

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

APPEAL No. 31/2014
SCZ/222/2011

B E T W E E N :

VINOD KUMAR PANDE

APPELLANT

AND

NICKSON MTINE

RESPONDENT

Coram: Wood, Malila and Musonda, JJS
On 23rd May, 2017 and 23rd June, 1017.

For the Appellant: Mr. D. K. Kasote - Messrs Chifumu Banda & Associates

For the Respondent: Mr. L. Mudenda - Messrs Tembo, Ngulube & Associates

J U D G M E N T

MALILA, JS, delivered the Judgment of the Court.

Cases referred to:

1. *Attorney-General, Ministry of Works and Supply and Rose Makano v. Joseph Emanuel Frazer and Peggy Sikumba Frazer*, [2001] ZR 87 p.95
2. *Attorney-General v. Steven Luguru* [SCZ No. 20 of 2001]
3. *Match Corporation Limited v. Choolwe and Another* [SCZ No. 57 of 2002]
4. *Mwenya Jane and Jason Radee v. Paul Kapinga* [SCZ No. 4 of 1998]
5. *Wilhelm Roman Buchman v. Attorney-General* [1994] S.J. 76

Legislation referred to:

1. *Lands Act, Chapter 184 of the Laws of Zambia*
2. *Constitution of Zambia (Amendment) Act No. 2 of 2016*
3. *Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia*

Other works referred to:

1. *Handbook on the Sale of Government Pool Houses*

The present appeal is one of the many arising from the sale of Government pool houses to sitting tenants that have ended up in this court. In point of fact, it raises absolutely no new issue to merit any extended consideration of the arguments that the learned counsel for the parties debated before us.

The appellant is an Indian national who came to Zambia in 1972. He is a permanent resident of Zambia and holds an entry permit and has been on such permit since his arrival in the country. He taught in various government schools with his last posting being at Libala Secondary School from where he retired in October, 2000. As an incidence of his employment the appellant was, in April 1988, allocated Flat No. LUS/2046/Katete/11 Lusaka, which flat is at the center of the dispute in this appeal. He lived in that flat for many years and was in fact residing there at the time of commencement of the current proceedings.

When the government came up with the policy of selling government pool houses to sitting tenants, the appellant applied to buy the flat in which he resided. He, however, received no response from the Committee on the Sale of Government Pool Houses. Later it occurred to the appellant that the government had, in fact, sold the flat to someone else, namely, the respondent.

The respondent, having paid for the subject flat and obtained a certificate of title, took out proceedings in the lower court claiming that he was the legitimate owner of the flat in dispute and sought vacant possession of the same. Evidence was given in that court to the effect that as a permanent resident, the appellant had applied to the President for consent to purchase the subject flat but had received no response, whatsoever. It was also demonstrated in the lower court that the respondent held a certificate of title over the subject flat, the sale and purchase transaction with the government having been consummated.

The High Court found in favour of the respondent, reasoning that the appellant did not purchase the property in question as he did not obtain the consent in writing of the President as required

under section 3 of the Lands Act No. 29 of 1995. The court accordingly, ordered the appellant to yield vacant possession of the subject flat to the respondent. The court, however, declined to grant the claim for mesne profits claimed by the respondent, stating that there was never a landlord and tenant relationship between the respondent and the appellant. Unhappy with that judgment, the appellant appealed raising four grounds as follows:

GROUND ONE

The trial court erred in both law and fact by holding as it did that the appellant was not entitled to buy the Flat No. LUS/2046/Katete/11 Lusaka, when in fact he is entitled to buy the subject property by virtue of him being a permanent resident of the Republic of Zambia.

GROUND TWO

The trial learned judge fell in error in both law and fact when he held as he did that there were no grounds upon which the respondent's title to Flat No. LUS/2046/Katete/11 Lusaka, could be impeached as the respondent was not a sitting tenant in the subject property among other grounds.

