

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

2014/HP/1981

BETWEEN:

LASTON GEOFFREY MWALE

AND

SHARON MWALE
CHISHALA KARABASSIS NIVEL



APPLICANT

1ST RESPONDENT
2ND RESPONDENT

BEFORE HONOURABLE JUSTICE M. CHANDA

APPEARANCES

For the Applicant	:	Mr N. Inambao of Inambao Chipanzya & Company
For the 1 st Respondent	:	No appearance
For the 2 nd Respondent	:	No appearance

J U D G M E N T

LEGISLATION REFERRED TO:

1. *The Authentication of Documents Act Cap 75 of the laws of Zambia.*
2. *The Lands and Deeds Registry Act, Chapter 185 of the laws of Zambia.*

CASES REFERRED TO

1. *Lumus Agricultural Services Ltd vs Gwembe Valley Development Ltd (1999) ZR 1.*
2. *Tembo vs Chitambala (2009) ZR 327.*
3. *Zambia Consolidated Copper Mines Limited v Eddie Katalayi and Max Chilongo (2001) ZR 28*
4. *Rajan Patel v Attorney General (2002)ZR 59*

On 12th December, 2014 **Laston Geoffrey Mwale**, the Applicant herein filed Originating Summons pursuant to Order 30 Rule 11 of the High Court Act, Cap 27, of the laws of Zambia against **Sharon Mwale** and **Chishala Karabassis Nivel**, the Respondents.

The reliefs sought by the Applicant were as follows:-

- (i) **A declaration that the Applicant was a joint Tenant of Plot No. 330 Eucalyptus, Avondale Lusaka;**
- (ii) **A declaration that the sale of plot No. 330 Eucalyptus Avondale Lusaka by the 1st Respondent to the 2nd Respondent without the knowledge and consent of the Applicant as Joint Tenant was null and void;**
- (iii) **An order for a writ of possession;**
- (iv) **Costs.**

The 1st Respondent did not file any Affidavit in opposition to the Originating Summons. The 2nd Respondent filed his Affidavit in opposition on 6th February, 2015 in rebuttal to the Originating Summons.

The matter was heard on 13th April, 2015, the Respondents despite being served with the notices of hearing chose not to appear before Court for reasons best known to themselves.

The Applicant gave viva voce testimony to augment his Affidavit evidence. The evidence adduced by the Applicant was as follows:-

That he was the registered proprietor and joint tenant of the property known as Plot No. 330, Eucalyptus, Avondale Lusaka as evidenced by exhibit "**LGM1**" in his Affidavit.

That the 1st Respondent did sell the said Plot to the 2nd Respondent without his knowledge and consent as Joint owner of the said property which now vests in the 2nd Respondent as per the print out from Ministry of Lands, Natural Resources and Environmental Protection marked as exhibit "**LGM 2**" in his Affidavit.

That the 1st Respondent entered into a Contract of Sale of the said property with the 2nd Respondent and executed the said Contract without the Applicants consent or knowledge as evidenced by exhibit "**LGM3**". The 1st Respondent purported to act on behalf of the Applicant by virtue of a forged Power of Attorney dated the 4th day of September 2009 and that the said power of Attorney was neither signed by the Applicant nor was it registered at the Lands and Deeds Registry as shown from exhibit "**LGM4**" in his Affidavit.

That the purported Power of Attorney did not give the 1st Respondent any powers to perform or execute any acts, deeds on behalf of the Applicant because at that time the Applicant was out of the Country.

That the 1st Respondent used the Applicants Passport without his knowledge or consent which expired on the 7th day of April, 2008 as per exhibit "**LGM 5**" in his Affidavit.

That the lodgement schedule and the list of documents lodged at the Ministry of Lands, Natural Resources and Environmental Protection by the 1st and 2nd Respondents were marked as exhibit "**LGM 6**" in his Affidavit.

The Applicant told the Court that the purported sale by the 1st Respondent to the 2nd Respondent of the said property without his knowledge and consent was unlawful.

The 2nd Respondent in his Affidavit in opposition to the Applicant's Originating Summons contended that he was the beneficial owner of Stand No. 330 Chelston, Lusaka by virtue of a Consent Order that was entered into in the matter of **Brafuss Limited v Laston Geoffrey Mwale** and **Sharon Erny Mwale 2011/HP/907**, as per Consent Order marked as exhibit "**CK1**" in his Affidavit.

The 2nd Respondent further deposed that as could be seen from the Land Record exhibited by the Applicant, the 2nd Respondent was the owner of the said property.

In reply to the affidavit in opposition the Applicant stated that at no time was he served with any Court Documents relating to Cause number 2011/HP/907 which indicated that he was the 1st Respondent and that the said Consent Order exhibited as "**CK1**" was not signed by him nor did it provide a separate space for his signature. That the Applicant's name was wrongfully spelt such that had it been brought to his attention, he would have noted and corrected the anomaly.

The Applicant averred that both **BRAFUSS LIMITED** and **CHISHALA KARABASSIS** were unknown to him and that at no time did he owe them a sum of K300, 000,000.

