

Selected Judgment No. 53 of 2018
P2047

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)

Appeal No.40/2016

BETWEEN:

CROSSLAND MUTINTA
BASHIR SEEDAT

AND

DONOVAN CHIPANDA



1ST APPELLANT

2ND APPELLANT

RESPONDENT

CORAM: Hamaundu, Kajimanga and Kabuka, JJS

On 6th November 2018 and 7th December 2018

For the Appellants: Mr. A. Mbambara of Messrs A. Mbambara Legal Practitioners

For the Respondent: Not in Attendance

J U D G M E N T

Kajimanga, JS delivered the judgment of the court

Cases referred to:

1. Zyambo v Ntharzy - Appeal No. 154/2011, SCZ Judgment 16 of 2014
2. Anort Kabwe and Another v James Daka and Others (2006) Z.R. 12
3. Hilda Ngosi (Suing as Administrator of the Estate of Washington Ngosi) v Attorney General and Another - SCZ Judgment No. 18/2015

4. **Aristogerasimos Vangelatos and Another v Another v Metro Investments Limited and Others – SCZ Selected Judgment No. 35 of 2016**
5. **Buchman v Attorney General (1993 – 1994) Z.R. 131**
6. **Nevers Sekwila Mumba v Muhabi Lungu (Suing in his capacity as National Secretary of the MMD) (2014) 3 Z.R. 351**
7. **Gerrison Zulu v Zambia Electricity Supply Corporation Limited (2005) Z.R. 39 SC**
8. **Honorius Maurice Chilufya v Chrispin Haruwa Kangunda, SCZ Judgment No. 29 of 1999**

Legislation referred to:

1. **Subordinate Courts Act, Chapter 28 of the Laws of Zambia; section 23**
2. **Lands Act, Chapter 184 of the Laws of Zambia; section 13**

Introduction

1. This appeal arises out of a land dispute action which was commenced in the Subordinate Court. It is an appeal against the judgment of the High Court at Livingstone handed down on 22nd May 2015, dismissing the appellant's appeal against the judgment of the Subordinate Court which had upheld the respondent's claims against the appellants.
2. It calls upon this Court to elaborate on the jurisdiction of the Subordinate Court to adjudicate upon a land dispute and the consequences of lack of such jurisdiction. Moreover, the appeal

requires us to consider whether a jurisdictional issue which was not raised at the trial can be raised on appeal.

Background

3. The 1st appellant's late father, Moses Delex Mutinta, acquired Plot No. 346 Mazabuka sometime in 1973. A re-entry was subsequently made on the property by the Commissioner of Lands for failure to comply with the lease conditions. The property was then re-advertised by the Mazabuka Municipal Council (the Council) and the respondent's late father, Mathews Chipanda, applied for it. The Commissioner of Lands later offered it to him following a recommendation by the Council on 10th February 1997 under Minute No. L. 4/5.
4. After paying the requisite fees, the respondent's father found that the 2nd appellant had trespassed on the property and a dispute ensued between them as the 2nd appellant claimed ownership over it. Following this dispute, the Commissioner of Lands wrote to the Council on 28th February 2002 seeking an explanation on the matter and requested for an inspection report. The Council

responded on 4th March 2002, advising the Commissioner of Lands to proceed to process title deeds in favour of the respondent's father.

5. Upon the demise of the respondent's father, the administrator of his estate wrote to the Commissioner of Lands requesting that title for Plot No. 346 Mazabuka be processed in the name of the respondent. A letter of offer was then issued by the Commissioner of Lands in favour of the respondent on 12th July 2004. However, the Council later wrote to the Commissioner of Lands on 29th September 2010, advising that the said offer letter be revoked on the ground that the Council had erroneously recommended for the allocation of the property to the late Mathews Chipanda and that the respondent would be given an alternative plot of land. In a letter dated 22nd March 2012, the Commissioner of Lands advised the council that Plot No. 346 was offered to the late Mathews Chipanda on merit. Further, in a letter dated 18th March 2013, the Commissioner of Lands informed the Council that the respondent was the legal owner of the property.

