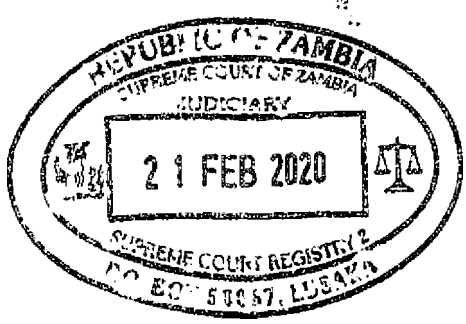
IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)

Appeal No. 216/2016
SCZ/8/173/2015

B E T W E E N :



PRISCA LUBUNGU — APPELLANT

AND

OBBY KAPANGO AND OTHERS — 1ST RESPONDENTS

NDOLA CITY COUNCIL — 2ND RESPONDENT

Coram: Malila, Kajimanga and Kabuka JJS on 5th November, 2019 and 21st February, 2020

For the Appellant: Mr. S. Mulengeshi of Messrs Mulengeshi & Co.

For the 1st Respondents: Mr. V. K. Mwewa of Messrs V. K. Mwewa & Co.

For the 2nd Respondent: Mrs. M. D. Phiri, In-house Counsel, Ndola City Council

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J U D G M E N T

Malila, JS delivered the judgment of the court.

Cases referred to:

1. *Mazoka & Others v. Mwanawasa & Others (2005) ZR 138*
2. *Nyampala Safaris (Z) Ltd & Others v. Zambia Wildlife Authorities & Others (2004) ZR 49*
3. *July Donobo T/A Juldan Motors v. Chimsoro Farms Ltd (2009) ZR 148*

4. *Allan Mulemwa Kandala v. Zambia National Commercial Bank & Others (SCZ Appeal No. 19 of 2014)*
5. *Shoprite Holdings Ltd & Another v. Lewis Chisanga Mosho & Another (2014) 3 ZR 25*
6. *Michael Liwanga Kaingu v. Sililo Mutaba (Selected Ruling No. 9 of 2018)*
7. *Henry Kapoko v. The People (SCZ Judgment No. 43 of 2016)*
8. *Access Bank (Z) Ltd. v. Group Five/ZCON Business Park Joint Venture (SCZ/8/52/2014)*
9. *Ram Auerbach v. Alex Kafwata (SCZ Appeal No. 65 of 2000)*
10. *Jamas Milling company Ltd. v. Inex International Ltd (2002) ZR 71*
11. *NCF Mining Plc v. Techpro (Z) Ltd (2009) ZR 236*
12. *Zambia Revenue Authority v. Charles Walumweye Muhau Masiye (SCZ Appeal No. 56 of 2012)*
13. *Leopold Walford (Z) Ltd v. Unifreight (1985) ZR 63*
14. *Bank of Zambia (As Liquidator of Credit Africa Bank) v. Al Shams Building Materials Co. Ltd (SCZ Appeal No. 214 of 2013)*
15. *Peter David Lloyd v. J. R. Textiles Ltd (SCZ Appeal No 137 of 2011)*
16. *Ravindranath Morargi Patel v. Rameshbhai Jagabhai Patel (SCZ Appeal No. 37 of 2012)*
17. *Socotec International Inspection (Z) Ltd v. Finance Bank (SCZ Appeal No. 147 of 2011)*
18. *Anti-Corruption Commission v. Barnett Development Corporation (2008) 1 ZR 69*
19. *Raphael Ackim Namung'andu v. Lusaka City Council (1978) ZR 358*
20. *Anort Kabwe & Charity Mumba Kabwe v. James Daka, Attorney General and Albert Mbazima (2000) ZR 12*
21. *Goswami v. Essa and Commissioner of Lands (2001) ZR 31 (SCZ Judgment No. 3 of 2001)*
22. *ZCCM v. Katalayi & Another (2001) ZR 28 (SCZ Judgment No 2 of 2001)*
23. *Lonrho Cotton Limited v. Mukuba Textiles Ltd (SCZ Judgment No. 168 of 2000)*
24. *Rosemary Bwalya v. Zambia National Commercial Bank (Appeal No. 33 of 2005)*
25. *Ramsden v. Dyson (1886) LR 1HL 129*
26. *Trevor Limpic v. Rachel Mawere & Two Others (SCZ Judgment No. 35 Of 2014)*
27. *Sambo & Two Others v. Paikani Mwanza (2001) ZR 79*
28. *Hilda Ngosi (Suing as Administrator of the estate of Washington Ngosi) v. Attorney General and Lutheran Mission (Zambia) Registered Trustees (Selected Judgment No. 18 of 2015)*

29. *Attorney General v. Nawakwi (Selected Judgment No. 16 of 2016)*
30. *Zambia Revenue Authority v. Post Newspapers Limited (2016) (1) ZR 394*
31. *David N. Lumanyendo and Another v. Chief Chamuka and Others (1988-89) ZR 194*

Legislation and Other Book referred to:

1. *Supreme Court Rules, Chapter 25 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.*
4. *G. Jones 'Restitutionary claims for services rendered' (1977) 93 LQR 273, 287*

1.0 Introduction

1.1 This appeal implicates the position of a mistaken non-owner improver of land – whether such improver should or should not be allowed restitution from the true owner of the land or from a third party misrepresenter who leads on such non-owner developer. Put shortly, the question is whether a developer of land which she honestly believes belongs to her, or that she has immediate or inchoate proprietary rights in it, but which in truth belongs to someone else, is entitled to recompense for improvements made by her to the land when the true facts emerge?

1.2 The present dispute is also in many respects paradigmatic of the rot in the administration of many local government

authorities in the country; a breakdown of orderly systems, epitomized by a highly casual and suspiciously corrupt manner that animates land allocation by these authorities in many instances.

