Selected Judgment No. 1 of 2018

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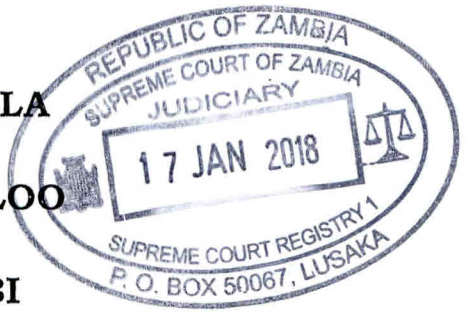
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 75/2016**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:



YAKUB FALIR MULLA **1ST APPELLANT**

FAZILA MULLA ALLOO **2ND APPELLANT**

MWILA MUMBI JABI **3RD APPELLANT**

AND

MOHAMED JABI **RESPONDENT**

CORAM: Hamaundu, Malila and Mutuna, JJS.
On 11th July, 2017 and 17th January, 2018.

For the Appellant : Mr M. Mutemwa, S.C., Messrs Mutemwa Chambers

For the Respondent : Mr M. Nzozo, Messrs ICN Legal Practioners

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Union Gold (Zambia) Limited v The Attorney General, SCZ Judgment No. 141 of 2016**
2. **Beatrice Mulamfu and Kelvin Mukuka Mwamba, Appeal No. 80 of 2014**
3. **London Street Tramways Company Limited v London County Council [1898] A.C. 375.**
4. **Edinburgh Streat Tramways Co. v Lord Provost, & C., of Edinburgh and London Street Tramways Co. v London County Council [1894] A.C. 456.**
5. **Knuller v DPP, (1972) 2 All E.R. 898**
6. **Kasote v The People [1977] ZR reprint, 101**
7. **Macfadyean v The People [1965] ZR1 and**
8. **Phiri C v The People [1973] ZR 63**

This appeal is against a ruling of the High Court which dismissed the appellants' contention, raised on a point of law, that by virtue of **Section 4(1)** of the **Lands Tribunal Act, No. 39 of 2010** the High Court has no jurisdiction to entertain disputes relating to land.

(3)

The facts constituting the background to this appeal are entirely not in dispute, and are these:

On 11th December, 2012, the respondent issued a writ of summons against the appellants, seeking essentially to repossess stand No F/369a/184 Makeni, Lusaka, on the ground that it had been fraudulently sold by the 3rd appellant to the 1st and 2nd appellants. The appellants then mounted a series of legal challenges against the suit, the first of which was raised about a month after the commencement of the suit. That challenge raised two questions: First, the respondent's locus standi as regards the land in issue considering that, being a foreigner, his capacity to own land was limited by **Section 4** of the **Land Act**; and, secondly, whether this suit ought not to be dismissed for being an abuse of court process; the subject matter of the suit having been before the court previously. That application was dismissed.

The second challenge was mounted on 1st June, 2015. This time, the appellants sought to have this suit dismissed on the ground that the issue of ownership was res judicata, the Lands Tribunal

having declared in another dispute of the same property that the 1st and 2nd appellants were innocent purchasers of the land. That application, too, was dismissed.

The appellants immediately engaged additional advocates, Messrs Mutemwa Chambers, who promptly mounted the third challenge which is now the subject of this appeal. In that application, the appellants raised the contention which we have stated at the beginning.

The arguments advanced by the appellants in support of their contention in the court below can be reduced to five points, namely:

(i) That it is the duty of courts of justice to try to get at the real intention of the legislature;

(ii) That, in this case, the primary task of the court is to discover the intention behind the enactment by the legislature of **Article 94** of the **Constitution** and **Sections 4 and 16** of the **Lands Tribunal Act**;

(iii) That, the Article in the Constitution and the two sections in the **Lands Tribunal Act** must be construed in such a way that the **Act** is made effective and workable;

(iv) That the jurisdiction of the High Court is not limitless: In land matters the boundaries are prescribed by the **Lands Tribunal Act** which gives it appellate jurisdiction over the Lands Tribunal. It is inconceivable that the intention of Parliament would have been to grant the High Court both original and appellate jurisdiction; such interpretation of the Article and the two sections creates an absurdity, and;

(v) That, that absurdity was addressed by the Minister's statement on the second reading of the amendment bill.

