

**IN THE HIGH COURT FOR ZAMBIA**  
**2009/HPC/0294**  
**AT THE COMMERCIAL REGISTRY**  
**HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**BETWEEN**

**KALUSHA BWALYA**

**PLAINTIFF**

**AND**

**CHARDORE PROPERTIES LIMITED**  
**DEFENDANT**

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

**IAN CHAMUNORA NYALUNGWE HARUPERI**

**2<sup>ND</sup> DEFENDANT**

**BEFORE THE HON. MR. JUSTICE NIGEL K. MUTUNA THIS 25<sup>TH</sup> DAY OF**  
**JUNE, 2012**

**FOR THE PLAINTIFF:**

**Mr. G. Chisanga of Messrs K. M. G**  
**Chisanga Advocates**

**FOR THE DEFENDANTS:**

**Mrs. A. Theotis - Cherubin of Theotis**  
**Mataka and Sampa Legal**  
**Practitioners**

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**JUDGMENT**

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Cases referred to:

- 1) Hartog-Vs-Colin and Shields (1999) 1 ALL ER page 566**
- 2) McMaster University-Vs-Wilcher Construction Limited (1972)**  
**22DLR page 9**
- 3) Fibrosa Spolka Akcyjna-Vs-Fainbairn Lawson Combe Barbour**  
**Limited (1943) AC page 153**
- 4) Gibbon-Vs-Mitchell (1990) 1 WIn page 1304**
- 5) Anderson Kambela Mazoka and Others-Vs-Levy Mwanawasa**  
**and Others SCZ/EP/01/02/03/2002**
- 6) Constantine Line -Vs-Imperial Smelting Corporation (1942) AC**  
**154 At Page 174**

## **7) Holmes-Vs-Buildwell Company Limited**

Other Authorities referred to:

- 1) Misrepresentation Act, Cap 70**
- 2) Chitty on Contracts, Volume 1, 29<sup>th</sup> edition, page 400 to 407**
- 3) Lands Act, Cap 184**
- 4) Phipson on Evidence, 14<sup>th</sup> Edition**
- 5) Lands and Deeds Registry Act, Cap 185**

The Plaintiff, Kalusha Bwalya commenced this action against the First and Second Defendants, Chardore Properties Limited and Ian Chamunora Nyalungwe Haruperi by way of writ of summons and statement claim. The Defendants' response was by way of memorandum of appearance and defence.

The facts as they are revealed in the pleading are that sometime in October, 2008 the Plaintiff approached the Second Defendant as representative of the First Defendant for purposes of borrowing money. The First Defendant agreed to lend the Plaintiff the sum of US D 26,250-00 on condition that the Plaintiff deposited the title deeds to his property stand 921 Woodlands, Lusaka (the property) with it. Upon the Second Defendant's request, the Plaintiff executed a contract of sale and deed of assignment in respect of the property.

Subsequently, the First Defendant transferred title to the property into its name alleging that the same was sold to it by the Plaintiff.

Arising from the foregoing facts, the Plaintiff's contentions as they are contained in the statement of claim are as follows. The First Defendant misrepresented to the Plaintiff that it was merely lending him the sum of US D 26,250-00 but it fraudulently transferred title to the property into its name.

This was notwithstanding an oral representation made by the Second Defendant that he would not register a charge over the property or transfer title to the First Defendant. In doing so it registered the deed of assignment signed by the Plaintiff in respect of the property which the Second Defendant had undertaken the First Defendant would not register. It was contended further that, the Second Defendant omitted to make known to the Plaintiff the First Defendant's intention to purchase the property and change ownership into its name on the basis of the documents the Plaintiff signed and deposited with the First Defendant. The Plaintiff went on to aver further that he would rely on Section 3 (1) of the **Misrepresentation Act**, Cap. 70 of the Laws of Zambia. He also averred that the First Defendant changed title to the property into its name without the Plaintiff offering his consent to assign pursuant to Section 5 (1) of the **Lands Act**, Cap 184 of the Laws of Zambia. Further that, the First Defendant paid for property transfer tax and obtained a tax clearance certificate from the Zambia Revenue Authority without the Plaintiff making a formal application. In doing so the First Defendant undervalued the property for purposes of payment of property transfer tax and obtaining consent to assign.