1.3 Indeed, the facts of the case are plainly suggestive of either maladministration, wrongdoing, an attitude of indifference or downright nonchalance on the part of employees or agents of Ndola City Council, the second respondent in these proceedings, in its execution of the important function of land allocation.

1.4 The inconvenience and disconcertment, not to mention the cost to the parties to this appeal, brought about by the seeming imprimatur by the second respondent of what turned out to be irregular or wrongful allocation to the first respondents of parts of the property subject of these proceedings, is not by any measure insignificant.

2.0 Background facts

2.1 The first respondents were a group of natural persons numbering fifty-four in total who, between January 2004 and

December 2006, were offered by the second respondent through its agents, employees or servants, various pieces of land in an area known as Ndola Lime Area Ndeke, in the City of Ndola, Copperbelt Province of Zambia, for purposes of developing residential properties. Those offers were variously accepted against relevant payments made to the second respondent.

2.2 In due course, the first respondents paid to the second respondent the necessary survey fees, scrutiny fees and such other charges as were required or demanded towards securing the first respondents' individual ownership of the specified pieces of land offered by the second respondent to them.

1.3 The first respondents individually commenced development of the parcels of land respectively offered to them. This was following their satisfaction of the necessary formalities such as the securing of approvals by Ndola City Council of construction plans.

2.4. When each of the first respondents had made considerable progress with the development of their properties, and in some cases, had completed such developments, the second respondent visited the first respondents and informed them that it had illegally allocated the parcels of land upon which they were constructing and that the construction works were likewise illegal and had to be halted or demolished. In October 2007, the second respondent's employees or agents, in the company of police officers, visited the first respondents' properties and began to demolish the structures with the help of a bulldozer.

2.5 The first respondents came to learn almost six years following the offers to them of the subject properties by the second respondent, that the appellant had been issued with a certificate of title dated 8th February 2011, covering the properties offered to them upon which they had erected structures. The appellant's property number covered by and indicated in the certificate of title obtained by her was Farm No. 36834.

2.6 Realising that it had made an embarrassing goof, the second respondent then sought to make amends. It selectively called some of the fist respondents, purportedly interviewed them, and re-offered them the same properties on condition that they each paid the sum of K1,800,000. It would appear that the money to be raised in that way was intended to be paid to the appellant owner of the land under an arrangement designed to pacify her. Some of the first respondents so approached accepted the re-offers while others declined them.

2.7 Feeling somewhat troubled by this state of affairs, but keen to protect their investment, the first respondents, in a calculated preemptive move, commenced proceedings in the lower court. They sought:

2.7.1 An order and declaration that the second respondent's purported cancellation of the letters of offer to the first respondents for the various properties was illegal and null and void.

2.7.2 An order and a declaration that the appellant was not entitled to possession of such pieces of land as were allocated to the first respondents, which allegedly encroached into the appellant's farm; and a further order that the appellant was not entitled to any compensation from the first respondents or any of them.

2.7.3 An order, in the alternative, that the first respondents were entitled to compensation by the appellant and the second respondent in respect of the developments they had put up in the event that such developments were demolished, and further that they should be indemnified by the second respondent against all or any claims made by the appellant.

2.8 The appellant's case, in response, was that since 2004, she had an interest in Farm 36834/M Ndola, which the first respondents had encroached upon and that she never created or gave any waiver on the first respondents' illegal construction on the said farm. In point of fact, the letter of

offer of the property to her from Ndola City Council is dated 16th December 2004. She further posited that at the time she acquired the said farm, it was bare land, free from any encumbrances. She paid for it to Ndola City Council and the Ministry of Lands. The offer was, of course, made and accepted way before the certificate of title was obtained.

2.9 It was the appellant's further case that the second respondent had never repossessed the said land from her and could thus not re-offer it to the first respondents as it purported to. She denied that the respondents were entitled to any of the reliefs they sought.

2.10 As the second respondent in the lower court, the appellant counter-claimed damages for loss of use of the pieces of land, purportedly offered to the first respondents, arising from their unlawful occupation; damages for trespass; vacant possession and any other relief which, in the estimation of the court, was suitable in the circumstances.

2.11 For its part, the second respondent, as first defendant in the lower court, also denied the first respondents' claim, contending that the pieces of land which the first respondents developed, had been illegally allocated to them by persons whom the first respondents had allegedly paid money to in a collusion scheme. The second respondent further claimed that it was duped into accepting some payments by the first respondents and that, in any event, the illegality culminating in their occupation of the various parcels of land could not be obliterated or waived through receipt by the second respondent of the first respondents' payments, which payments were, in any case, received by the second respondent's agents or employees outside the course of their duties.

2.12 It was further contended by the second respondent that the first respondents were entreated and warned not to develop the properties in question from inception but that the latter ignored or rebuffed such advice and warning.

3.0 Holding by the High Court

3.1 Mulanda J, tried the action over an extended period and received evidence from the parties, in the course of which she made a record three site visits to the land in dispute.

3.2 The resultant judgment, which occasioned grievance, can fairly be described as fulsome. She held that the cancellation by the second respondent of the letters of offer for the sale of pieces of land to the first respondents was lawful, considering that the various pieces of land over which the letters of offer were issued, already belonged to the appellant who held title over it. Rather generously, the court ordered that the appellant be compensated by the second respondent in respect of those pieces of land following which the first respondents were to continue to occupy the appellant's said plots 'without disturbance.' The court also ordered the second respondent to pay to the appellant damages for loss of use of the pieces of land occupied by the first respondents. Costs were ordered against the second respondent.

3.3 Not surprisingly, that judgment of the High Court caused considerable consternation, not least to the appellant as the title holder of the property.

