

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 47 OF 2019

HOLDEN AT LUSAKA

(Civil Jurisdiction)

**BETWEEN:**

**DAVISON MKANDAWIRE**

**1<sup>ST</sup> APPELLANT**

**UNKNOWN MALE (OTHERWISE KNOWN  
AS SAUSANDE)**

**2<sup>ND</sup> APPELLANT**

**ALL ILLEGAL SQUARTERS**

**On Lot 3124/M**

**3<sup>RD</sup> APPELLANT**

**AND**

**JULIA MALEMBEKA**

**1<sup>ST</sup> RESPONDENT**

**KAMO MALEMBEKA**

**2<sup>ND</sup> RESPONDENT**



**CORAM: Chashi, Mulongoti and Lengalenga, JJA**

**ON: 22<sup>nd</sup> January and 13<sup>th</sup> March, 2020**

*For the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants: N/A*

*For the 1<sup>st</sup> and 2<sup>nd</sup> Respondents: F.C Zulu, Messrs MSK  
Advocates*

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## **J U D G M E N T**

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**CHASHI JA**, delivered the Judgment of the Court.

**Cases referred to:**

1. **Anti-Corruption Commission v Barnet Development Corporation Limited (2008) ZR,69**
2. **Rosemary Phiri Madaza v Awadh Karen Colleen SCZ Judgment No.2 of 2008**
3. **Febian Musialela v Evans Chipman - 2010/HPC/0256**
4. **Townap Textiles Zambia Limited and Chhaganlal Distributors Limited v Tata Zambia Limited (1988-1989) ZR, 93 (SC)**
5. **Donovan v Gwentoyo Limited (1990) WLR 472**
6. **Nkhata and Four Others v The Attorney General of Zambia (1966) ZR, 147 - Reprint**
7. **Nkongolo Farms Limited v Zambia national Commercial Bank Limited (In Receivership) Charles Haruperi (2007) ZR, 149**
8. **Mususu Kalenga Building Limited and Winnie Kalenga v Richmans Money Lenders Enterprises (1999) ZR, 27**

**Statutes referred to:**

1. **The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia**
2. **The Lands Tribunal Act No. 39 of 2010**

- 3. The Intestate Succession Act, Chapter 59 of the Laws of Zambia**
- 4. The Statute of Limitation Act, 1939**
- 5. The Constitution of Zambia (Amendment) Act, No. 2 of 2016**

**Rules referred to:**

- 1. The Supreme Court Practice (White Book) 1999**

**1.0 INTRODUCTION**

- 1.1 This appeal emanates from the Judgment of the Lands Tribunal (the Tribunal) delivered on 30<sup>th</sup> November, 2017.
- 1.2 In the said Judgment, the Tribunal declared that, the Respondents herein, who were the complainants before the Tribunal, were the legal owners of Lot 3124/M, Chamba Valley.
- 1.3 As a consequence, the Tribunal ordered that the Appellants who were the respondents, yield up occupation and possession of Lot 3124/M, Chamba Valley within fourteen (14) days from the date of the Judgment upon the Respondents providing logistics.

## 2.0 BACKGROUND

2.1 The brief facts giving rise to this appeal are that, the Respondents lodged a complaint before the Tribunal against the Appellants claiming the following reliefs:

2.1.1 A declaration that the Respondents are the rightful owners of Lot 3124/M (the Land).

2.1.2 That the Appellants must yield up occupation and possession of the Land.

2.1.3 An Order for an interlocutory injunction to restrain the Appellants, their agents, servants or whomsoever, from trespassing, encroaching and interfering with the Respondents' enjoyment of the Land or any person deriving title therefrom.

2.2 According to the affidavit in support of the complaint, the Land was demised by the President of the Republic of Zambia to Abraham Kamimbi Malembeka **vide** a statutory lease dated 2<sup>nd</sup> June, 1987.