6. Armed with this information, the respondent commenced an action against the appellants before the Subordinate Court claiming possession of Plot No. 346 Mazabuka; an eviction order of any tenants on the said property, demolition of any structures built thereon; damages for trespass onto the said property; and costs. For their part, the appellants disputed the respondent's claim.

Evidence of the parties in the Subordinate Court

7. The gist of the respondent's evidence in the Subordinate Court was that he is the legal owner of Plot 346 Mazabuka after it was offered to his late father and later allocated to him as a beneficiary of his father's estate. That following the offer, he made a payment to the Ministry of Lands on 2nd December 2011 for the processing of title deeds in his favour.
8. His evidence also revealed that the Council was dishonest in its letter of 29th September 2010 in that the alternative plot that was to be re-allocated to him is actually a fully developed property with an existing house left by his late father.

9. The 1st appellant's evidence, on the other hand, revealed that after his late father acquired Plot No. 346 Mazabuka, he caused to be drawn a site plan for an office block which he later built up to window level with other structures. That his father stayed on the property until 1984 when he sold it to the 2nd appellant who then began to pay to the Council owner's rates for the property.
10. His evidence also disclosed that following the letter from the Council to the Commissioner of Lands explaining that there had been a wrong re-entry on Plot No. 346 Mazabuka and that the respondent had already been given an alternative plot, the acting senior lands officer at the Ministry of Lands wrote to the Council requesting for a site plan so that title deeds could be processed in favour of the 1st respondent. On 4th July 2013, he received an offer letter from the Commissioner of Lands in respect of Plot 346 Mazabuka and title deeds were later issued in his favour on 8th August 2013.

Consideration of the matter by the Subordinate Court

11. Upon hearing the matter and considering the evidence of the

parties, the trial magistrate started by observing that although the defendants disputed the claim being a land matter, the court assumed jurisdiction after neither party objected to the jurisdiction of the Subordinate Court as provided under section 23 of the Subordinate Court Act Cap 28 of the Laws of Zambia.

12. The trial magistrate also observed that the dispute before him related to the ownership of Plot 346 Mazabuka. He noted that the office of the Commissioner of Lands which had earlier allowed the respondent to pay for the processing of his title deeds, went ahead to process and issued title deeds in favour of the 1st appellant. He also observed that the said title deeds were not in existence when the matter was commenced in June 2013 and were only tendered in court on 14th November 2013 when the matter had been adjournment for judgment. He reasoned that the position of the law is that the 1st appellant's acquisition of title did not oust the jurisdiction of the Subordinate Court on land matters as per section 23 of the Subordinate Courts Act.
13. The trial magistrate found that there had been a re-entry by the Commissioner of Lands on Plot No. 346 Mazabuka and that the

same should have been challenged by the 1st appellant before the Lands Tribunal in accordance with section 13(3) of the Lands Act, Chapter 184 of the Laws of Zambia. Instead of doing so, the 1st appellant prevailed upon the Council to rescind its decision to recommend the property to the respondent's father when in fact the Council had no powers to overrule the decision of the Commissioner of Lands to re-possess the property. He also found that the 1st appellant's father did not develop the property and therefore, the re-entry was justified. Further, that the respondent followed the right procedure in acquiring Plot No. 346 Mazabuka.

14. The trial magistrate accordingly found that the respondent had proven his case and upheld all his claims against the appellants.
15. Dissatisfied with this decision the appellants appealed to the High Court on the following grounds:

- 1. That the court below lacked jurisdiction to hear and determine the matter.**
- 2. That the lower court erred by ignoring clear evidence from the Council and the Ministry of Lands showing that legal ownership of the disputed plot was at all material times vested in the 1st appellant.**

Consideration of the appeal by the High Court

16. After considering the evidence deployed in the Subordinate Court and the arguments advanced by the parties on appeal, the learned judge of the High Court found in respect to ground one that under section 23 of the Subordinate Court Act Chapter 28 of the Laws of Zambia, the Subordinate Court could adjudicate on matters where title to land was disputed or where an ownership question arises if the parties to the action consent. He observed that there was no evidence on record to show that there was any consent by the parties for the Subordinate Court to determine the matter and that the trial magistrate merely assumed that there was consent because none of the parties objected. He, however, held that since the question of jurisdiction had not been raised by the appellants in the Subordinate Court, it could not be raised in the High Court as a ground of appeal.
17. As regards the second ground of appeal, the learned trial judge noted that the disputed property had been repossessed from the 1st appellant's father and as such the property no longer belonged to him. Consequently, he did not have the capacity to transfer

the said property to any other person and the re-entry on the disputed plot meant that the property was open to the public following an advertisement by the council. Accordingly, the respondent's father applied for the property and was successful.