4.0 Appeal to this court against the judgment of the High Court

4.1 The appellant (second defendant in the court below) was so aggrieved by the judgment that she appealed to us on three grounds structured as follows:

Ground One

The learned trial judge erred in law and fact when she held that despite the appellant's legal ownership in Farm No. 36834 Ndola, being evidenced by a bona fide Certificate of Title, the respondents should continue with occupation of the plots wrongly allocated to them by officers of the Ndola City Council.

Ground Two

The learned trial judge erred in law and in fact when she found that the respondents were entitled to quiet enjoyment of the illegal plots on account of having already built on the appellant's property.

Ground Three

The learned trial judge erred in law and in fact when she ordered that the damages for loss of use of land occupied by the respondents be paid for by Ndola City Council to the appellant the same remedy was appropriate for the said Ndola City

Council to the respondents without violating the appellant's right to quiet of her land. [sic!]

4.2 There was no cross-appeal filed.

5.0 Issue in *limine*: procedural history

5.1 The learned counsel for the first respondents duly filed a notice to raise a preliminary issue pursuant to rule 19 of the Rules of the Supreme Court, Chapter 25 of the Laws of Zambia.

5.2 The preliminary issue raised was whether the record of appeal filed by the appellant, or on her behalf, was not in fact defective and, therefore, incompetent for offending the provisions of Rule 58(4)(a)(e) and (h) of the Supreme Court Rules, Chapter 25 of the Laws of Zambia.

5.3 Skeleton arguments in support of the preliminary issue were filed. At the hearing, Mr. Mwewa, learned counsel for the first respondents, relied on those skeleton arguments.

5.4 Mr. Mulengeshi, learned counsel for the appellant, applied for leave to file the first respondents' skeleton arguments and list of authorities out of time on account of the late service on

the appellant of the skeleton arguments by the first respondent. There was no objection to the application from counsel for the first respondents, provided the court gave him indulgence to respond in writing. Mrs. Phiri, learned counsel for the second respondent, equally had no objection. Asked how much time Mr. Mwewa would require to file the appellant's reply, he intimated that five days at least, would suit him.

5.5 We allowed the application by Mr. Mulengeshi and equally granted Mr. Mwewa time for his reply as requested. We further intimated that we would, in keeping with a practice supported by such cases as *Mazoka & Others v. Mwanawasa & Others*[1] and *Nyampala Safaris (Z) Ltd & Others v. Zambia Wildlife Authorities & Others*[2], consider the preliminary issue following the submission of all the arguments on it by the parties and thereafter hear the arguments in the main appeal and then deliver, at the same future time, a ruling on the preliminary issue first and later our decision in main appeal, should the latter still be necessary.

5.6 Mr. Mwewa, at that stage, called our attention to the fact that he had not filed the first respondents' heads of argument for the reason he had articulated in the preliminary application. We also noted that the second respondent had not filed its heads of argument either. In these circumstances, we allowed and directed the respondents to file their heads of argument which we would consider, if necessary, after the preliminary issue had been determined. We intimated that we would reserve our judgment on both matters to a date to be advised. This it is.

5.7 Both the first and the second respondents duly filed their heads of argument on 11th November, 2019.

6.0 Issue in *limine*: the arguments

6.1 In support of their preliminary issue, the first respondents contended, through their learned counsel, that the record of appeal was defective and offended rule 58(4)(a)(e) and (h) of the Rules of the Supreme Court, Chapter 25 of the Laws of Zambia. After reproducing *verbatim*, the provisions of the rule, counsel submitted that the record of appeal offended

rule 58 in that it did not contain a complete index of the evidence, nor did it have the names of witnesses in a numerical sequence representing the order in which the witnesses were presented in the court below. Furthermore, that the record did not contain a notice of address of service of either the first or the second respondents contrary to rule 58(4)(e).

6.2 Mr. Mwewa further complained that the record of appeal was jumbled up with little regard being paid to the provision in the rules requiring documents to be arranged in the order in which they were originally filed or presented in evidence. The record of appeal furthermore omitted altogether the supplementary bundle of documents filed by the second respondent in the trial court on the 7th October, 2012. It also did not contain the reply filed by the first respondent. To add salt to injury, the record of appeal, went on the learned counsel, contained handwritten comments in ink and it is not known at what stage those notes were written and by whom.

6.3 The learned counsel for the first respondents quoted a passage from our judgment in the case of *July Donobo T/A Juldan Motors v. Chimsoro Farms Ltd*[3] where we observed that:

> **Where the record of appeal is not prepared in accordance with the manner prescribed under rule 58, rule 68(2) provides for sanctions. Rule 68(2) clearly states that if the record of appeal is not drawn up in the prescribed manner the appeal may be dismissed.**

He also referred to the case of *Allan Mulemwa Kandala v. Zambia National Commercial Bank & Others*[4] where we stated that although rule 68(1) of the Supreme Court rules allows for amendment there can be no amendment of a record that has been badly compiled.

6.4 Counsel also adverted to the case of *Shoprite Holdings Ltd & Another v. Lewis Chisanga Mosho & Another*[5] where we remarked that although rule 59 of the Supreme Court rules allows a respondent to file a supplementary record of appeal, it does not take away a respondent's right to apply to dismiss the record of appeal for non-compliance with the rules. He

urged us to dismiss the appeal on account of the defective record.

6.5 There were no arguments preferred on behalf of the second respondent either in support of, or against the preliminary application.

6.6 The appellant opposed the preliminary issue, arguing in the main that the index to the record of appeal is substantially compliant with the rules and the practice of the court. Counsel contended that records of appeal are allowed where the testimonies of witnesses are contained, as here, in the record of proceedings.

6.7 As regards the notice of address for service, counsel for the appellant contended that notwithstanding the omission to include that notice, the last known addresses of the respondents were nonetheless indicated in the letters which are in the record of appeal. Counsel dismissed as superfluous the contention that the record of appeal was jumbled as no affidavit evidence was laid before the court to establish that allegation.

