

**IN THE HIGH COURT FOR ZAMBIA**  
**AT THE KITWE DISTRICT REGISTRY**

**2010/HK/198**

(Civil Jurisdiction)

**BETWEEN:**

SUZEN MWELA NKUNDE (Female Sole) PLAINTIFF

AND

CETZAM FINANCIAL SERVICES LIMITED DEFENDANT

Before the Honourable Mrs. Justice R.M.C. Kaoma in Open Court  
this 27<sup>th</sup> September, 2013

For the Plaintiff: Mr. R. Mandona- Chilupe and Permanent  
Chambers

For the Defendant: No Appearance

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**JUDGMENT**

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**Case referred to:**

1. Collins v Jones (1955) 2 ALL.E.R 145

**Works referred to:**

2. Halsbury's Laws of England, Fourth Edition Volume 28  
paras 172, 175, 176 and 177
3. Street on Torts, 12<sup>th</sup> Edition John Murphy, Oxford  
University Press, New York, 2007
4. Supreme Court Practice 1999, para18/12/12

The plaintiff commenced this action by writ of summons and statement of claim on 11<sup>th</sup> May, 2010. She seeks, inter alia: (1) the sum of K600,000 (now K600) being the balance of the amount due by the defendant for a consideration which has wholly failed; (2) damages for libel by innuendo contained on page 12 'Sangwapo' of the Post Newspaper dated 13<sup>th</sup> February, 2010 and for fraudulent use of her title deeds relating to House No. 417 Kwacha East, Kitwe; (3) an order directing the defendant to surrender to her the title deed relating to the said house.

In the defence filed on 26<sup>th</sup> May, 2010 the defendant denies the plaintiff's claims. In her reply the plaintiff joins issue with the defendant in its defence in so far as the same consists of admissions. At the trial the plaintiff gave evidence and called two other witnesses. The defendant's counsel did not appear, so no witnesses were called for the defence.

The plaintiff testified that she is a tailor. She operates from Chisokone market. She has been operating from there for nine years. She came to know the defendant in 2009 when a lady by the name of Charity went to her shop looking for clients. Charity told her that she came from the defendant, a lending institution which was giving out money to people who could constitute a group. She told Charity that she was interested in a loan as an individual as she did not want a group loan. Charity told her that she would introduce her to a man who was tasked to give loans to individuals as she was dealing only with group loans. Later Charity introduced her to the man at their office.

The man told her that she first needed to purchase a form for K10,000.

After buying the form she was told that she had to provide a bank statement, title deeds for a house, a water bill and a guarantor and since she wanted a loan of K5,000,000 she had to pay 20% of the loan amount as security which amounted to K1,000,000. Later when Charity went to see her, she (plaintiff) told her that she did not want the loan to take long because she was diabetic and did not want to move up and down to pursue the matter. Charity took the form, the K1,000,000 and the title deed and assured her that she would do everything for her. The plaintiff also provided a letter from the guarantor, Moses Mwila and a letter of recommendation from ZANAMA, an organisation for marketeers which was helping women in the market and of which the plaintiff was a member.

She testified that the loan was not processed. She phoned Charity to inquire why the loan was taking long. Charity assured her that everything would be okay. The second time Charity went to see her, she demanded for refund of the 20% security and return of her title deed because the defendant had failed to give her the loan. Charity refunded her K400,000 and assured her that she would take the balance and the documents later.

She was later approached by ZANAMA officials who wanted to know if the loan had been processed. She answered in the negative. She was advised to go to their office because they had heard what had happened. She did so. She found ZANAMA officials with three representatives of the defendant. The

ZANAMA officials told her that there were other complaints like hers and that the defendant's officials were there to find out.

During the discussion the defendant's officials said they had heard her story and advised her to go to their offices, so that they could process the loan. She did so and saw Constance who told her that she would go to her shop to assess the business, but she never did. She was forced to go back to the defendant's offices. This time she met a lady by the name of Chilekwa. She explained to her what they had discussed at the ZANAMA office. Chilekwa told her that she had understood her explanation and then asked her if she had surrendered her title deed and if it had a red ribbon. She answered in the affirmative. Chilekwa then gave her a telephone number and told her that she would go to the shop to assess her business. She said she started dealing with Chilekwa at the beginning of 2011. During all that time she did not discuss the issue with any of the senior managers of the defendant until Chilekwa also failed to go and assess her business.

