

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA

2013/HP/1713

(Civil Jurisdiction)

IN THE MATTER OF : **THE PROPERTY KNOWN AS FARM NUMBER
2303/T IBEX HILL AREA, IN THE CITY AND
PROVINCE OF LUSAKA IN THE REPUBLIC
OF ZAMBIA**

AND

IN THE MATTER OF : **AN APPLICATION FOR A VESTING ORDER
PURSUANT TO SECTION 14 OF THE HIGH
COURT ACT CHAPTER 27 OF THE LAWS OF
ZAMBIA**

BETWEEN:

EVERLIGHTER SONENI NDHLOVU

APPLICANT

**(Suing in her capacity as Administratrix
of the estate of the late
Christopher Siwila Ndhlovu)**

AND

MOFFAT RICKY TUMBILA

RESPONDENT

**Before the Hon. Mrs. Justice A. M. Sitali on the 6th day of January,
2014**

***For the Applicant* :** ***Mr. H. H. Ndhlovu, SC of
Messrs H. H. Ndhlovu and Company***

For the Respondent* :** ***No Appearance

J U D G M E N T

Case referred to:

1. Galaunia Farms Limited v. National Milling Company Limited and Another (2004) ZR 1

The Applicant commenced the action herein by way of originating summons seeking the following reliefs: 1) an order that the Applicant is entitled to a vesting order relating to the property known as Farm Number 2303/T Lusaka; 2) an order that the Deputy Registrar of the High Court shall execute a deed of assignment for and on behalf of Moffat Ricky Tumbila the seller of the property to the Applicant herein in favour of the aforementioned Everlighter Soneni Ndhlovu; 3) an order that the Registrar of Lands and Deeds shall effect transfer of ownership of the property to Everlighter Soneni Ndhlovu the Applicant herein as stated in the affidavit in support filed herewith and shall issue a certificate of title in the name of Everlighter Soneni Ndhlovu; 4) any further or other relief the court may deem fit; and 5) Costs.

The originating summons is supported by an affidavit deposed to by Everlighter Soneni Ndhlovu the Applicant. In the affidavit in support the Applicant deposed that she was duly appointed as administratrix of the estate of the late Christopher Siwila Ndhlovu as evidenced by the letters of administration issued by the High Court marked "ESN1". The Applicant went on to depose that sometime in 1985, the Applicant entered into a contract of sale with Moffat Ricky Tumbila for the property known as Farm number 2303/T, Ibex Hill, Lusaka and that the agreed purchase price was ten thousand Kwacha (K10,000.00) only which money was fully paid to the Respondent Moffat Ricky Tumbila and that after the full payment of the purchase price was made, the Respondent surrendered to the Applicant the original certificate of title for Farm number 2303/T Ibex Hill, Lusaka.

The Applicant further deposed that her late husband Christopher Siwila Ndhlovu lost the original certificate of title and on 20th January 1986, he executed a statutory declaration indicating that the original certificate of title which had been in his custody was lost and could not be located. A copy of the statutory declaration to that effect is exhibited marked "ESN2". She further deposed that on 4th February, 1986 and again on 10th March, 1986 her husband through his advocates then caused to be published an advertisement in the government gazette advising the general public of his intention to obtain a duplicate certificate of title. The Applicant exhibited a copy of the newspaper cutting of the advertisement and the government gazette, respectively jointly marked "ESN3".

She further deposed that on 9th June 1986, her late husband lodged diagrams for Farm No. 2303/T with the Ministry of Lands as shown by exhibit "ESN4" and that since no objection was lodged at the Ministry of Lands against the issuance of a duplicate copy of the certificate of title on the subject property, a duplicate of the certificate of title was issued by the Ministry of Lands to the late Christopher Siwila Ndhlovu on 20th March 1986 as evidenced by a copy of the lands register computer printout marked "ESN5".

The Applicant further stated that on 24th November, 1986, the late Christopher Siwila Ndhlovu registered a caveat against the property as intending purchaser and the said caveat is still registered against the property to this day. A copy of the caveat is exhibited marked "ESN6". The Applicant went on to state that after the death of her late husband Christopher Siwila Ndhlovu she looked for the Certificate of title for Farm No. 2303/T Lusaka but has failed to locate it and that she has also failed to locate the family of Moffat Rick Tumbila as their whereabouts are unknown.

The Applicant further stated that she has been unable to obtain the certificate of title for the subject property from the Ministry of Lands in her name because of the Respondent's disappearance as he did not, as vendor, obtain state consent to assign the property or execute an assignment to transfer the said property to Christopher Siwila Ndhlovu as required by law and that all efforts to trace the said vendor Moffat Ricky Tumbila have proved futile as she does not have his contact number or address nor was she introduced to any of his relatives.