6.8 Counsel also refuted the claim that the record did not contain the supplementary bundles of documents, submitting without more, that the supplementary bundle is in fact contained in the record. The learned counsel for the appellant once again took a swipe at the first respondents' counsel's failure to show, by affidavit evidence, a copy of the missing supplementary bundle of documents.

6.9 Turning to the allegedly handwritten notes in the record, counsel for the appellant contended that those notes are merely comments and it is thus a misrepresentation to categorise them as complete handwritten notes as the first respondent has done.

6.10 In response, the appellant conceded that the respondent's reply was inadvertently omitted from the record but contended that this is an omission that could easily be cured with the leave of court and that it is, in any event, not fatal to the appeal.

6.11 It was also contended on behalf of the appellant that rule 68(2) uses the word 'may' dismiss and not 'shall' to show the

permissive nature of the rule. Counsel cited the case of *Michael Liwanga Kaingu v. Sililo Mutaba*[6] where this court stated that it is not every breach of a rule relating to the preparation of the record of appeal that is fatal. We were implored to take that sentiment fully into account. Counsel also referred to Article 118(2)(e) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 and the Constitutional Court judgment in *Henry Kapoko v. The People*[7] on the interpretation of that constitutional provision. We were urged to dismiss the preliminary application.

6.12 The first respondents filed skeleton arguments in riposte to the appellant's arguments against the preliminary issue in which the arguments in support were rehashed. We have fully noted those arguments. They reinforce the earlier arguments made in support of the application. It is, however, neither necessary nor expedient that we should repeat them here.

7.0 Issue in *limine*: our decision

7.1 The first respondents have raised an issue of more than passing moment, namely whether a breach of a procedural rule as it relates to the preparations of a record of appeal, should attract the ultimate sanction against the breaching party, namely the dismissal of the appeal. The source of our power to met out that ultimate sanction is rule 68 of the Supreme Court Rules, Chapter 25 of the Laws of Zambia which provides as follows:

> **If the record of appeal is not drawn up in the prescribed manner, the appeal may be dismissed.**

7.2 Regarding the argument touching on Article 118(2)(e) of the Constitution which enjoins courts not to pay undue regard to technicalities when they discharge the noble constitutional function of dispensing justice, we must make it very clear that we have not the slightest appetite to make anything resembling a constitutional interpretation. We are not entirely the correct forum for that. In fact, we believe we said enough in our obiter remarks in *Access Bank (Z) Ltd. v. Group*

Five/ZCON Business Park Joint Venture[8] when we observed that:

> **the Constitution never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the courts.**

7.3 Counsel for the first respondents has specified the sense in which he alleges the record of appeal filed by the appellant is violative of the rules. As we have indicated in the preceding paragraphs, more particularly paragraphs 6.7 and 6.10 some of these allegations against the record of appeal have not been entirely repulsed by the appellant.

7.4 We have in a number of case authorities emphasised the need for strict compliance with rules pertaining to the preparation of records of appeal and have not hesitated to hold against parties in contempt of those rules by dismissing their appeals. A brief review of some of the case authorities, will suffice.

7.4.1 In *Ram Auerbach v. Alex Kafwata*[9] we observed that litigants default at their own peril since any rights available as, of course, to a non-defaulter

are usually jeopardized. In *Jamas Milling Company Ltd. v. Inex International Ltd*[10], we remarked that while the rules of procedure are meant to facilitate the proper administration of justice, their breach could be visited by unpleasant sanctions to a party who breaches them. In *July Donobo T/A Juldan Motors v. Chimsoro Farms Ltd*[3], which has been cited by counsel for the respondent, we expressed the view that failure to compile a record of appeal in the prescribed manner could lead to the dismissal of the appeal. Similar sentiments were strongly carried in *NCF Mining Plc v. Techpro (Z) Ltd*[11].

7.4.2 Another case in which we dismissed an appeal under rule 68(2) of the Rules of the Supreme Court is *Zambia Revenue Authority v. Charles Walumweye Muhau Masiye*[12].

7.4.3 Yet, we have also in numerous other case authorities stated that it is not every failure to

comply with a court rule that will be fatal to the non-complying party. The cases of *Leopold Walford (Z) Ltd v. Unifreight*[13] and *Shoprite Holdings Ltd & Another v. Lewis Chisanga Mosho & Another*[5] are some of these. *Bank of Zambia (As Liquidator of Credit Africa Bank) v. Al Shams Building Materials Co. Ltd*[14] and *Peter David Lloyd v. J. R. Textiles Ltd*[15] are yet others.

7.4.4 In *Ravindranath Morargi Patel v. Rameshbhai Jagabhai Patel*[16] we stated thus:

> **Rules of procedure must be followed. However, the effect of breach of the rules will not always be fatal if the rule in question is merely directory or regulatory.**

In *Socotec International Inspection (Z) Ltd v. Finance Bank*[17], we allowed an amendment of a record that had omitted certain vital documents.

7.5 Mr. Mulengeshi called our attention to the use in rule 68(2) of the word 'may' rather than 'shall', suggesting that the rule imported regulatory force only. What emerges is that as no

two cases are exactly the same, each case will be determined on its own merits. The court will exercise discernment and gumption in making that judgment call. After all as we stated in the *Socotec*[17] case:

> **Whether the appeal will be dismissed or not will depend on the peculiar circumstances of each case.**

7.6 The position as we see it, therefore, is that the present case ought to be determined on its own plusses or minuses. Our view is that the overriding consideration should be whether or not on the basis of the record as presented, an appeal can fairly be determined without prejudice to either party.

