

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2012/HP/0530



BETWEEN:

**MUTINTA FEBBY KANENE
HOSEA MUMBA**

**1ST PLAINTIFF
2ND PLAINTIFF**

AND

**JESSY ZULU
PULSE FINANCIAL SERVICES**

**1ST RESPONDENT
2ND RESPONDENT**

*Before the Hon. Mrs. Justice A. M. Banda-Bobo, on the.....day of
....., 2015.*

FOR THE PLAINTIFFS:

In person

FOR THE 1ST RESPONDENT:

In person

FOR THE 2ND RESPONDENT:

J & M Advocates, Lusaka

JUDGMENT

Cases referred to:

1. *Santley vs. Wilde* [1899] Ch 47
2. *Pilcher vs. Rawlins* [1872] 7 Ch 259.

Legislation and other Works referred to:

- *Rules of the Supreme Court, RSC 1965 (White Book) Volume 1 (1999) Edition*
- *The Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia*

By Originating Summons made pursuant to **Order 113 (1) of The Rules of the Supreme Court, RSC 1965 (White Book) Volume 1**

(1999) Edition ("RSC"), the plaintiffs herein claim for the following:

1. For an order for specific performance relating to the property known as farm No. 251, Lusaka West.
2. Costs and any other relief the court may deem fit.

The same was supported by an affidavit sworn by one Mutinta Febby Kanene who deposed as follows:

That on 18th day of December, 2010 the 1st plaintiff entered into a contract of sale for a piece of land to the extent of one (1) acre which is part of the said property known as Farm No. 251a Lusaka West from the 1st respondent herein. Additionally that on 25th day of July, 2011 the 2nd plaintiff herein entered into a contract of sale for another piece of land to the extent of one (1) acre which is also part of Farm Number 251a, Lusaka West from the 1st respondent.

That the plaintiffs paid sums of K35, 000.00 and K45,000.00 respectively as purchase prices for their respective pieces of land. That upon paying the agreed prices the plaintiffs started the process of changing ownership by engaging surveyors to carry out a survey and drawing of the diagrams for the respective pieces of land which was done. It was further deposed that once drawn, the diagrams were submitted and approved by the Ministry of Lands. Additionally, that the Ministry requested the plaintiffs to submit the original certificate of title for the purposes of processing the certificate of title for the subdivision.

The deponent found himself deposing that when the 1st respondent was approached to produce the original Certificate of Title, the plaintiffs discovered that the 1st respondent had obtained a loan from the 2nd respondent and that she had submitted the certificate of title to the 2nd respondent as collateral without the knowledge of the plaintiffs. Further, that the plaintiffs only learnt about the loan after the 1st respondent had already sold the said pieces of land which fact was not disclosed at the time of contracting.

Going on, the deponent stated that after discovering the foregoing they approached the 1st respondent who confirmed custody of the 1st respondent's certificate of title and her indebtedness to it. Additionally, that their further correspondence has yielded no results hence this application.

The Originating Summons was opposed through an affidavit sworn by the 1st defendant herein who deposed in the main that she borrowed K100, 000.00 for her business from the 2nd respondent. Further, that she had indeed sold the pieces of land on her farm as deposed by the applicants. Additionally, that the Ministry of Lands had advised her not to hand over title to the purchasers but mark off, do the subdivision and handover the title deeds to each buyer for their portions. She further deposed that the Court grants her a period of five months (from 1st August - 31st December, 2014) within

which to redeem her loan and avail the subject Certificate of Title and to reach completion four weeks thereafter.

The Originating Summons was opposed through an affidavit sworn by one Francis Musaode Banda in which it was deposed as follows: That on 11th March, 2013, the 2nd respondent granted the 1st respondent a loan facility of ZMW 100,000.00 secured by way of legal mortgage between the 1st and 2nd respondents over property known as S/D No. 16 of S/D E of Farm No. 215a situate in the Lusaka province. The said mortgage was duly executed and registered at the Lands and Deeds Registry.