GROUND THREE

The trial court below misdirected itself in both law and fact when it failed to appreciate that the interests of the appellant in Flat No. LUS/2046/Katete/11 Lusaka, ranked first to those of the respondent by virtue of the former being a sitting tenant and not having paid his benefits after retiring from the civil service [sic!].

GROUND FOUR

The trial learned judge fell in error in both law and fact when it failed to appreciate that the decision of the court in the Attorney-General v. Stephen (2001) ZR 116 has been upset by the later decision of this court in which this court held that a permanent resident qualifies to own land in Zambia [sic!].

Heads of argument on behalf of the appellant were filed on the 9th October, 2013. At the hearing of the appeal Mr. Kasote, learned counsel for the appellant, relied on those heads of argument which he orally augmented briefly.

In regard to ground one, it was contended that the trial court fell into error when it held that the appellant was not entitled to purchase the flat subject of the present dispute. By virtue of his being a permanent resident of Zambia and a sitting tenant in the subject flat he was, according to counsel for the appellant, entitled to buy the said flat. He referred us to the case of **Attorney-General, Ministry of Works and Supply and Rose Makano v. Joseph Emanuel Frazer and Peggy Sikumba Frazer⁽¹⁾**, and quoted a long passage from that judgment as follows:

The facts not in dispute in the present appeal have clearly established that the first appellant is a civil servant who is a legal sitting tenant in accordance with Clause 2.1(a) of the Handbook on Sale of

Government Pool House. The first appellant is also a civil servant who qualifies to own land in Zambia under the provisions of Section 3(3)(a) of the Lands Act, Chapter 184 of the Laws of Zambia and in accordance with Clause 2.1(e) of the Handbook, he is entitled to purchase a Government Pool House in question. The further undisputed facts are that the third respondent Mrs. Rose Makano, who is not a legal sitting tenant, was hurriedly sold the house despite the fact that the authorities had in their possession the first appellant's application to purchase the house in issue. Instead of advising the first appellant to obtain Presidential consent as required by the law and by the guidelines, the authorities took up the wrong position in law and he did not qualify to buy that house when in law he qualified.

Instead the authorities decided to allocate the house in issue and made an offer to purchase the same house to the person who had never been a sitting tenant. This case, among many more others that have come before us in relation to sale of Government Pool houses as well as sale of parastatal houses, is a clear example of unfairness and injustice in the sale of Government Pool houses, as well as parastatal houses which the authorities concerned must rectify. The guidelines and the law are very clear. Non-Zambians are entitled to buy land in Zambia and to purchase Government Pool houses on certain conditions, among them the obtaining of Presidential consent. The first appellant in his case met all the conditions. All that remained was to obtain Presidential consent which on the facts, he would have obtained but the authorities decided to overlook this.

Counsel's contention was that this case is authority that a non-Zambian is entitled to purchase a government pool house by virtue

of clause 2.1(e) of the Handbook on the Sale of Government Pool houses. The spirit of that provision, according to the learned counsel, is that non-Zambians are eligible to purchase government pool houses as long as they qualify to own land under section 3(3) of the Lands Act, Chapter 184 of the Laws of Zambia. That provision allows non-Zambians upon securing the consent of the President in writing, to acquire land. Mr. Kasote also referred us to the case of **Attorney-General v. Steven Luguru**⁽²⁾ from where he quoted the following passage:

The tribunal spent a great deal of time in consideration of Section 3 of the Lands Act. The Cabinet Circular also refers to Section 3 of the Act. From our interpretation of the circular the Government introduced a condition of service to sell some of the pool houses to the civil servants who were Zambians. The policy was to sell the houses to any civil servant who qualified under Section 3 of the Lands Act. Section 3 of the Lands Act, is a general provision which empowers any civil servant to purchase land under certain conditions of service. The Government circular empowered Zambian civil servants to purchase Government Pool houses. We consider that the reference to Section 3 of the Lands Act in the circular was intended to cover those non-Zambian civil servants who were established residents and who had complied with the Section. There was no evidence here that the respondent had obtained the relevant Presidential consent under Section 3. For avoidance of any doubt the circular was to empower the Zambian civil servants to purchase some Government pool houses.

