

**IN THE HIGH COURT FOR ZAMBIA**

**2011/HPC/0019**

**AT THE COMMERCIAL REGISTRY**

**AT LUSAKA**

(Civil Jurisdiction)

BETWEEN:

**ISILILO MZYECE**

**PLAINTIFF**

**AND**

**NEPTUNE PROPERTIES LIMITED (IN LIQUIDATION) 1<sup>ST</sup>**

**DEFENDANT**

**CHAMPION MOONGA CHILOMO**

**2<sup>ND</sup> DEFENDANT**

**Before Hon. Mr. Justice Nigel K. Mutuna this 24<sup>th</sup> day of June 2015**

**For the Plaintiff : Mrs Simachela and Mr. Chewe of  
Nchito & Nchito.**

**For the Second Defendant : Mr. M. Muchende of Messrs Dindi  
&**

**Company.**

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## **J U D G E M E N T**

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**CASES REFERRED TO:**

- 1) *Wesley Mulungushi vs. Catherine Bwale Mizi Chomba (2004) ZR 96*
- 2) *Jonas Amon Banda vs. Dickson Machiya Tembo (2008) (1) ZR 204*
- 3) *Mwenya and Randee vs. Kapinga (1998) ZR 12*
- 4) *Limpic vs. Mawere and Others Appeal No.121 of 2006*
- 5) *Zambia Consolidated Copper Mines vs. Katalayi & others (2001) ZR 28*
- 6) *Zambia Bata Shoe Company Ltd vs. Vin Mas Limited (1994) ZR 136*

- 7) *Josia Tembo and Henry Jawa vs. Peter Mukuka Chitambala (2009) ZR 326*
- 8) *Kayoba and Another vs. Ngulube and Another (2003) ZR 132*
- 9) *GF Construction (1976) Ltd vs. Rudnap (Z) Ltd and another (1999) ZR 134*
- 10) *Mhango vs. Ngulube (1983) ZR (6)*

**Other authorities referred to:**

- 1) *Chitty on Contracts – General Principles, Volume 1, General Editor, H.G. Beole, D.C. 13<sup>th</sup> edition, 2008, Sweet and Maxwell and Thomson Reuters (Legal) Limited*
- 2) *High Court Act, Cap 27 of the Laws of Zambia*

The delay in delivery of this judgment is regretted. The reasons however, are a matter of public notoriety.

The Plaintiff Isililo Mzyece commenced this action against the two Defendants, Neptune Properties Limited (in Liquidation) and Champion Moonga Chilomo on 23<sup>rd</sup> March 2010. The claim as it is endorsed on the writ of summons is for an order of specific performance of contract of sale for the remaining extent of subdivision No.2 of Subdivision No. D of subdivision No.5 of subdivision No. B of Farm No. 396a, Lusaka (the property). The claim is also for an order to compel the Second Defendant to transfer the property to the Plaintiff.

The Plaintiff is also claiming for damages for breach of contract and interest on any monetary awards.

The undisputed facts of this case are as follows. The Plaintiff who is a banker by profession, contracted to purchase the property from the First Defendant, which was in liquidation at the time. The property is an intended subdivision of the parent property. The agreed purchase price for the property was K240,000,000.00 which the Plaintiff paid to the First Defendant through its liquidator. The source of the moneys for the

purchase price was a loan obtained by the Plaintiff from his then employer Barclays Bank, which loan was transferred to his current employer Stanbic Bank.

At the time the Plaintiff and First Defendant contracted, the property was still registered in the name of Second Defendant who had offered it to the First Defendant by way of an offer sale letter dated 4<sup>th</sup> December 2003. As a consequence of this, it was an express term of the contract that, and the First Defendant covenanted that the Second Defendant in whose name the property was registered, would execute the necessary assignment of the property to the Plaintiff. Pursuant to the foregoing, the offer of sale letter between the First and Second Defendants was annexed to their contract of sale. The Plaintiff took vacant possession of the property after the parties contracted. The property is still registered in the Second Defendant's name because the sale transaction was never concluded.

The Plaintiff has contended that the First Defendant is obliged to ensure that the Plaintiff's title to the property is perfected. Further that, the First Defendant is entitled to demand that the Second Defendant undertake the assignment of the property to the Plaintiff. It is also contended that the First Defendant is in breach of the contract as it has failed, omitted or neglected to procure the assignment of the property to the Plaintiff. As a consequence of this, the Plaintiff has suffered and continues to suffer damages.

