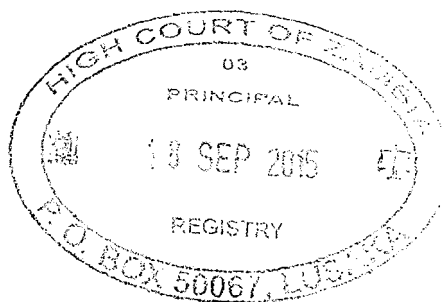


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



2012/HP/0756

BETWEEN:

ITAL TERRAZZO LIMITED (In Receivership)

PLAINTIFF

AND

HUMPHREY KAPAPULA
LEONARD KANYANDA

1st DEFENDANT
2nd DEFENDANT

Before the Honourable Mr. Justice C.F.R. Mchenga SC

For the Plaintiff: K. Chenda, Simeza, Sangwa & Associates

For the 1st Defendant: No appearance

For the 2nd Defendant: L.E. Eyaa, K.B.F. & Partners

JUDGMENT

Cases referred to:

1. Anti-Corruption Commission v Barnett Development Corporation Limited [2008] 1 Z.R. 69
2. Walder v The Mayor, Alderman and Burgesses of the Borough of Hammersmith [1944] 1 All ER 490
3. Josia Tembo and Another v Peter Mukuka Chitambala [2009] Z.R. 326

4. Maxwell Mwamba and Stora Solomon Mbuzi v Attorney General SCZ
Judgment NO. 10 of 1993
5. Isaac Tantameni Chali v Liseli Mwala [1995-1997] Z.R. 199
6. Fresh Mint Limited and Others v Kawambwa Tea Company limited
[2008] 2 Z.R. 32
7. Bank of Zambia v Chibote Meat Corporation SCZ Judgment No. 14 of
1999
8. National Airport Corporation v Reggie Ephraim Zimba and Savior
Konie SCZ Judgment No. 34 2000
9. William Jacks and Company (Z) Limited v O'connor (in his capacity
as Registrar of Lands and Deeds) Construction and Investment
Holdings Limited Intervening [1967] Z.R. 109
10. Watts v Morrow [1991] 1 W.L.R. 1421
11. Archer v Brown [1984] 2 AII ER 267
12. Moss Steamship Company v Whitney [1911-13] Ch. D. 65.

Legislation referred:

1. The Lands and Deeds Registry Act, Chapter 185 of the Laws of
Zambia
2. The Companies Act, Chapter 388 of the Laws of Zambia

This action was commenced by Writ of Summons accompanied by a Statement of Claim on 10th July 2012. The plaintiff's claim is for the following reliefs:

1. A declaration that they are the registered owner of the properties known as Lot 18003/M and 18004/M Lusaka and the defendants have no interest in the properties nor any part of the Land comprised therein
2. A declaration that the defendants are not entitled to enter or cross the plaintiff's said properties
3. An Order that the defendants do forthwith pull down, demolish and remove so much of the structure so far as already erected or constructed on the plaintiff's properties
4. An injunction to restrain the defendants by themselves, their servants or otherwise howsoever from doing the following acts or any of them, that is to say trespassing by passing or re-passing over and by building upon or erecting any structure on the said properties or as the case maybe preventing the plaintiff from enjoying quiet possession of the said properties.
5. Further or other relief; and
6. Costs

The 2nd defendant has a counterclaimed and he seeks the following reliefs:

1. A declaration that he is the legal owner of the properties known as Lot 18003/M and 18004/M, Chalala, Lusaka and the plaintiff has no legal interest in the properties or any part of the Land comprised therein
2. An order of rectification of records at the Lands and Deeds Registry, directed at the Commissioner of Lands, through the Registrar of Lands and Deeds Registry
3. An order directed at the plaintiff for removal of the caveat lodged on 22nd May 2012 forthwith
4. Damages for inconvenience arising from mental torture and anguish suffered by the defendant
5. An order that certificate of title be issued in the names of the 2nd defendant LENARD KANYANDA in respect of plots 18003/M and 18004/M Chalala Lusaka

6. *Such further order or other relief that the court may deem fit to impose*

7. *Costs.*

Moses Kanjika, Pw1, was the plaintiff's only witness. His evidence was that in 2008 he was appointed as an assistant to the plaintiff's manager/receiver, Mr. Robert Simeza. In May 2012, it was brought to his attention that one Solomon Musechisapila was selling some land. It turned out to be Lots 18003/M and 18004/M that are situated in Chalala, Lusaka. The said Solomon Musechisapila produced a site plan bearing the name Ital Terrazo Limited and proposed subdivisions which they had created.

He said he informed the plaintiff's receiver/manager who instructed him to get computer printouts from the Ministry of Lands to ascertain if the plaintiff was still registered as beneficial owner of the two properties. When it was confirmed that it was the case, they placed caveats on the two properties.

