

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA

1993/HP/0688

(Civil Jurisdiction)



BETWEEN:

TWIKATANE AFRICA ART COMPANY LIMITED	-	PLAINTIFF
AND		
MORGAN KACHINGA CHELLAH	-	1 ST DEFENDANT
IMS FINANCIAL SERVICES LIMITED	-	2 ND DEFENDANT
PANFIELD PROPERTIES LIMITED	-	3 RD DEFENDANT
COMMISSIONER OF LANDS	-	4 TH DEFENDANT

Before the Hon. Justice D.Y. Sichinga, SC in Open Court at Lusaka
on the 24th day of July, 2014.

For the Plaintiff : Mr. S. Soboshi – Messrs Muleza Mwiimbu and
Company

For the 1st Defendant : No Appearance

For the 2nd Defendant : No Appearance

For the 3rd Defendant : Ms. K. Viyuyi – Messrs Simeza Sangwa and
Associates

For the 4th Defendant : No Appearance

JUDGMENT

Cases referred to:

1. *Ndongo v. Mulyango and Another* (2011) ZR 187
2. *G.F. Construction (1976) Limited and Rudnap (Zambia) Limited and Unitechna Limited* 1999 ZR 134
3. *Snells equity* 29th Edition para 3 at page 413
4. *Lenton Holdings v. Airforce Moyo* (1984) ZR 55
5. *Midland Bank Trust Co. Limited v. Green* (1981) AC 513
6. *Construction and Investment Holdings Limited v. William Jacks and Company (Zambia) Limited* ZR 66
7. *Kabwe v. Nkhoma* ZR (2012) 14

Authorities referred to:

1. *Halbury's Laws of England*
2. *Megarry's Manual of the Law of Real Property* 6th Edition at page 66
3. *Mudenda's Land Law in Zambia cases and Materials* at page 55
4. *Chitty on Contracts Vol 1 General Principles* 28th Edition, sweet & Maxwell, 1999 para 28-37

This is a longstanding matter which commenced in 1993 and was subsequently transferred to this court in January 2014. At the time I heard the matter in May, 2014, this court was in the process of moving to Kitwe on transfer. Counsel for the Plaintiff informed the court that the parties were desirous to proceed with this court by way of points of claim and points of defence upon which the court would make a determination of the facts in issue. A consent order was thus duly executed by the Plaintiff and the Third Defendant as the First, Second and Fourth Defendants did not attend these proceedings. In June, 2014, I moved to my new station at Kitwe and commenced with a criminal session. The delay thus in delivering this Judgment is regretted.

The Plaintiff's claims in this matter are illustrated in the Points of claim filed on 15th July, 2010. The Plaintiff claims –

- (a). Against the 1st Defendant, an order for specific performance of a Contract of Sale between itself and the 1st Defendant dated 31st January, 1992 relating to subdivision 'B' of Stand No. 474, Lusaka;
- (b). An Order directing the 4th Defendant to execute an Assignment transferring the sold property to the Plaintiff and to issue a Certificate of Title relating to Subdivision 'B' of stand 474, Lusaka in the name of the Plaintiff;
- (c). An Order directing the 4th Defendant to rectify the record and issue a Certificate of Title for the portion mortgaged by the 1st Defendant to the 2nd Defendant and as subsequently sold to the 3rd Defendant;
- (d). An Order that the 3rd Defendant replace the Plaintiff's buildings and property unlawfully demolished and damaged by the 3rd Defendant at subdivision 'B' of Stand No. 474, Lusaka.
- (e). Damages for loss of business and opportunity of loss of business as against First, Second and Third Defendants;
- (f). Interest on the damages;
- (g). Any other relief the court may deem necessary in the circumstances of the case; and
- (h). Costs.

The Third Defendant's assertions in its defence are that the Plaintiff's allegations as stated in the Statement of Claim are denied. The Third Defendant denies that the Plaintiff is the legal and rightful owner of Subdivision 'B' of Stand No. 474 and avers that no such sub-division was created, exists or has ever existed in relation to its property being Stand No. 474, Lusaka.

As earlier alluded to, this matter has a long history emanating from a Contract of Sale of a subdivision of Stand No. 474, Lusaka between the Plaintiff and the First Defendant. The said contract was executed on the 31st January, 1992 and is exhibited in an affidavit in support of summons under Order 86 Rule 2 of the Rules of the Supreme Court dated 12th May, 1993. The Plaintiff then sued the First Defendant for failure to complete the transaction claiming specific performance. The Plaintiff claims having paid a consideration of then K6 million as (now K6,000=00) a down payment and in satisfaction of a special condition of the contract. They allege they paid the balance of then K6 million (now K6,000=00) to the First Defendant's advocates.