In its defence, the Second Defendant contended that it did not sell the property to the Plaintiff. It contends further that the First Defendant had no title to the property to pass onto the Plaintiff. As a consequence of this, it was contended, the Plaintiff is not a bonafide purchaser for value as he knew or ought to have known that the First Defendant had no right to assign the property.

By way of a counter claim, the Second Defendant contended that the Plaintiff did not conduct a due diligence or search on the property prior to contracting to purchase it. Despite this, the Plaintiff was given possession

of the property. The Second Defendant therefore claims for possession of the property and damages or mesne profits to be assessed.

In the alternative, the Second Defendant contended that the First Defendant failed to account to the Second Defendant for the moneys received as consideration for the sale of the property. He therefore counter claimed, for the First Defendant and Plaintiff to account for the purchase price of the property.

Prior to commencement of the trial and on 24<sup>th</sup> May 2011, the Plaintiff entered default judgment against the First Defendant. Therefore, when the matter came up for trial, the matters in dispute that were before court related only to the Plaintiff and Second Defendant.

At the trial there were two witnesses for the Plaintiff, namely, the Plaintiff himself as PW1, and Malewa Victor Kaona as PW2. The Second Defendant testified in his defence.

The Plaintiff's evidence was that sometime in July 2007, he was looking for a property to purchase in the Makeni, Saint Bonaventure area. He therefore contacted a Mr. B.C. Mutale who showed him the property which was a huge incomplete structure located on a two acre piece of land. Mr. B.C. Mutale informed him that the property was being sold by liquidators.

The Plaintiff entered into negotiations with Mr. B.C. Mutale for the purchase of the property who represented and worked with PW2 of Messrs Nakonde Chambers. The Plaintiff was informed that the property did not have a separate title deed because the property had still not been subdivided. The two then provided him with documents to prove ownership of the parent property from which the property was to be subdivided and the authority to sell. These were given to the Plaintiff by Messrs Nakonde Chambers under cover of letter dated 30<sup>th</sup> July 2007 and they were: notice of appointment of liquidators; consent order in cause number 2006/HPC/0076; and offer letter dated 4<sup>th</sup> December 2003 from the Second Defendant to the First Defendant in respect of the parent property.

After receipt of the documents the Plaintiff testified that he was satisfied that PW2 and Mr. B.C. Mutale had authority to sell the property and his advocates Messrs Mweemba Chashi and partners then sent the draft contract of sale to Messrs Nakonde Chambers who were acting for the First Defendant. The draft contract of sale indicated that the Plaintiff was purchasing the property which was a subdivision of the parent property but since there was only the diagram relating to the parent property available, this is what was indicated in the section of the contract of sale for particulars of the property. It was also agreed that the property would be assigned directly from the Second Defendant to the Plaintiff because the transfer of the property from the Second Defendant to the First Defendant had not been done.

The Plaintiff testified further that the purchase price for the property was agreed at K240,000,000.00, and he obtained a loan from his employer at the time, Barclays Bank for purposes of funding the purchase.

After the Plaintiff paid for the property he testified that he started having problems with concluding the sale. PW2 advised him that the Second Defendant was out of town and as such he could not sign the deed of assignment and that he would sign it upon his return to Lusaka. Mr. B.C. Mutale informed him that the Second Defendant had collected the title deeds to the parent property for purposes of speeding up conclusion of the subdivision of the property. Later he received a call from the Second Defendant and when they met he advised him not to go ahead with the sale transaction. The Second Defendant did not give him any reason for this and the Plaintiff advised him that it was too late because he had already paid for the property.

Sometime in August 2008, the Second Defendant approached the Plaintiff and informed him that he had repaid all the moneys he had obtained from the First Defendant as a loan and therefore ownership of the property had reverted back to him. He then asked the Plaintiff to vacate the property.

At this point the title deeds to the property had not been processed because PW2 informed the Plaintiff that he awaited receipt of the survey

diagrams. This delay prompted the Plaintiff to engage a surveyor named Mr. Chikwali whom the liquidators were using for the subdivision for purposes of his showing him the boundary to the property. This was for purposes of his constructing a boundary wall. He then built the wall on one side of the property which prompted the Second Defendant to propose that he take this portion of the property and surrender the rest to the Second Defendant as a way of settling the matter excuria. The Plaintiff declined the proposal because he felt it was unfair as he had borrowed the money he used to pay for the purchase price from the bank.