2.2.1 The said Abraham Kamimbi Malembeka died in September, 2000 without leaving a will.

Subsequently, the 1<sup>st</sup> Respondent, the widow and

Golden Mutoma, were registered as Co-administrators of the estate in April, 2009.

2.2.2 By deed of assent registered on 16<sup>th</sup> April, 2009, ownership of the Land was transferred to the Respondents.

2.2.3 It has deposed that, unknown persons, without licence or consent of the Respondents, have trespassed and occupied the land, thereby depriving the Respondents the use and enjoyment of the Land.

2.3 Although the Appellants filed an affidavit in opposition to the injunction, they did not file an affidavit in opposition to the complaint. Neither did they attend the proceedings which led to the Judgment being impugned.

### **3.0 FINDINGS BY THE TRIBUNAL**

3.1 Upon considering the pleadings, affidavit evidence, witnesses' evidence and the Respondents submissions, the Tribunal made the following findings of fact:

3.1.1 That the late Abraham Kamimbi Malembeka at the time of his death was the registered owner of the Land. According to the Tribunal, the finding was

underpinned by the land register and the lease appearing on pages 7 and 15 respectively of the Respondents bundle of documents in the court below.

3.1.2 The Land was not part of the administration of the estate as the late Malembeka left it to his wife, the 1<sup>st</sup> Respondent.

3.1.3 That ownership of the Land was by deed of assent dated 16<sup>th</sup> April, 2009, transferred to the Respondents and the certificate of title to the Land is in their names.

#### **4.0 DECISION OF THE TRIBUNAL**

4.1 After having recourse to Section 33 of **The Lands and Deeds Registry Act**<sup>1</sup>, as to the effect of a certificate of title and the cases of **Anti-Corruption Commission v Barnet Development Corporation Limited**<sup>1</sup>, **Rosemary Phiri Madaza v Awadh Karen Colleen**<sup>2</sup> and **Febian Musaillela v Evans Chipman**<sup>3</sup>, The Tribunal found in favour of the Respondents and granted all the reliefs which were being sought. The Tribunal following these cases, adjudged the

Respondent to be the lawful owners of the Land, as the certificate of title was conclusive evidence of ownership.

## **5.0 GROUNDS OF APPEAL**

5.1 Dissatisfied with the Judgment of the Tribunal, the Appellants have appealed to this Court advancing nine grounds of appeal couched as follows:

5.1.1 The Tribunal erred in law and fact, when it found that the late Mr. Malembeka left Farm No. 3124/M to his wife Julia Malembeka, the 1<sup>st</sup> Respondent.

5.1.2 The Tribunal erred in law and fact when it held and declared that the Respondents are the legitimate owners of Lot 3124/M, Chamba Valley, Lusaka as evidenced by the certificate of title they own.

5.1.3 The Tribunal erred in law and fact when it held that the Respondents certificate of title has a valid date contrary to the allegations by the Appellants that it had no valid date.

5.1.4 The Tribunal erred in law and in fact when it failed to hold that a local court order of appointment cannot

be used to administer Lot 3124/M, Chamba Valley, Lusaka.

5.15 The Lands Tribunal erred in law and in fact when it held that the certificate of title of Lot 3124/M, Chamba Valley is in the name of the 1<sup>st</sup> Respondent.

5.1.6 The Lands Tribunal erred in law and in fact when it failed to hold that the certificate of title of Lot 3124/M, Chamba Valley was obtained by reasons of impropriety as it is not signed by the Registrar.

5.1.7 The Honourable Lands Tribunal erred in law and in fact when it failed to hold that the Respondents claim of Lot 3124/M, Chamba Valley, was and is statute barred.

5.1.8 The Tribunal erred in law and fact when it held and directed that the properties built on Lot 3124/M be demolished within 14 days after delivery of Judgment.

5.1.9 The Tribunal erred in law and fact when it delivered Judgment without hearing the Appellants.



## **6.0 ARGUMENTS IN SUPPORT OF THE APPEAL**

6.1 At the hearing, of the appeal, neither the Appellants nor their advocates were in attendance. We however, decided to accept their heads of argument filed into Court.