She spoke to the manager, and told her that the loan officer had failed to assess her business. The manager called Chilekwa who told her to go back the following day, but kept on postponing until she told her that she was fed up and wanted her balance and documents. She also told the manager that the loan officer did not process the loan, so she was withdrawing the application and wanted the balance of K600,000 and all her documents. She did not get the money or the documents as they asked her for a receipt on which she had paid the money.

She told them that she was not given a receipt. She gave the house number on the title deed to the manager, so that she could locate it.

The manager asked for her phone number and said that she would contact her. The manager called her after 14:00 hours. She went to the office. The manager asked if she had lent someone her title deed. She refused as she made the application and surrendered the title deed to them herself. The manager informed her that someone had borrowed K10,000,000 using her title deed and that the person had failed to pay back the loan, so they were about to sell the house. At that point the manager called Chilekwa and asked her if she knew where one Barnabas Ng'andwe was staying or working. The manager also asked her to accompany her to find Barnabas. On their way the manager told her that if they find Barnabas she should tell him that she would take him to court for using her title deed without her permission. However, they did not find him, so she was asked to go back the following day.

The next day she was introduced to Barnabas Ng'andwe as the owner of the title deed. She said Barnabas was not a person known to her; it was her first time to see him. He explained that he was told by Vincent that there was a lady who wanted her title deed to be used to obtain a loan and that in return the lady wanted K1,000,000. The manager asked Barnabas if he gave the plaintiff the K1,000,000. He responded in the negative. The plaintiff also asked Barnabas if he knew her. He said he did not. She asked him how he could use property that belonged to someone else he did not even know. He kept quiet. She said as they were discussing the issue of the loan, she received information that someone had been to her house to view it.

She discovered that the person wanted to buy the house. The said person said the defendant had advertised the house for sale. She lodged a caveat at the council and instructed her lawyers to write a letter to demand for her title deed. She said she did not authorise anyone to use her title deed to obtain a loan of K10,000,000; the defendant did not get her authority to process the loan on her title deed; and no one from the defendant informed her. The title deed was later returned to her in March, 2013. She said the advertisement for sale of the house caused her embarrassment because it portrayed that she had failed to pay for the loan when in fact not.

PW2 is Moses Mwila. He testified that the plaintiff approached him in 2009 to stand as guarantor for a loan she wanted to obtain from the defendant. She asked him to write a letter of guarantee. He wrote the letter on 14<sup>th</sup> February, 2009. He also saw the loan application form and signed on it as the guarantor. He said the plaintiff used to update him on what was happening, so he knew that she never got the loan.

PW3 is the plaintiff's brother, George Bwalya Nkunde. He said he was aware that the plaintiff had applied for a loan from the defendant because she told him that she wanted to apply for the loan to boost her business. He said the plaintiff kept updating him on the progress of the loan application. To his knowledge the loan was never obtained. He recalled that on Thursday, 11<sup>th</sup> February, 2010 he was tending to his nursery at the backyard of the house in issue, when he heard a knock at

the gate. He found a man who introduced himself as Newsted Mwanza.

The man said he had gone to inspect the house as it was up for sale by the defendant. The man produced a newspaper cutting from the Post Newspaper (page 1 of plaintiff's Bundle) which at caption six showed Plot No. 417 Kwacha Township. The man said it was actually the defendant that gave him directions to the house. When Mr Mwanza left PW3 felt very uncomfortable, so he went to the defendant's offices and asked to see the manager. He was told that the manager was out. He was asked why he needed to see her. He explained that they advertised the house he was occupying without his knowledge. The assistant manager called him to his office. He asked why they advertised the house he was living in. He was told that they had already resolved that issue. PW3 said the house was a family house bequeathed to them by their late father; he lived there with his sisters, so the house does not belong solely to the plaintiff.

At the close of the plaintiff's evidence, due to the defendant's unexplained absence, I deemed that it did not intend to adduce any evidence in defence; hence I would proceed to render judgment on the evidence adduced by the plaintiff. I have not received any submissions from counsel on both sides.