The Second, Third and Fourth Defendants were not party to the action. The Second Defendants applied to be joined as a party on 29th August, 2002. Their case was that the First Defendant, herein, as a registered owner, mortgaged the entire Plot No. 474 of 0.212 hectares to the Second Defendant on 12th January, 1996. The First Defendant defaulted in redeeming the said mortgage and the Second Defendant foreclosed the mortgage and become a mortgagee in possession. The Second Defendant then perfected the foreclosure by selling the property to the Third Defendant. The latter obtained title with a Certificate No. L3695 dated 29th June, 2000.

On account of the various Rulings, orders and Judgments given in this matter, the Supreme Court Ordered the matter to be reheard by the High Court in order that every aspects of this suit between the parties are adjudicated upon. In ordering the matter to be reheard, the Supreme Court directed that all affidavits on record now, be presented before the High Court to be used as part of the pleadings.

The affidavit evidence on record in support of the Plaintiff's case shows that the Plaintiff and the First Defendant entered into a Contract of Sale executed on 31st January, 1992.

The particulars of the property, the subject of the sale are described as ***“ALL THAT piece of Land in extent approximately 617.91 Squares metres more or less being the Western portion of Stand No. 474 situated at Lusaka in the Lusaka Province of the Republic of Zambia which piece is yet to be surveyed but is currently delineated and described on Diagram No. 235 of 1948 Except and Reserved all minerals oils and precious stones whatsoever upon or under the said piece of land. The sketch plan describing the said piece of land is attached hereto.”*** (Affidavit in support of summons under Order 86 Rule 2 of the Supreme Court Rules filed on 13th May, 1993 refers).

In its affidavit in support of summons under Order XLI filed on 4th May, 1995, the Managing Director of the Plaintiff Company deposes as follows-

- “4. That on 23rd November, 1993, the Plaintiff’s lawyers wrote to a firm of surveyors, Messrs G.F. Mponda Surveys of Luangwa House, Cairo Road, Lusaka requesting them to have the property surveyed to facilitate sub-division thereof. See exhibit “RF 2.”***
- 5. That by our letter dated 15th December, 1993 to the surveyors Messrs G.F. Mponda surveys afore mentioned, we paid K40,000 for the survey. There is now produced before me marked “RF3” the said letter. There is also produced before me marked “RF4” the surveyors’ letter of their efforts.***

6. *That on 27th June, we wrote and the vendor refused to accept the sketch plan showing the proposed road reserve leading to the premises bought by the Plaintiff Company. There are now produced the letters marked "RF5" and "RF6."*

7. *That on 27th July, 1994 the Lusaka City Council required amendments to the application in connection with the survey and sketch plan, but the requirements were not met. See exhibit marked "RF7."*

8.

9. *That in any case the application to subdivide the plot into two commercial plots had long been approved by Lusaka Urban District Council per letter now produced to me marked "RF8."*

10. *That the Plaintiff Company has suffered damages for breach of contract and loss of business interest on mesne profits and loss of rentals from all the tenants who continue to pay to the Defendant since the said breach."*

In 2000 the Plaintiff sought to add the Second Defendant to the proceedings in court in respect of the mortgage availed to the First Defendant. The affidavit in support of summons to add party filed on 6th October, 2000 shows that Plaintiff was aware that the Second Defendant, IMS Financial Services Limited an interested party in Stand No. 474, Lusaka and had as at that date foreclosed and neglected the foreclosure of the said property.

The Plaintiff's position as deciphered from the pleadings is that the Second Defendant ought not to have foreclosed the demarcated portion sub-division B of Plot No. 474 Cha Cha Cha Road, Lusaka as this was the portion which was the subject of a sale between the Plaintiff and the First Defendant.

The First Defendant's position is that the Contract between himself and the Plaintiff was frustrated on account of a breach of the said contract. In his affidavit in support of Ex-parte application to stay execution of writ of possession and fieri facias filed on 22nd January, 1996 he deposes as follows-

- “3. That in 1992 I entered into a Contract of Sale with the Plaintiff herein for the Sale of part of my property known as Stand No. 474 Lusaka. Produced and Marked “MKC 1” is a copy of the said contract of sale.**
- 4. That only shops Nos. 5,6,7,8,9,10 and 11 were to be sold to the Plaintiff and the total purchase price was K12 million.**
- 5. That according to the terms and conditions of the contract of sale, as agreed, the Plaintiff was obliged to pay a deposit of K6 million initially and another K6 million after the issuance of state's consent to assign.**
- 6. That the Plaintiff breached the conditions set out in clause 8 of the said contract of sale as demonstrated in the letters dated 30th January, 1992 and 31st January, 1992 respectively. Produced and Marked “MKC 2 -3” are copies of the letters.**

7. ***That in accordance with special condition 13 of the contract of sale, vacant possession would only be given to the Plaintiff upon the payment of the full purchase price which was K12 million.***

8. ***That the Plaintiff has not paid the Defendant the balance of K6 million to date and therefore the Defendant humbly requests this august court to grant the Order prayed for.”***

In his further affidavit in support of summons to set aside writ of possession and fieri facias filed on 8th February, 1996, the First Defendant reiterates his position that the Plaintiff was in breach of special conditions 8 and 13 and asserts that these were a fundamental breach of the contract.