It was also averred that the First Defendant lodged the documents at Lands and Deeds Registry for purposes of change of title through a person who is not a Legal Practitioner, thereby contravening Section 90 of the **Lands and Deeds Registry Act**, Cap. 185 of the Laws of Zambia. Further that, the deed of assignment pursuant to which the change of title was made was not dated.

The Plaintiff alleged that the foregoing actions were fraudulent, pursuant to which he claimed the following relief:

*“ 1) Rescission of the said contract or Agreement on the ground of misrepresentation*

*or mistake with all consequential directions including an order for cancellation of the First Defendant's title and restoration of the Plaintiff's title in relation to Stand 921, Woodlands, Lusaka.*

*2) Further and alternatively, an order to set aside the said Contract or Agreement for being void on account of mistake.*

*3) Any other relief.*

*4) Costs”.*

In the Defendants' defence it was contended that the parties freely contracted and understood the terms of the agreement entered into. There was therefore, no

misrepresentation of facts and the Plaintiff had full knowledge of the actions he undertook and consequences thereof. It was contended further that it was the parties' choice that neither of them was represented by a legal practitioner.

The Defendants also contended that there was no false representation or omission or concealment of intention on the part of the Defendants. It was therefore contended, in this respect that, the Plaintiff assigned his property to the First Defendant at the price of US D 26,250-00. Further that the Plaintiff freely and conscientiously signed the agreement with the First Defendant and surrendered the title deeds to his property to the First Defendant with an option to buy back the property under clearly defined circumstances.

As regards the allegation of fraudulent misrepresentation, it was contended that the Plaintiff was at all material times fully aware of his actions and

consequences thereof. He is therefore estopped from claiming fraudulent misrepresentation. Further that, all actions taken by the Plaintiff and Defendants prior to and after the agreement was signed, were agreed upon by the parties. Therefore, the First Defendant has merely exercised its options under the agreement entered into with the Plaintiff and performed the terms of the said agreement as consented to by the Plaintiff.

Prior to the hearing and on 3<sup>rd</sup> April, 2009, this Court granted to the Plaintiff an interim order of preservation in respect of the property. The order restrained the Defendants, their servants, agents or whosoever from dealing with the property. Although the said order made provision for inter parte hearing scheduled for 8<sup>th</sup> April, 2009, there is no evidence on the record to show that the application was heard on that day.

At the trial the Plaintiff called one witness and the Defendants also called one witness. The Plaintiff's witness, PW was Kalusha Bwalya, the Plaintiff himself. He testified that in October, 2008, he approached the Second Defendant for purposes of borrowing money from him. The Second Defendant informed him that he was in a position to lend him money through the First Defendant, a company he owned and controlled.

The Plaintiff went on to testify that during the negotiations he held with the Second Defendant, the latter advised him that since the First Defendant was not a financial institution the security for the loan would not take the form of a mortgage. The Plaintiff would however, be required to surrender his title deeds to his property until he repaid the amount he borrowed. Further that, the Second Defendant also requested him to sign a contract of sale and deed of assignment as additional security. These documents he testified, the Second Defendant undertook to keep for record purposes only to be returned back to him upon repayment of the loan.

On the basis of the foregoing, the Plaintiff's understanding was that what he was entering into was a loan transaction and as such he did as he was requested by the Second Defendant, following which the First Defendant advanced him the loan. The Plaintiff's understanding was that the Second Defendant would give him back the title deeds to his property after he repaid the loan. Further that, in the event of delay in settling the loan he would pay a minimum of US D 32,800-00 to the Second Defendant. This, he testified, is as evidenced by Clause 16 of the contract of sale. He also testified, that he had not been accorded the opportunity to seek independent legal advice by the Defendant.