Further to the foregoing, that prior to the execution of the said mortgage deed, the 2nd respondent through its duly authorised agents conducted a search at the Lands and Deeds Registry which search revealed no encumbrance. This led to the 1st respondent to surrender her Certificate of Title to the 2nd defendant duly noting that there was no existing encumbrance on the land. It was further deposed that the 2nd respondent was not aware of the 1st and 2nd respondents' interest in the said piece of land as the same were not registered or brought to the attention of the 2nd respondent. In the premises, according to the deponent the 2nd respondent has an equitable interest in the said piece of land, which interest shall subsist until the liquidation of the loan owed to it by the 1st respondent. The deponent added that an order for the deponent to yield the Certificate of Title to the applicants would seriously

prejudice the 2nd respondent's interest robbing him of security for the loan. Further that this was not a proper case for the 2nd respondent to surrender the Certificate of Title held as security for the loan facility aforesaid.

In its skeleton arguments, the 2nd respondent through counsel drew my attention to the case of **Santley vs. Wilde**¹ for the definition of mortgage and **section 65 of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia** (Cap 185) to buttress the argument that a mortgage shall operate as security redeemable upon payment of a debt or discharge of the obligation as the case may be and that to this end the mortgage subsisting between the 1st and 2nd respondent shall continue to operate until the 1st respondent repays its debt to the 2nd respondent.

It was contended that not only were the contracts between the plaintiffs and the 1st defendant not known to the 2nd defendant but that they were executory in nature only as they had not reached completion.

Counsel contended that any person who holds an equitable interest in property can only enforce his/her rights against certain persons. Such interest counsel submitted is enforceable against every transferee of land except a bonafide purchaser for value without notice of the equitable right. The Court's attention was drawn to the case of **Pilcher vs. Rawlins**²

It was further submitted that there was no crookedness or sharp practice on the part of the 2nd Respondent in transacting with the 1st respondent nor was there collusion between the two parties. The transaction in question according to counsel was based on good faith after the 2nd defendant was advised by the 1st respondent and after conducting inspection of the title of the said property.

Counsel reiterated that the 2nd respondent had shown that it had no notice actual or constructive of the applicants' interests in the property nor was any encumbrance registered at the Lands and Deeds Registry when the inspection was done in terms of **section 22 of Cap 185**.

The parties augmented the affidavit evidence and skeleton with oral arguments

The applicants for their part mainly rehashed their written evidence but in addition asked the Court to sever the 1st respondent's land from the portions they had purchased from her to enable them to get certificates of title.

In response the 1st respondent admitted entering into a contract with the applicants and largely agreed with their version of events and the amounts paid to her for the two respective pieces of land.

She also admitted that the applicants paid all that was due to her in the transaction.

Additionally she confirmed that she had obtained a loan from the 2nd respondent using the Certificate of Title relating to the entire piece of land from which the portions in question were sold to the applicants. Further that the said loan was obtained after she had sold the pieces of land to the applicants.

It was confirmed that the 2nd respondent had refused to surrender the Certificate of Title unless and until she liquidates the loan. She pleaded for time to repay the balance of, as she claimed, K16,000.00.

In reply the 1st applicant said that when she bought the property she was not told that there was an encumbrance. Further, that she only discovered this in January, 2014 when the diagrams were issued. She submitted that the 2nd defendant value the 1st respondent's house to get the remainder of the money.

Additionally those discussions with the 1st respondent had been going on since January, 2014 to no avail.

The 2nd applicant echoed the co-applicant's submissions and added that the 1st respondent had not been cooperative and that he was

not sure she was going to sort things out in the five months she had asked for.

I have considered the affidavit evidence and skeleton arguments and fully applied my mind to the authorities to which I was referred. This is a rather sad case of greed and want of consideration. It also an example of how not to live with one's neighbours.