6.1.1 In arguing the first ground of appeal, it was submitted that, the decision of the court must be supported by evidence. It was contended that there was no evidence submitted before the Tribunal to that effect. Reliance was placed on the case of **Townap Textiles Zambia Limited and Chhaganlal Distributors Limited v Tata Zambia Limited**<sup>4</sup> where the Supreme Court held that there must be some evidence that the Court should rely on.

6.2.1 The second, third and fifth grounds of appeal were argued together. The gist of the argument is that the perusal of the certificate of title reveals that, it has no valid date but the Tribunal held otherwise. According to the Appellants, the finding was not based on the evidence submitted to the Tribunal.

6.3.1 As regards the fourth ground of appeal, our attention was drawn to Section 43 (2) of **The Intestate Succession Act**<sup>3</sup>, which provides that:

*"(2) A local court shall have and may exercise jurisdiction in matters relating to succession, if the value of the estate does not exceed fifty thousand kwacha".*

6.3.2 According to the Appellants, the Respondents obtained an Order of appointment from the local court and the said Order was used to obtain the title deed and administer the Land. It was contended that, the Order did not grant the Respondents the right to obtain the title deed and administer the Land, because the local court did not have jurisdiction to grant the Order as the Land was worth more than K50,000.00.

6.3.3 It was the Appellant's argument that, in view of the aforesaid, the certificate of title ought to be cancelled because the Order granted by a court which had no jurisdiction was used to obtain title.

6.4.1 In arguing the sixth ground of appeal, it was submitted that, the title deed was not signed by the Registrar, who issued it. That failure to sign an important document like a title deed makes it not to be authentic and such a document cannot be used to claim ownership of the Land.

6.5.1 As regards the seventh ground of appeal, Counsel drew our attention to Section 4 (3) of **The Statute of Limitation Act**<sup>4</sup> which provides that:

*"No action shall be brought by any person to recover any land, after expiration of twelve years from the date on which the action accrued to him or it first accrued to some person through whom he claims to that person".*

6.5.2 According to Counsel, the Judgment by the Tribunal reveals that, the late Malembeka died in September, 2000 and that is the time squatters settled on the Land. It is Counsel's submission that, the Respondents averred that they built a structure

which was demolished and further that, they were chased from the Land.

6.5.3 It is Counsel's submission that, the aforestated facts, fly in the teeth of Section 4 (3) of the Act. That the complaint was filed on 25<sup>th</sup> April, 2017, the period being seventeen (17) years.

6.5.4 It is Counsel's contention that, the Tribunal should have taken judicial notice of the Statute of Limitation as the claim was statute barred. Counsel relied on the case of **Donovan v Gwentoy's Limited**<sup>5</sup> on the purpose of the limitation period being to protect the defendant from injustice of having to face a stale claim; that is, a claim which he never expected to have to deal with.

## **7.0 ARGUMENTS IN RESPONSE TO THE APPELLANT'S GROUNDS OF APPEAL**

7.1 In response, the Respondents, argued all the grounds separately. In doing so, Mr. Zulu, Counsel for the

Respondents relied on the heads of argument which were filed into Court.

7.1.1 In response to the first ground of appeal, Counsel submitted that the Appellants have misapplied the **Townap Textiles Zambia Limited**<sup>4</sup> case, as the case was dealing with issues of winding up and not evidence **per se** before a Court.

