

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

2013/HP/0282

(Civil Jurisdiction)

BETWEEN:

JOSEPH KANDANI BWALYA



1ST PLAINTIFF

AGNESS KAMBALAKOKO BWALYA

2ND PLAINTIFF

AND

EDSON CHITI KANG'OMBE

DEFENDANT

Before the Hon. Mrs. Justice A. M. Sitali on 5th day of August, 2014.

For the Plaintiffs* : *In Person

For the Defendant* : *In Person

J U D G M E N T

Cases referred to:

- 1. Zambia Railways Limited v. Pauline S. Mundia and Brian Sialumba (2008) Vol.1 ZR 287**
- 2. Galaunia Farms Limited v. National Milling Company Limited and Another (2004) ZR 1**

The plaintiff commenced this action by way of writ of summons on 1st March, 2013 claiming for payment of K34,000.00 rebased with interest being a refund of money paid to the defendant towards the purchase of a residential property and any other relief the court may deem fit and costs.

At the trial of the action, the first plaintiff, Joseph Kandani Bwalya (PW1) an internal auditor in the Ministry of Health, testified that in 2011, his wife and he saw an advertisement in the Post newspaper for residential plots in the Silverest area of Lusaka. They got interested and PW1 called the telephone number for the contact person stated in the advertisement and a man answered whom the plaintiffs later came to know as Edson Chiti Kang'ombe, the defendant in this action. They arranged to see the plots and the defendant took them to the Silverest area in the Chongwe District of Lusaka Province. Among the properties they were shown was Lot No. 23990/M which the defendant informed them belonged to Harold Lungu. The defendant said that he was an agent for Harold Lungu who was selling the plot. When the plaintiff expressed interest in the said property, the defendant informed them that it was being sold at K60 million (un-rebased).

PW1 went on to state that on 9th August, 2011, the defendant brought a contract of sale to them which stipulated that they should pay 50 per cent of the sale price upon execution of the contract and that the balance of K30 million would be paid within two weeks after the title deeds were processed. The plaintiffs signed the contract and paid K30 million to the defendant on that date, which payment is acknowledged in clause 4 of the contract. PW1 identified the contract of sale which is on pages 2 to 4 of the plaintiffs' bundle of documents.

PW1 went on to state that the defendant failed to deliver the certificate of title within two weeks as he had undertaken to do. On 27th September, 2011, the defendant went back to PW1 and informed him that he had experienced difficulties in processing the title deeds and requested him to pay a further K4 million for logistics. PW1 paid the K4 million and a receipt was issued to him by the defendant, a copy of which is on page 5 of the plaintiffs' bundle of

documents. The defendant subsequently disappeared and became unreachable by telephone. PW1 stated that he became suspicious when he saw the defendant at Manda Hill in December 2011 and motioned to him to stop but the defendant drove off. PW1 reported the matter to the police.

On May 2012 PW1 received a telephone call from Chelston Police Station where he was requested to go and identify the defendant, which he did. The defendant promised to refund the plaintiffs the sum of K34,000.00 which they had paid to him within 14 days from 29th May, 2012 and wrote a commitment to that effect, which is on page 6 of the plaintiffs' bundle of documents. PW1 stated that to show good faith the defendant presented to the him a certificate of title No. 127104 as security for the money owing. The certificate of title was left with the police. The defendant did not pay the money within 14 days as he had undertaken to do. Thirty days later the police informed PW1 that they could no longer hold on to the certificate of title or force the defendant to refund the money and they advised him to seek legal advice.

He approached Lewis Nathan Advocates who summoned the defendant and he made an undertaking to pay K20 million to the plaintiffs by 31st October, 2012 and the balance of K14 million within 30 days of payment of the first instalment. A copy of the written undertaking is on page 15 of the plaintiffs' bundle of documents. The defendant failed to refund the money on the agreed dates. PW1 then conducted a search at the Ministry of Lands and discovered that Harold Lungu, the owner of Lot No. L/23990/M had sold it to one Justine Silumbwe on 14th June, 2011 which was a date before the advertisement run in the newspaper. PW1 said that he obtained a copy of the contract of sale between Harold Lungu and Justine Silumbwe from Harold Lungu, a copy of which he indentified on page 11 of the plaintiffs' bundle of documents. PW1 said

that he spoke to Harold Lungu who confirmed that he had heard that someone was selling his plot but he was not bothered since he had already sold it. PW1 said Harold Lungu informed him that he never engaged the defendant to sell his property. PW1 requested Harold Lungu to state this in writing which he did and he identified a copy of the note to that effect on page 14 of the plaintiffs' bundle of documents.

In cross examination PW1 stated that when the defendant gave him the certificate of title as security for the money owed by the defendant to the plaintiffs, he said the certificate of title belonged to his wife and not to his daughter.