The court ruled that **Article 94(1)** of the **Constitution** which was applicable then vested the High Court with unlimited jurisdiction in civil matters, including those involving land and that that jurisdiction was retained in **Article 134** of the current Constitution. The court went on to hold that **Section 4** of the **Lands Tribunal Act** did not oust the High Court's jurisdiction in land matters because it

expressly stated that the provisions in that section were subject to the Constitution. It was the court's view that, if it had been intended that the Lands Tribunal should have exclusive jurisdiction in matters concerning land, the Constitution would have expressly so stated. Finally, the court found that the Minister's remarks did not state that the Lands Tribunal was to have exclusive jurisdiction.

The appellants have advanced five grounds of appeal. They read as follows:

(1) The learned trial judge in the court below misdirected herself in law when she held that Article 94(1) of the Constitution grants the High Court unlimited and original jurisdiction on issues which include land.

(2) The learned trial judge in the court below misdirected herself in law when she held that the Lands Tribunal is not an alternative forum to the High Court, and its subjection to the Constitutional provisions in Section 4 of the Lands Tribunal Act Number 39 of 2010 shows that the High Court's jurisdiction is not ousted in land matters.

(3) The learned trial judge in the court below misdirected herself in law when she held that the mere fact that section 16 of the Lands Tribunal Act number 39 of 2010 provides for appeal to the High Court

on decisions of the Lands Tribunal does not mean that the High Court's original jurisdiction in these matters is ousted.

(4) The learned trial judge in the court below misdirected herself in law when she held that the issues of exclusivity of jurisdiction [of the tribunal] cannot be inferred or assumed, but must be specifically provided for.

(5) The learned trial judge in the court below misdirected herself in law and fact when she held, in relation to the portion of the Hansard in the further affidavit and submissions, that she had not seen any remarks to the effect that the Lands Tribunal was to have exclusive jurisdiction over all land matters.

We must, at the outset, point out that this appeal comes in the wake of two appeals that were before us recently. The said appeals raised the same question as that raised in this appeal, namely; whether or not the provisions of the **Lands Tribunal Act Number 39 of 2010** ousted the unlimited jurisdiction of the High Court to determine disputes over land as a court of first instance. The cases are **Union Gold (Zambia) Limited v The Attorney General, SCZ Judgment No. 141 of 2016**[1] and **Beatrice Mulamfu v Kelvin Mukuka Mwamba, Appeal No. 80 of 2014**[2], whose judgment was rendered in December, 2016, after our decision in the **Union Gold** case. We settled this question in the **Union Gold** case when we held

(8)

that the **Lands Tribunal Act number 39 of 2010** does not oust the High Court's jurisdiction to hear land disputes as a court of first instance. We re-affirmed that holding in the *Beatrice Mulamfu* case. The question that, therefore, arises in this particular appeal is; what approach does a final court of appeal take as regards an appeal that turns on a question of law that the court has previously decided.

In England in 1898, the rule established by the House of Lords to deal with that question can be seen in the judgment of the Lord Chancellor, the Earl of Halsbury in **London Street Tramways Company Limited v London County Council**[3]

In that case, the London County Council required the London Street Tramways Company Limited to sell certain portions of the latter's tramways to the former as provided for under the **Tramways Act, 1870**. The company demanded to be paid, not merely for the cost of construction but for the value as a going and profit-earning concern. To that end the company tendered evidence showing that,

at the time of the notice to sell, there were existing profits of the company. The referee appointed by the Board of Trade rejected that evidence on the ground that the **Act** did not allow him to adopt a method of valuation based upon profits. The company took the matter to the Queen's Bench Division, and, eventually to the House of Lords. Earlier, in 1894, the House of Lords had dealt with that question in two cases that were heard together. These are **Edinburgh Street Tramways Co. v Lord Provost, & C., of Edinburgh** and **London Street Tramways Co. v London County Council**[4]. The House of Lords had decided that the valuation was to be based only on the cost of construction, less depreciation as provided for by the **Act**. So, in the latter case, the question that arose to be argued was as to the power of the House of Lords to reconsider previous decisions of its own and, if it thought the decisions were wrong, to overrule or depart from them in subsequent cases. The following is part of what the Lord Chancellor said in his judgment:

> **"My Lords, for my own part I am prepared to say that I adhere in terms to what has been said by Lord Compbell and assented**

> **to by Lord Wensleydale, Lord Cranworth, Lord Chelmsford and others, that a decision of this House once given upon a point of law is conclusive upon this House afterwards, and that it is impossible to raise that question again as if it was *res integra* and could be reargued, and so the House be asked to reverse its own decision. That is a principle which has been I believe, without any real decision to the contrary, established now for some centuries, and I am therefore of opinion that in this case it is not competent for us to rehear and for counsel to reargue a question which has been recently decided."**