The main facts are not in dispute. I find that the plaintiff was approached at Chisokone market and advised by an employee of the defendant to obtain a loan in order to boost her business as a tailor. I find that about February or March, 2009 the



plaintiff and defendant entered into an agreement in which the plaintiff agreed to borrow from the defendant the sum of K5,000,000 to finance the purchase of raw materials for her business.

I find that in order to secure the loan, the plaintiff provided two letters of recommendation as to her reputation, a sum of K1,000,000 and her title deed. Although she fulfilled the requirements, the defendant failed to honour its obligation to give her the agreed loan. However, the defendant allowed Barnabas Ng'andwe a person not known to the plaintiff to obtain a loan of K10,000,000 on her title deed and later advertised the plaintiff's house in the Post Newspaper of 13<sup>th</sup> February, 2010 on account that the loan had not been redeemed. I accept that the plaintiff was one of the beneficial owners of the house in question.

I take into account the fact that the defendant has since returned to the plaintiff the title deed which in fact is in her father's name. Therefore, the plaintiff's claim for an order directing the defendant to surrender the title deed relating to the house in issue falls away, but the other issues still remain to be resolved. I shall proceed to decide whether the plaintiff is entitled: to the sum K600,000 being the balance of the amount due to her for a consideration which has wholly failed; to damages for libel by innuendo contained on page 12 'Sangwapo' of the Post Newspaper dated 13<sup>th</sup> February, 2010; and to damages for fraudulent use of her title deed relating to the house in issue.

With regard to the sum K600,000 it is not disputed that of the K1,000,000 that the plaintiff paid to the defendant as security for the loan, only the sum of K400,000 was refunded by Charity who also assured her that she would take the balance and the documents later, but never did.

I am satisfied that the consideration for which the security was paid has wholly failed. Therefore, I find and hold that the defendant has no justification to hold onto the plaintiff's money. Accordingly I enter judgment for the plaintiff for the balance of K600,000 (now K600.00) with interest at the average of the bank deposit rate per annum from date of writ to date of judgment and thereafter at the current bank lending rate as determined by the Bank of Zambia until fully paid.

I come to the publication in the Post Newspaper of Saturday, 13<sup>th</sup> February, 2010. In an action for defamation, the actual words complained of, and not merely their substance, must be set out verbatim in the statement of claim. A libel action cannot be brought in respect of a document the contents of which the plaintiff is unaware [**Halsbury's Laws of England, Fourth Edition Volume 28 para 172** and **Collins v Jones (1)**].

It is also trite that a communication is defamatory if it tends to harm the reputation of another so as to lower him, her or it in the estimation of the community or deter third persons from associating or dealing with them. Sometimes a communication can be defamatory and actionable even though by their natural and ordinary meaning the words used are not defamatory in themselves. In these cases it is the extrinsic facts and circumstances that attend to their publication that lend defamatory import to the words in question [**Halsbury's Laws of England (supra) paras. 175 and 176**].

By necessary implication, the extrinsic facts will not be generally known. These extrinsic facts are facts known only to a subset of the general population and, often a small one. Thus a plaintiff who pleads a legal innuendo must supplement the references to the impugned words with a detailed account, in the statement of claim, of the extrinsic facts that lend the words their “extended” meaning, and identify as best he can those readers or hearers who knew the special or extrinsic facts or matters on which he relies to support the innuendo.

However, such proof need only establish that there are persons, aware of the extrinsic facts, who could have understood the impugned words in the defamatory sense that they acquire through association with those extrinsic facts. It is generally not necessary to prove that any person actually understood them in that sense [**Halsbury’s Laws of England (supra) para 177**].

Moreover, the judge decides whether a statement is *capable* of bearing a defamatory meaning, whether in its normal meaning or by innuendo. In order to fulfil this task, the judge must construe the particular words used to determine whether they are capable of bearing a defamatory meaning. Only once he decides that they may bear such a meaning does the judge (or jury as the case may be), then decide whether in fact they were defamatory [**Street on Torts, 12<sup>th</sup> Edition John Murphy, Oxford University Press, New York, 2007**].

In this case the issue then is: did the words of the advertisement for sale of the house carry any meaning defamatory of the plaintiff by innuendo? If so was that meaning sufficiently serious to be defamatory? I can safely say that the defendant has not disputed that it advertised the house in issue for sale.