PW 2 was the second plaintiff, Agness Kambalakoko Bwalya whose testimony was essentially the same as that of PW1. It was to the effect that sometime in July, 2011 she and her husband, Joseph Kandani Bwalya the first plaintiff saw an advertisement in the newspaper for a piece of land for sale. They got interested and called the number which was given on the advertisement. They spoke to a Mr Chiti and when they met Mr Chiti (the defendant in this action) he took them to see the land. Upon seeing the piece of land, they got interested in purchasing it and the defendant told them the sale price was K60 million and that they would have to pay 50 per cent down payment after which he would process the title.

PW2 said they paid him the sum of K30 million by cheque. Two weeks passed and they did not get any certificate of title. PW1 made several attempts to follow up how far the defendant had gone in processing the title but failed to get through to the defendant on the cell phone number he had given them. Two months after the first payment was made, PW1 informed her that he had seen

the defendant and had paid him an additional K4 million to assist him with logistics to get the title. PW2 said after that she did not have any dealings with the defendant as it was PW1 who continued to follow him up for the title. PW2 said at the end of the day the defendant did not give them the title deeds as he promised and he did not return to get the balance they owed him. PW2 said that three years later the defendant has still not refunded them their money.

There was no cross examination of this witness.

PW3 was Harold Lungu, an office orderly at the National Institute for Scientific and Industrial Research in Lusaka who testified that he was offered Lot No. L/23990/M, in Silverest in Lusaka by the Ministry of Lands some time in 2011. He identified the offer letter dated 6th April, 2011 which was issued to him by the Ministry of Lands on page 17 of the plaintiffs' bundle of documents. PW3 went on to state that he sold the property to one Justin Silumbwe in June, 2011. He referred to the contract of sale dated 14th June, 2011 relating to L/23990/M, Silverest between himself and Justin Silungwe on pages 10 to 13 of the plaintiffs' bundle of documents. PW3 stated that he did not engage an agent when he sold the property in issue and that he found the purchaser and sold the property on his own. He went on to state that he did not know the defendant and that he had never met him before. He did not know how the defendant got hold of his offer letter.

In cross examination, PW3 reiterated that he did not engage an agent when he sold the property to Justin Silumbwe and said he did not try to sell the property to anyone else. He stated that he knew Jonathan Phiri who was his workmate and was also offered a residential property in the Silverest area by the Ministry of

Lands. PW3 denied that Jonathan Phiri was his agent and stated that he informed Jonathan Phiri that he was selling his land.

That was the plaintiff's case.

The defendant, Edson Chiti Kang'ombe, testified on his own behalf and did not call any witnesses. His testimony was to the effect that he met the plaintiffs at the time he was selling Lot No. L/23990/M in the Silverest area of Lusaka in 2011. He went on to state that on a date he could not recall whilst he was being shown his own plot in the Silverest area by surveyors from the Ministry of Lands, he ran into three employees of the National Institute for Scientific and Industrial Research. The three men included Jonathan Phiri. They informed him that they had been offered plots in the same area by the Ministry of Lands but that they had failed to raise the money to accept the offers and were therefore planning to sell their land. As he operated a real estate agency called Green Dew Estates, he ran an advertisement for the sale of the plots and that it was through the advertisement that he met the plaintiffs Mr and Mrs Bwalya. He showed them the plots and they settled for Harold Lungu's plot and they initially paid K30 million and K4 million afterwards.

The defendant said he later discovered that Chrispin Chibense and Jonathan Phiri who said they were acting for Harold Lungu had already sold their plots and were reluctant to take him to Harold Lungu. That is how he got stuck with the process of transferring the property to the plaintiffs. He admitted that he has not refunded the plaintiffs the sum of K34 million which he collected from them because someone in his office misused the money and that the money is still outstanding to date. The defendant also admitted that he had never met Harold Lungu and that Harold Lungu did not give him instructions to sell the land on his

behalf. The defendant stated that he was requesting to be given the shortest possible time to pay the plaintiffs and recover his daughter's title deeds which he surrendered to PW1 as collateral for the money he owes the plaintiffs when he was arrested at Chelston Police Station.

In cross examination, the defendant admitted that he did not sell any property for any employee of the National Institute for Scientific and Industrial Research. He informed the court that he got Harold Lungu's national registration card number and offer letter from Jonathan Phiri and conceded that Lot No. L/23990/M is not available for sale as he alleged in his defence.

That was the defendant's case.