The Lord Chancellor provided the rationale for this principle in another portion of his judgment. This is what he said:

> **"My Lords, it is totally impossible, as it appears to me, to disregard the whole current of authority upon this subject, and to suppose that what some people call** 'extraordinary case,' **an** 'unusual case,' **a case somewhat different from the common, in the opinion of each litigant in turn, is sufficient to justify the rehearing and rearguing before the final court of appeal of a question which has been already decided. Of-course, I do not deny that cases of individual hardship may arise, and there may be a current of opinion in the profession that such and such a judgment was erroneous; but what is that occasional**

interference with what is perhaps abstract justice as compared with the inconvenience, the disastrous inconvenience, of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final Court of Appeal? My Lords *'interest rei publicae'* **that there should be** *'finis litium'* **at some time, and there could be no** *'finis litium'* **if it were possible to suggest in each case that it might be reargued, because it is** *'not an ordinary case,'* **whatever that may mean."(380).**

The Lord Chancellor concluded as follows:

"Under these circumstances it appears to me that your Lordships would do well to act upon that which has been universally assumed in the profession, so far as I know, to be the principle, namely, that a decision of this House upon a question of law is conclusive, and that nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgment of this house" (381).

Clearly, at that time, the House of Lords could never reconsider its previous decisions, let alone overrule or depart from them. In more recent years, the rule of parctice seems to have changed slightly.

Hence in 1966 Lord Gardiner, the Lord Chancellor of the House of Lords then issued a Practice **Note** on behalf of himself and the Lords of Appeal in the ordinary. The Note read:

> **"Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.**
>
> **Their lordships nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous one when it appears right to do so.**
>
> **In this connexion they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlement of property and fiscal arrangements have been entered and also the especial need for certainty as to the criminal law." [1966] 3 All E.R. 77**

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In **Knuller v The People**[5], Lord Reid summed up the modified position in the following words:

> **"I dissented in Shaw's case. On reconsideration I still think that the decision was wrong and I see no reason to alter anything which I said in my speech. But it does not follow that I should now support a motion to reconsider the decision. I have said more than once in recent cases that our change in practice in no longer regarding previous decisions of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good reason before we act. We were informed that there had been at least 30 and probably many more convictions of this new crime in the ten years which have elapsed since Shaw's case was decided, and it does not appear that there has been manifest injustice or that any attempt has been made to widen the scope of the new crime."(903)**

Coming to our jurisdiction, in **Kasote v The People**[6], a case in which our attention was drawn to two previous decisions of ours which contradicted each other, namely, **Macfadyean v The People**[7] and **Phiri C v The People**[8], we said the following:

> **"Having said that, however, it is proper for us to say that in fact Macfadyean was not drawn to our attention during the**

> **argument in Phiri. We are also satisfied that those two cases cannot be reconciled. There can be no doubt that, had we been aware of Macfadyean, we would have dealt with it and would have made two decisions – first, whether in our view it was wrongly decided, and second, even if we were of that view, whether there was a sufficient strong reason to decline to follow it. This court, being the final court in the land, adopts the practice of the House of Lords in England as set out by Lord Gardiner in the Note reported at [1966] 3 All E.R. 77."**

Therefore, our practice as regards departure from our previous decisions is well summed up in **Kasote v The People**. Coming back to this appeal, it is evident that all the grounds of appeal seek to reargue the point of law that we have already settled previously. That ought not to be the approach. Instead, the appellants ought to be demonstrating to us; first, in what manner our decision is wrong and, secondly, what sufficiently strong reason exists to persuade us to depart from that decision. So, as far as the arguments by the parties are concerned, we decided to look at only such of the arguments as address us on those two points.

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The parties relied, by and large, on the written heads of argument that they filed. In those heads, the appellant does not point out in very precise terms how our decision in the **Union Gold case** was wrong. However, it was clear from the oral arguments by Mr Mutemwa, State Counsel, on behalf of the appellants, that their bone of contention is that when we resorted to other amendments such as those in the **Lands and Deeds Registry Act** and the **Housing (Statutory and Improvement Areas) Act** in order to determine the effect of the provisions in the **Lands Tribunal Act, No. 39 of 2010**, we ignored the purpose for which the **Lands Tribunal Act of 2010** was enacted, as can be discerned from the debates in Parliament when the **Act**, as a bill, was being proposed and read. To that end, learned counsel referred us to the speeches of some Members of Parliament during the debate and argued that, from the speech of the sponsor of the bill, one could discern the intention that the Lands

Tribunal was to have the exclusive jurisdiction to deal with land disputes; the High Court coming in only on appeal.