7.7 We have perused the documents on the record of appeal, and the memorandum of appeal. Having regard to the grounds of appeal raised, we believe that this appeal can quite passably be determined on the basis of the documents as presented in the record of appeal. We do not think, therefore, that the circumstances here warrant the dismissal of the appeal merely because the record of appeal has deviated slightly from the rules. The point must be made that while it is imperative that rules should, as much as possible, be

complied with, they should not be used as a minefield for the unwary in circumstances where the overriding consideration of justice will not be impaired. We are thus inclined to accept the submission by counsel for the appellant that the record is in substantial conformity with the rules and the appeal can properly be determined without prejudice to the other parties even without calling for the filing of a supplementary record of appeal. The preliminary issue is dismissed accordingly.

8.0 The main appeal

8.1 The three grounds in the main appeal are set out at paragraph 4.1 of this judgment. To support those grounds, heads of argument were filed on behalf of the appellant. These were opposed by rival arguments filed on behalf of the first respondents.

8.2 There were also heads of argument filed on behalf of the second respondent. Rather interestingly, these heads of argument support, in substance, the appeal

9.0 The appellant's case on appeal

9.1 In the heads of argument filed on behalf of the appellant, grounds one and two of the appeal were argued together while ground three was argued separately.

9.2 The main point taken under the first two grounds of appeal was that the lower court was wrong to have ruled in one breath that the appellant held title evidencing ownership of the disputed property, and in another breath that the offerees of the property, being the first respondents, should continue to occupy the pieces of land upon which they had erected structures. Counsel for the appellant made reference to the case of *Anti-Corruption Commission v. Barnett Development Corporation*[18] where this court stated that:

> **Under section 33 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia, a certificate of title is conclusive evidence of ownership of land by the holder of the certificate of title...However, under section 34 of the same Act, a certificate of title can be challenged and cancelled for fraud or reasons of impropriety in its acquisition.**

9.3 The learned counsel recalled that the lower court held that the appellant acquired the land in question after following the land acquisition procedures correctly and that the first respondents were not challenging the appellant's title on any ground, let alone for fraud or impropriety. Further, that all the pieces of land offered to the first respondents encroached into the appellant's farm. Not only that, the court also found that the process leading to the respondents' purported acquisition of those parcels of land was tainted with illegality.

9.4 Counsel contended that the lower court did not demonstrate a proper appreciation of the rights which a certificate of title such as that held by the appellant, donated to the title holder of the land to which it pertains. Those rights, according to counsel, include the right to quiet enjoyment of the property and the right to choose who to contract with in respect of such land.

9.5 Counsel for the appellant also contended that the holding by the lower court judge to the effect that the first respondents were entitled to continue with their quiet occupation and

enjoyment of portions of the appellant's farm on condition only that the second respondent compensated the appellant, was a judgment that sounded only in morality and not in legality; that in passing it, the lower court wore a 'jacket of morality' and not an 'amour of legal justice.'

9.6 In the learned counsel's estimation, the lower court's decision offended the principles of law that were so clearly articulated by this court in the case of *Raphael Ackim Namung'andu v. Lusaka City Council*[19] when we stated, in effect, that a squatter who builds at someone else's land does so at his own peril. In making this submission, the learned counsel for the appellant surmised that the first respondents were in the circumstances of the case, in the position of squatters or trespassers who had no protection at law against the rights of the appellant as a title holder.

9.7 Counsel reiterated that the law as propounded in the *Raphael Namung'andu*[19] case, does not concern itself with the level or value of construction already effected on someone's land; rather it concerns itself with the actions of the trespasser.

Counsel added that it was incongruous for the lower court to have failed to identify the first respondents for what they were – trespassers.

9.8 The appellant's alternative argument was that it was wrong for the court below to have failed to adjudicate on all issues presented before it contrary to the principles of law that casts upon a trial court the obligation to determine all issues in controversy brought before it. In this regard, counsel faulted the lower court for failing to pronounce itself on the claims raised by the appellant (then as second defendant) in her counter claim. She had claimed and prayed for damages for loss of use of part of her piece of land occupied by the first respondents; damages for trespass and an order for vacant possession of all the parcels of land occupied by the first respondents, yet the lower court judge opted to say nothing regarding these claims which were presented before her. The court merely ordered compensation to the appellant from the second respondent for the value of the land which the appellant 'lost' to the first respondents and compensation

from the same party for loss of use of the encroached portions of the land.

9.9 It was also contended that the land in question had at all material times remained the property of the appellant and had not been re-entered in accordance with the procedure envisioned in section 13 of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia and as explained by this court in *Anort Kabwe & Charity Mumba Kabwe v. James Daka, Attorney General and Albert Mbazima*[20]. This in itself entitled the appellant to an order for vacant possession of the property.

9.10 Under ground three of the appeal, the appellant's argument was that the court should never have ordered damages for loss of use of the land occupied by the first respondents to be paid by the second respondent as such order went against logic as regards who occasioned the loss, especially given that the appellant was not privy to any arrangement with either the first or the second respondents. According to counsel, the appropriate order should have been against the first

respondents to grant vacant possession of the appellant's land and to pay damages for loss of use of that land caused by the first respondents' wrongful occupation.

9.11 According to counsel, by making the order that it did, the court below violated the appellant's right to quiet possession and enjoyment of her land. The court's judgment furthermore had the effect of compelling the appellant to surrender part of her land held under title to the first respondents against her will. This contravened an important constitutional premise regarding ownership of property which was explained in the case of *Goswami v. Essa and Commissioner of Lands*[21] where we said that:

> **Our constitution does not countenance the deprivation of property belonging to any one without compensation.**

9.12 Counsel made the further point that the judgment of the lower court had the legally unacceptable effect of rewarding squatters and punishing instead the holder of a valid title deed; the first respondents cannot even seek the benefit of being innocent purchasers for value who had no reason to suspect that there was an adverse claim over the property

they occupied in the way we explained that concept in *ZCCM v. Katalayi & Another*[22].