The Plaintiff concluded his testimony by stating that the dispute over the property has not been resolved as he has been unable to obtain the title and yet continues to service the loan through monthly deductions. Further that, his present employer Stanbic Bank who took over the loan from Barclays Bank have been unable to perfect their security over the loan.

In cross examination the Plaintiff testified that before he purchased the property he did conduct a search at Ministry of Lands and that he is aware that the First Defendant has no title to the property. Further that he is aware that the title deeds to the property are in the name of the Second Defendant. That he did not obtain the Second Defendant's consent to buy the property before he committed himself.

The Plaintiff also testified that he is not aware if the First Defendant has a specific order of the court for the sell of the property.

As regards his prayer for specific performance, the Plaintiff testified that there is a document at page 11 in his bundle of documents which obliges the Second Defendant to assign the property to him. Upon further scrutiny of the document, the Plaintiff conceded that there is no direct undertaking in the document to that effect. He also conceded that his name does not appear in the document and that he did not give any consideration to the Second Defendant for purposes of his transferring the property to him. Further that he does not have a contract of sale between himself and the Second Defendant for the sale of the property.

The Plaintiff also testified that he did not consult the Second Defendant in respect of the contents of special condition 5(c) of the contract of sale, nor was he shown any letter from the Second Defendant making the assurances mentioned in special condition 5(c). He also confirmed that the letter of sale between the First and Second Defendants which is at page 1 of his bundle of documents indicates that the sale of the property is subject to contract. The Plaintiff stated in this respect that the letter itself is the contract of sale between the First and Second Defendants. Further that, he is aware that the First Defendant never perfected title to the property he contracted to purchase.

As regards the Second Defendant's counter claim, the Plaintiff conceded that: he has entered upon a piece of land which is registered in the name of the Second Defendant; he found a huge incomplete structure on the piece of land; the house was roofed with green Harvey tiles; it had 90% of the windows in place; there was a borehole on the property which was not connected; he moved onto the property on 27<sup>th</sup> October 2007 without obtaining permission from the Second Defendant; and the Second Defendant threatened his workers and requested him to vacate the property.

In re-examination the Plaintiff testified that he was compelled to go ahead with the purchase of the property because of the letter of sale between the First and Second Defendants. Further, he was comforted by the fact that there was a court order appointing PW2 and Mr. B.C. Mutale as liquidators of the First Defendant. He explained that his understanding was that the two had proven that they had a right to dispose of any assets that belonged to the First Defendant. The Plaintiff also explained that he was not mentioned in the letter of sale because the transaction it related to happened in the year 2003 between the two Defendants and he only became interested in the property in the year 2007.

The evidence of PW2 was that he and Mr. B.C. Mutale were appointed as joint liquidators of the First Defendant by a consent order of the Court dated 25<sup>th</sup> April 2006. When he took over possession of the First

Defendant he discovered records relating to the parent property which had been sold to the First Defendant by the Second Defendant. The intention was that the parent property was to be subdivided to create two properties with separate titles. The original certificate of title to the parent property was in the possession of the First Defendant but the contract of sale had been misplaced. There was therefore only the offer of sale letter to prove the sale transaction and sketch diagrams for the subdivision. He testified further that the Second Defendant was not in possession of the property and that it was the First Defendant that was in possession. The First Defendant, he testified had purchased a bare portion of the land from the Second Defendant and had started construction of an executive main house with a guest wing annexed. The house had five bedrooms two of which were self-contained.

PW2 testified that when he met with the Second Defendant to introduce himself he assured him that the title to the property would be assigned directly to the new purchaser. Further that, in September 2007 he handed over the original certificate of title to the parent property to the Second Defendant because he insisted that he was the one responsible for pursuing the subdivision of the parent property for purposes of obtaining separate title deeds. The Second Defendant undertook to return the title deed after he had concluded the marking off and subdivision of the property. This did not happen and the Second Defendant refused to return the original title deeds as a consequence of which, PW2 could not conclude the sale transaction.