As regards what would constitute compelling reasons for us to depart from the **Union Gold case**, Mr Mutemwa argued that it was absurd for the High Court to share original jurisdiction with the Lands Tribunal in land disputes, and at the same time preside over the Tribunal as an appellate court.

In response, Mr Nzonzo, learned counsel for the respondent argued that this court settled the question that the appellants are raising now in the **Union Gold Case** when it held that in land matters a party has a choice of forum and that the High Court has both original and appellate jurisdiction.

On the argument by the appellants that it is absurd for the High Court to have both original and appellate jurisdiction, learned counsel argued that there was nothing absurd or unworkable about such a position. He gave as an example the relationship between the

High Court and the subordinate courts in certain civil matters which are within the jurisdiction of the subordinate courts where a party may still opt to commence them in the High Court. He argued that should such a party commence his matter in the subordinate courts, the High Court will have appellate jurisdiction if the party becomes dissatisfied with the subordinate court's decision.

We have considered the arguments by the parties. The appellants argued that we ignored the purpose of the **Lands Tribunal Act, No. 39 of 2010** as discerned from the Parliamentary debates. While the debates were not brought to our attention in the **Union Gold case**, they were referred to us in the subsequent case of **Beatrice Mulamfu v Kelvin Mukuka Mwamba**. We did consider the debates and still stood by our decision in the **Union Gold case**. In so doing, we were persuaded by a portion of the speech that was given by the Chairperson of the Committee that had considered the bill.

(18)

That portion read:

> **"Sir, the Committee notes that Section 4(1) of the Bill, which proposes to extend the jurisdiction of the tribunal, appears to be at variance with Article 94(1) of the Constitution, which gives unlimited and original jurisdiction to the High Court to hear and determine, inter alia, all civil matters. The Committee proposes that the provision be harmonized so that the High Court will have concurrent jurisdiction with the Lands Tribunal in land matters."**

This passage, clearly, explains why in the amendments to the **Lands and Deeds Registry Act** and the **Housing (Statutory and Improvement Areas) Act** which were intended to correspond with those of the **Lands Tribunal Act of 2010**, the words *"Court"* and *"Judge"* are not done away with. Instead, there is merely an inclusion of the words *"Lands Tribunal"* where, hitherto, the latter words had not existed. Therefore, our decision in the **Union Gold Case** was supported by the Parliamentary debates. In the circumstances, we do not agree with the appellants that our decision in the **Union Gold case** was wrong.

Even assuming that our decisions were to be wrong, the appellants have not demonstrated any special reason why we would depart from it. Their contention that it is an unworkable arrangement for the High Court and the Lands Tribunal to have concurrent original jurisdiction in land matters simply does not hold water. The respondent has given a very good example of how such an arrangement works; namely, the relationship between the High Court and the Subordinate Courts in certain civil cases, such as those where the claim is unliquidated. This arrangement has been in existence since the creation of these two courts in this country. Yet, never has the arrangement been found to be unworkable. As we said in the **Union Gold Case**, the arrangement provides parties with a choice of forum to commence their litigation. We see no absurdity or injustice in that. Certainly, we do not see any injustice that has been occasioned to the appellants by coming to defend the dispute in the High Court instead of starting from the Lands Tribunal. What we see, instead, from the record, is a desire by the appellants to curtail the

respondent's action without going to trial. This can be seen from the unsuccessful applications that they made prior to this one. It should be noted that the respondent started this action in 2012 when the **Lands Tribunal Act, No. 39 of 2010** was already in force. If, indeed, the commencement of this action directly in the High Court was prejudicing the appellants, then we expected the appellants to have brought this application first. But the appellants only made it some three years later, after other applications that were intended to curtail the respondent's action failed; a clear indication that the action does not prejudice them.

In conclusion, the appellants have failed to persuade us that our decision in the **Union Gold case** was wrong. On that ground this appeal fails. We dismiss it, with costs to the respondent.

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E. M. Hamaundu
SUPREME COURT JUDGE

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Dr. M. Malila, SC
SUPREME COURT JUDGE

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N.K. Mutuna
SUPREME COURT JUDGE