

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

2012/HK/06

(Civil Jurisdiction)

BETWEEN:

**BARBRA ZULU
SIMPAMBA DAVY**

**1ST PLAINTIFF
2ND PLAINTIFF**

AND

**SHARON MUSONDA
DEFENDANT
KITWE CITY COUNCIL**

**1ST
2ND DEFENDANT**

Before the Honourable Madam Justice C.K. Makungu

For the 1st Plaintiff: In Person
For the 2nd Plaintiff: In Person
For the 1st Defendant: In Person
For the 2nd Defendant: Nobody

J U D G M E N T

Cases referred to:

1. Khalid Mohamed v The Attorney-General (1982) Z.R. 49

PLEADINGS

According to the Writ of Summons and Statement of Claim the plaintiffs' claims are as follows:

1. A declaration that the plaintiffs are the rightful owners of Plot No. MW 1353.

2. An Order for payment of K950,000.00 (old currency) to the 1st plaintiff for the bricks and sand which the 1st defendant used without her permission.
3. An Order for payment of K766,000.00 to the 2nd plaintiff for the fence and toilet walls destroyed by the 1st defendant.
4. Costs.
5. Any other relief the Court may deem fit.

The 1st and 2nd defendants did not file defences but the matter proceeded to trial as though they had done so because the case is unsuitable for the grant of Judgment in default of defence.

IMPORTANT NOTE

I must mention that the plaintiff cited the Resident Development Committee (R.D.C) as 2nd defendant. However, on the hearing of the plaintiffs' application for an injunction, the Town Clerk of Kitwe City Council, namely Barnwell Luanga had sworn an affidavit in opposition which was filed herein on 14th February, 2012 to the effect that the R.D.C. is not a body corporate and not an agent of the Council in terms of land allocation. He also stated that Plot No. 1353 does not exist in the 3rd defendants records relating to land and the Council does not recognize the contract of sale and receipts exhibited by the plaintiffs.

Therefore in my Ruling on injunction dated 11th April, 2012 on page 3, I found accordingly. I further found that the R.D.C. cannot

sue or be sued because it is not a corporate legal entity. I inadvertently committed to order the removal of R.D.C. from these proceedings but I have since taken it that R.D.C. is not a party to these proceedings and I hereby remove it. There are now only two defendants as cited.

SUMMARY OF EVIDENCE ON RECORD

PW1 Barbara Zulu testified that on 31st October, 2005 she bought the Plot in issue which is situated in Mindolo Kitwe from the R.D.C. as evidenced by the receipt on page 2 of the plaintiff's Bundle of Documents. After being shown the full extent of the plot, she had the ground dug up in preparation for building a foundation. She then went to the village to attend to some family problems, when she returned, she brought some bricks and building sand which were piled up at the plot.

Later, she found that the 1st defendant had started building a foundation on that plot. Therefore, she reported the matter to the R.D.C. who decided that the plot belonged to the 1st defendant. She said that later, the building materials she had kept on the plot got stolen, that is when she obtained permission from the R.D.C. to sale the plot. She said she sold it to the 2nd plaintiff on 3rd July, 2010 at K2,600,000.00 cash. She further stated that she paid the R.D.C. K200,000.00 (unrebated) for change of ownership of the plot from herself to the 2nd plaintiff. She said the R.D.C. gave her the document for change of ownership on page 3 of the plaintiffs

bundle of documents. That document is dated 3rd July, 2010 and was signed by Mr. Remy Musonda the chairman of the R.D.C. at the material time and Mr. B. Mutale another member of the R.D.C. Thereafter, the 2nd plaintiff built a three bedroomed house, a toilet and fence. About two months later, she learnt from the 2nd plaintiff that the 1st defendant had started claiming the same plot.

She referred to a letter dated 24th November, 2010 from the 2nd plaintiff to the Town Clerk in which he complained that Sharon Musonda (1st plaintiff) was claiming his plot and that he had reported the matter to the R.D.C. who had decided that the plot belongs to Sharon Musonda. In the same letter, the 2nd plaintiff requested for the Town Clerk's intervention in the matter. She also referred to the reply from the Town Clerk on page 5 of the plaintiff's bundle of documents which is dated 23rd December, 2010 and it is to the effect that the 2nd plaintiff should pursue the matter with the one who sold him the plot because the council was not involved in the transaction.

