the appellant have admitted the illegality. It was therefore, proper for the court to dismiss the counter-claims without hearing counsel.

It was the further submission of counsel that though the trial court spoke of the government, compensating the appellant for the loss, such compensation would be ex-gratia as there would be no legal basis for it.

The Supreme Court decision in **Hilda Ngosi (suing as administrator of the estate of Washington Ngosi) v The Attorney General and another**[4]was relied upon that:

> ***"the 2nd respondent was complicit and was to a greater extent the author of its own misfortune as it participated actively in the scheme to dispossess the appellant of her land. Any developments carried out by the 2nd respondent were obviously undertaken at the 2nd respondent's own risk and cannot be compensated for by the appellant".***

Counsel observed that the appellant was advised by KTZ way back in 1971 that Board approval was required for the transaction but

they ignored it. Their cry is self-inflicted and they cannot be compensated for self-inflicted wounds.

We have considered the arguments and Judgment appealed against. As we see it, the pertinent issue this appeal raises is whether title or ownership to the house in question had or can be passed to the respondent by virtue of the historical background and the fact that the appellant built the house in question, albeit on land belonging to KTZ.

To put things in proper context we will consider grounds one to five simultaneously as they are interlinked. It was not disputed that the appellant built the house in question in 1972 albeit on the land belonging to KTZ. The land was erroneously allocated to the appellant by INDECO. Efforts by the appellant to obtain a title deed to the house proved futile. It was further not disputed that the

respondent was offered the house for purchase as an incidence of his employment.

The trial Judge analyzed the facts and correctly identified the ownership of Plot P74/1C5 as the issue for determination. He found that the appellant constructed a house on a piece of land that did not belong to it. Furthermore, that there was no evidence that in due course, the anomaly was regularized as no transfer of the piece of land was made by the owner KTZ to the appellant. The trial Judge also observed that no certificate of title had been issued to the appellant in respect of the property and as such, no ownership devolved upon the appellant. Guided by the holding in **Hilda Ngosi v The Attorney General and another**[4], the Judge concluded that ***"the appellant constructed the house at its own peril".***

We note that the Judge made these findings based on the facts before him. The appellant is essentially asking us to interfere with the findings of fact made by the trial court. It is settled law and authorities abound such as **Nkata and others v Attorney General**[5] where the Supreme Court elucidated that:

"A trial Judge sitting alone without a jury can only be reversed on questions of fact if (i) the Judge erred in accepting evidence, or (ii) the Judge erred in assessing the evidence by taking into account some matter which he should have ignored or failing to take into account something which he should have considered, or (iii) the Judge did not take proper advantage of having seen and heard the witnesses, and (iv) external evidence demonstrated that the Judge erred in assessing the manner and demeanor of witnesses."

This principle was followed in **William Masautso Zulu v Avondale Housing Project Ltd**[6] and **Attorney General v Marcus Achiume**[7]. The appellant contend that the trial Judge misapprehended the facts and ignored the historical background which favors them. The Judge instead considered the evidence of the offer and acceptance which were made in 2014 and 2016 to find in favor of the respondent.

The evidence before the trial Judge was that the appellant built the house in dispute on land belonging to the respondents' former employer KTZ. This was after INDECO apparently gave the plot or land to the appellant. However, INDECO later recognized the

mistake in giving KTZ land to the appellant. The appellant were advised to hold on before building as Board approval of KTZ was sought. The appellant proceeded to build, culminating in a plethora of exchange of corrsepondence between the parties mainly to do with ownership of the house by the appellant. This yielded nothing as KTZ board never approved the transaction. Subsequently, KTZ was privatized and its assets including the house surrendered to ZPA, which eventually led to sale of the house to the respondent who had been retrenched by not paid his benefits in full.

It is also clear as argued by Mr. Mukande, that as late as 2002 the appellant was still trying to regularize the anomaly so that title of the house is passed to it, but to no avail. The appellant even involved state house through the President's Legal Advisor then, Mr. D. Mwape, but it yielded nothing.

In finding that the respondent was an innocent purchaser of the house, the trial court reasoned that there is no evidence that in due course the anomaly was regularized as no transfer of the piece of land was made by KTZ to the appellant. The Judge therefore

considered the historical background as against the offer to the respondent. We find that he did not misapprehend the facts nor did he fail to consider the relevant evidence. We cannot fault him. This is thus not a proper case for us to interfere with the findings of the trial court.

We note the argument by Mr. Chizu, that there is no evidence that respondent's separation package included a monetary component and a house to sitting tenants in the company's stock of houses. However, we note that after the scheme of arrangement was executed in the High Court, the respondents and other former employees were still not paid in full. What is material to us, is that the house was offered and sold to the respondent by the relevant authorities, which is not the case with the appellant.

The respondent as an ex-employee of KTZ and sitting tenant who had not yet been paid in full was properly offered the house. In the case of **Frank Malichupa v Tanzania-Zambia Railway Authority**[8] the Supreme Court elucidated that for somebody to be eligible to purchase a house from the government or a parastatal, they had to be a sitting tenant and at the same time either an employee or

former employee not paid their terminal benefits. Clearly, the respondent qualified to purchase the house as a former employee of KTZ who had not been paid in full. He was offered the house and paid for it after negotiating for a price discount. The trial court, cannot be faulted for finding that the respondent as a lawful sitting tenant, stood to benefit as a former employee of KTZ. This was further perfected after he received an offer and paid for the house.

As argued by Mr. Mukande, the historical background does not help the appellant much. In our view, the trial court analysed, correctly so, how one legally acquires property or land in this country. The appellant failed to prove that it legally acquired the land on which it built the house in issue. We cannot compel the authorities or government to give the land and house to the appellant. We are equally persuaded by Scott, J (as he then was) in the case of **Raphael Ackim Namang'andu v Lusaka City Council**[9] where he observed that:-

> ***"no one properly advised would build without endeavoring to get a good and legal title to the land. His failure to do so even if his story is correct results in his loss."***

The respondent proved he was an ex-employee of KTZ, who had not been paid in full and a sitting tenant, who was offered the house which he paid for. The trial court correctly found that he was an innocent purchaser. These findings were not perverse but supported by the evidence. The trial Judge adjudicated on all the issues and resolved the issue of ownership of the house which was at the core of this case.

Regarding the objection to the evidence on the offer letters of 2014 and 2016, we note from the Record of Appeal that the Judge aptly dealt with it. He ruled that the letters were in the supplementary bundle of documents filed in 2016. Additionally, that since there was inspection of documents and bundles of documents exchanged, the objection could not be sustained and it was overruled.

In light of the foregoing, grounds one to five must fail.

Regarding ground six we note that the government was joined as a party to the proceedings in the court below by virtue of the consent order dated 9th November, 2016. The government was even notified

of the hearing. We note the arguments in the alternative by Mr. Chizu, that the government should compensate the appellant for the house, should we agree with the trial Judge as we have done. We are of the considered view that the circumstances of this case are that INDECO was not the owner of the land and could not give it away. Even then the trial court found, that the appellant failed to prove that INDECO allowed them to build.

We therefore, agree, with Mr. Mukande SC that there is no legal basis upon which to order the government to compensate the appellant. Ground six equally fails.

The net effect is that the appeal is dismissed for lack of merit with costs to the respondent, to be taxed failing agreement.

C.F.R. MCHENGA
DEPUTY JUDGE PRESIDENT

J.Z. MULONGOTI
COURT OF APPEAL JUDGE

F.M. LENGALENGA
COURT OF APPEAL JUDGE