The Second Defendant, IMS FINANCIAL SERVICES LIMITED's position is that it availed a mortgage to the First Defendant in respect of the whole of Plot 474, Lusaka. Affidavit in support of summons to add party dated 6th October, 2000 and exhibits attached thereto refer. The Second Defendant's position is that it was entitled to sale the subject property, as it did to the Third Defendant, by virtue of being a mortgage in possession.

The Third Defendant's position is that it is the beneficial registered owner of the entire Stand No. 474 Lusaka having purchased the property from the Second Defendant, a registered mortgagee in possession of the property. The Third Defendant avers that the only legal obligation it had at the time it purchased the subject property was to conduct a due diligence search at the Ministry of Land's and Deed's Registry, which search was done and no interest of the Plaintiff as alleged was ever found to have been registered. The Third Defendant's position is that it is a bonafide purchaser for value without notice of any defect.

These are the positions of the parties and the evidence on record. At the hearing of this matter on 15th May, 2014, I directed the parties to file their submissions by the 3rd day of June, 2014 for the Plaintiff and by the 23rd day of June, 2014 for the Defendants. The Plaintiff did not file any submissions, whilst only the Third Defendant filed submissions dated 17th July, 2014. I am grateful for the submissions received and the authorities cited which reflect in my Judgment.

The Third Defendant submits, through Counsel that there are six (6) issues for determination as follows:

- i. Whether sub-division 'B' of Stand 474 Lusaka was properly created and does exist.
- ii. Whether the Plaintiff has any claim/right to Sub-division 'B' of Stand No. 474.
- iii. Whether the Contract of Sale transferred title to the Plaintiff.
- iv. Whether the Plaintiff is entitled to an Order of specific performance./
- v. Whether the Third Defendant was a bonafide purchaser of Stand 474 Lusaka.
- vi. Whether the Third Defendant was within its right to demolish the structure on Stand No. 474, Lusaka.

WHETHER SUBDIVISION 'B' OF STAND NO. 474 LUSAKA WAS PROPERLY CREATED

It is submitted by Counsel for the Third Defendant that the evidence shows that sub-division 'B' of Stand No. 474 does not exist. (Page 60 of the Third Defendant's Bundle refers). It is submitted that there is no evidence on record to show that the said sub-division was approved by the Lusaka City Council.

It is submitted that if the application for the subdivision was approved in January, 1992, as alleged by the letter dated 29th January, 1992 there would have been no need for a further application made on 31st March, 1994 by the Plaintiff's Advocates.

It is submitted that that there is further evidence on record showing that subdivision 'B' of Stand No. 474, Lusaka did not exist. The surveyor General's office stated in a letter dated 26th March, 2002 that Diagram No. 13/1997 which appears on the Title Deed that was issued to the Plaintiff did not exist in their records.

It is submitted that no order for specific performance or indeed the other orders sought in the points of claim can be made over a non-existent property.

WHETHER THE PLAINTIFF HAS A CLAIM TO SUB-DIVISION 'B' OF STAND NO. 474

Counsel for the Third Defendant point to a letter dated 27th May, 1999 by the Chief Registrar of Lands and Deed in which letter he questions how the Plaintiff acquired the now cancelled title to subdivision 'B' of Stand No. 474. In the said letter the Chief Registrar says that the Plaintiff ought to have known by 12th January, 1996, the date when the mortgage was registered by the Second Defendant that Stand 474 was subject to a mortgage. The Registrar noted that the portion of land claim by the Plaintiff, which the Plaintiff calls sub-division 'B' of Stand No. 474, was only surveyed sometime in 1997, after the mortgage by the Second Defendant, IMS Financial Services Limited had already been registered by the Registrar of Lands.

It is submitted that the Registrar of Lands and Deeds would not have been in a position the Assignment relating to the subject sub-division in the absence of the original Certificate of Title which at the material time had been in the custody of the Second Defendant.

It is submitted that the Lands Register, produced at pages 8-14 of the Third Defendant's bundle of documents shows inter alia that the Second Defendant sold the entire D.212 hectares of Stand No. 474 as mortgagee in possession to the Third Defendant at a consideration of then K350,000,000 (now K350,000=00) and a Certificate of Title No. L 3695 was issued to that effect.