She further stated that on 23rd December, 2010 the Chief Building Inspector of Kitwe City Council had written to the 1st plaintiff to stop the construction works and report to him on 27th December, 2010 with documents pertaining to the plot in issue. On 11th March, 2011 she wrote a letter to the council explaining the circumstances under which she bought the plot which letter is on page 7 of the plaintiffs bundle of documents.

Under cross-examination, she said that the R.D.C. had registered the 1st plaintiff's as the plot owner. She was also aware that the 1st defendant had put up a box on the plot.

PW2 Remmy Cosmas Musonda testified that in 2004 he was the chairman of the R.D.C. in Mindolo, Kitwe. He said he had talked to the area councilor Elizabeth Kachidza who advised him that the land in that area belonged to ZCCM. Then the R.D.C. decided to start allocating plots to members of the community in conjunction with the Kitwe City Council. In October, 2005 they allocated the plot in issue to the 1st plaintiff who paid K450,000.00 for it and was given a receipt which she has shown this Court. Later, the 1st plaintiff complained to the R.D.C. that the 1st defendant was developing her plot. He said to his knowledge the new R.D.C. that came in 2008 had sold the 1st defendant's plot to someone else and given her the 1st plaintiff's plot instead.

Under cross-examination, he said that the 1st plaintiff's plot was about three plots from the 1st defendant's plot, and the plots were demarcated with the help of some council employees.

PW3 Benedict Mutale confirmed that he was the secretary of the R.D.C. at the material time and that he was in charge of issuing receipts to buyers of plots in Mindolo West. He also confirmed that he was the one who issued the receipt for K450,000.00 to

Barbara Zulu and issued another receipt to the 1st defendant who had bought a different plot in the same area.

PW4 Modesto Elijah Phiri testified that he was the Treasurer of the R.D.C. in Mindolo Kitwe in 2005 and confirmed that the R.D.C. sold a plot to the 1st plaintiff and another to the 1st defendant in the same area. He further stated that the R.D.C. used the proceeds of sale of plots to maintain water pipes e.t.c. in the same area and they accounted for the money to the area councilor.

PW5 Davy Simpemba testified that he bought the plot in issue from the 1st plaintiff on 3rd July, 2010 at K2,600,000.00 (unrebassed kwacha). Thereafter, the parties signed a document for change of ownership which is on page 3 of the plaintiff's bundle of documents which form was given to them by the R.D.C. He then built a three roomed house, a toilet and installed a septic tank and fenced the premises. Later, the 1st plaintiff started claiming that piece of land which she said she had also bought from the R.D.C. on 2nd November, 2005. She then accused him of having destroyed the box she had built on the plot. He reported the matter to the R.D.C., the incumbent Mayor and the Kitwe City Council. The Mayor and the R.D.C. decided that the plot belonged to the 1st plaintiff, while the council refused to be involved in the matter. He further stated that on 22nd December, 2010 the 1st plaintiff took some bricks to the plot. He therefore went and

complained about it to the Building Department of the Kitwe City Council who wrote a note to her to the effect that she should halt construction works and go to the council to meet with the building inspector.

Under cross-examination, he said that he used the building material that he found on the plot because he thought he bought the plot with whatever was on it.

The 1st defendant testified that on 2nd November, 2005 she bought the plot in issue from the R.D.C. of Mindolo West at K1,250,000.00, old currency. She then started clearing the plot but was stopped by people whose names she did not mention. She said in 2007 the incumbent Town Clerk of Kitwe City Council Mr. Ali Simwinga went to that area and addressed the plot owners saying that they should build big houses. When she built a foundation, the 1st plaintiff started claiming the plot. The matter was reported to the R.D.C. that looked into it and found that she (Sharon Musonda) was the registered owner of the plot.