In cross examination PW2 testified that he was the liquidator of the First Defendant and as such he was the one responsible for the sale of the property to the Plaintiff. He testified further that the Plaintiff was represented by Messrs Mweemba Chashi and partners in the sale transaction and that he was the one who prepared the contract of sale between the Plaintiff and the First Defendant. Further that the sale was not directly between the Plaintiff and Second Defendant and that the Second Defendant is not a party to the contract between the Plaintiff and



the First Defendant. He also testified that he did not have written consent from the Second Defendant allowing him to execute a deed of assignment on his behalf. That he did not pay the Second Defendant any money from the funds received from the Plaintiff as consideration for the sale.

As regards the offer of sale letter at page 1 of the Plaintiff's bundle of documents, PW2 confirmed that at paragraph 6 it indicates that the offer was subject to a contract of sale. Further that, as far as he could remember the contract of sale had been misplaced or lost. As such the contract was not before court. He also testified that he had not found any evidence to show that consideration was paid by the First Defendant to the Second Defendant. That there was no registration of the First Defendant's interest on the property at Ministry of Lands and he was aware that he sold a property to the Plaintiff that was held on title by the Second Defendant.

In re-examination PW2 testified that he had authority to transact on the property because the First Defendant which was in liquidation was in possession of certificate of title to the parent property. Further that, there was an offer of sale letter and the property was in the possession of the First Defendant which had built a structure on it.

The evidence of the Second Defendant was led by the Second Defendant himself. He testified that he is the title holder of the parent property. That sometime in December 2003, he was offered to sale his vacant house on the property to the First Defendant subject to contract and also the requisite subdivision. There was no contract of sale that was executed between himself and the First Defendant and no money was paid by the First Defendant to him as consideration. However, sometime in 2008, he saw the Plaintiff taking possession of his house and when he confronted him he informed him that he bought the property from the First Defendant. Following from this he queried the officials of the First Defendant and discovered that the First Defendant had been placed in liquidation and the liquidators denied having sold the property to the

Plaintiff. He ended by stating that he had now seen the contract of sale, purporting to sell the property to Plaintiff which he is not party to.

In cross examination the Second Defendant testified that he moved back to the property in dispute in the year 2008 at which time he found the Plaintiff in occupation. Prior to this he testified, he had in 2003 offered the property to the First Defendant as is evidenced by the offer of sale letter at page 1 of the Plaintiff's bundle of documents. The offer he stated related to a portion of the parent property and it was two acres in size. Further that, he has never revoked the offer of the said portion to the First Defendant.

The Second Defendant testified further that he is in possession of the original title deed to the whole property which he got from one Victor Hantambo a brother to the deceased proprietor of the First Defendant. He testified further that on receipt of the certificate of title he was given a letter which stated that the certificate of title was being released to him for purposes of subdividing the property. The said letter he stated is at page 2 of the Plaintiff's supplementary bundle of documents. Further that, he did not facilitate the subdivision of the property. He denied attempting to benefit from the sale of the property twice. As regards the state of the exhausted improvements on the property, he testified that a comparison of the valuation reports for the years 2007 and 2011 indicates that there were improvements made on the property.

This was the evidence led by the parties during the trial. At the close of the trial the parties filed submissions.

Counsel for the Plaintiff Mrs. Simachela and Mr. Chewe argued that the Second Defendant should be ordered to convey the property to the Plaintiff. It was argued that the evidence on record clearly shows that the Second Defendant offered a subdivision of the parent property to the First Defendant in 2003. Further, the Second Defendant admitted that he did not revoke the offer he made to the First Defendant and that the evidence on record shows that the original certificate of title was in the First Defendant's possession from 2003 to 2007. The foregoing facts, counsel

argued, indicate that the sale transaction between the First Defendant and Second Defendant was concluded. It was argued that the Second Defendant received payment for the property that is why he surrendered the title deeds to the property. As a consequence of this the First Defendant had a right to sell the property to the Plaintiff despite the fact that it was not the title holder.

It was argued that the conduct by the Second Defendant indicated that he intended to be bound by the sale agreement. In advancing this argument, counsel relied on the case of **Wesley Mulungushi vs. Catherine Bwale Mizi Chomba (1)** whose principle counsel argued was confirmed in the case of **Jonas Amon Banda vs. Dickson Machiya Tembo (2)**. He therefore urged me to enforce the contract offer between the First Defendant and Second Defendant thereby compelling the Second Defendant to transfer or assign the property to the Plaintiff.

The second limb of counsel's argument was that this court should order the transfer of the property to the Plaintiff and not award damages. It was argued that an award of damages would not sufficiently compensate the Plaintiff for his loss. Counsel relied on the case of **Mwenya and Randee vs. Kapinga (3)** in which the Supreme Court held that an award of damages cannot adequately compensate a party for loss of land.