7.1.2 It was submitted that the Tribunal did, as a matter of fact, review the evidence, made findings of fact and reasoned why it decided as it did. Counsel drew our attention to page 178, line 24 of the record of appeal (the record wherein, the 1<sup>st</sup> Respondent during examination in chief testified as follows:

*"I was appointed as Administrator at the time he died, so I have a letter of appointment and Chamba Valley (L/3124/M, the property subject of these proceedings) was one of the farms that was mentioned, so I have this letter to show that, this farm (L/ 3124/M) was left to me by my late husband,*

*it is specifically mentioned in my letter of appointment..."*

7.1.3 According to Counsel, the Tribunal made a finding of fact which should not be interfered with lightly in line with the case of **Nkongolo Farms Limited v Zambia National Commercial Bank Limited, Kent Choice Limited, Charles Haruperi**<sup>7</sup>. It was held in that case that, as a general rule, an appellate court should rarely interfere with the findings of fact by the lower court, unless such findings are not supported by evidence on record or the lower court erred in assessing and evaluating the evidence, by taking into account matters which ought not to have been taken into account or failed to take into account some matters which ought to have been taken into account or mistakenly, the lower court failed to take advantage of having seen and heard the witnesses and this is obvious from the record or the established evidence demonstrates that the lower court erred in assessing the evidence.

7.1.4 It was Counsel's submission that the Tribunals' decision was based on evidence before it, and therefore this is not a proper case for reversing that finding of fact.

7.2.1 In response to the second ground, Counsel drew our attention to section 33 of **The Lands and Deeds Registry Act**<sup>1</sup> and **Article 253 of The Constitution of Zambia**, which guarantees securing of tenure for lawful Land owners.

7.2.2 It was submitted that, the evidence on record shows that the Respondents were the title holders of Land and the Appellants did not produce any evidence to the contrary and or a better title to the Land.

7.3.1 As regards the third ground of appeal, Counsel reiterated the argument on the second ground. He submitted that, it is trite law that fraud as a defence must be precisely alleged and proven. That the Tribunal addressed its mind on the issue of fraud and found that it had not been pleaded and no particulars of it given. According to Counsel, the Tribunal was on firm ground in its holding.

7.4.1 In response to the fourth ground of appeal, Counsel submitted that the Appellants did not file an affidavit in opposition to the complaint nor did they attend before the Tribunal. That they only filed an affidavit in opposition to **ex parte** summons for an Order for an interim injunction.

7.4.2 According to Counsel, the issue being raised was never raised in the Tribunal. Reliance was placed on the Supreme Court case of **Mususu Kalenga Building Limited v Richmans Money Lenders Enterprises**<sup>8</sup> where it was held **inter alia** that:

*"...where an issue was not raised in the court below, it is not competent for any party to raise it in this Court".*

7.4.3 It was Counsel's submission that, as it was not raised in the Tribunal, it is incompetently before this Court.

7.5.1 In respect to the fifth ground of appeal, it was submitted that, the argument by the Appellants is *otiose* as the Tribunal declared the Respondents the legitimate owners of the Land and holders of the certificate of title to the Land.



7.6.1 In response to the sixth ground of appeal, it was submitted that, the issue was never raised before the Tribunal.

7.7.1 In response to the seventh ground of appeal, Counsel adopted the arguments on grounds 4,5 and 6, that the issue was not raised in the Tribunal.

7.7.2 In the alternative, it was argued that, the cause of action is not statute barred. Further that, the Land which is subject of a certificate of title cannot be subject to adverse possession or a contrary interest. Reliance in that respect was placed on section 35 of **The Lands and Deeds Registry Act** which provides that:

*"After Land has been the subject of a certificate of title, no title thereto, or to any right, privilege or easement in, upon or over the same shall be acquired by possession or used adversely to or in derogation of the title of the registered properties".*

7.7.3 It was submitted that, the Land was at all material times subject of a certificate of title, from the time of the late Malembeka, who obtained title in June, 1987 up to the time title was changed into the Respondents' names.

7.7.4 In addition, Counsel argued that, the Appellants never pleaded the defence of the statute of limitation before the Tribunal and cannot be allowed to plead it now.

7.8.1 We note that, although the Respondents addressed the eighth and ninth grounds of appeal, the same were not argued by the Appellants. We shall revert to that in due course.