It is clear to me that the 1st respondent knew exactly what she was doing when she purported to sale portions of land to the two unfortunate applicants herein. She knew that she had to give such title as she had and disclose any encumbrance if such existed. The 1st respondent's transactions with the applicants clearly preceded the loan she obtained from the 2nd respondent. Be that as it may, it is also true that the same transactions remained executory as between the parties. In addition, the applicants retained an equitable interest in the piece of land known as Stand No. 251a Lusaka.

The processes that should have followed were no doubt dealt a blow when from then on, the 1st respondent engaged in what I would term duplicity of a nature that is highly undesirable. The 2nd respondent has argued that it had no knowledge of the transactions between the 1st respondent and the applicants and it is right. By her own admission she knew exactly what she was doing.

The law with regard to mortgages is to be found in **section 65 of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia**. That section provides as follows:

" 65. A mortgage of any estate or interest in land shall have effect as security and shall not operate as a transfer or lease of the estate or interest thereby mortgaged, but the mortgagee shall have and shall be deemed always to have had the same protection powers and remedies (including a power of sale, the right to take proceedings to obtain possession from the occupiers and the persons in receipt of rents and profits or any of them and, in the case of land held in leasehold, the right to receive any notice relating to the land the subject of the mortgage which under any law or instrument the mortgagor is entitled to receive) as if the mortgage had so operated as a transfer or lease of the estate or interest mortgaged. " (emphasis added by Court)

The clarity of **section 65** above with respect to the rights and obligations that arise with respect to the land mortgaged and the mortgagee and mortgagor cannot be doubted. The mortgagee's powers and remedies shall include a power of sale, the right to take proceedings to obtain possession from the occupiers and the persons in receipt of rents and profits. As 1st respondent's counsel correctly argued the mortgage operates as security redeemable upon payment of a debt or discharge of the obligation as the case may. It follows that in the present case, the mortgage subsisting between the 1st and 2nd respondent shall continue to operate until the 1st respondent repays its debt to the 2nd respondent.

Further and by that section the 2nd respondent had the right to receive any notice relating to Stand No. 215a, the subject of the mortgage entered into between the respondents herein. I find as a fact that the 2nd respondent conducted a search and found no encumbrance in the names of the applicants. This was so because the said applicants were sold their portions before the 1st respondent obtained a loan from the 1st respondent. Not only were the contracts between the plaintiffs and the 1st defendant not known to the 2nd defendant, they were executory in nature only as they had not reached completion.

From the evidence on record one notes that while there was no crookedness or sharp practice on the part of the 2nd respondent in transacting with the 1st respondent, the same cannot be said on how the 1st respondent conducted herself. She it was who advised the 1st respondent of there being no encumbrance when she knew fully well that she had sold portions of the land in question to the applicants. This behaviour is deprecated.

Counsel contended and I agree that any person who holds an equitable interest in property can only enforce his/her rights against certain persons. As counsel correctly argued, the said is enforceable against every transferee of land except a bonafide purchaser for value without notice of the equitable right (see: **Pilcher vs. Rawlins** (supra))

There having been no notice actual or constructive of the applicants' interests and there having been no encumbrance registered at the Lands and Deeds Registry when the inspection was done in terms of **section 22 of Cap 185**, this Court cannot compel the 2nd respondent to release the original Certificate of Title relating to Stand No. 251a, Lusaka West. That notwithstanding, the 1st respondent is **ordered** to, if she has not already done so, ensure specific performance of her obligations under the respective contracts on or before 31st January, 2014 so that the same can be brought to completion failure to which the applicants will be at liberty to apply to this Court for further measures.

Costs follow the event to be taxed in default of agreement.

Leave to appeal is granted.

DELIVERED AT LUSAKA THIS 5TH DAY OF JANUARY, 2014.



MRS. JUSTICE A. M. BANDA-BOBO
HIGH COURT JUDGE