As regards the Second Defendant's counter claim, counsel argued that the same should fail in view of the evidence that shows that the Second Defendant's conduct is inconsistent with a person who had sold his property. It was argued further that if the claim for vacant possession is granted to the Second Defendant it will amount to unjust enrichment in view of the massive improvements made on the property by the Plaintiff. Reliance was made on the case of **Limpic vs. Mawere & Others (4)**. This situation, it was argued is compounded by the fact that the Plaintiff obtained a loan from a bank. Counsel prayed that the Plaintiff's case must succeed.

In the Second Defendant's submissions Mr. M. Muchende argued that this case is distinguished from the cases cited by counsel for the Plaintiff. He

argued that the Plaintiff in this case is claiming the relief of specific performance from an innocent third party who is the title holder to the land in dispute. It was argued that by distinction, in the cases cited by the Plaintiff's advocates specific performance was sought against the title holders of land who were also parties to the contract or the memoranda of sale. The Second Defendant it was argued is not a party to the contract of sale nor was he consulted prior to the contract being entered into. Counsel referred me to the case of **Zambia Consolidated Copper Mines vs. Katalayi & Others (5)** in which the Supreme Court refused to grant the relief of specific performance to the Respondents because there was an innocent third party involved who had overriding interest in the land. He also referred me to the case of **Zambia Bata Shoe Company Limited vs. Vin-Mas Limited (6)** in which the Supreme Court granted the relief of specific performance and gave the reason *obiter dicta* that there was no innocent third party.

It was also argued that strictly speaking a contract can only be enforced against a person who is a party to it. As such, parties to a contract cannot impose an obligation upon a third party. Counsel referred me to my decision in the case of **Josia Tembo and Henry Jawa vs. Peter Mukuka Chitambala (6)** and **Chitty on Contracts**. Counsel argued further that the Plaintiff cannot sue or assert any rights arising from the letter of sale because it is only the First Defendant who can sue on it.

The other limb of counsel's argument was that the Plaintiff cannot seek refuge in equity as bonafide purchaser for value because he failed, ignored or neglected to make the necessary inquiries before purchasing the property. He referred to the case of **Kayoba and Another vs. Ngulube and Another (7)**.

As regards the counter-claim counsel argued that it must succeed because the Second Defendant had demonstrated that he is the title holder to the land. He argued that the facts demonstrate that the Plaintiff entered and remained on the property without consent of the Second Defendant who is the title holder. The Plaintiff is therefore a trespasser on

the Second Defendant's property and therefore should be compelled to pay damages. It was further argued that in view of the principle of *quic quid plantator solo solo cedit* the Plaintiff is not entitled to any relief in respect of the developments he made on the land. Counsel prayed that the Plaintiff's claim should be dismissed and the counter-claim succeed.

In the Plaintiff's reply submissions, it was argued that the relief sought against the Second Defendant is not specific performance but rather an order that he be compelled to convey the property to the Plaintiff. Further that, the claim for specific performance was against the First Defendant against whom default judgment had already been entered.

It was also argued that if the court is not inclined to grant the order sought, it must order that the Plaintiff be compensated for the development he made on the property in line with the **Limpic** case.

I have considered the evidence and arguments tendered by the parties. In his claim the Plaintiff has contended that he seeks an order compelling the Second Defendant to transfer the property in issue to him. The basis for this is that it is contended that the First Defendant is entitled to the property as a consequence of the offer of sale letter executed between the First Defendant and Second Defendant. On the other hand, the Second Defendant's counter-claim as against the Plaintiff is for possession of the property, damages or mesne profits to be assessed and interest. Alternatively, he claims for an order for the First Defendant and the Plaintiff to account for the purchase price of the property and costs.

I will first deal with the Plaintiff's claim.

The evidence led by the Plaintiff and indeed arguments by counsel for the Plaintiff point to the fact that the relief sought is indeed specific performance. I say so because there is no known relief or remedy at law or in equity arising from facts similar to the ones in this case that can compel a party to transfer or assign a property to a person other than specific performance. Therefore, although in the reply submissions counsel for the Plaintiff has argued that the claim for specific performance

is not directed at the Second Defendant I will determine this matter as if this were specifically so stated.