I have considered the evidence adduced by the plaintiffs and the defendants. From the evidence on record it is not disputed that the plaintiffs Joseph Kandani Bwalya and Agness Kambalakoko Bwalya are husband and wife and that in July 2011, they responded to an advertisement for the sale of residential plots in the Post newspaper. The advertisement was ran by Edson Chiti Kang'ombe, the defendant. The defendant represented himself to the plaintiffs as an agent for Harold Lungu the owner of Lot No. L/23990/M, in the Chongwe District of the Lusaka Province and informed them that it was being sold at the price of K60 million (un-rebased). The defendant subsequently presented to the plaintiffs a contract of sale relating to Lot No. L/23990/M Chongwe which they executed and paid K30 million (un-rebased) being 50 per cent of the purchase price of K60 million in accordance with the contract of sale. The defendant promised to process the issuance of the certificate of title in the plaintiffs' names within 14 days of execution of contract of sale but this did not happen. Subsequently, the defendant requested for a further sum of K4 million for logistics which the

plaintiffs paid. The defendant failed to process the said title deeds and disappeared. The plaintiffs discovered that Lot No. L/23990/M was offered to Harold Lungu by the Ministry of Lands on 6th April, 2011 and that Harold Lungu sold the said property to Justin Silumbwe on 14th June, 2011 before the defendant ran the advertisement for the sale of the property in the Post newspaper in July 2011. Despite numerous demands made by the plaintiffs for the defendant to refund them the sum of K34 million (un-rebased) which they paid in respect of the said property, and despite making undertakings in writing and orally to refund the money the defendant has failed or neglected to do so. Hence this action.

In order to succeed in this action the plaintiffs must prove their case against the defendant on a balance of probabilities which is the standard of proof required in civil cases. This is because it is trite law that a party who asserts a claim in a civil trial must prove on a balance of probabilities that the other party is liable as it was held in Zambia Railways Limited v. Pauline S. Mundia and Brian Sialumba (1). The same position of the law as regards the burden of proof in civil matters had earlier been stated by His Lordship Sakala C.J as he then was in the case of Galaunia Farms Limited v. National Milling Company Limited and Another (2).

The plaintiffs claim for the refund of the sum of K34,000.00 rebased which they paid to the defendant in respect of Lot No. L/23990/M with interest. The evidence in support of this claim is that after the plaintiffs responded to an advertisement in the Post Newspaper for the sale of Lot No. L/23990/M, Chongwe, they met the defendant who represented himself to them as an agent of Harold Lungu, the owner of the subject property. The defendant later presented to them a contract of sale in relation to the property which they executed and that as a condition of the contract of sale, the plaintiffs paid the

sum of K30 million to the defendant which was 50 percent of the purchase price of K60 million. The defendant promised to facilitate the processing of the certificate of title relating to Lot No. L/23990/M in the plaintiffs' name within 14 days of execution of the contract of sale.

The defendant did not deliver the certificate of title to the plaintiffs in the stipulated period as he undertook to do. He subsequently returned to the plaintiffs and obtained K4 million from them purportedly for logistics to facilitate the processing of the certificate of title. The defendant then disappeared and was only located after the first plaintiff reported the matter to the police. The defendant made undertakings to refund the plaintiffs the money they paid to him but he has failed to make good his promise to date. At the time the defendant advertised Lot No. L/23990/M, Chongwe, for sell, the property had already been sold by the registered owner Harold Lungu to Justin Silumbwe.

The defendant has not rebutted this evidence but in fact admits that he did obtain the sum of K34 million (un-rebased) from the plaintiffs as part-payment for Lot No. L/23990/M, Chongwe. He further admits that he had no instructions from Harold Lungu, the owner of Lot No. L/23990/M, Chongwe to sell the property on his behalf although he misrepresented to the plaintiffs that he was Harold Lungu's agent. He further admitted that he got Harold Lungu's national registration card number and a copy of his offer letter for Lot No. L/23990/M, Chongwe, from Jonathan Phiri, who was a workmate of Harold Lungu. These are the documents which he showed the plaintiffs at the time of the purported sale. The defendant also admitted that Lot No. L/23990/M, Chongwe is no longer available for sell and that he has not refunded the plaintiffs the sum of K34,000.00 rebased which he said is still outstanding to date.

From the evidence on record it is clear to me that the defendant had no authority from Harold Lungu, the owner of Lot No. L/23990/M, Chongwe to sell the said property to anyone and that he acted crookedly in purporting to sell the said property to the plaintiffs as an agent of Harold Lungu. It is also clear that the defendant has wilfully neglected to refund the sum of K34,000.00 which he obtained from the plaintiffs by false pretences for a period of over three years to date and that he is not in a hurry to refund the money, if his request during the trial for more time within which to repay the money is anything to go by. It is a wonder, in my view, that the defendant has not been prosecuted for his actions given the criminality he exhibited in this whole process.

On the totality of the evidence before me, I am satisfied that the plaintiffs have proved their case against the defendant on a balance of probabilities. I, therefore, find in favour of the plaintiffs and enter judgment for the plaintiffs in the sum of K34,000.00. I, accordingly, order that the defendant immediately pays to the plaintiffs the sum of K34,000.00 rebased which they paid to the defendant purportedly for the purchase of Lot No. L/23990/M, Chongwe. The sum of K34,000.00 will carry 15% simple interest from the date of the writ to the date of this judgment. Thereafter until payment, it will attract interest at bank lending rate as determined by the Bank of Zambia.

I also award costs to the plaintiffs to be agreed and taxed in default of agreement. Leave to appeal is granted.

Dated this 5th day of August, 2014.



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A. M. SITALI
JUDGE