It is submitted that the Plaintiff's Certificate of Title was purportedly issued after a court order dated 7th March, 2001 which ordered the Chief Registrar of Lands and Deeds to forthwith issue a Certificate of Title in respect of the subdivision to the Plaintiff. It is submitted that the said Certificate of Title was cancelled. Therefore in the absence of such title the Plaintiff cannot claim to be the legal owner of subdivision 'B' of Stand No. 474 Lusaka.

WHETHER THE CONTRACT OF SALE TRANSFERRED TITLE TO THE PLAINTIFF

The Third Defendant submits that the signing of the Contract by the Plaintiff and the First Defendant did not transfer ownership of the land or any interest thereof to the Plaintiff. The Third Defendant rely on the case of **Ndongo v. Mulyango and Another (2011) ZR 187** where the Supreme Court held:

"A contract of sale does not per se transfer ownership of land to the buyer and this is the position in this case. At the same time, a mere payment of a deposit towards the purchase price does not transfer ownership to the buyer. Indeed, much is required."

The Third Defendant also relied on the case of **G.F. Construction (1976) Limited and Rudnap (Zambia) Limited and Unitechna Limited 1999 ZR 134**, where the Supreme Court held:

“We take judicial notice of the fact that a Contract of Sale of land does not per se transfer ownership of land to the buyer. Much more is required. There must be a deed of assignment executed by the parties which must be lodged with the Registrar of Lands together with the necessary contents or licences.”

It is submitted that the legal states of an intending purchaser of land vis the contract of sale is that he obtains an equitable interest in the property if he is potentially entitled to the equitable remedy of specific performance and he has paid the purchase price in full by virtue of the doctrine of conversion. The case of ***Kabwe v. Nkhoma ZR (2012) 14 and The Law of Real Property, Seventh Edition, (London, Sweet and Maxwell, 2008)*** were cited as authorities to this proposition.

It is submitted that the Plaintiff claims that it had paid the full purchase price but did not disclose when this was done. It is submitted that as at 5th February, 1999, the Plaintiff had not paid the balance of the agreed purchase price with the First Defendant. It is submitted that this entails that at the time the Second Defendant registered its mortgage on 12th January, 1996 and subsequently foreclosed on the property on 12th May, 1997, the Plaintiff had not as yet obtained an equitable interest in the property as the purchase price was not paid in full.

The Third Defendant relies on the authority of Halbury's Laws of England Volume 32, paragraph 767 at page 374 –

“Under a legal mortgage by demise the mortgagee becomes absolute owner of the mortgage term at law as soon as the day fixed for redemption is past, and the equity of redemption arises by virtue of the interference of equity to allow the mortgagor to redeem,, notwithstanding that his legal right of redemption is gone.”

It is thus submitted that the Plaintiff does not have any equitable interest in the property, and it is not potentially entitled to the equitable remedy of specific performance as shown below.

WHETHER THE PLAINTIFF IS ENTITLED TO AN ORDER FOR SPECIFIC PERFORMANCE

It is submitted that the property subject of the contract in issue as at 31st January, 1992 was described as “the western portion of Stand No. 474 situated at Lusaka. It is submitted that at the time of the contract the said property had not been subdivided and was therefore not clearly ascertainable.

It is submitted that at the time the subdivision was alleged to be done the records both at the Lusaka City Council and the Lands and Deeds Registry did not show the existence of a subdivision ‘B’ of Stand 474.

It is submitted that an Order for specific performance against the First Defendant is impossible as the latter no longer owns Stand No. 474, Lusaka. The Third Defendant submits that Plaintiff is seeking an equitable remedy while its hands are soiled and dirty as it failed to explain how it got title to a subdivision which was rejected by the planning authority.

It is alternative the Third Defendant submits that if it is found that there was a contract between the Plaintiff and the First Defendant the appropriate remedy would be damages as against the First Defendant.

WHETHER THE THIRD DEFENDANT WAS A BONAFIDE PURCHASER

It is submitted that the Third Defendant is the registered proprietor of Stand No. 474 Lusaka and that in the absence of any fraud, the Third Defendant's interest in the property is subject only to the encumbrances, liens, estates or interest as shown by such certificate of title.

It is submitted that the Plaintiff does not argue that the Second and Third Defendants are bonafide purchasers for value of a legal estate but that they had actual and constructive notice of the Plaintiff's interest in the portion of land on Stand No. 474.

It is submitted that the letters exhibited by the Plaintiff as evidence of the Second Defendant having actual notice of the Plaintiff's interest were written in the year 1998 and 1999, at which time the Second Defendant had already mortgaged the property on 12th January, 1996 and subsequently foreclosed on 12th May, 1997.

It is further submitted that the default judgment of 1993 in the Plaintiff's favour was never registered on the Lands Register as required by section 4(1) of the Lands and Deeds Registry Act Cap 185.