9.13 The learned counsel contended further that it would amount to unjust enrichment if the first respondents, as squatters properly so called, were allowed to benefit from their unlawful acts. The second respondent could not give the first respondents any better title than the second respondent itself had. As it is, the second respondent had no title; it could therefore give none to the first respondents. The case of *Lonrho Cotton Limited v. Mukuba Textiles Ltd*[23] was cited to buttress that submission. There we stated that:

> **where a property is sold by a person who is not the owner thereof and who did not sell under the authority, or with the consent of the owners, the buyer acquires no better title than the seller.**

9.14 On the basis of all these submissions, we were urged to uphold the appeal.

10.0 The first respondents' case on appeal

10.1 The first respondents' learned counsel, in responding to the appeal, began by attacking what the appellant termed as the

alternative argument. It will be recalled that under that argument, the appellant had contended that the lower court failed to adjudicate on all issues presented before it, contrary to its obligation under established principles of law. The point the learned counsel for the first respondents made was that there was no substantive ground of appeal raised which justified that argument. Counsel contended that under the guise of putting up an alternative argument, the appellant in fact sneaked in what should have been a separate (4th) ground of appeal, and did so without seeking leave to amend the memorandum of appeal.

10.2 The case of *Rosemary Bwalya v. Zambia National Commercial Bank*[24] was cited as authority for the proposition that an argument not borne out of the grounds of appeal shall not be entertained by an appellate court unless leave to amend the memorandum of appeal is sought and granted. Counsel urged us to discountenance the alternative argument which is not premised on any substantive ground of appeal as originally filed.

10.3 The learned counsel for the first respondents then responded to all the three grounds of appeal compositely. He supported the holding of the lower court on all grounds, contending that it was not the first respondents' scheme to contest the validity of the certificate of title issued to the appellant. Their argument was that they were allocated pieces of land by the second respondent at a time when they were not even aware that those pieces of land were part of the land over which the appellant asserted ownership. In this sense, therefore, the argument regarding the meaning and import of section 33 of the Lands and Deeds Registry Act, Chapter 185 were not brought into issue and the lower court judge did in fact give full effect to the certificate of title held by the appellant.

10.4 It was also submitted by counsel for the first respondents that the court below duly acknowledged that the first respondents were allocated pieces of land on the appellant's land by the second respondent, albeit in a manner which the court frowned upon. In these circumstances, according to the learned counsel, it is inappropriate to equate the first

respondents as squatters. We understood the logic of that submission to be that all arguments and authorities premised on the categorization of the first respondents as squatters, had no application here.

10.5 In supporting the lower court's holding that the second respondent should compensate the appellant for the pieces of land occupied by the first respondents and for loss of use of the said land, counsel for the first respondents reminded us that the trial court judge made site visits to the land in dispute three times and observed first-hand the extent of the structures erected on it by the first respondents, some of which structures the judge described as 'completed.' Counsel made a rather stunning submission that the lower court judge 'had her own reasons for doing so which we applaud.'

10.6 After quoting section 13 of the High Court Act, Chapter 27 of the Laws of Zambia, which enjoins the High Court to administer law and equity concurrently, the learned counsel submitted that he saw absolutely nothing wrong in the lower

court's order that the second respondent compensates the appellant for the appellant's pieces of land alienated to the first respondents and for damage to the appellant, as that was, after all, the most equitable thing to do in the circumstances. Counsel prayed that we dismiss the appeal with costs.

11.0 The second respondent's case on appeal

11.1 In the written heads of argument filed on behalf of the second respondent, the learned counsel was rather brief but made the most extraordinary submission. She gave the factual background to the matter before extensively quoting a passage from the judgment of the lower court after reciting the grounds of appeal.

11.2 In responding to grounds one and two, counsel reproduced *verbatim* the provisions of section 33 of the Lands and Deeds Registry Act, in advance of making the fascinating submission admitting that the certificate of title issued to the appellant cannot be challenged in the absence of evidence of fraud. We say that submission was fascinating because it is

the kind of submission that one would not expect a respondent, opposing an appeal, to make. Counsel submitted that the lower court was right to order, as she did, and therefore that grounds one and two should be allowed.

11.3 As with the submission in respect of grounds one and two, the submission made in response to ground three is devoid of any worthwhile legal reasoning. Counsel merely stated that as the lower court found that the appellant was the lawful owner of the property in question, the appellant should have been entitled to an order granting her vacant possession of her land. According to her, the lower court was thus wrong not to have granted such an order. We were implored to allow the appeal.

12.0 Our analysis and decision

12.1 We must from the outset agree with Mr. Mwewa that the alternative argument put up by the learned counsel for the appellant has no place in this appeal for the reasons that Mr. Mwewa so ably articulated. To be precise, the alternative argument orbited outside the issue canvassed in the grounds

of appeal as originally framed and filed. In the absence of leave to amend the grounds of appeal, it was inapropos for the appellant's learned counsel to introduce the alternative argument.

12.2 We must also record our misgivings about the attitude of the second respondent (Ndola City Council) in the handling of the dispute that has brought about the current proceedings. It was the author, the architect of every conceivable wrong in the land transaction involving the appellant and the first respondents. As the local authority tasked, on an agency basis, to alienate land, the second respondent was fully aware, and at any rate had, or could access, all the records relating to the land in issue, and yet it went ahead and did the most despicable wrong of offering to the first respondents land which was already owned by a different party. And that is not all. When joined to the action in the High Court, the local authority, put up a feeble defence in which it sought to disown the actions of its employees.