18. The learned trial judge opined that had the 1st appellant's father intended to challenge the re-entry, he would have done so in accordance with section 13 of the Lands Act. He, however, noted that there was no evidence on record to suggest that the 1st appellant's father appealed to the Lands Tribunal challenging the re-entry. As a result, he lost his right of appeal following the lapse of the thirty day prescribed period.
19. The learned trial judge went on to observe that there was no contract of sale or any other documentation to show that the disputed plot was transferred from the 1st appellant's father to the 2nd appellant and, thus, there was no basis for believing that the said property was sold to the 2nd appellant. That the record, however, contained an extract of minutes dated 19th March 2001 where the Council offered the disputed plot to the 2nd appellant

in the absence of an advertisement to the public for the said land. He found that in both scenarios, the correct procedure of transferring the disputed plot was not followed. That in view of this, the issue of fraud could not be ruled out. For this reason, he held that there was reason to believe that the certificate of title issued in the name of the 1st appellant after commencement of proceedings in the lower court may have been in circumstances of fraud as procedure for its acquisition was not followed.

20. The learned High Court judge accordingly upheld the decision of the Subordinate Court and ordered that the certificate of title issued in the name of the 1st appellant be cancelled and a new one be issued to the respondent in respect of the disputed plot. He also ordered the eviction of the current tenants of the property, if any, and that any structures built on the said land be demolished.

The grounds of appeal to this Court

21. The appellants have appealed to this Court against the decision

of the High Court advancing two grounds as follows:

1. **The learned Judge in the Court below erred in law and in fact when he narrowly interpreted section 23 of the Subordinate Court Act and held that if the matter of lack of jurisdiction on the part of the Court is not raised by the parties at trial stage, the said issue of lack of jurisdiction cannot be raised on appeal and therefore the Subordinate Court by virtue thereof assumed jurisdiction to hear and determine the matter; the provisions of section 23 of the Subordinate Court Act notwithstanding.**

2. **The learned Judge in the Court below erred in law and fact when he held that there was a legally acceptable re-entry on the property by the Commissioner of Lands when in fact there was no legally [acceptable] re-entry on the property and Certificate of Title No. 42373 remained valid at all material times.**

The arguments presented by the parties

22. Both parties filed written heads of argument on which they relied. In support of ground one, the learned counsel for the appellant, Mr. Mbambara, began by referring us to the provisions of section 23 of the Subordinate Court Act which states as follows:

“If, in any civil cause or matter before a Subordinate Court, the title to any land is disputed, or the question of the ownership thereto arises, the court may adjudicate thereon, if all parties interested consent; but if they did not all consent, the

presiding magistrate shall apply to the High Court to transfer such cause or matter to itself.”

23. He also referred to the case of **Zyambo v Ntharzy**¹, where we held that:

“Now, looking at the sequence of events, it is clear to us that the learned Magistrate erred when he transferred the case to the High Court. Section 20(1) of the Subordinate Court Act does not clothe a magistrate with power to transfer a case to the High court for lack of jurisdiction. Certainly, if this was the case, the High Court would be inundated with cases from the Subordinate Court. The correct position is that, the Magistrate having found that he had no jurisdiction, should have dismissed the case before him. Therefore, the learned trial Judge misdirected himself when he upheld the transfer of the case from the Subordinate Court to the High Court.”