The instances where specific performance will be granted have been stated by ***Chitty on Contracts - General Principles***, 13<sup>th</sup> edition at page 1718 as follows:

*“The jurisdiction to order specific performance is based on the existence of a valid, enforceable contract ... It will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality, which makes the contract invalid or unenforceable.”*

This therefore means that for one to successfully invoke the remedy of specific performance, he must demonstrate that he entered into a legally binding contract with the person against whom he seeks the remedy. This is the starting point that opens the doors to the remedy of specific performance. The Zambian courts have also rendered decisions on which matters are suited to the remedy of specific performance. One such case is the case cited by counsel for the Plaintiff of ***Wesley Mulungushi vs. Catherine Bwale Mizi Chomba (1)***. In that case the Supreme Court held at page 97 that *“the court will decree specific performance only if it will do more perfect and complete justice than the award of damages.”* In an earlier case of ***Jane Mwenya and Josan Randee vs. Paul Kapinga (3)*** which was also cited by counsel for the Plaintiff, the Supreme Court went further and held at page 17 as follows:

*“The law takes the view that damages cannot adequately compensate a party for breach of contract for the sale of an interest in a particular piece of land or of a particular house however ordinary.”*

After making this holding, the court went ahead and ordered specific performance.

What can be discerned from the ***Mulungushi*** and ***Jane Mwenya*** cases is that specific performance is to be granted where an award of damages

will not be sufficient recompense for the loss of a property or a house. It is also clear from the two authorities that the aggrieved parties in the cases had signed contracts or memoranda which the court found to be valid and binding. The courts therefore went ahead and ordered specific performance. In the case before me, the undisputed facts show that there was no contract of sale entered into between the Plaintiff and Second Defendant who is the title holder to the property in dispute. The only contract of sale was between the Plaintiff and First Defendant. This is at page 17 of the Plaintiff's bundle of documents. A perusal of the said contract of sale indicates that the Second Defendant was not a party to it neither did he sign it. The only mention made of the Second Defendant in the said contract of sale is in special condition 5(b) which is at page 20 of the Plaintiff's bundle of documents. The special condition states as follows:

*"That the said Neptune Properties are beneficial owners of the said property acquired from one Champion Moonga Chilomo as per letter of sale dated 4<sup>th</sup> December 2003 annexed hereto."*

It is pursuant to the said special condition and offer of sale letter that the Plaintiff has contended that the First Defendant had a legal right to sell the property to it. The letter is at page 1 of the Plaintiff's bundle of documents. It is important that I reproduce the letter before I comment on it. It states as follows:

*4<sup>th</sup> December 2003*

*The Director  
NEPTUNE PROPERTIES  
P.O. Box 37742  
Lusaka*

*Attention: Mr. Mulomba Hankombo*

*Dear Sir,*

**OFFER OF SALE:        REMAINING EXTENT OF SUBDIVISION 2  
OF SUB 'D OF SUB 5 SUB B OF FARM 396a MAKENI LUSAKA**

*Following today's discussion held at your offices between ourselves concerning the above subject matter, I am pleased to offer you the property (stand above) to buy at open market value under the following general terms and condition:*

- 1. The sale price shall be K60 million*
- 2. The sum of K40 million be paid upon exchange of the "contract of sale"*
- 3. The K20 million balance upon competition*
- 4. The property on offer is the "Remaining extent of subdivision 2 of subdivision D of Subdivision B of farm 396a Makeni"*
- 5. That vacant possession of the said property shall be the 30<sup>th</sup> of June 2004*
- 6. The sale is subject to contract*

*By copy of this letter please sign herein below in acceptance of the offer and return one copy to us.*

*Yours faithfully,*

*Champion Moonga Chilomo  
PROPERTY OWNER*

*Signed in acceptance on the behalf of NEPTUNE PROPERTIES*

*Mulomba Hankombo  
DIRECTOR*

It is important to note that not only is the letter indeed an offer of sale of property to the First Defendant but that it is made subject to contract. The net effect is that it was predicated upon the execution of a contract by the First and Second Defendants. See number 6 in the letter. There is no evidence that in pursuance of the said offer of sale letter consideration passed between the two parties to the letter. The Plaintiff has not produced in evidence the contract that the purported sale was predicated upon. The letter cannot therefore, in my considered view be considered a valid and legally binding contract. Neither can it be said to have assigned proprietary interest in the property from the Second Defendant to the First Defendant. The Plaintiff's claim against the Second Defendant cannot



therefore be aided by the said letter and I find that this is not an appropriate case for the grant of the remedy of specific performance.