The Plaintiff went on to testify that on or about 24<sup>th</sup> February, 2008 he went to see the Second Defendant for purposes of repaying the loan. To his shock he discovered that the First Defendant had assigned the property to itself and was in the process of assigning it to the Second Defendant. He also testified that the said transfer of the property by the First Defendant to itself was in disregard of the laid down procedure. Further, that he informed the Second Defendant that he intended to seek legal redress on the grounds that: the manner in which the Second Defendant granted the loan to him was articulated by dishonesty misrepresentation and concealment of the real intention; and the manner in which the Second Defendant transferred the property to itself was articulated by fraudulent and dishonest conduct. He ended his testimony by urging the court to note that the documents on record demonstrate that the value of the property is far in excess of the loan advanced to him. This he stated was evident from the minimum buy back price agreed by the parties.

In cross examination, the Plaintiff testified that he was a very famous footballer who played for both local and international clubs. He went on to

confirm that he played football for five international clubs where he signed contracts with them and that he did not have legal representation when he signed the said contracts. As such, this was not the first time he signed a legal document. He also confirmed that indeed he did sign the contract of sale and deed of assignment and that he recognised the two documents. However, he denied signing the acknowledgement for the funds which indicated that he was selling the property. It was his testimony, in this respect that, what he signed was a blank piece of paper which did not have any writing on it.

In re-examination, the Plaintiff testified that the transaction he entered into with the Second Defendant was for purposes of the latter lending him money. He testified that the documents he signed were for purposes of his providing to the Second Defendant his property as security for the loan. Further that, he merely signed on a blank piece of paper which the Second Defendant typed on purporting that he was selling his property.

The Plaintiff proceeded to close his case.

DW was Ian Chamunora Nyalungwe Haruperi, the Second Defendant. His testimony was that in October, 2008 the Plaintiff approached the First Defendant and offered to sell his property. After negotiations, it was agreed that the property would be sold to the First Defendant for the sum of US D 26,250-00. Following from this, a contract of sale and deed of assignment were duly executed by the parties which appear at pages 1 to 5 and 15 to 18, respectively of the Defendants' bundle of documents.

DW went on to testify that it was a term of the contract that should the First Defendant decide to resell the property, the Plaintiff would be given the first

right of refusal to purchase the property at a minimum purchase price of US D 32,800-00. This he stated is as per special conditions 15 and 16 of the contract of sale which appear at page 5 of the Defendants' bundle of documents. He went on to testify that, the parties agreed that the purchase price would be paid in full simultaneously upon the Plaintiff yielding vacant possession and surrendering the title deeds of the property to the First Defendant. Further that, the First Defendant would bear the responsibility and cost of obtaining states consent to assign and the property transfer tax. This he testified is as per special conditions 8, 9, 10, 14 and 15 of the contract of sale appearing at page 5 of the Defendants' bundle of documents. He went on to testify that the Plaintiff having read the contract of sale and appended his initials on every page was aware of all the accompanying terms as they were clearly stated in the contract.

DW went on to testify that after the contracts were signed, he deposited a total of US D 25,000-00 into the Plaintiff's bank account on the 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> October, 2008. This he stated is as evidenced by bank deposit and funds transfer slips at page 6 of the Defendants' bundle of documents and page 1 of the Defendants' supplementary bundle of documents. Further that, he made these deposits for and on on behalf of the First Defendant. He also testified that the balance of US D 1,250-00 was paid to the Plaintiff in cash.

DW's testimony went on to indicate that the Plaintiff acknowledged receipt of the purchase price by signing the acknowledgment of receipt at page 7 of the Defendants' bundle of documents. Following from this the First Defendant as intending purchaser, lodged a caveat on the property at the Lands and Deeds Registry as is evidenced by document at page 27 of the Defendants' bundle of documents. Subsequently the First Defendant applied for the necessary states consent to assign, which the Commissioner of Lands



granted as is evidenced by documents at page 26 of the Defendants' bundle of documents. He testified in this respect that, the First Defendant was able to apply for the states consent to assign because the Plaintiff had availed it the certificate of title to the property and a copy of his passport, in accordance with special condition number 14 of the contract of sale. Following from this and after all the formalities had been concluded, he testified that the Defendants' registered the assignment duly executed by the Plaintiff at the Lands and Deeds Registry. Once the assignment was registered a certificate of title was duly issued in the name of the First Defendant. This is as is evidenced by the certificate of title at pages 14 to 21 of the Defendants' bundle of documents. However, despite the conclusion of all the formalities, and contrary to special condition number 1 of the contract of sale, the Plaintiff did not yield up vacant possession of the property to the First Defendant.