It is submitted that although the said judgment of 1993 was subsequently set aside and the Certificate of Title issued to the Plaintiff in respect of subdivision 'B' of Stand No. 474 cancelled, the absence of registration of the judgment in so far as it affected Plot 474, Lusaka was null and void as per section 6 of the Lands and Deeds Registry Act Cap 185.

It is further submitted that the Second Defendant's interest in the property cannot be affected by any notice direct or constructive of the Plaintiff's unregistered interest, if any except in the case of fraud, and the Plaintiff has not alleged any fraud on the part of the Third Defendant.

It is submitted that a letter written to the Third Defendant at page 26 of the Plaintiff's bundle of documents dated 21st March, 2001, did not constitute any notice as the Third Defendant had acquired title to the property and was already in occupation as at this day.

On the question of Constructive Notice, the Third Defendant relied on *Megarry's Manual of the Law of Real Property 6th Edition at page 66* reads:

"A person has constructive notice of all facts of which he would have acquired actual notice had he made those inquiries and inspections which he ought reasonably to have made, the standard of prudence being that of men of business under similar circumstances. A purchaser has constructive notice of a part if he-

- i. Had actual notice that there was some encumbrance and a proper inquiry would have revealed what it was, or***
- ii. Has whether deliberately or carelessly, abstained from making those inquiries that a prudent purchaser would have made".***

It is obviously prudent to inspect the land and to investigate title.

On the issue of investigation of Title the Third Defendant submit that at the time of creating the mortgage, a due diligence including a search on the property was conducted by the Second Defendant and there was no indication that the property had been subdivided. Similarly, on investigation of title by the Third Defendant at the Lands and Deeds Registry revealed that there were no encumbrances on subdivision on Stand No. 474.

In relation to Inspection of land, the Third Defendant submits that in a purchase transaction from a mortgagee in possession following an order for foreclosure, physical inspection of land may not always be possible as a defaulter may still be in occupation and may be hostile towards an intended purchaser.

It is submitted that it was enough for the Third Defendant to have verified that there was a mortgage between the First Defendant and the Second Defendant which was duly registered at the Lands and Deeds Registry and that the First Defendant defaulted and a foreclosure order subsequently made by the high Court.

WHETHER THE SECOND DEFENDANT HAD THE POWER OF SALE

The Third Defendant submits that whether the Second Defendant properly exercised its power of sale to the Third Defendant or not does not affect that sale of Stand 474 to the Third Defendant and the Third Defendant's title is thus not affected by the purported irregularity of the sale. The authority of Snell's equity 29th Edition para 3 at page 413 is cited which states;

“Usually however, a bona fide purchaser from the mortgagee is not affected by the conduct of the mortgagee; and although he must see that the power has arisen, he is not, either before or on conveyance,

concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised.”

It is submitted that the Second Defendant properly exercised its statutory power as mortgagee in possession, obtained an order for foreclosure and sold the property to the Third Defendant.

WHETHER THE THIRD DEFENDANT WAS WITHIN ITS RIGHT TO DEMOLISH THE STRUCTURE ON STAND NO. 474, LUSAKA

It is submitted that the buildings demolished did not belong to the Plaintiff but the Third Defendant as the registered owner and thus the demolition of the buildings by the Third Defendant was lawful. The Third Defendant relies on the authority of Mudenda’s Land Law in Zambia cases and Materials at page 55 which reads;

“From the legal point of view, land means not only the ground but also the subsoil and all structures and objects such as buildings, trees, and minerals standing or lying beneath it. This concept of land is often expressed in the Latin maxim quic quid plantatur solo, solo cedit (whatever is annexed to the land becomes part of the land.”

It is further submitted that the demolition was lawful as the Plaintiff as a tenant of the Third Defendant was served with the Landlord’s notice to quit pursuant to section 5 of the Landlord and Tenant (Business Premises) Act. (Page 44 of the Third Defendant’s Bundle refers). It is submitted that the Plaintiff did not challenge the warrant of distress.

The Third Defendant submits that the Plaintiff's claims are misconceived and that the action should therefore fail with costs to the Third Defendant.

I have carefully considered the evidence on record and the submissions of Counsel. From the evidence adduced in the pleadings before this court, I find the following to be facts not in dispute:

1. That there was a Contract of Sale executed between the Plaintiff and First Defendant executed on 31st January, 1992;
2. That there was a mortgage deed executed between the First Defendant and the Second Defendant in respect of Stand 474, Lusaka;
3. That there was a Contract of Sale between the Second Defendant and the Third Defendant in respect of Stand No. 474, Lusaka;
4. That there was an Assignment between the Second Defendant and the Third Defendant in respect of Stand No. 474, Lusaka; and
5. That Certificate of Title No. L 3695 was duly issued in respect of Stand No. 474, Lusaka.