24. Counsel, therefore, submitted that the Subordinate Court did not have the jurisdiction to adjudicate on the present case and could not assume jurisdiction by virtue of the issue not being raised at trial stage. Upon appeal, the High Court should not have upheld the appeal from the Subordinate Court on this ground because the Subordinate Court ought to have dismissed the matter having found it had no jurisdiction. He contended that page J2 of its judgment showed that the Subordinate Court directed its mind

to the issue of jurisdiction, and instead of dismissing the matter for want of jurisdiction, the Court assumed jurisdiction on the basis that neither party objected to its jurisdiction. However, there is no provision in the law that allows a court to assume jurisdiction of a matter in a case where that particular court clearly has no jurisdiction even if none of the parties raises an objection calling for lack of jurisdiction.

25. In arguing ground two, counsel submitted that the Commissioner of Lands did not re-enter the disputed property in accordance with section 13 of the Lands Act Chapter 184 of the Laws of Zambia which provides that:

“(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 entered in the register.

(2) If the lessee does not within three months make the representations required under sub-section (1), or if after making representations the President is not satisfied that a breach of a term or a condition of a covenant by the lessee was

not intentional or was beyond the control of the lessee, he may cause the certificate of re-entry to be entered in the register.

(3) A lessee shall pay such ground rent as may be prescribed, by statutory instrument.

26. According to counsel, no notice of intention to cause a certificate of re-entry to be entered was given to the 1st appellant and so, he was not accorded an opportunity to make representations as to why such re-entry should not be entered. He contended that the re-entry by the Commissioner of Lands was, therefore, invalid at law and that the disputed property could not be allocated to the respondent. In support of this argument, he cited the case of **Anort Kabwe and Another v James Daka and 2 Others**,² where it was held that:

“The mode of service of the notice of intention to cause a certificate of re-entry to be entered in the register for a breach of the covenant in the lease, as provided for in Section 13(2) of the Lands Act, is cardinal to the validation of the subsequent acts of the Commissioner of Lands in disposing of the land to another person. We say so because if the notice is properly served, normally by providing proof that it was by registered post using the last known address for the lessee from whom the land is to be taken away, the registered owner will be enabled to make representations, under the law, to show why he could not develop the land within the

period allowed under the lease. If the land is eventually taken over because of being in breach, despite the warnings from the Commissioner of Lands, the registered owner cannot successfully challenge the action to deprive him of the land. On the other hand, if the notice is not properly served and there is no evidence to that effect, as was the case here, there is no way the lessee would know so as to make meaningful representations. It follows that a repossession effected in the circumstances where a lessee is not afforded an opportunity to dialogue with the Commissioner of Lands, with a view to having an extension of period in which to develop the land, cannot be said to be a valid repossession. In our view, the Commissioner of Lands cannot be justified in making the land available to another developer.”

27. He also relied on the case of **Hilda Ngosi (Suing as Administrator of the Estate of Washington Ngosi v Attorney General and Another**³, where we held that:

“In its judgment, this Court confirmed the case of **Kabwe and Another v Daka and Others**¹ cited above and held further that there was no evidence which shows that South End Properties Limited was properly notified in accordance with section 13 of the Lands Act. The Commissioner of Lands should have complied with provisions of section 13 of the Lands Act by serving the notice of intention to re-enter on South End Properties Limited. This omission was fatal and rendered all subsequent dealings in the land to the detrimental of South End Properties and/or its assignees null and void.”

28. On the basis of these authorities, counsel argued that the failure by the Commissioner of Lands to comply with section 13 of the Lands Act was fatal and rendered the subsequent assignment of the disputed property to the respondent null and void. This, he contended, essentially entailed that the certificate of title issued to the 1st appellant remained valid and has been so at all material times as there was no valid re-entry and, therefore, no repossession of the disputed property by the Commissioner of Lands.
29. In conclusion, counsel submitted that the court below erred at law when it ignored the clear evidence that there was no re-entry on the property within the provisions of the law. He accordingly urged us to allow the appeal.
30. In response to ground one, the respondent submitted that the issue of jurisdiction was not raised during trial and the same cannot be raised at appeal. We were referred to the case of

Buchman v Attorney General⁵, where it was held that:

“[a] matter not raised in the lower court cannot be raised in a higher court as a ground of appeal.”