Members of the R.D.C. who sold the plot to her were Musonda, Mutale and Phiri and by 2007 they were no longer members of that committee. By then, her plot was not numbered. In 2010 when the 1st plaintiff sold the plot to the 2nd plaintiff, some council employees had numbered the plots in that area. The 2nd plaintiff took possession of the plot and built a cabin using her building

materials and destroyed her building. She said the matter was reported to the Mayor who decided that the plot belonged to her. Under cross-examination, she said that she went to the Kitwe City Council with the 2nd plaintiff and the council denied having written a note to her to stop constructing on the plot.

DW2 Nonde Mulenga Davies, confirmed that the 2nd plaintiff had paid Mutale, Phiri and Musonda of the R.D.C. for the plot in issue in November, 2005 and built a box on it. Later, he learnt that the 2nd plaintiff had bought the same plot and built a two bedroomed house using some of Sharon Musonda's building materials as he had destroyed the box that was there and used the salvaged materials. He said when he first went to the plot with the 1st defendant they found no burnt bricks or sand there. He said his plot was right next to the plot in issue so he was observing everything that was happening there.

DW3 Peter Musamba's evidence was that he is the Senior Legal Assistant at Kitwe City Council. The plot number of the piece of land in question was not given by the Council, therefore it does not exist in their system. In 2010 he thoroughly investigated the matter with the Director Engineering, Director of Development Planning and the Ministry of Lands and discovered that plot number MW 13/53 exists only in the Mindolo Settlement Register of Squatters. They also found out that the person who was occupying the plot was Sharon Musonda the 1st defendant herein

and the house was at box level. He said he was unable to tell if that piece of land had been conveyed to somebody else as the Council has no record of such a transaction as it was not involved in the matter, neither was the Ministry of Lands.

He further stated that there are politics involved in handling the problem of squatters, therefore local authorities usually come in to prevent the occurrence of communicable diseases and counting the people in those communities. Sometimes with the authority of the ruling political party, the council may regularize such settlements. He gave an example of the regularisation of Ipusukilo and Mulenga compound settlements.

He added that in the present case, there is a Squatter's Register but the settlement has not been legalized. He said R.D.C's are elected by members of the community to help them liase with councils so that utility services are delivered to them. The role of the R.D.C's is to help the council maintain the community. They have no mandate to allocate plots and whatever they do should be done with the council's approval. He said in the present case, the council did not ratify the purported contract between the R.D.C. and the 1st plaintiff and between the R.D.C. and the 1st defendant. None of the parties concerned has formally applied to the council for regularization using the standard form which can be obtained from the council. He produced a copy of that form.

Under cross-examination, he said that the information on the Mindolo plots was obtained in 2010 when there were a lot of problems between individuals. The council through the R.D.C's gathered data on the occupants of the plots so that they could help them. The Register of squatters which he had seen only indicates the year 2010 and not the day or month.

He further stated that anyone who needs a piece of land or has land issues should approach the Council and not the R.D.C's. Documents 12-17 of the 1st defendant's bundle of documents are two letters that were written by the Town Clerk of Kitwe City Council to the Chairman of Mindolo R.D.C. on 10th February, 2009 and 13th May, 2009 on the regularization of illegal developments in Mindolo North or ward. The first letter gives instructions on the requirements for regularization and talks about meetings having been held over this issue with the area M.P. Mr. M. Musenge and the R.D.C. members it reads as follows:

"13th May, 2009

**The Chairman
Mindolo RDC
KITWE**

ATTENTION: COUNCILLOR F. MWAPE

Dear Sir,

**Re: REGULARISATION OF ILLEGAL DEVELOPMENTS - MINDOLO
WARD**

**We make reference to the above matter and to previous
correspondence relating hereto resting with the consultative**

meeting held in my office which was attended by councilors, RDC members and Chief Officers and wish to confirm the advice I tendered to you as follows:

1. The decision to regularize plots in Mindolo was acceded to by the Council on the following conditions;
 - (i) That developers should in the meantime stop any further development as that would compromise the process of regularization and upgrading in terms of water, sewerage and road provisions.
 - (ii) That it is a condition of this regularization process that all developers should adhere to the standard plans being prepared by the Director of Engineering Services in conjunction with Director of Development Planning in order to enhance the quality and status of houses. Needless to say, the current status of the houses under construction are by far inferior to the surrounding former mine houses.
 - (iii) That the developers and those seeking regularization will be required to meet the full cost of regularization which include plot premium which is K2,000,000.00, numbering, survey, application forms which are currently at K150,000.00.