As I see it the house was advertised not because the plaintiff failed to pay back a loan, as no loan was disbursed to her, but because someone else who got a loan using her title deed, without her knowledge and authority failed to settle the loan. The plaintiff was alerted to this fact by the manager after she continued to ask for reimbursement of the K600,000 and return of her documents. She was also informed that someone went to view the house in her absence. The man spoke with PW3, her brother who is also a beneficial owner of the said house together with his other sisters. It was the said man that produced to PW3 a newspaper cutting containing the advertisement.

As I understand it, in proving the contents of a document the original of the writing is the best evidence of its contents and must, therefore, be introduced. When an admissible writing has been lost or destroyed or cannot be produced, the contents may be proven by an authenticated copy or by the testimony of a witness who has seen or can remember the writing. I have applied my mind to the fact that an unauthenticated photocopy of the newspaper cutting has been produced making it

secondary evidence. The plaintiff has not explained why an original copy of the newspaper advertisement or cutting has not been produced.

In my view she could have proved her case by subpoenaing the publisher of the newspaper to produce it, but she did not. There is some writing in ink on the photocopy which reads "**The Post Page 13 - 13/02/2009**". I am not certain as to who made the writing or when actually the advertisement came out. I think that no weight should be attached to this document.

In my judgment while I accept that the defendant was not entitled to advertise the house to the public for sale on account of someone else's failure to settle the alleged loan of K10,000,000, the actual words complained of are not set out in the statement of claim, there is no authenticated copy of the publication, and the plaintiff has not supplemented the references to the impugned words with a detailed account of the extrinsic facts that lend the words their "extended" meaning, to establish that there are persons, aware of the extrinsic facts, who could have understood the words in the defamatory sense.

The plaintiff's plea in para 11 of the statement of claim is that by advertising her property in the manner that the defendant did, she was portrayed to the public as a person who is incapable to pay her debts and that as a consequence her reputation and character was injured in the eyes of the public particularly those known to her as the owner of the said

property and a businesswoman. For me the words pleaded are merely the substance and not the actual words used. The defence is that the plaintiff has misrepresented the facts.

However, in the absence of the actual words complained of, I cannot construe the particular words used to determine whether they are capable of bearing a defamatory meaning. Therefore, I hold that the plaintiff has failed to establish that the said publication referred to her especially that she was not the sole beneficial owner of the house. I decline to hold that the publication amounted to libel based on innuendo. Accordingly the claim for defamation fails.

I turn now to the claim for damages for fraudulent use of the title deed. Clearly the plaintiff made a follow-up with the defendant when the loan was not processed. There was a meeting at the ZANAMA office with three representatives of the defendant who advised her to go to their office so that they could process the loan, but nothing was done. Meantime the defendant allowed Barnabas Ng'andwe, a person not known to the plaintiff to obtain a loan on her title deed which was in their custody without alerting her or confirming that arrangement with her. Admittedly Barnabas did not know the plaintiff or give her the K1,000,000 which it was alleged she wanted for use of the title deed.

I find the defendant's behavior to be tainted by fraud, very alarming, and totally unaccepted especially that the plaintiff was approached in the first place by a servant of the defendant to ask for the loan. Suffice to add that the plaintiff was only a humble tailor and unsuspecting member of the public who saw



a chance of a life time to improve her business, only to be duped and caused unwarranted inconvenience and distress.

The defendant cannot be heard to say that it was not aware of the fraudulent activities of its loan officers. I am satisfied that the plaintiff is entitled to general damages for the fraudulent use of her title deed. The guiding principle is that general damages are within the discretion of the court and are awarded to put the plaintiff in the position before the wrong, and the award of general damages for the inconveniences suffered by a plaintiff is usually justified.

The fraudulent acts of the defendant in this case would have entitled the plaintiff to an award of aggravated damages, but the position of the law is that these must be specifically pleaded together with the facts relied on [**para18/12/12, Supreme Court Practice 1999**]. In the premises I award the plaintiff damages in the sum of K15,000,000 (now K15,000.00) with interest at the average of the bank deposit rate per annum from date of writ to date of judgment and thereafter at the current bank lending rate as determined by the Bank of Zambia from time to time until fully paid. Costs are for the plaintiff to be taxed if not agreed.

Delivered in Open Court this 27<sup>th</sup> day of September, 2013

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**R.M.C. Kaoma**

**JUDGE**