The Applicant went on to depose that she sued the respondent herein under cause number 2013/HP/1344 for specific performance of the contract executed between Moffat Ricky Tumbila and Christopher Siwila Ndhlovu and judgment was granted in her favour. A copy of the said judgment is exhibited marked "ESN7". The Applicant stated that she has been advised to obtain a vesting order to vest ownership of the subject property in her name so that a direct lease can be prepared in her favour as failure to do so renders her presence on the subject piece of land illegal. She prays for a vesting order and an order that the Deputy Registrar of the High executes the assignment on behalf of Moffat Ricky Tumbila whose whereabouts are unknown.

On 3rd December, 2013, the Applicant obtained an order for leave to serve the originating summons and notice of hearing by substituted service by advertising the same in the local newspaper. On 9th December, 2013 the Applicant filed an affidavit of service in which she deposed that she had served the court process on the Respondent by advertisement placed in the Zambia Daily Mail newspaper on 6th and 7th December, 2013. A copy of the advertisement and certificate of publication are exhibited marked "ESN1" and "ESN2", respectively.

The Respondent did not file any affidavit in opposition to the originating summons.

At the hearing of the matter Mr. Ndhlovu, SC relied on the affidavit in support of the application filed by the Applicant on 18th November, 2013 and prayed that the Applicant be granted the orders she seeks.

I have considered the affidavit evidence adduced by the Applicant. The application for a vesting order is made pursuant to section 14 of the High Court Act, Chapter 27 of the Laws of Zambia. Section 14 of the High Court Act provides that:

“14. Where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract or other document, or to endorse any negotiable instrument, the Court may, on such terms and conditions, if any, as may be just, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the Court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it.”

The Applicant has exhibited a number of documents to support her assertion that the property known as Farm No. 2303/T Ibex Hill, Lusaka was sold to the late Christopher Siwila Ndhlovu by Moffat Ricky Tumbila in 1985 at the price of K10,000.00 and that after Christopher Siwila Ndhlovu paid the purchase price in full Moffat Ricky Tumbila surrendered the certificate of title to the said property to Christopher Siwila Ndhlovu. According to the Applicant Moffat Ricky Tumbila did not obtain consent to assign the property nor did he

execute an assignment to transfer the said property to Christopher Siwila Ndhlovu.

I have carefully considered the affidavit evidence on record. I note from paragraphs 5 and 6 of the statutory declaration marked "ESN2" which was made by the late Christopher Siwila Ndhlovu and which the Applicant exhibited in support of her application for a vesting order that Christopher Siwila Ndhlovu declared that the certificate of title relating to Farm 2303/T Lusaka was left in his custody to effect the sale of the said property and that he had failed to locate the certificate of title which was lost, mislaid or destroyed. The late Christopher Siwila Ndhlovu did not declare that the certificate of title was handed over to him after he purchased the subject property from Moffat Ricky Tumbila. Further, the caveat marked "ESN6" which was lodged by Christopher Siwila Ndhlovu shows that he lodged the said caveat as intending purchaser and not as purchaser of Farm No. 2303/T Lusaka. These documents do not support the claim by the Applicant that Christopher Siwila Ndhlovu purchased the said Farm No. 2303/T Lusaka from Moffat Ricky Tumbila.

It is significant that the Applicant has not exhibited any contract of sale executed by Moffat Ricky Tumbila and the late Christopher Siwila Ndhlovu relating to Farm No. 2303/T Lusaka and further the Applicant confirms in her affidavit evidence that Moffat Ricky Tumbila did not obtain consent to assign the subject property and that he did not execute any assignment to transfer the said property to Christopher Siwila Ndhlovu. The onus to prove an allegation is always on the party who makes the allegation: See *Galaunia Farms Limited v. National Milling Company Limited and Another* (1). In the present case the Applicant has not proved on a balance of probabilities that Farm No 2303/T Lusaka was sold by Moffat Ricky Tumbila to Christopher Siwila Ndhlovu. In the absence of evidence to support the Applicant's claim

that Farm No. 2303/T Lusaka was sold to Christopher Siwila Ndhlovu by Moffat Ricky Tumbila I find no basis to grant the Applicant a vesting order relating to Farm No. 2303/T Lusaka or that the Deputy Registrar should execute a deed of assignment for and on behalf of Moffat Ricky Tumbila the alleged vendor of the property to transfer the said property to the Applicant Everlighter Soneni Ndhlovu. The application fails in its entirety and is dismissed.

Leave to appeal is granted.

Dated the 6th day of January, 2014.

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A. M. SITALI
JUDGE