The Plaintiff's predicament is compounded by the fact that he cannot seek refuge in the equitable remedy of bonafide purchaser for value without notice of encumbrance. It is clear from the Plaintiff's evidence that he was aware that the First Defendant was not the title holder and that the title holder was the Second Defendant, whom he did not deal or contract with. Further, it is clear from his evidence that he knew that the property he was contracting to purchase had not been subdivided nor was it on title. He should therefore, in my considered view, have exercised caution by insisting on proof of the First Defendant's authority to sell or consent from the Second Defendant before paying for the property.

In any event, the basic principles of the law of contract are settled that you cannot enforce a contract against a third party to it unless certain criteria has been met. The fact that the Second Defendant was not a party to the contract sought to be enforced against him is *ipso facto* a deciding factor in this matter. The case by the Plaintiff as against the Second Defendant must fail even on this ground alone.

I now turn to determine the counter claim. The view I take is that the counter claim must succeed because as the Second Defendant's advocate has argued, the Second Defendant has proved that he is the owner of the property which the Plaintiff is in occupation of. The Plaintiff himself admitted in cross examination that he was aware that the Second Defendant was the title holder of property and that he did not get the Second Defendant's consent before he moved onto the property. He also confirmed that the Second Defendant had threatened his workers. Further, his claim against the Second Defendant having failed, he has no reason to continue in occupation of the property.

I therefore enter judgment in favour of the Second Defendant as against the Plaintiff and order that the Plaintiff should vacate the property forthwith known as the remaining extent of sub-division 2 of subdivision D of Subdivision B of farm 396a Lusaka, the property.

The Second Defendant has also claimed for mesne profits or damages. The basis of this claim is that he was denied use of his property. The case of ***GF Construction (1976) Ltd vs. Rudnap (Z) Ltd and another*** has defined mesne profits at page 137 as “... damages awarded to a landlord for holding over a tenancy by a tenant.” The court went on to observe that “... there was no relationship of landlord and tenant between the appellant and the First Respondent or was there an agreement between them that before completion the appellant would pay rent to the First Respondent”. The facts of this case show that there was no landlord and tenant relationship between the Plaintiff and Second Defendant. Further, since no contract of sale exists between the two, there can be no question of payment of rent before completion arising. I accordingly find that this is not an appropriate case for the award of mesne profits and I dismiss the claim.

As regards the claim for damages it is contained in paragraph 7(b) of the defence and counterclaim filed by the Second Defendant and it states merely that the Second Defendant claims for damages. The Second Defendant has not endeavoured to particularize the damages but it can be discerned from paragraphs 4 and 6 of the defence and counterclaim that the claim relates to the period that the Plaintiff was in occupation of the property without the consent of the Second Defendant. This can be discerned from paragraphs 4 and 5 of the defence and counterclaim in which the Second Defendant avers that the Plaintiff was given possession of the house by the First Defendant and that efforts to take back possession of the property from the Plaintiff have proved futile. Further, in his evidence in chief, the Second Defendant testified that to his surprise, sometime in 2008 he saw the Plaintiff entering his vacant house and when he confronted him he said that he bought the property from the First Defendant. This evidence was not contested and the Plaintiff has indeed admitted that he is in occupation of the property. Infact at paragraph 6 of the reply and defence to counterclaim the Plaintiff confirms that he was granted possession of the property by the First Defendant. He justifies the taking of possession on the basis that the First Defendant had been in

possession of the property since 2003. This is the only justification that the Plaintiff has given for being in possession which is based on his belief that the property had been sold to the First Defendant who had authority to sell it. I have already found that there was no agreement between the First Defendant and Second Defendant which assigned the property to the former. Further that, the First Defendant had no authority to sell the property to the Plaintiff. It was on this premise that I found that the Second Defendant is entitled to possession of the property. Further, having found that the Second Defendant is entitled to possession of the property I also find that he is entitled to an award of damages as he was kept out of use of his property and I accordingly so order.