DW went on to testify that in February 2009, the First Defendant being a real estate company decided to sell the property in issue. It therefore, invited the Plaintiff to exercise his right to indicate whether or not he wished to purchase the property. This was in accordance with special condition 15 of the contract of sale and the offer to the Plaintiff was made by way of letter dated 9<sup>th</sup> February, 2009, which is at page 29 of the Defendants' bundle of documents. In response to the said offer, the Plaintiff on 25<sup>th</sup> February, 2009 placed an encumbrance on the property with the Lands and Deeds Registry. This is as is evidenced by document at page 28 of the Defendants' bundle of documents and it was notwithstanding the fact that the Plaintiff had still not yielded up vacant possession of the property. Further, the Plaintiff served the Defendants with a writ of summons and statement of claim issued by the court pursuant to this action. Following this, the First Defendant through its lawyers gave notice to and informed the tenants in the property to vacate the property within one month from the date of receipt of the notice. This is

as per notice appearing at page 2 of the Defendants' supplementary bundle of documents. Arising from this, DW testified, the Plaintiff applied for and was granted an interim order of preservation of property.

As a consequence of the foregoing DW testified that, the First Defendant as registered proprietor of the property has not been able to exercise its rights over the property.

In cross-examination DW began by stating that the First Defendant is engaged in the purchase, sale and lease of property. Further that, it is not engaged in lending money nor is it registered as a money lender. He went on to restate that the Plaintiff approached him in October, 2008 and offered to sell his property at the price of US D 26,250-00. In so doing he restated that the transaction was not a loan transaction and the money paid to the Plaintiff was not meant to be paid back. He however conceded that the contract of sale as appears at pages 1 to 5 of the Defendant's bundle of documents is not dated.

As regards the provision in the contract granting the Plaintiff first right of refusal, DW confirmed that it was agreed that in the event that the First Defendant decided to sale the property it would offer it to the Plaintiff first. This he testified was at the price of US D 32,800-00 and that the Plaintiff was indeed given an offer to purchase the property.

On the issue of registration of the deed of assignment at the Lands and Deeds Registry, DW testified that he used a lawyer by the name of Cuthbert Tembo. He however conceded that the deed of assignment indicated that it was lodged by the First

Defendant. He also conceded that the tax clearance certificate in respect of the sale of the property and the consent to assign are dated later than the date of issuance of certificate of title. He clarified further that, he paid the funds for property transfer tax to his lawyer who in turn paid them to Zambia Revenue Authority.

DW went on to confirm that it was he who typed out the contract of sale and the acknowledgement of funds signed by the Plaintiff. This he testified, was done in the presence of the Plaintiff, and that the Plaintiff actually signed the acknowledgment for the funds but that there was no one present as a witness.

In re-examination he testified that he and the Plaintiff agreed on the purchase price of US D 26,250-00. He also restated that the transaction was not a loan transaction.

The Defendants proceeded to close their case.

At the close of the hearing I directed the parties to file submissions twenty one days apart. The parties did not file submissions. This fact notwithstanding, I considered the skeleton arguments filed by the parties pursuant to the order for directions issued out in this matter. The Plaintiff's skeleton arguments were filed on 7<sup>th</sup> February, 2011, while the Defendants' skeleton arguments were filed on 22<sup>nd</sup> October, 2010.