12.3 In her judgment, the learned judge in the court below held (at page J29) that:

> **...the fact that the plaintiffs [first respondents] had even submitted building plans to the Planning Department of the 1st Defendant [second respondent], paid the fees that they were told to pay and were later given building permits to start building, shows that the Council had a hand in this scam or was negligent in that it did not take precaution to ensure that the plots that the plaintiffs were dealing in were legally allocated to them.**

12.4 Perhaps what constitutes the soul of the lower court's judgment comes right in the peroration of the judgment where the lower court judge stated as follows:

> **I order and declare that the 1st defendant [second respondent] purported cancellation of the letters of offer for sale of plots in issue was legal, bearing in mind that the farm on which the offer letters were issued already belonged to the second defendant [appellant] who, during the trial, showed conclusively, by producing two certificates of title, that she was the lawful owner of the farm. Further, since most of the plaintiffs [first respondents] have already started building houses on the second defendant's farm and others have already completed their house, I order that the second defendant is entitled to compensation from the first defendant in respect of the plots that the first defendant allocated to the plaintiffs. This will enable the plaintiffs to continue staying in the second defendant's farm without disturbance.**

12.5 Unsurprisingly, in this appeal, we discern that counsel for the second respondent has not addressed the real questions touching upon the order of the lower court as they implicate the second respondent. Among these questions was whether the court was right to order that Ndola City Council pays compensation to the appellant?

12.6 Another is whether the court was indeed correct to direct that the first respondents should be allowed to continue occupying the pieces of land which the second respondent had wrongfully allocated to them in total disregard to the appellant's legal ownership of the land? We would have expected the learned counsel for the second respondent to address us on those issues. Regrettably, we see in the arguments preferred on behalf of the second respondent, the same nonchalance and casualness that inspired the present dispute in the first place.

12.7 In our considered view, the broad issues for determination in the present appeal, taking the findings of the trial court *pro veritate*, are as follows:

(a) Was the holding by the lower court judge that the first respondents should continue to occupy the properties which had been allocated to them by the second respondent, consistent with the ownership status of the property of the title holder? In other words, what is the fate of a developer of land that is not her own where such developer genuinely believes they have ownership rights in the land, current or inchoate?

(b) Was the lower court judge right to order that compensation for loss of use of the land encroached by the first respondents be paid by the second respondent to the appellant?

(c) Can a property owner who holds title be divested of part of, or the whole of such property without their consent or acquiescence merely because there are developments put up on the property by a mistaken improver.

13. We should pose the question: were the first respondents entitled to compensation for the developments they put up on the appellant's land? This, in our view, is the prize question which the learned lower court judge ought to have addressed.

14. We are fully cognizant of the established position that where a person develops land which that person honestly believes belongs to her/him, but which in truth belongs to someone else, and such improvement is done in circumstances where that other person has not acquiesced, the developer would not normally be allowed at law to recover the cost of such improvements. (See G. Jones, *'Restitutionary claims for services rendered'* (1977) 93 LQR 273, 287).

15. It is a settled principle of law that improvements to realty become part of the realty and can never be returned, and to compel the land owner to make recompense would be unjust even if it can be demonstrated that the land owner had intended to effect similar improvements (See G Jones *op.cit*). The Roman law doctrine of *quicquid plantatur, solo solo cedit* has long been accepted as a principle of English law – and Zambian law. Its application is well-illustrated in *Ramsden v. Dyson*[25] where it was held that if a stranger builds on land which is the property of another, equity will not prevent the

real owner from afterwards claiming the land, with the benefits of all the expenditure upon it.

16. In fact, we have, in a number of cases in this jurisdiction, held that a developer of land belonging to another does so at his/her peril as he/she stands to lose the value of those improvements. In *Trevor Limpic v. Rachel Mawere & Two Others*[26], we refused to award compensation to the appellant for the improvements made to a property whose ownership was acquired by the developer through fraud. A similar conclusion was reached in the case of *Sambo & Two Others v. Paikani Mwanza*[27].

17. In the case of *Hilda Ngosi (Suing as Administrator of the estate of Washington Ngosi) v. Attorney General and Lutheran Mission (Zambia) Registered Trustees*[28] we stated as follows:

> **The undisputed evidence of the appellant was that the second respondent has since built a structure on the land. That notwithstanding, the second respondent was complicit and was to a great extent the author of its own misfortune as it participated actively in the scheme to dispossess the appellant of her land. Any developments carried out by the second respondent were obviously undertaken at the second**

respondent's own risk and cannot be compensated by the appellant.

18. We believe that the principle in those authorities applies as much to situations involving fraud as to other forms of unlawful occupation of land which could well be short of being fraudulent.

19. Turning to grounds one and two of the appeal, we note with much interest that, as quoted at paragraph 12.4 of this judgment, the lower court did make a finding of fact that the appellant had legal ownership in the property in dispute and possesses a certificate of title in respect of the said property. The court found further that the appellant lawfully acquired the said property and there was no fraud or impropriety involved in the process of acquisition of title. Despite all this, the court held that the first respondents should continue with unhindered occupation of the pieces of land irregularly allocated to them by the second respondent.

20. We must agree with the submission of counsel for the appellant that the court clearly made a moral, rather than a

legal, judgment when it ordered that the first respondents must continue to occupy the appellant's property despite the clear evidence deployed in the court that the rightful owner of the property in issue was the appellant. It is incontrovertible that a certificate of title is evidence of proprietorship of the land to which it relates.

21. Section 54 of the Lands and Deeds Registry Act, chapter 185 of the Laws of Zambia provides, so far as it is relevant, as follows:

> **Every...Certificate of Title, duly authenticated under the hand and seal of the Registrar, shall...unless the contrary is proved...be conclusive evidence that the person named in such...Certificate of Title, or in any entry thereon, as seized of or taking estate or interest in the land therein described is seized or possessed of such land for the estate or interest therein specified as from the date of such certificate...and that such certificate has been duly issued.**

22. An owner of land under a certificate of title given under the Lands and Deed Registry Act, has bestowed upon him/her a bundle of legal rights. Those rights include the right to quiet and exclusive possession, the power of control of use, enjoyment of the land and the unfettered power of disposition

of the land. The holding by the lower court judge that the first respondents could continue to occupy the appellant's land on terms which fall short of the appellant's express agreement or acquiescence, directly contradicted, if not negated altogether, the appellant's legal rights to the land in question.