I am however at pains to determine how much the Second Defendant is entitled to as damages because as I have stated earlier, the claim for damages has not been particularized. The case of **Mhango vs. Ngulube (9)** has put the position on this issue thus at page 66:

*“It is, of course, for any party claiming a special loss to prove that loss and to do so with evidence which makes it possible for the court to determine the value of that loss with a fair amount of certainty”.*

The court went on to hold that:

*“The result is that the evidence presented to the court was unsatisfactory, and, in our opinion, the learned trial judge would have been entitled either to refuse to make any award or to award a much smaller sum, if not a token amount in order to remind litigants that it is not part of the judge’s duty to establish for them what their loss is”.*

The court went on to hold that for purposes of doing justice, where the evidence is inadequate, the court can make an intelligent guess as to what loss has been suffered.

In view of what I have stated in the preceding paragraph and in the absence of any evidence to aid me, I can only resort to the principle in the

**Mhango** case and make an intelligent guess as to the Second Defendant's loss. The evidence before me is that the Plaintiff has been in occupation of the property in dispute since 2007. It is not clear what purpose he put the property to because the evidence led is that the house on the property is an incomplete structure. As a consequence of this one cannot say with certainty that the Plaintiff enjoyed his stay in the house as one would in a complete house. The evidence in this regard revealed that the house is not completely fitted with windows. This is especially so because it is not clear if there is electricity in the house or indeed water because in the case of the latter the evidence led is that there is a borehole which is not connected. Given these uncertainties I can only award the Second Defendant K20,000.00 for each year he was denied possession of the property. This means that he is entitled to this amount from 2007 to 2015 which is eight years. The total award is therefore the sum of K160,000.00 and I accordingly enter judgment in favour of the Second Defendant against the Plaintiff in that amount. The said sum to attract interest at the short term bank deposit rate from date of counterclaim to date of the judgment thereafter at the current bank lending rate as determined by Bank of Zambia till date of payment.

The matters however do not end there. There is the issue of the Plaintiff having made improvements to the property. The evidence reveals that the Plaintiff constructed a part of the boundary wall. The Second Defendant has not denied this and has actually acknowledged this position. He cannot therefore benefit from the Plaintiff's labour by acquiring without compensation, the developments the Plaintiff has made on his property. It has been argued by the Second Defendant's advocate that the Plaintiff cannot be compensated for the developments on account of the principle of *quic quid plantator solo solo cedit*. Put simply, this principle can be translated to mean everything affixed to the land becomes part of the land. It is often used as a caveat to a tenant that, should he erect permanent fixtures on the landlord's property he will not at law be allowed to remove them at the expiry of the lease as they would have become part of the land. The principle, in my considered view, is not

applicable in this case because the basis of the Plaintiff's claim is the equitable principle that militates against unjust enrichment. I as a court in Zambia am compelled to apply equitable principles by virtue of section 13 of the **High Court Act** which states as follows:

*"In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereon may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible all matters in controversy between the said parties may be completed and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided: and in all matters, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail".*

By virtue of the foregoing section I have a wide discretion to award an equitable remedy. The remedy anticipated in this matter is that of refund of the expenses incurred by the Plaintiff in developing the property, that is construction of part of the wall fence. This is so that the Second Defendant is not unjustly enriched by taking over developments on his land for free, which he did not expend any moneys on. Especially that the facts show that at all material times the Second Defendant knew that the Plaintiff had taken occupation of the property and took no serious step to eject the Plaintiff from the property or indeed to prevent him from improving the property save to caution him against proceedings with the sale and warning his workers.

I therefore order that the Plaintiff should be refunded by the Second Defendant what he expended on construction of part of the wall fence. I further direct that since the Plaintiff has not produced any documentary evidence to show how much he spent on construction of part of the wall fence, the two parties should each engage a property valuer to assess the value of the construction. Once this is done the two values arrived at should be compared and the average of the two values will be the refund to be paid to the Plaintiff. This should be done within 30 days of the date of this judgment. I further direct that the Second Defendant should pay to the Plaintiff the refund value within 10 days of the 30 days I have referred to above. Along with the said refund, I also award the Plaintiff interest on the refund at the short term bank deposit rate from date of writ to date of judgment, thereafter at the current bank lending rate till date of payment.

As for the costs, in view of the fact that the Plaintiff's case has substantially failed, and the Second Defendant's counterclaim substantially succeeded, I condemn the Plaintiff to costs. The same are to be agreed, in default taxed.

**Dated at Lusaka this 24<sup>th</sup> day of June 2015**

**NIGEL K. MUTUNA  
HIGH COURT JUDGE**