Under cross examination, Pw1 maintained that even if he had no documentary proof of his appointment, he was appointed as an assistant of the plaintiff's manager/receiver in 2008. He also admitted to not having a list of all the properties owned by the plaintiff. Neither did he know which properties belonging to the plaintiff had been sold

prior to their appointment. He said he contacted the manager/receiver because the site plan suggested that the plaintiff was about to subdivide the properties.

He also said he was not aware that the 2nd defendant had purchased the properties and that they had no encumbrances at the time. He added that when they took over, Antonio Ventriglia, his two sons and wife were directors of the plaintiff. He stated that he was also not aware of there being a mortgage on the properties. He said that there must have been a legal or equitable mortgage for one to be appointed a receiver. He admitted that they had not exhibited any mortgage. When Pw1 was referred to page 6 of the Plaintiff's Bundle of Documents, he admitted that according to the printout, there was no mortgage nor did it show that any encumbrance existed on the properties.

When the witness was referred to page 1 of the Defendant's Bundle of Documents, he admitted that it was a contract between Ital Terrazzo and the 2nd defendant. He also admitted that on the second page of the contract, there is a signature on behalf of Ital Terrazzo and a witness. He also admitted that according to the contract, the defendant was given vacant possession of the two properties.

When he was re-examined, Pw1 said that there is no requirement for an assistant manager to be registered and for that reason; the manager/receiver can appoint anyone. He also said while a legal mortgage is by deed, an equitable mortgage is executed by surrendering certificate of title to the lender in the hope that a formal legal mortgage will be drawn and signed by the borrower. He said he could not confirm whether the people who signed the contract between the plaintiff and the 2nd defendant were appointed agents of the plaintiff.

There was no appearance from the 1st defendant but the 2nd defendant gave evidence on his own behalf. The 2nd defendant testified that he bought the properties in dispute in 2007 after he was approached by one John Muleya Banda who informed him that Ital Terrazzo was selling plots 18003/M and 18004/M. He got in contact with Neol Pareaes, the company secretary and thereafter, went to Ministry of Lands where he verified that there were no encumbrances on them.

He said he then informed his Lawyers Shepande and Company, who met Neol Pareaes and prepared a contract of sale. Neol Pareaes executed the contracts in November 2007 and they were witnessed by John Muleya Banda. The assignments were also prepared and both copies were signed

after he paid K200, 000.00 for each property. Upon completion, he was given vacant possession of the properties and their title deeds.

The 2nd accused also said the application for consent to assign was delayed because the properties' files at Ministry of Lands could not be traced until 2012. When they were found, the consent was given and thereafter he went to ZRA to pay property transfer tax. He was told that he could not pay the tax until the properties were inspected. While awaiting the inspection, he received summons from Simeza Sangwa and Associates who claimed to be the receivers of the plaintiff. They also placed caveats on the two properties and served him with an injunction.

Finally, the 2nd defendant said that he bought three plots and applied for consent separately. When he finished processing title for plot 18005/M and had it changed its title into his name, he started processing title for plot 18004/M but could not complete because a caveat was placed on it.

When he was cross examined, the 2nd defendant said John Muleya Mwanza told him that he was a caretaker and introduced him to the plaintiff's company secretary. He said though did not produce a search report in

court, he conducted a search at PACRA to confirm that Mr. Pareaes was the plaintiffs company secretary. He said the contracts were signed by Mr. Neol Pareaes on behalf of the plaintiff and he paid the money to him in cash. He said though he had no documentary proof, the offer came from the plaintiff and he paid because he was in a hurry to acquire the land. He maintained that the delay in obtaining consent to assign was due to the fact that the files went missing. He admitted not fulfilling the special conditions by obtaining state consent within 14 weeks but said it was not his fault.

The 2nd defendant admitted that it probable that the caveats would not have been placed on the properties if he had provided proof that he had paid for them. He admitted that though the assignments were executed in 2007, they have not been registered to date. He also admitted that the certificates of title for the properties he has produced in court are still in the plaintiff's name and have not been cancelled.

Submitting on behalf of the plaintiff, Mr. Chenda referred to the cases of **Anti-Corruption Commission v Barnett Development Corporation Limited (1)** and **Section 54 of the Lands and Deeds Registry Act** and submitted that a certificate of title is conclusive proof of ownership

of property. In this case, the plaintiff being holders of certificates of title for properties 18003/M and 18004/M, have an uncontested proprietary interest in them.

Counsel also referred to case *Walder v The Mayor, Alderman and Burgesses of the Borough of Hammersmith* (2) and submitted that since the 2nd defendant was not invited unto the property by the plaintiff, he is a trespasser. This being the case, his attempt to subdivide the properties is illegal and any structures constructed on the properties should be demolished without compensation.