I shall deal with the issues as have been dealt with in the sequence of the submissions.

The first issue for determination is whether the subdivision 'B' of Stand No. 474, Lusaka was properly created and does exist. In this matter I found as a fact that there was a contract of sale between the Plaintiff and the First Defendant in respect of a portion of Stand No. 474.

The evidence on record found in the Plaintiff's affidavit in support of summons under Order XLI is a letter exhibited as "RF 8" which was written by the Lusaka Urban District Council to the first Defendant.

The said letter is dated 29th January, 1992 and reads in part-

“This serves to inform you that the above said subdivision on Plot 474, Cha Cha Cha road was approved on 31st January, 1992 and will be available for collection in the next fourteen (14) days.”

There is however further evidence in the same affidavit as evidenced by exhibit “RF 5” a letter from the Plaintiff’s advocates to the First Defendant suggesting that the said subdivision had not been approved by the Lusaka City Council as at 27th June, 1994. This date means that the subdivision had still not been created for over two years after the execution of the Contract of Sale. The evidence on record also shows a letter dated 27th July, 1994 from the Lusaka City Council. The letter was written in relation to Stand No. 474 and refers to an application submitted on 31st March, 1994. It reads in part that-

“the application will be deemed refused and kept pending in this office until all outstanding amendments and requirements have been satisfied.” (Exhibit : RF 7” refers).

The most downing evidence in this aspect is found in a letter dated 26th March, 2002 from the office of the Surveyor – General to the Commissioner of Lands. The said letter reveals that-

- (a). There were never any Council minutes approving the said subdivision ‘B’ of Stand 474, and that council rejected minutes No. PWD/2/1/96 on 30th January, 1996 on behalf of the Plaintiff company herein;
- (b). The Surveyor General’s office discovered that Diagram No. 13/1997 did not exist in their records and neither could the same be traced;

- (c). According to the Surveyor-General's office Stand No. 474 Cha Cha Cha Road still existed and remained unchanged as at 26th March, 2002.
- (d). That Certificate of Title No. L 1102 in the Plaintiff's name was illegally issued, and not in existence. (Page 67 of Third Defendant's Bundles).

This evidence was not rebutted by any other evidence on record. I therefore found that remained and challenged. I thus find as a fact from the evidence on record that subdivision 'B' of Stand No. 474 was not properly created.

As regards the Plaintiff's claim to sub-division 'B' of Stand No. 474, Lusaka, in addition to my holding above, it may be pointed out that the Plaintiff herein claims an interest in a portion of Stand No. 474, Lusaka by virtue of being and intended purchaser of a said portion. On the other hand, the Second Defendant claimed an interest in Stand no. 474, Lusaka as a result of being a registered mortgagee. An affidavit in opposition to vary dated 6th December, 2000 exhibits "IMS 1" a printout from the Lands Registry shows that the Plaintiff entered a caveat on 20th May, 1996.

Section 76 and Section 77 Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia provides-

"76. Any person-

- (a). claiming to be entitled to or to be beneficially, interested in any land or any estate or interest therein by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied, or otherwise howsoever; or**
- (b). transferring any estate or interest in land to any other person to be held in trust; or**

- (c) *being an intending purchaser or mortgagee of any land; may at any time lodge with the Registrar a caveat in Form 8 in the schedule.*

77.(1).Every caveat shall be signed by the caveator or by his attorney or agent, and shall state with sufficient certainty the nature of the estate or interest claimed by the caveator, with such other information and evidence as may be required by any regulations under this Act, and shall appoint a place or give an address within three miles of the Registry at or to which notices and proceedings relating to such caveat may be served or addressed.”

The said caveat entered by the Plaintiff on 20th May, 1996 does not reveal any interest in the Stand No. 474, Lusaka same that there was a pending appeal hearing in Court. In this case, I find that the Plaintiff did not have any interest in Stand No. 474, Lusaka when it entered a caveat. I am fortified in my finding by the case of **Lenton Holdings v. Airforce Moyo (1984) ZR 55** where the Supreme Court held:

“Although the terms of section 76 (a) would appear to be very wide indeed, as can be seen, yet they would not, in our considered opinion, go so far as to cover rights other than those which are otherwise recognizable as being lawfully claimed or held. However, section 77 (1) which we have set out would appear to require that the caveat should disclose the interest claimed.”

It is trite that at law, in any liquidation, only secured creditors are paid first and unsecured creditors' claims will rank pari passu and not in any priority as compared to secured creditors. It therefore stands to reason, in my assessment of the facts herein, that the Plaintiff is in no better comfort than an unsecured creditor, and that the Second Defendant and Third Defendant were in positions akin of being secured creditors as registered mortgagee in possession and registered proprietor of the property respectively.