31. The respondent contended that this Court refined the holding in the **Buchman**⁵ case in **Nevers Sekwila Mumba v Muhabi Lungu (suing in his capacity as National Secretary of the MMD)**⁶, by holding as follows:

“Furthermore, we loath to reverse a lower court based on an issue that the lower court has not ruled upon. This court will, however, affirm or overrule a trial court on any valid legal point presented by the record, regardless of whether that point was considered or even rejected.”

32. It was submitted that even if ground one raises a valid point of law as held in the **Nevers Sekwila Mumba**⁶ case, section 23 of the Subordinate Court Act does not expressly oblige the presiding magistrate to assist the parties, particularly on the question of consent of parties in proceedings touching on land dispute or ownership. That parties themselves must raise the issue of consent unassisted by the trial court as our court system is adversarial. The case of **Gerrison Zulu v Zambia Electricity**

Supply Corporation Limited⁷ was cited in support of this argument, where this Court stated that:

“We bear in mind that our system of trying cases is one of adversarial system where each party has to fight his own case unaided by the trial judge...”

33. The respondent contended that the court below was on firm ground when it ruled in favour of the respondent. We were accordingly urged to dismiss the first ground of appeal.
34. In response to ground two, the respondent argued that the court below was on firm ground when it ruled against the appellants on the question of re-entry. The gist of the lower court’s ruling was that the 1st appellant’s father did not challenge the decision of the Commissioner of Lands in repossessing the land in issue.
35. Consequently, the respondent contended, since the appellant’s father did not challenge the re-entry decision, he lost title to the land. Further, that the title that was produced after trial had finished but before judgment was delivered in the Subordinate Court was fraudulently obtained as it was meant to defeat the course of justice.

36. It is evident that the acquisition of the purported title whilst being fully aware that there was a matter in court relating to the property in question was done malafide and was a deliberate manoeuvre to interfere with the course of justice. It is such fraudulent conduct, the respondent argued, that courts frown upon. That in terms of section 33 of the **Lands and Deeds Registry Act Cap 85 of the Laws of Zambia**, fraud will vitiate title.

37. Reliance was placed on the case of **Honorius Maurice Chilufya v Chrispin Haruwa Kangunda**⁸, where this Court stated that:

“A Certificate of Title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, ... except in case of fraud...”

38. It was argued that fraud cannot be ruled out in the present case. Therefore, nothing precluded the lower court in making an order granting ownership of land in issue to the respondent on account of fraudulent conduct on the part of the [1st] appellant in acquiring title whilst being fully aware of the proceedings in the

Subordinate Court.

39. Further, that adverse possession or recovery of possession can be sustained against the registered proprietor where fraud, among other factors is established.
40. We were, in the premises, urged to also dismiss the second ground of appeal.

Decision of the Court

41. We have considered the record of appeal, the judgment of the Subordinate Court, the judgment appealed against and the parties' heads of argument.
42. The appellant's grievance in ground one is that the learned trial judge erred when he narrowly interpreted section 23 of the Subordinate Court Act and held that the issue of jurisdiction could not be raised on appeal because it was not raised at trial stage; and by virtue thereof, the Subordinate Court assumed jurisdiction to hear and determine the matter.

43. We must state from the outset that we agree with the position that a matter that has not been raised in the court below cannot be the subject of appeal. We note in the present case, however, that the issue that was being raised on appeal in the court below relates to the jurisdiction of the Subordinate Court to adjudicate on a land dispute.
44. In the case of **Aristogerasimos Vangelatos and Another v Metro Investments Limited and 3 Others**⁴, we held as follows with regard to jurisdictional questions being raised on appeal which had not been raised in the lower court:

“However, although it is a general rule that an issue that has not been raised in the court below cannot be raised on appeal, the question of jurisdiction can be raised on appeal notwithstanding the fact that it was not raised in the court below. In arriving at this decision we are guided by the learned authors of Halsbury’s Laws of England, 4th edition, volume 10, at paragraph 717 who state as follows:

‘It is the duty of an appellate court to entertain a plea as to jurisdiction at any stage, even if the point was not raised in the court below.’