Mr. Kasote's contention was that the holding in the two cases that he cited appeared different. However, the two cases had a striking similarity in that they both acknowledged that reference by the government in clause 2.1(e) of its Handbook on the Sale of Government Pool Houses to section 3 of the Lands Act, was intended to cover non-Zambian civil servants who were permanent residents and who complied with the Lands Act. Counsel also referred to the case of **Match Corporation Limited v. Choolwe and Another**⁽³⁾ in urging us to review our earlier decision in regard to eligibility of a permanent resident to purchase a government pool house. It was his prayer under this ground that we hold that clause 2.1(e) of the Handbook on the Sale of Government Pool houses entitles the appellant to purchase the flat subject of the present dispute and make appropriate orders.

Mr. Kasote then argued grounds two and three together. Ground two attacked the learned trial judge's finding that the respondent's title to the disputed property could not be impeached as no ground for such impeachment existed. In the view of the

appellant, however, a ground for impeachment existed, namely, that the respondent was not a sitting tenant of the subject property.

Under ground three, the learned judge in the court below was faulted for seemingly failing to appreciate that the interests of the appellant in the disputed flat ranked above those of the respondent by virtue of the fact that the appellant had been a sitting tenant and had not received his benefits after retiring from the civil service. The learned counsel effectively reiterated the arguments that he made in regard to the appellant's eligibility. Mr. Kasote also referred to the case of **Mwenya Jane and Jason Radee v. Paul Kapinga**⁽⁴⁾ where we stated, that the occupation of land by a tenant affects a purchaser of land who has constructive notice of encumbrances affecting the land. He submitted that the respondent, in his own evidence in the lower court, confirmed that he knew that the appellant was a sitting tenant in the property in dispute at the time the offer was made to him. He, therefore, had actual knowledge of the appellant's occupation and on the authority of **Jason Radee v. Paul Kapinga**⁽⁴⁾ he could not, according to Mr. Kasote, acquire better title as he was not a bona fide purchaser of the property.

Under ground four of the appeal, the appellant contended that the trial judge fell into error in both law and fact when he failed to appreciate that the decision of the court in the case of **Attorney-General v. Steven Luguru⁽²⁾** had been upset by a later decision of the Supreme Court in which the court held that a permanent resident qualifies to own land in Zambia. It was Mr. Kasote's chief prayer that we uphold the appeal on all grounds.

Mr. Mudenda, learned counsel for the respondent, was granted leave to file the respondent's heads of argument out of time. He in turn relied on those heads of argument.

In regard to ground one, the learned counsel submitted that the respondent was a civil servant eligible to be offered for sale a government pool house. However, because the respondent was living in an institutional house at the time, he could not be offered that house as a sitting tenant because the relevant Handbook expressly excludes the sale of the institutional houses. He was instead offered the house occupied by the appellant who is a foreign national and who, according to Mr. Mudenda, could not benefit from the sale of government pool houses. He submitted also that from the decision

in **Attorney-General v. Steven Luguru⁽²⁾**, it was clear that government circulars on the sale of pool houses were intended to empower only Zambian civil servants to purchase pool houses. According to Mr. Mudenda, the court did address its mind to the fact that a non-Zambia citizen who is an established resident and who complied with section 3 of the Lands Act, could benefit from the sale of government pool houses. In the present case, however, there was no evidence whatsoever to confirm that the appellant, who was a non-Zambian, had obtained the relevant Presidential consent and thus qualified to purchase a government pool house.