The Applicant deposed that the Consent Order exhibited as "**CK1**" had a lot of anomalies as follows:

- (i) That under clause (1) the figure in words was Kwacha Seven Hundred and Fifty Thousand while in figures it was K750, 000, 000;
- (ii) That under clause (1) it indicated Kwacha Four Hundred and Fifty Million (450, 000, 000) and the remaining balance in words indicated Kwacha Four Hundred Thousand while in figures it showed (K300, 000, 000); and
- (iii) That under clause (iii) it indicated Kwacha One Hundred Thousand in words while in figures it showed (K150, 000, 000).

The Applicant stated that the above anomalies in figures could not have arisen as at 28th September 2011 as the currency rebasing was only done in January 2012, and as such he doubted the authenticity of the Consent Order. He added that the said Consent Order might not have been procured in 2011.

At the close of the case, Counsel for the Applicant filed written submissions for which I am greatly indebted.

Having considered the evidence in this matter, I have found as facts the following:-

1. It is common cause that property No. 330 Eucalyptus situated in Avondale Lusaka was jointly owned by the Applicant and 1st Respondent as Husband and Wife;
2. It is also common cause that to amortise her indebtedness Brafuss Limited, in the sum of K450, 000, 000, the 1st Respondent assigned property No. 330 Eucalyptus, Avondale Lusaka to the 2nd Respondent at the purchase of K750, 000, 000;
3. I find that out of the afore stated purchase price the 2nd Respondent agreed to net off an amount of K450, 000, 000 owed to Brafuss Limited and the remaining K300, 000, 000 was paid to the 1st Respondent;
4. That the 1st Respondent filed a lodgement schedule with the lands and Deeds Registry to complete the transaction with the 2nd Respondent regarding the sale of the afore named property;
5. That the list of documents lodged were an Application of Consent to assign, a copy of Certificate of title No. 18066, Power of Attorney and a Contract of Sale;
6. It is common ground that at the time the 1st Respondent executed the Contract of Sale with the 2nd Respondent, the Applicant was resident in the United Kingdom.

I have carefully considered the evidence on record and the submission by Counsel for the Applicant. As I understand the evidence and submissions of Counsel, the crux of this matter is whether the 2nd Respondent who acquired title was a bonafide purchaser for value without notice, whose title is unassailable.

The 2nd Respondent has emphatically stated in his Affidavit in opposition that his ownership of the property in contention stemmed from the Consent Order dated 28th September, 2011 that was executed in the matter of **Brafuss Limited v Laston Geoffrey Mwale and Sharon Erny Mwale.**

The Applicant on the other hand has categorically denied ever knowing or transacting with Brafuss Limited and the 2nd Respondent. The Applicant has further alleged that the Consent Order in cause number 2011/HP/907 was fraudulently procured and that he never appended his signature to the document.

Counsel for the Applicant, **Mr Inambao** in his submission has also contended that the whole scheme to have the Applicant's house transferred to the 2nd Respondent was a Plot orchestrated by the Respondents to defraud him of his property which should be declared null and void.

Counsel has argued that even if the 2nd Respondent purported to rely on the Power of Attorney that was availed to him by the 1st Respondent it was not registered with the Lands and Deeds Registry, and that neither was it authenticated nor notarised as required by the law. Counsel referred the Court to Section 3(a) of the Authentication of Documents Act Cap 75 of the laws of Zambia which is couched in these terms:-

"....Any document executed outside Zambia shall be deemed to be sufficiently authenticated for the purpose of use in Zambia if:

(a) in the case of a document executed in Great Britain or Ireland it is duly authenticated by a Notary Public under his signature and seal of office,”

Counsel referred the Court to the case of **Lumus Agricultural Services Ltd v Gwembe Valley Development Ltd**¹ where the Supreme Court held that:-

“If a document executed in Zambia is authenticated as provided by the authentication of Documents Act, then it shall be deemed or presumed to be valid for use in this Country and if it is not authenticated, the converse is true that it is deemed not valid and cannot be used in this Country”

Counsel has submitted that the said Power of Attorney is *null and void* and has referred this Court to section 4 and 6 of the Lands and Deeds Registry Act, Chapter 185 of the laws of Zambia which provides that:-

4. *“Every document purporting to grant, convey or transfer land or an interest in land must be registered within the time hereinafter specified in the registry”*
6. *“Any document required to be registered as aforesaid and not registered within the last preceding sections shall be null and void.”*

To buttress his submission Counsel drew the attention of the Court to the case of **Tembo vs Chitambala**² where 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.”