23. To be clear, the lower court judgment undermined the right to possession, control, exclusion, enjoyment and disposition of the whole of the appellant's land. When viewed against a titleholder, a person in mere adverse possession, such as the first respondents were in the present appeal, are in a precarious position as far as the law is concerned. Their want of legal title, disentitles them to any remedy in a court of law to which only persons with legally recognized proprietary or possessory rights are entitled.

24. In ordering, as she did, that the first respondents should be allowed to continue to occupy the pieces of land illegally allocated to them by the second respondent, the judge clearly overreached herself. She did not explain, let alone appear to

have given any, or sufficient thought to the legal consequences of the order she made. With the greatest respect to the lower court judge, her judgment is remarkably imprecise as to what it implied on the ownership status of the land in question; it is speculative. Does it, for example, imply that the appellant's farm was to be subdivided to allow the first respondents to own the pieces of land illegally allocated to them? If so, under what terms? The ratiocination leading to that judgment is, to us, intriguing to say the least, and appears to be a sort of fraud on reason and logic.

25. We are inclined to accept the submission made by counsel for the appellant that the lower court judge may well have worn a jacket of morality, not an armour of law, for we are unable to appreciate what principle of law the learned lower court judge was applying when she, in effect, sanctioned a forced 'sale' to the first respondents of pieces of land allocated to them irregularly, with the purchase consideration being paid by the second respondent.

26. What is clear from the portion of the judgment which we have quoted at paragraphs 12.3 and 12.4 is that the lower court judge was motivated by considerations extraneous to the law. In *Attorney General v. Nawakwi*[29] we stated that courts should not be swayed by sympathy into making moral judgments. In endorsing that position, we stated in *Zambia Revenue Authority v. Post Newspapers Limited*[30] as follows:

> **We wish to add that such judgments deviate from the rule of law, the principle which endures consistency, certainty, uniformity, fairness in the delivery of justice.**

27. The appellant contended that she obtained title to the said property in or around 2004. This fact only became known to the first respondents some six years later. So, it may have, but that does not vitiate the appellant's title to the land. Section 35 of the Lands and Deeds Registry Act provides that:

> **After land has become 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 possessor or user adversely to or in derogation of the registered proprietor.**

The case of *David N. Lumanyendo and Another v. Chief Chamuka and Others*[31] confirmed this position.

28. We entertain no doubt whatsoever that the lower court's reasoning in coming to its decision was demonstrably wrong. It finds no support in law and just as little in reason.

29. Our view is that the first respondents could not, by being in adverse possession, assume any colour of right against the title holder of the land. To the extent that the order of the lower court sanctioned the first respondents' continued occupation of the appellant's property without the agreement of the appellant, merely because they developed those pieces of land, it was misconceived and thus a misdirection. Grounds one and two of the appeal are bound to succeed and we uphold them accordingly.

30. Turning to ground three of the appeal, the grievance, as we understand it, is that the lower court judge was wrong to have ordered only damages for loss of occupation of the land to be paid rather than order the outright vacation by the first respondents of the said property.

31. We have at paragraph 22 of this judgement set out the rights that an owner of land held under title has as against third

parties that may have adverse possession. There can be little doubt as to what each of those rights entails when it becomes necessary to vindicate them. In the present case, the appellant had, in the lower court, counter-claimed damages for loss of use of the property; damages for trespass; and an order for vacant possession. These claims were, in our view, consistent with the rights that attend a land owner whose rights have been violated.

32. What the lower court did, however, was to order compensation to the appellant not by the occupier of the land, being the first respondents, but by the second respondent. The court did not order vacant possession of the property. The remedy ordered did, in our view, fall short of full vindication of the appellant's rights as a titleholder. In fact, in a sense, it violated the appellant's rights to possession, control, exclusion, enjoyment and disposition. This is neither justice nor noble and it is entirely to be deprecated.

33. What is clear is that the appellant was not selling her property. She was entitled to quiet enjoyment of the whole of her farm. In this sense, the lower court's order was a fettler in her enjoyment of her ownership rights of the land. The second respondent had no business making decisions whatsoever on how the appellant dealt with her property, nor did the lower court have the power to determine how the appellant was to exercise her right of disposition of her land or parts of it.

34. The court below ordered the second respondent to compensate the appellant for the land occupied by the first respondents illegally allocated by it. As we have demonstrated, it is the occupants of the appellant's property that are legally obliged to pay damages for trespass and loss of use. These occupants may, if they are so inclined, and if they can establish a sustainable claim against the second respondent, seek indemnification from the second respondent.

35. We hold, therefore, that ground three of the appeal equally has merit and must succeed. The criticism of the judgment of the lower court is thus well-founded.

36. Taken in the round, this appeal succeeds. The appellant, as the title holder to the property in question, is entitled to quiet possession and enjoyment of the whole property. As developers of land which is not theirs, the first respondents are hereby ordered to vacate the appellant's land forthwith. The development on the land having become part of the land shall, in keeping with the law as we have explained it, now vest in the appellant landowner. We also award damages to the appellant against the first respondents for trespass and for loss of use of the said land to be assessed by the Deputy Registrar.

37. It is clear from what we have stated in this judgment that we take a very dim view of the conduct of local authorities like the second respondent which fail the public in their provision of essential services such as land allocation, backed by proper record keeping. Likewise, we do not give succor to self-

servicing meddlesome developers of land which is not theirs in the vain hope that they will acquire ownership through such development.

38. We order costs here and below against the second respondent for the reasons we have given in paragraph 1. These are to be taxed if not agreed.

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M. Malila
SUPREME COURT JUDGE

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C. Kajimanga
SUPREME COURT JUDGE

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J. K. Kabuka
SUPREME COURT JUDGE