This authority clearly places an obligation upon us to allow a plea of want of jurisdiction to be raised, even where, as in this

case, the issue was not raised in the court below. The rationale for this lies in the consequence of the court exercising jurisdiction which it does not possess. Halsbury's at paragraph 715 states, in this regard, that where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

45. From the foregoing excerpt, we posit that it was a misconception for the learned trial judge to have held that the jurisdictional issue raised by the appellants could not be raised on appeal. In the view that we take, the issue of jurisdiction is properly before us in this appeal and we shall proceed to determine it.
46. The appellants contend that the trial magistrate did not have jurisdiction to adjudicate upon the matter in the court below and that he could not have assumed jurisdiction merely because neither party objected to its jurisdiction. To buttress this argument, they have relied on the provisions of section 23 of the Subordinate Court Act.
47. We have had the opportunity of examining the provisions of that section and agree with the interpretation given to it by the learned

trial judge. Indeed, a Subordinate Court may only adjudicate on matters where title to land is disputed or where an ownership question arises if the parties to the action consent.

48. At page J2 of his judgment, the trial magistrate acknowledged the need for consent of the parties in the context of section 23 of the Subordinate Court Act when he stated as follows:

“The defendants disputed the claim being a land matter however, this court assumed jurisdiction after neither party objected to the jurisdiction of the Subordinate Court as provided under the Subordinate Court Act section 23 of Cap 28 of the Laws of Zambia.”

49. The record of proceedings as recorded by the trial magistrate on 1st August 2013 shows the following, among others:

**“Plaintiff: I shall be using English. I am ready for hearing.
Defendant: I am also ready for hearing. No objection to the Subordinate Court hearing this matter.”**

50. It is not clear from the said proceedings as to which defendant the words, “No objection to the Subordinate Court hearing this matter” were attributed. What is clear, however, is that the response was only from one defendant and yet both defendants

were present. We, therefore, find no basis in the trial magistrate's reasoning that he assumed jurisdiction after neither party objected. The import of section 23 is that **all** interested parties to the matter must consent to the Subordinate Court adjudicating on the matter. A perusal of the record in this case reveals that no such consent was obtained from the other appellant before the trial magistrate proceeded to hear the matter. The absence of this consent, in our view, effectively means that the trial magistrate did not possess the requisite jurisdiction to determine the matter.

51. In the **Vangelatos**⁴ case referred to in paragraph 44, we held that:

“...the absence of jurisdiction nullifies whatever decision follows from such proceedings.”

52. Similarly in the present case, we conclude that the absence of jurisdiction on the part of the trial magistrate nullified the proceedings in the Subordinate Court. To that extent, it was a futile exercise on the part of the High Court Judge to purport to consider an appeal, and consequently uphold, a judgment of the

trial magistrate when, for want of jurisdiction, the court proceedings from which it arose were null and void *ab initio*. As we stated in the **Vangelatos**⁴ case, the decision of a court which purports to exercise a jurisdiction it does not have amounts to nothing. This is better illustrated by the latin maxim, *ex nihilo nihil fit* (from nothing nothing comes). Ground one, therefore, has merit and it must succeed.

53. It was contended by the respondent that section 23 of the Subordinate Court Act does not oblige the presiding magistrate to assist the parties on the question of consent in proceedings relating to land disputes and that they should raise such issues themselves as our court system is adversarial. We find this argument not only startling but legally flawed. The point should be made that where a statute sets out a condition precedent for a court to acquire jurisdiction as is the case with section 23 of the Subordinate Court Act, it is incumbent upon the court, even if not moved by the parties, to ensure that the condition precedent is satisfied before embarking on hearing the matter.

54. Consequently, we take the view that although the **Gerrison Zulu**⁷ case is good law, it is inapplicable to the circumstances of this case.
55. Given our decision on ground one, it is otiose for us to consider the second ground of appeal as such consideration will serve no useful purpose.

Conclusion

56. The net result is that the appeal is allowed and the judgment of the court below is set aside. The parties are at liberty to commence fresh proceedings if they so wish. We award costs both here and below to the appellants, to be taxed in default of agreement.



E. M. HAMAUNDU
SUPREME COURT JUDGE



C. KAJIMANGA
SUPREME COURT JUDGE



J. K. KABUKA
SUPREME COURT JUDGE