I am therefore satisfied, on the totality of the evidence before me, that the Plaintiff has not shown sufficient interest as legal owner of a sub-division of Stand No. 474 that did not exist as at 20th May, 1996 when the caveat was lodged.

On the question of whether the Contract of Sale transferred title to the Plaintiff, I have earlier found that the Plaintiff did not have any interest in Stand No. 474, Lusaka. The converse therefore would be that the contract of sale did not transfer any title to the Plaintiff. It is not in dispute in this case that that a contract of sale was executed as between the Plaintiff on the one hand, and the First Defendant, on the other, who was the registered owner of the said property. The contract of sale describes the land to be transferred as;

“ALL THAT piece of Land in extent approximately 617.91 Squares metres more or less being the Western portion of Stand No. 474 situated at Lusaka in the Lusaka Province of the Republic of Zambia which piece is yet to be surveyed but is currently delineated and described on Diagram No. 235 of 1948 Except and Reserved all minerals oils and precious stones whatsoever upon or under the said piece of land. The sketch plan describing the said piece of land is attached hereto.” (Emphasis is mine)

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The evidence on record from the Lusaka City Council (Pages 60 and 61 of Third Defendant's Bundle of Documents) shows that the subdivision of Stand No. 474 Lusaka was rendered null and void. In the case of **Ndongo v. Mulyango and Another (2011) ZR 187** the Supreme Court held:

“A Contract of Sale does not per se transfer ownership of land to the buyer and this is the position in this case. At the same time, a mere payment of a deposit towards the purchase price does not transfer ownership to the buyer. Indeed, much is required.”

In the instant case, there is no evidence on record that the First Defendant ever obtained the necessary authority or permits for the subdivision of Stand No. 474. There is no evidence that in fact even an assignment was executed between the parties. I hold that there being no subdivision of Stand No. 474 at the execution of the contract of sale, there was no interest conferred on the Plaintiff by the said contract, I accept the Third Defendant's submissions and the authorities cited on this point.

As regards the remedy of specific performance sought by the plaintiff. I have earlier found that subdivision No. 474 did not exist at the execution of the contract and that the contract did not confer any interest upon the Plaintiff. There is affidavit evidence contained in paragraphs 8 and 9 of the Plaintiff's affidavit in support of summons under Order XLI filed on the 4th day of May, 1995 that the sub-division of Stand No. 474 had been approved by the local authority. This averment is not confirmed by responsible authority, so far as the evidence shows. Exhibit RF 7 of the Plaintiff's own affidavit in support of summons under Order XLI contradicts this position.

There is further evidence on record, the effect of which shows that the subdivision of Stand No. 474 by the Plaintiff was marred with irregularity and clouded in suspicions of irregularity. There is further no evidence on record challenging the assertions that title had been illegally obtained by the Plaintiff.

The remedy of specific performance is an equitable one that compels a party to execute a contract in accordance with the precise terms agreed upon or to execute a contract substantially in conformity with the intentions of the parties, so that justice will be done as between the parties.

The Third Defendant's Counsel submitted that an Order for Specific Performance cannot be ordered against the First Defendant because he no longer owns Stand No. 474, Lusaka. They cited the learned authors of **Chitty on Contracts Vol 1 General Principles 28th Edition, sweet & Maxwell, 1999 para 28-37** which states-

“specific performance will not be ordered against a person who has agreed to sell land which he does not own and cannot compel the owner to convey to him, because the court does not compel a person to do what is impossible.”

I agree with these submissions. Specific performance is ordered only on equitable grounds given all the conditions encapsulating a particular case. The determining factor is whether, in equity and good conscience, the court should specifically enforce the contract because the legal remedy of damages would be inadequate to compensate the plaintiff for the loss incurred. Given the circumstances of this case, I do not find that an order for specific performance would serve the ends of justice.

On the question of whether the Third Defendant was a bonafide purchaser of Stand No. 474, Lusaka, it is trite that the requirement of bona fides or good faith on the part of a purchaser is largely tied to the element of notice. A purchaser for value must thus show firstly, that he did not have notice of any equitable interest. Secondly, that his conduct was 'genuine and honest.' (The case of **Midland Bank Trust Co. Limited v. Green (1981) AC 513** refers).

The facts in this case show that the Third Defendant bought Stand No. 474 Lusaka from the Second Defendant who was the registered mortgagee. Exhibit "MAZ 2" in affidavit in support of summons to add party filed on 6th October, 2000 shows at entry number 22 of the Lands and Deeds Register that the First Defendant mortgaged Stand No. 474 Lusaka to the Second Defendant to secure the sum of then K50,000,000=00. The Mortgage was dated on 11th January, 1996 and registered on 12th January, 1996.

