

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

2012/HP/0238

(Civil Jurisdiction)

BETWEEN:

MONICA TEMBO MBUZI

PLAINTIFF

AND

OLIVER SOONGA

DEFENDANT

Before the Hon. Mrs. Justice A. M. Sitali on the 15th day of May, 2014.

***For the Plaintiff : Mrs. C. M. Chapewa of the
National Legal Aid Clinic for Women***

For the Defendant : No Appearance

J U D G M E N T

Cases referred to:

- 1. Khalid Mohamed v. Attorney-General (1982) ZR 49**
- 2. Wilson Masauso Zulu v. Avondale Housing Project Limited
(1982) ZR 172**
- 3. Galaunia Farms Limited v. National Milling Company Limited
and Another (2004) ZR 1**

Legislation referred to:

4. The High Court Act, Chapter 27 of the Laws of Zambia, section 14.

The plaintiff commenced this action against the defendant by way of writ of summons accompanied by a statement of claim on 2nd March, 2012. She seeks as order that the defendant execute the documents of conveyance in order for title to Stand No. CHELS/1023, House No. 8 Mkushi Flats, Chelston Lusaka to vest in her name. She further seeks an order that in the event that the defendant fails to execute the documents within 30 days of being requested to do so, the Deputy Registrar of the High Court should execute the said documents in his place.

On 23rd March, 2012 the defendant entered a memorandum of appearance without filing a defence and has failed to file a defence since then. In view of the provisions of Order 12 rule 8 of the High Court Rules, Cap 27 the matter proceeded as if the defendant had appeared as there is satisfactory proof on record that the defendant had been served with the writ of summons by substituted service.

At the trial of the action, the plaintiff, Monica Tembo Mbuzi, testified that she purchased Stand No. CHELS/1023, Lusaka also known as House No. 8 Mkushi Flats, situate on Palm Drive in Chelston, Lusaka from Oliver Soonga the defendant on 15th January 2001. A contract of sale was executed by the parties after the plaintiff paid the full purchase price of ten million Kwacha in old currency. The plaintiff identified the Law Association of Zambia Contract and Conditions of Sale relating to House No. 8, Mkushi Flats, Chelston, Lusaka on pages 1 to 3 of the plaintiff's bundle of documents.

The plaintiff went on to state that upon paying the full price of ten million Kwacha, the defendant handed over to her all the documentation relating to the said house, namely, the letter written by the Senior Account of the

Ministry of Finance and Economic Development, as it was known then, requesting the Commissioner of Lands to release the title deeds for Stand CHELS/1023/MKW/8, Lusaka to the defendant and a Government of the Republic of Zambia receipt No. 247664 issued to the defendant upon full payment for the purchase of the House No. 8 Mkushi flats, Stand No. CHELS/1023, Chelston Lusaka. The plaintiff identified the letter and receipt to that effect which are on pages 5 and 6 of the Plaintiff's bundle of documents.

The plaintiff testified that Messrs Pikiti and Company who were the advocates for the two parties during the transaction undertook to process the acquisition of the title deeds on behalf of the plaintiff. The plaintiff testified that Mr. Pikiti passed away before the Certificate of title was issued in her name and that she has not heard from the defendant since the transaction for the purchase of the subject property was concluded and that she does not know the defendant's whereabouts.

The plaintiff further testified that she took possession of the subject property in accordance with the conditions of the contract of sale and that she currently resides in the said property. It was the plaintiff's further testimony that she paid survey fees in respect of the property and identified the receipt issued to her in that regard by the Ministry of Lands on page 7 of the plaintiff's bundle of documents. The plaintiff further said that she has been paying the property rates to the Lusaka City Council as evidenced by the receipt on page 8 of the plaintiff's bundle of documents. She, therefore, prays that she may be granted a vesting order for the property to be registered in her name.

The defendant did not appear at the trial although there is, on record, an affidavit of service filed by the plaintiff on 5th May 2014 stating that the

defendant's advocates were served with the notice of hearing and that they acknowledged receipt of the same.

I have carefully considered the evidence adduced by the plaintiff in support of her claim. I should state at the outset that although the defendant did not file any defence, the plaintiff must nonetheless prove her case against the defendant on a balance of probabilities if she is to succeed in her claim. It is trite law that a person who initiates civil proceedings must prove his case in order to succeed in his claim. The learned authors of Phipson on Evidence, 17th edition in paragraph 6-06 at page 151 state the following regarding the burden of proof in civil cases:

"So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons."

It will be observed from the foregoing quotation that the plaintiff's burden to prove her case against the defendant on a balance of probabilities if judgment is to be entered in her favour remains on her. The mere failure of a defendant's case does not automatically entitle the plaintiff to judgement if the plaintiff fails to prove his claim against the defendant: see Khalid Mohamed v Attorney-General (1), Wilson Masauso Zulu v Avondale Housing Project Limited (2) and Galaunia Farms Limited v National Milling Company Limited and Another (3).

In the present case, the Law Association of Zambia Contract and Conditions of Sale relating to the property in issue which was drawn up by Messrs Pikiti

and Company and produced by the plaintiff clearly shows that the Plaintiff satisfied all the conditions relating to the purchase of Stand No. CHELS/1023, Lusaka and that she paid the full price of ten million Kwacha at that time for the said property. In terms of the contract of sale the full price was to be paid upon exchange of contract and the vendor was to vacate the house by 28th February, 2001. There is clear evidence that the vendor did vacate the house as agreed by the parties as the plaintiff took possession of the house and currently resides in the said house.

I am satisfied on the evidence before me that the plaintiff has proved on a balance of probabilities that she is entitled to the vesting order that she seeks from this court. In exercise of the powers vested in me by section 14 of the High Court Act, chapter 27 of the Laws of Zambia, I order that the defendant Oliver Soonga shall execute a deed of assignment relating to Stand No. CHELS/1023/MKW/8, Lusaka and related documents of conveyance to enable the subject property to be registered in the plaintiff's name. The said documents shall be executed within 30 days of the date of this judgment. If the defendant fails to execute the documents of conveyance within the stipulated period, the said documents of conveyance shall be executed by the Deputy Registrar in the place of the defendant.

Cost shall follow the event and are to be taxed in default of agreement.

Dated the 15th day of May, 2014.

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A. M. SITALI
JUDGE