Coming to the 2nd defendant's counterclaim, Mr. Chenda referred to Section 4(1) of the Lands and Deeds Registry Act and the case of *Josia Tembo and Another v Peter Mukuka Chitambala* (3) and submitted that he cannot be declared legal owner of the properties because the assignments he seeks to rely on are void. He submitted that they are void because they were not registered within the period stipulated by the law and Section 6 of the Lands and Deeds Registry Act provides that in such a case, the documents will be null and void.

As regards the reliefs claimed in paragraphs 2 and 5 of the 2nd defendant's counterclaim, counsel referred to the cases of *Maxwell*

Mwamba and Stora Solomon Mbuli v Attorney General (4) and Isaac Tantameni Chali v Liseli Mwala (5) and submitted that since the State is not a party to these proceedings, the court cannot order that the land records be rectified and certificates of title be issued in his favour. He submitted that the 2nd defendant should have applied to join them to these proceedings before seeking such orders. Counsel also submitted that the 2nd defendant's claim for damages for inconvenience or mental anguish should fail because they have not been substantiated.

Finally, Mr. Chenda referred to the case of and Fresh Mint Limited and Others v Kawambwa Tea Company limited (6) and submitted that none of the 2nd defendant's claims must succeed because they are premised on contracts of sale that are not binding on the plaintiff. The defendant has not provided any evidence that the plaintiff was involved in their signing nor has he provided any proof that they received the money referred to in them. He prayed that the court upholds the plaintiff's claims and simultaneously dismiss the 2nd defendant's counterclaims.

On behalf of the 2nd defendant, Mr. Eyaa referred to Sections 22(1) and 23 of the Companies Act and the cases of Bank of Zambia v Chibote Meat Corporation (7) and National Airport Corporation v Reggie Ephraim

Zimba and Savior Konie (8) and submitted that that since the plaintiff had the capacity to enter into the transaction to sell property to third parties, the 2nd defendant was under no obligation to investigate into whether Neol Pareaes had the authority to sell on behalf of the plaintiff. Counsel submitted that whether or not Neol Pareaes had such authority was an internal matter that did not concern the defendant.

He also submitted that the principle set out in the case of *Fresh Mint Limited, Heman Jallan, Thompson Lloyd and Ewart Limited v Kawambwa Tea Company* (9) is not applicable to this case because Sections 22(1) and 23 of the Companies Act confers upon the plaintiff unrestricted capacity to transact. Third parties will not be taken to know about any limitations merely because the limitations are contained in documents that they could have inspected, counsel argued. Mr. Eyaa submitted that this being the case, the 2nd defendant is the legal owner of Lot 18003/M and 18004/M Chalala, Lusaka, because they were legally transferred to him. Since he paid the purchase price and was given vacant possession, he cannot be said to be a trespasser.

As regards the submission that the conveyance documents were invalid by reason of not being registered, counsel referred to the case of *William Jacks and Company (Z) Limited v O'Connor* (in his capacity as

Registrar of Lands and Deeds) Construction and Investment Holdings Limited Intervening (10) and submitted that the court has the discretion to register documents that fall under Section 4(1) of the Lands and Deeds Registry Act out of time. He submitted that it is appropriate that such registration takes place in this case because the delay in having the documents registered is because their files at the Lands Registry went missing and they could not be found at the time the 2nd defendant wanted to register them. He also submitted that plaintiff's placing of caveats on the properties also contributed to his failure to register the documents.

Mr. Eyaa referred to the cases of *Watts v Morrow* (11) and submitted that the 2nd defendant's claim for damages for inconvenience arising out of mental torture and anguish must succeed because the plaintiff's fraudulent claim that they were owners of the properties and halting of his efforts to develop them has caused him great inconvenience, anguish and torture. He also referred to the case of *Archer v Brown* (12) and submitted that aggravated damages can be awarded to the 2nd defendant him to compensate for the injury to his feelings that he has suffered as a result of the plaintiff's deceit.

Finally, Mr. Eyaa referred to the case of *Moss Steamship Company v Whitney* (13) and submitted that given that Mr. Robert Simeza was appointed as manager/receiver after the 2nd defendant had already bought the properties; the properties cannot fall under the control of the receiver as title had already passed to the 2nd defendant. He also referred to Section 116 of the Companies Act and submitted that the receiver is under an obligation to produce an inventory of the assets that belong to the plaintiff and since he has failed to do so, it cannot be claimed that the two properties that are the subject of these proceeding belong to the plaintiff. He prayed that the plaintiff's claims be dismissed as they lack merit and that the 2nd defendant be granted all the reliefs he claims.

I am indebted to counsel for their detailed submissions and I have taken them into account in arriving at my decisions.