To this end, the Director of Engineering Services has been instructed to commence the detto picking exercise which will commence immediately and should be completed by the 23rd February, 2009 after which letters of regularization will be communicated to those who accept the conditions herein.

Please indicate to us with dispatch whether these terms are acceptable to your members to enable me move this process forward. Otherwise council expects your response within 14 days hereof.

Yours faithfully,

**A.D. Simwinga
TOWN CLERK**

Cc: Councillor F. Mwape

Cc: Director of Engineering Services

Cc: Director of Development Planning”

He finally stated that the council has not yet done the ground work for the regularization process like demarcation, mapping, offering plots etc. He referred to the letter on page 18 of the defendant's bundle of documents which was written to the 2nd plaintiff by the Town Clerk on 23rd December, 2010 saying that the council was not involved in the transaction he had with the 1st plaintiff as regards the plot in issue.

FINDINGS OF FACT AND APPLICATION OF THE LAW TO THE FACTS

I have considered the oral and documentary evidence on record. It is not in dispute that on 31st October, 2005 the 1st plaintiff paid the sum of K450,000.00 to the R.D.C. of Mindolo West for a plot which in 2010 appeared in the Register of Squatters for Mindolo

Settlement under the name of the 1st defendant. Mindolo Settlement is an illegal settlement. The 1st plaintiff sold that plot to the 2nd plaintiff on 1st July, 2010 after the 1st defendant started claiming it as her own. It is also not in dispute that the 1st defendant bought a plot from the same R.D.C. on 2nd November, 2005 for K1,250,000.00. Both the 1st plaintiff and the 1st defendant were issued with cash sale receipts for the money they had paid to some members of the R.D.C. which receipts did not indicate what they had bought. There is no cogent evidence that the 1st defendant bought a different plot from the one purportedly bought by the 1st plaintiff. I therefore find that they bought the same plot because they were both shown the same by the seller.

I further find that the Resident Development Committee was a brain child of the Mindolo Community who chose some members of the community to represent them and help them liase with the council for service delivery. Their role was to help maintain the community that chose them. Therefore, they were agents of the community that put them in place. They had no legal authority to allocate or sale land. I further find that the R.D.C's are not agents of district councils or the Ministry of Lands as regards the administration of land. The piece of land in issue was sold by Musonda, Phiri and Tembo who were members of the R.D.C. to both the 1st plaintiff and the 1st defendant without the council's authority or approval. The R.D.C. did not own that land and could not have owned it as it was not a corporate entity.

It is trite law that land in Zambia is owned by the President and administered by the Ministry of Lands whose agents are District Councils. Therefore, the purported sale of land by the R.D.C. are null and void *ab initio*. It follows that the sale of the plot by the 1st plaintiff to the 2nd plaintiff is also null and void *ab initio* because the 1st plaintiff had no title to the land to pass to anyone else. I further find that whatever developments were effected on the land were made at the 1st plaintiff, 2nd plaintiff and 1st defendant's own risks as none of them has a legal right to occupy that piece of land.

CONCLUSION

In reaching my decision, I have taken into account and applied the case of ***Khalid Mohamed v The Attorney General*** (1) where Ngulube D.C.J, as he then was said:

“An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A plaintiff must prove his case and if he fails to do so, the mere failure of the opponent's defence does not entitle him to judgment. I would not accept a proposition that even if a plaintiff's case has collapsed of its inanition or for some reason or other, judgment should nevertheless be given to him on the ground that defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need a defence.”

For the foregoing reasons, I find no merit in the plaintiff's case and dismiss it. Each party will bear his own costs. I advise the parties that in future, they must follow proper channels for acquisition of

land in this country.

Dated at Kitwe this 21ST day of January, 2014.

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C.K. Makungu
JUDGE