In the Plaintiff's skeleton arguments Counsel for the Plaintiff Mr. G. Chisanga began recounting the facts of the case with special emphasis on the fact that the first Defendant is not a registered money lender and that there was no demand made to the Plaintiff for payment of the money's lent out. He went on to argue that under section 2 and 3(1) of the ***misrepresentation Act***, a

party who enters into a contract as a result of misrepresentation of another is entitled to statutory reliefs which include damages and recession even after a contract has been perform. Further that, a party who enter into a contract in consequence of a unilateral mistake is allowed to avoid such a contract on realizing the real intention of the other party. My attention in this respect was drawn to the cases of **Hartog-Vs-Colin(1)** and **Shield and Mc Master University -Vs-Wilcher Construction Limited(2)** and the text **Chitty on Contracts, Volume 1, 29<sup>th</sup> edition**.

Counsel went on to articulate the law articulate the law on unjust enrichment and argued that a party is allowed to recover where he was made to transfer property under mistake. My attention in this respect was drawn to the cases of **Tibroze Spolka Akcyjna-Vs-Fairbairn** and **Gibbon-Vs-Mitchell(4)**.

Counsel ended by submitting that the conduct of the first Defendant was attended by a combination of misrepresentation, dishonesty and fraud.

In the Defendants' skeleton arguments counsel for the Defendants Mrs. Theotis Cherubin began by highlighting the test necessary to prove that there was an agreement between the parties and what constitutes an offer and acceptance. This was with reference to **Chitty on Contracts**. She argued that these ingredients were present in the transaction between the parties to this action, and as such there was a valid contract. Counsel went on to argue that the burden of proof lies on the Plaintiff and that the evidence led fell for short of the required standard to prove this case. My attention in this respect was drawn to the text **Phipson on Evidence**, 14<sup>th</sup> edition, and the cases of **Constantine Line-Vs-Imperial Smelting Corporation(5)** and **Mazoka & Others -Vs-Mwanawasa & Others(6)**. She concluded by arguing that there was an express agreement between the parties for the sale of the property.

I have considered the pleading filed by the parties, the evidence and the submissions.

From the facts of this case as highlighted by the evidence and pleading, the following facts are not in dispute: that the Defendants gave the Plaintiff the sum of US D 26,250-00; that the Plaintiff deposited his title deeds with the Defendants; and he executed a contract of sale and deed of assignment. What is in dispute are the following issues that is to say: whether or not the transaction was a sale transaction; whether or not the Plaintiff signed the acknowledgement of the funds as being in respect of the sale of the property; and whether or not there was misrepresentation on the part of the Second Defendant as to the nature of the transaction the parties were entering into.

In determining the foregoing issues and indeed this matter, I am obliged as a court to have recourse to the documents signed by the parties. My finding is based on the principle laid down in the parole evidence rule as stated in the case of ***Holmes Limited Vs. Buildwell Construction Company Limited (7)*** which states as follows:

***“Where the parties have embodied the terms of the contract in a written document, extrinsic evidence is not generally admissible to add to, vary, subtract from or contradict the terms of the written contract.”***

I have already stated that the parties are in agreement that they executed a contract of sale and deed of assignment. These documents are at pages 1 to 5 and 6 to 9 respectively of the Plaintiff’s bundle of documents. By the former document at page 3 it is stipulated that:

*“WHEREBY IT IS AGREED that the vendors will sell and the purchaser will purchase the properties referred to in the accompanying particulars •••”*

While the latter states at page 7 states as follows:

*“AND WHEREAS the vendor has agreed to sell the said hereditament to the purchasers for all the residue now unexpired of the term created by the said Lease subject as hereinafter mentioned but otherwise free from encumbrances at the price of United States Dollars Twenty Six Thousand Two Hundred and Fifty (US D 26,250-00).”*

I find that these clauses clearly spell out the intention of the parties which is that the Plaintiff would sell and the First Defendant would purchase the property. The evidence and argument by the Plaintiff that the intentions of the parties prior to executing the documents was to enter into a loan agreement is untenable and I dismiss it. This is not only because it is parole evidence which is inadmissible in this form as the **Holmes Limited** (7) case I have cited above indicates, but also because having subsequently reduced their intention to writing, all other preliminary negotiations are nullified. This is as per the said case **Holmes Limited** (7) which states at page 98 as follows:

***“Any discussion of verbal conditions before the written agreement was completely superceded by the written document.”***

My finding is fortified by the acknowledgment that the Plaintiff signed which appears at page 7 of the Defendant's bundle of documents. By the said acknowledgement the Plaintiff clearly acknowledges receipt of the sum of US D 26,250-00 as being the purchase price for his property. In the last paragraph of the said acknowledgement he states further that he signed "*••• without duress, undue influence or misrepresentation on the part of •••*" the First Defendant. This statement clearly negates the claim for misrepresentation and fraud made by the Plaintiff.

I also do not accept the Plaintiff's evidence that he did not sign the acknowledgement in the form it appears at page 7 but rather on a blank piece of paper. The reason for this is that, if the Plaintiff is indeed objecting to the contents of the said document he should have done so at the stage of inspection of documents. He cannot object to a document at trial stage as he seeks to do now. Further, if he indeed did sign on a blank piece of paper as he alleges, he ought to have known and is taken to have known the natural and probable consequences of such a callous act and therefore has himself to blame for any adverse consequences to his rights.

In arriving at the foregoing finding I have also considered the fact that the certificate of title is dated later in time than the consent to assign and tax clearance certificate. Further that, the deed of assignment appears to have been registered by the First Defendant and not a legal practitioner. The contention by the Plaintiff in this respect is that the sale transaction was not properly concluded. This may well be so, but it does not in any way render the contract of sale by which the Plaintiff sold the property to the First Defendant, a nullity. The contract, in my considered view, is valid and enforceable as it was executed by the Plaintiff and First Defendant.

Having found that the parties are bound by the contents of the documents they signed, there is no merit in the Plaintiffs claim as endorsed in the writ of summons for recession of the contract and agreement. Further, in the light of the provision of Section 34(1) of **the Lands and Deeds Registry Act** and the copy of the Registrar's register on the property at pages 28 to 29 of the Defendant's bundle, there is no merit in the claim for cancellation of the title deeds. The said section states inter alia as follows:

***“34(1) No action for possession, or other action for the recovery of any land, shall lie or be sustained against the Registered Proprietor holding a Certificate or Title for the estate or interest in respect to which he is registered, except in any of the following cases, that is to say:***

- (a) the case of a mortgage as against a mortgagor in default;***
- (b) the case of the President as against the holder of a State Lease in default***
- (c) the case of person deprived of any land by fraud, as against the person registered as proprietor of such land through fraud, or against a person deriving otherwise than as a transferee bonafide for value from or through a person so registered through fraud:***
- (d) the case of a person deprived of or claiming any land included in any Certificate of title of other land by misdescription of such other land, not being a transferee, or deriving from or transferee, thereof bonafide for value:***
- (e) the case of a registered Proprietor claiming under a Certificate of title prior in date in any case in which two or more Certificates of Title have been issued under the provisions of Parts III to VII in respect to the same land.”***



***(2) In any case other than as aforesaid, the production of the Registrar or of a copy of an extract therefrom, certified under the hand and seal of the Registrar, shall be held in every court of Law or equity to be an absolute bar and estoppels to any such action against the Registered Proprietor of land the subject of such action, and in respect of which a Certificate of Title has been issued, any rule of law or equity to the contrary notwithstanding."***

The Plaintiff has failed to prove allegation of fraud, therefore, he can not invoke the provisions of Section 34 specifically subsection ( 2). He is also barred by virtue of the said section from taking out an action against the First Defendant as registered proprietor of the property as evidenced by the Registrar's register on the property I have referred to above. This action is therefore misconceived.

In view of my findings in the preceding paragraphs I find that the Plaintiff claim lacks merit and I accordingly dismiss it with costs. The same are to be agreed in default taxed. I also order that the interim order of preservation of property granted herein be and is hereby discharged.

Leave to appeal is granted.

**DELIVERED** this 25<sup>th</sup> day of June 2012

**NIGEL K. MUTUNA  
HIGH COURT JUDGE**