## **8.0 DECISION OF THIS COURT**

8.1 We have considered the record, the Judgment being impugned and the arguments by the parties. We note from the onset that the eighth and ninth grounds of appeal were not argued. We therefore take it that, they have been abandoned.

8.1.1 We are of the view that, it will be appropriate to consider the seventh ground of appeal first, for the obvious reason that, if we are to find that, the claim before the Tribunal was statute barred, then the rest of the grounds will become *otiose*.

8.1.2 As earlier alluded to, apart from filing an affidavit in opposition for an injunction, the Appellants did not file an answer to the complaint and in addition, they stayed away from the proceedings of the Tribunal.

8.1.3 In general, the effect of the expiration of the periods prescribed by part 1 of the **Statute of Limitation Act**<sup>4</sup>, is to bar the remedy and not the right, and that the Act must be specially pleaded by way of defence. Order 18/8 of The Rules of **The Supreme Court (RSC)**<sup>1</sup>, which deals with matters which must be specifically pleaded states as follows:

*"8-(1) A Party must in pleading subsequent to a statement of claim, plead specifically any matter, for example, performance release, the expiry of any relevant period of limitation, fraud or any fact showing illegality*

*(a) which he alleges makes any claim or defence of the opposite party not maintainable; or*

*(b) which if not specifically pleaded, might take the opposite party by surprise; or*

*(c) which raises issues of fact not arising out of the preceding pleading".*

8.1.4 Order 18/8/2 **RSC** goes on to state that, wherever a party has a special ground of defence or raises an affirmation case to destroy a claim or defence, as the case may be, he must specifically plead the matter on which he relies for such purpose. The effect of the rule is, for reasons of practice and justice and convenience, to require the party to tell his opponent what he is coming to the court to prove; but the rule does not prevent the court from giving effect in proper cases to defences which are not pleaded.

8.1.5 The Appellants did not plead the defence of the claim being statute barred under **The Statute of Limitation Act**<sup>4</sup>. In addition, this is not a proper case in which we can give effect to the defence, as the Appellants did not lead any evidence before the Tribunal to prove when the right of action accrued,

as to when the Appellants came on to the Land. To do so now, through the Appellants heads of argument, amounts to giving evidence at the bar which is not permissible.

8.1.6 In the view that we have taken, the seventh ground of appeal has no merit and is accordingly dismissed.

8.2.1 We now turn to the first ground of appeal. This ground essentially attacks the finding by the Tribunal that, the late Malembeka left the Land to his wife the 1<sup>st</sup> Respondent. The contention being that, there is no evidence on record which supports the said finding.

8.2.2 We have perused the record, in particular the affidavit evidence and the 1<sup>st</sup> Respondent's evidence before the Tribunal. The Respondents' Counsel referred us, in the arguments, to page 128 line 24 of the record, where the first Respondent testified that, the Land was left to her by the late husband and that was specifically mentioned in the letter of appointment. What we gather from that evidence,

which was not rebutted, was that the late Malembeka gave the Land to the 1<sup>st</sup> Respondent before he died. There is therefore, evidence on the record which the Tribunal relied on in making its finding of fact. We therefore, in line with the **Nkongolo Farms Limited** case decline to interfere with the finding of the Tribunal.

8.2.3 The first ground of appeal has no merit and is accordingly dismissed.

8.3.1 The second, third and fifth grounds of appeal were argued together by the Appellant and we shall accordingly consider them as such, together with the sixth ground of appeal as they are related. The issues gravitate on the Tribunal's finding that the Respondents were according to the certificate of title, the legitimate owners of the Land. The Appellants are questioning the validity of the certificate of title in that, it was not dated and bears no signature by the Registrar.