From the evidence before me, I find that it is not in dispute that the properties known as Lot No. 18003/M and 18004/M Chalala, Lusaka, were prior to 2007 and are still registered in the plaintiff's name. It is also not in dispute that the 2nd defendant and other persons are in occupation of those properties at the instance of the 2nd defendant.

What is in issue is whether the 2nd defendant and those other persons are legally in occupation of the properties.

The 2nd defendant's position is that though the properties are still registered in the plaintiff's name, he bought them in 2007 and paid the full consideration of K200,000 for each one of them. He was then given vacant possession. He relies on contracts of sale and assignments that were executed in to support his claims. This case therefore wholly hinges on whether those documents have any legal effect because other than those documents, there is no other evidence in support his claim that properties were sold to him and that he paid K200 million for each one of them.

Section 4 (1) of the Lands and Deeds Registry Act provides that:

"Every document purporting to grant, convey or transfer land or any interest in land, or to be a lease or agreement for lease or permit of occupation of land for a longer term than one year, or to create any charge upon land, whether by way of mortgage or otherwise, or which evidences the satisfaction of any mortgage or charge, and all bills of sale of personal property whereof the grantor remains in apparent possession, unless already registered pursuant to the provisions of "The North-Eastern Rhodesia Lands and Deeds Registration Regulations, 1905" or "The North-Western Rhodesia Lands and Deeds Registry Proclamation, 1910", must be registered within the times hereinafter specified in the Registry or in a District Registry if eligible for registration in such District Registry."

Further, Section 6 of the Lands and Deeds Registry Act provides that:

“Any document required to be registered as aforesaid and not registered within the time specified in the last preceding section shall be null and void.”

In the case of Josia Tembo and Another v Peter Mukuka Chitambala (supra) it was held that:

“Any document purporting to grant an interest in land for a period of more than one year must be registered with the Lands and Deeds Registry. Failing such registration, the document shall be null and void.”

In this case, the contracts of sale and assignments the 2nd defendant seeks to rely on to prove his interest in Lot 18003/M and 18004/M were executed in 2007. This was five years before the action was commenced. It was submitted that even if this is the case, this court can exercise its discretion and follow the decision in the case of William Jacks and Company (Z) Limited v O’connor (in his capacity as Registrar of Lands and Deeds) Construction and Investment Holdings Limited Intervening (10) and register the documents.

I agree with the 2nd defendant’s position that the court has the discretion to register a document at the expiry of the period prescribed in the Lands and Deeds Registry Act. But for the court to exercise such discretion, an appropriate application must be made. In this case, since no application was made, it would be inappropriate for the court to grant a relief that was not pleaded and on which the

plaintiff did not have the opportunity to be heard. I therefore decline to register the documents.

Since the documents were not registered within the prescribed period, the 2nd defendant cannot rely on the contracts of sale and assignments relating to his purchase of lot 18003/M and 18004/M as they are null and void. In the absence of those documents, there is no evidence to prove that the properties were sold to him or that he paid for them.

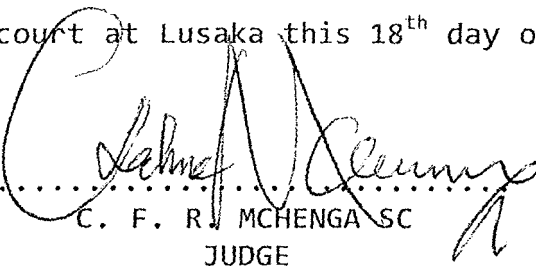
Having found that the documents are null and void, considering the question whether Neol Pareaes had the authority to transact and whether his actions bound the plaintiff is moot. It will be of no consequence because the documents he is alleged to have executed are null and void for want of registration.

Consequently, I declare that the plaintiff is the registered owner of the properties known as Lot 18003/M and 18004/M Chalala, Lusaka and the defendants have no interest in them or any part of the land comprised therein. I also declare that the defendants are not entitled to enter or cross the plaintiff's said properties. I order that the defendants do forthwith pull down, demolish and remove any structures that they have erected or constructed on the said properties.

Having so found, I find that the 2nd defendant's counterclaim that he is the legal owner of the properties known as Lot 18003/M and 18004/M, Chalala, Lusaka fails. Consequently, his prayers for rectification of records at the Lands and Deeds Registry, directed at the Commissioner of Lands, through the Registrar of Lands and Deeds Registry; for an order directed at the plaintiff for removal of the caveat lodged on 22nd May 2012; for damages for inconvenience arising from mental torture and anguish he has suffered and for an order that certificate of title be issued in his names in respect of plots 18003/M and 18004/M Chalala, Lusaka, also fail.

Costs to the plaintiff.

Delivered in open court at Lusaka this 18th day of September 2015



 C. F. R. MCHENGA SC
 JUDGE