The record further shows that the Third Defendant is the current certificate holder in respect of Stand No. 474, Lusaka. The law provides in section 33 of the Lands and Deeds Registry, Chapter 185 of the Laws of Zambia that a Certificate of Title shall be conclusive as from the date of its issue and shall be subject only to such encumbrances, liens, estates or interests as may be shown by on the Certificate of Title.

Further, section 34 (1) (C) provides:

"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 of 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).....

(b).....

- (c). *the case of a 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 bona fide for value from or through a person so registered through fraud.”*

My assertion of this provision is that in order to have the Certificate of Title cancelled in respect of Stand No. 474 Lusaka, the Plaintiff would have to prove, on a balance of probabilities, before this court that the Second Defendant in fact acquired title fraudulent and transferred the same to the Third Defendant who would be deemed a beneficiary of the fraud. I find that evidence of fraud is lacking so far as the record shows.

There was an attempt by the Plaintiff to register its interest so far as exhibit “MAZ 2” supra, shows. However, the entry of the caveat does not show any interest held by the Plaintiff. I have held earlier that the caveat registered by the Plaintiff on 21st May, 1995 did not disclose its interest in Stand No. 474. In the case of **Construction and Investment Holdings Limited v. William Jacks and Company (Zambia) Limited ZR 66** the Court held:

“Only if a person has or purports to have an enforceable interest in land may be justified in interfering with the rights of the registered proprietor by lodging a caveat. The caveator’s cause for lodging a caveat is dependable upon his claim to be entitled to an interest in land. Enforceable, in this sense, means Justifiable.”

I find that in the absence of any interest demonstrable in Stand No. 474, Lusaka, it would be unjustifiable for the Plaintiff to interfere with the prior rights of the registered mortgagee, the Second Defendant, and now the registered proprietor, the Third Defendant.

I thus agree in entirety with the submissions of the Third Defendant's Counsel and hold that the Third Defendant was a bona fide purchaser of Stand No. 474, Lusaka.

As regards the Plaintiff's claim that the Third Defendant unlawfully demolished damaged buildings on subdivision 'B' of Stand No. 474 did not exist at the time it entered into a contract with the First Defendant and subsequently thereafter. I have found that in the absence of fraud to vitiate the same, Certificate of Title No. L 3695 in respect of Plot No. 474, Lusaka was lawfully issued by the Commissioner of Lands, the Fourth Defendant, herein. Having so found, it is my finding thus that the Third Defendant was entitled to lawfully demolish buildings, subject to such reservations, restrictions, encumbrances, liens, estates and interests indorsed on its title, on Plot No. 474, Lusaka. I accept the Third Defendants submissions and hold that on the totality of the evidence before me, the Plaintiff is not entitled to specific performance of the contract executed on the 31st day of January, 1992 between the First Defendant and itself.

I have considered other relief that may be just and fair in the circumstances of this long standing matter. I did find as a fact not in dispute that a contract was executed as between the Plaintiff and the First Defendant. Clause 14 of the said contract states:

"14. The vendor hereby authorizes the Purchaser to make reasonable improvements to the subject property and in the event that this contract shall

be rescinded or frustrated on account of failure on the part of the vendor to fulfill his part of the bargain the purchaser shall be entitled to a refund on the actual cost of such improvements in addition to the refund of the whole of the deposit or part payment which the vendor shall have received from the Purchaser.”

The First Defendant and the Plaintiff in my assertion of the facts herein were at the centre of a transaction that went horribly wrong. There is evidence on record showing that the First Defendant considered the contract as at an end as early as 14th July, 1994. A letter exhibited in the Plaintiff's affidavit in support of summons under Order XLI filed on 4th May, 1995 shows this fact. The letter is addressed to the Plaintiff's advocates by the First Defendant and clearly expresses to refund the money paid.

Further in his affidavit in support of Ex parte application to stay execution of writ of possession and fieri facias, filed on 22nd January, 1996 the First Defendant avers that the Plaintiff breached clause 8 of the said contract which required that the Plaintiff was to pay a deposit of K6 million of the purchase price by 30th March, 1993. He produced exhibit "MKC 3" a letter from the Plaintiff's advocates showing that at the time the affidavit was filed in 1996, the Plaintiff had only paid a deposit of K1.5 million.

I find no evidence on record to show when the full purchase price was settled, if at all. I therefore hold that the contract was frustrated by the conduct of the Plaintiff.

In this case, given that the contract of 1992 was frustrated as between the Plaintiff and the First Defendant, I order that the First Defendant refunds the Plaintiff the portion of the purchase price received. The money shall be assessed by the Deputy Registrar to determine its current value. The value of the principle sum found shall attract interest at 10 per centum per annum from the date of writ of summons to date of settlement of the principle sum.

All in all, the Plaintiff's claims herein are dismissed with costs to the Defendants.

Delivered in Open Court at Lusaka this 24th day of July, 2014.



D.Y. Sichinga, SC
JUDGE