Arguing specifically on the precedential value of the two cases cited by the appellant's counsel, namely, **Attorney-General, Ministry of Works and Supply and Rose Makano v. Joseph Emanuel Frazer and Peggy Sikumba Frazer⁽¹⁾** and that of **Attorney-General v. Steven Luguru⁽²⁾** Mr. Mudenda submitted that as the case of **Luguru⁽²⁾** is later in time and in keeping with the doctrine of *stare decisis* the latter authority is the case to be followed. He also referred to Article 125(3) of the Constitution of Zambia (Amendment) Act No. 2 of 2016, which states:

The Supreme Court is bound by its decision, except in the interest of justice and development of jurisprudence.

He emphasized that the case of **Steven Luguru**⁽²⁾ was correctly decided and should, therefore, provide guidance in resolving the dispute before us.

In regard to ground two, the learned counsel for the respondent supported the finding of the trial judge that there were no grounds upon which the respondent's title could be impeached as there was no evidence of fraud. He quoted Section 23 of the Lands and Deeds Registry Act, chapter 185 of the laws of Zambia, which states, among other things, that a certificate of title shall be conclusive as from the date of issue, notwithstanding, the existence of any other person with an estate or interests in the property in respect of which the title was issued.

As regards ground three, counsel again supported the decision of the trial court and argued that the learned judge below did, in fact, consider the interest of the appellant in the disputed flat as a sitting tenant who had not been paid his terminal benefits, but that on the basis of the available evidence and authorities, he could not sustain the appellant's claim.

In respect to ground four, counsel argued that the appellant never raised any issue pertaining to the argument that he did not require Presidential consent in the court below. Therefore, he cannot raise the matter on appeal for the first time. He cited the case of **Wilheim Roman Buchman v. Attorney-General**⁽⁵⁾. Counsel prayed that the appeal be dismissed.

We have considered the evidence before the trial court as well as the arguments that were articulated before us by the learned counsel for the parties. To us, the issue for determination is simply whether the appellant qualified to purchase the disputed flat and whether the conditions for such purchase of the flat were satisfied.

There is no doubt, whatsoever that, as a permanent resident, the appellant was entitled to own land and, therefore, that he was eligible to purchase the government pool house. Such eligibility, however, is conditional on satisfaction of two vital prerequisites: firstly, that he was a sitting tenant, and secondly, that he obtained the consent in writing of the President in accordance with the requirements of section 3(3) of the Lands Act.

There is no dispute in the present case that the appellant was a sitting tenant in the subject flat. The evidence before us, however, clearly indicates that the appellant did not satisfy the requirement of obtaining Presidential consent in writing. Whatever the reason for the non-response by the President to the appellant's application for consent, is to us irrelevant. What is crucial is that the condition precedent i.e. obtaining the consent in writing of the President, ought to have been satisfied before the appellant's eligibility to own land could be practically actualized and/or be a subject of an enforceable court order. As long as Presidential consent was absent or was not forthcoming, the appellant's eligibility remained hollow. Given this position we do not believe that any useful purpose will be served by us saying anything more. The authorities on the point are clear and the statutory law is not in doubt.

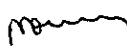
We must also state that the issue that merits strict focus here is the eligibility of the appellant to purchase the subject flat. It is not within the remit of the appeal for us to pronounce ourselves on whether or not the respondent did qualify to purchase the same flat.

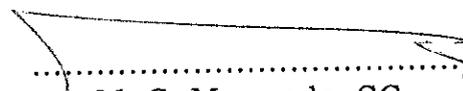
The fact is that he obtained a certificate of title, and no fraud has been pleaded and proved to impeach that title.

As we intimated at the outset of this judgment, in light of the many cases authorities that have been generated by disputes arising from the sale of government pool houses - some of which have been referred to by the learned counsel for the parties - this appeal was unnecessary. We admit though that a party has the right to have his day in court no matter how hopeless or misconceived his claim may be.

We find no merit in the appeal and we dismiss it accordingly. The respondent shall have his costs to be taxed in default of agreement.


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A. M. Wood
SUPREME COURT JUDGE


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~~Dr. M. Malila, SC~~
SUPREME COURT JUDGE


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M. C. Musonda, SC
SUPREME COURT JUDGE