Counsel asserted that although the 2nd Respondent obtained title the same was not valid in that the Lands and Deeds Registry Act states among other things that a Certificate of Title shall be conclusive evidence of ownership of property unless fraud is alleged. He referred the Court to Section 33 and 34(1) of the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia which provides that:

33. *“A certificate of title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise, which but for Parts III to IV might be held to be paramount or to have priority; the registered proprietor of land comprised in such a certificate shall, except in case of fraud, hold the same subject only to such encumbrance, liens, estates or interest as maybe shown by such certificate as may be notified on the folium of the register relating to such land but absolutely free from all other encumbrance, lien, estates or interest:*
- (a) Except the estate or interest of the proprietor claiming the same land under a current prior certificate of title issued under the provisions of parts III and IV and*
 - (b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon land; and*
 - (c) Except so far as regards position of land that maybe erroneously included in the Certificate of Title, evidencing the title of such registered proprietor by wrong description of parcels or of boundaries.”*

And Section 34(1) further provides:-

“No action for possession , or other action for the recovery of any Land, shall lie or be sustained against the Registered Proprietary holding a Certificate of Title for the estate or interest in respect to which he is registered, except in any of the following cases that is to say:-

- a) The case of a mortgage as against a mortgagor in default;*

- b) *The case of the President as against the holder of a state lease in default;*
- c) *The case of a person deprived of any Land by fraud as against the person registered as proprietor of such Land through fraud, or against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered though fraud”.*

In concluding his submissions, Mr. Inambao has implored the Court to declare *null and void* the transaction that took place between the Respondents, with regard to the sale of the house in contention, as it was procured fraudulently.

I have carefully considered these submissions in the light of the evidence. It is apparent to me that the evidence being led by the Applicant clearly shows that Sharon Mwale committed a fraud on her husband. This is so because a perusal of the Consent Order produced by the 2nd Respondent and marked as exhibit “LGM3” clearly shows that the Applicant did not sign on the said Court document. The Contract of Sale executed by the Respondents herein equally shows that the Applicant never affixed his signature to the said document. Further, I am satisfied that the Applicant’s Passport (i.e exhibit “**LGM5**”) which was used by the 1st Respondent in the transaction expired on 7th April 1998. Thus, I agree with Mr. Inambao’s submission that the said expired Passport could not have been possibly used by the Applicant to vest power unto the 1st Respondent to transfer the property to the 2nd Respondent. I also agree with Counsel’s Submission that the address on the purported Power of Attorney is not correct as the Applicant last lived at **15 Diploma Court**

High Road, East Finchley, London N2 8NY, in 1991 which evidence has not been challenged by the 1st Respondent.

I must also affirm that the power of Attorney used by the 1st Respondent in the transaction was not in consonant with the provisions of the law as provided for in Section 3(a) of the Authentication of Documents Act Cap 75 of the Laws of Zambia as it was neither notarised nor authenticated.

It must be noted that if the document was indeed executed in Great Britain by the Applicant it should have been duly authenticated by a Notary Public under his signature and seal of office. I therefore hold that at the time the 1st Respondent sold the house in contention to the 2nd Respondent by virtue of a Power Attorney and the Consent Order obtained in Cause No. 2011/HP/2011, the Applicant was unaware of the fraudulent transaction.

The 1st Respondent clearly held out herself to the 2nd Respondent as having the Power of the Attorney on behalf of the Applicant when infact not. The implication of her actions was that she was an imposter who lacked authority to transfer the property in issue to the 2nd Respondent.

It is our affirmation that the 2nd Respondent was not guilty of any impropriety. But the fact that the property in question was transferred to him because of the fraud committed by Sharon Mwale, the title acquired has been properly challenged.

Had the 1st Respondent possessed the legal authority to sell the property on behalf of the Applicant, the 2nd Respondent would have been an innocent purchaser for value whose rights would not have been ignored. In so saying I am relying on the cases of **Zambia Consolidated Copper Mines Limited v Eddie Katalayi and Max Chilongo**³ and **Rajan Patel v Attorney General**⁴.

The gist of these two authorities is that a purchaser, for value, who obtains some goods in good faith without notice of the defect of want of title in the goods, obtains good title in the goods. This cannot be so said in *casu* because of the conduct of the principal party, namely the 1st Respondent who had no powers to confer any title on anybody. So no proper transfer of goods was done in this case.

While I sympathise with the 2nd Respondent, for having been misled by the 1st Respondent I cannot turn a blind eye to the law. The sale under review did not only border on deceit but was also fraudulent. The 2nd Respondent may have obtained a Title Deed for the house in question but this title has been rendered defective for the reasons already given above. I am therefore, satisfied that the Applicant was fraudulently deprived of Plot No. 330, Eucalyptus Avondale, Lusaka in line with Section 34 (1)(c) of the Lands and Deeds Registry Act Cap 185. The 2nd Respondent was not a "*bona fide*" purchaser of the said property.

I have no doubt that the Applicant has proved his case on a balance of probabilities. The claim is upheld. The Title Deed issued herein in favour of the 2nd Respondent shall be cancelled.

House No. 330, Eucalyptus, Avondale, Lusaka shall revert to the Applicant. The 1st Respondent by engaging in fraud has accordingly forfeited her interest in the said property. Costs shall follow the event, in default of agreement, they shall be taxed.

Leave to appeal to the Supreme Court is granted.

Dated at Lusaka this01.....day ofJUNE..... 2015



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HONOURABLE JUSTICE M. CHANDA