8.3.2 The finding by the Tribunal that the Respondents are the legitimate owners of the Land, is a finding of fact. As was espoused by the Court of Appeal in the case of **Nkhata and Four Others v The Attorney General of Zambia**<sup>6</sup>, an Appellate Court can only reverse findings of fact made by trial court, if (1) the Judge erred in accepting evidence or (2) the Judge erred in assessing and evaluating the evidence by taking into account some matters which he should have ignored or failing to take into account something which he should have considered or (3) the Judge did not take proper advantage of having seen and heard the witnesses, (4) external evidence demonstrates that, the Judge erred in assessing manner and demeanor of witnesses.

8.3.3 In arriving at this finding, the Tribunal took into consideration the provisions of Section 33 of **The Lands and Deeds Registry Act**<sup>3</sup> and the relevant case law which provides that, under the said Section, a certificate of title is conclusive evidence of ownership

of land by a holder of the certificate of title. The court also noted that under section 34 of the same Act, a certificate of title can be challenged for fraud or reasons of impropriety.

8.3.4 We note that, the Appellants who were duly represented by lawyers, post-delivery of Judgment by the Tribunal, never challenged the certificate of title on grounds of fraud or impropriety. In the affidavit in opposition to the application for an injunction, which the Tribunal took into consideration, in arriving at its decision, the issue of lack of the date was raised by the Appellants. However, the issue of lack of the Registrar's signature was never raised. There is a *plethora* of cases amongst them the case of **Mususu Kalenga Building Limited and Another v Richman Money Lenders Enterprise**<sup>8</sup> where the Supreme Court emphasised that, an issue which was not raised in the court below is not competent for any party to raise it in an appellate court.



8.3.5 As regards the issue of the date, that was duly considered by the Tribunal and it found that, the certificate of title had a valid date. This is what the Tribunal said at page 7 of the Judgment (refer page 19 line 6 of the record of appeal):

*"The certificate of title herein is in the names of the Complainants, but the Respondents have not adduced any evidence to prove their ownership of Lot 3124/M, Chamba Valley, Lusaka. Equally vital, is the fact though a certificate of title can be quashed, where it was obtained by fraud, there is no evidence adduced to show that the Complainants obtained the certificate of title by fraud. In other words, the Respondents have not pleaded fraud nor have they given particulars of it to meet the **Madaza** standard. We have no penumbra of doubt in our mind, and we so hold that the complainants are the legitimate owners of the land and they are so declared. The certificate of title has a valid*

*date contrary to the allegation by the Respondents that it has no valid date".*

We had occasion to look at the certificate of title at page 151 of the record. Although it has typographical errors, we re affirm that the certificate of title is dated.

8.3.6 In view of the aforestated, we find no basis on which to fault the Tribunal's findings and neither have the Appellants' met the threshold in the **Nkhata** case to prompt us to reverse the finding of the Tribunal. The second, third, fifth and sixth grounds of appeal are accordingly dismissed.

8.4.1 The fourth ground of appeal attacks the Tribunal's failure to hold that a local court Order of appointment could not be used to administer the Land. Once again, this was not an issue before the Tribunal and neither was any evidence led before the Tribunal as to the value of the land. We decline to be drawn into this argument which is being raised on appeal for the first time. Accordingly, we dismiss this

ground. In any case, having found under the first ground of appeal that the Land was not part of the estate for administration purposes, this ground of appeal is incompetent.

## 9.0 CONCLUSION

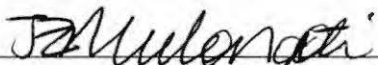
9.1 All the grounds of appeal having failed, the appeal is accordingly dismissed. This being an appeal from a Tribunal, each party shall bear its own costs.



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**J. CHASHI**

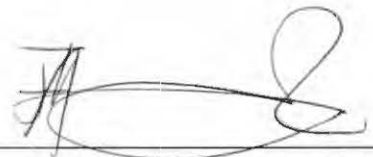
**COURT OF APPEAL JUDGE**



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**J. Z. MULONGOTI**

**COURT OF APPEAL JUDGE**



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**F. M. LENGALENGA**

**COURT OF APPEAL JUDGE**