

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(CIVIL JURISDICTION)**

2012/HP/0376

BETWEEN:



**JOSEPH KAMANGA
AND
ENEDY CHIYALA
WISDOM CHIYALA**

PLAINTIFF

**(Sued in his capacity as joint administrator
of the Late Favour Chiyala)**

**1st DEFENDANT
2nd DEFENDANT**

BUSIKU CHIYALA

3rd DEFENDANT

**(sued in his capacity as joint Administratrix
Of the estate of the Late Favour Chiyala)**

Before the Honourable Mrs. Justice M.S Mulenga on the 10th day of May 2016

For the Plaintiff : Mr. M. Sinyangwe and Mr. M. Libakeni of
Douglas and Partners

For the 1st Defendant : No appearance

For the 2nd and 3rd Defendant : Mr. K. Mwale Legal Resources
Foundation

J U D G M E N T

Cases cited

- 1. Mulenga and Others v Investrust Bank Limited (1999) ZR 101**
- 2. Bimzi Limited vs B & C Commodities and Shipping Limited SCZ/8/177/98**
- 3. Patel v Attorney General (2002) ZR 59**
- 4. Enesi Banda v Abigail Mwanza (2011) vol 3 ZR 239**
- 5. Nora Mwaanga Kayoba and Vilizani Banda v Eunice Kumwenda Ngulube and Andrew Ngulube (2003) ZR 132**
- 6. Wilson Masauso Zulu v Avondale Housing Project (1982) ZR 172**
- 7. Annie Scott v Oliver Scott SCZ Judgment Number 3 of 2007.**
- 8. Chief Bright Nalubamba and Zambia Coepartive Federation Limited v Muliuyunda Wakunguma Mukumbuta (1987) ZR 75**

9. **Anderson Mazoka and another v Levy Mwanawasa and 2 others (2005) ZR 138**
10. **Mwenya and Randee v Kapinga (1998) S.J. 12 (S.C.)**

Legislation referred to

1. **High Court Act Chapter 27 of the Laws of Zambia**
2. **Intestate Succession Act, Chapter 59 of the Laws of Zambia**
3. **Rules of the Supreme Court 1999 edition**

Works referred to:

1. **Cheshire's Modern Law of Real property, Burn, 9th Edition, Sweet and Maxwell London**
2. **Phipson on Evidence, 17th Edition**
3. **Land Law in Zambia, S.M Mudenda, UNZA Press 2008**

The Plaintiff commenced this action by way of writ of summons dated 11th April, 2012 claiming the following reliefs:

- i. *Vacant possession of the said property, house No. 10 Chuswe Road*
- ii. *Compensation for all the rentals from the time the Plaintiff assumed ownership of the house (mesne profits)*
- iii. *Any other order the court may deem fit*
- iv. *Interest at the current commercial bank lending rate*
- v. *Costs of and incidental to this action*

The Plaintiff states in the statement of claim that he was at all material times a businessman and the legal owner of House No. 10. Chuswe Road, Lusaka being Plot No. 1283/7417 situated in the Lusaka province. He bought the said House from the 1st Defendant and one Aaron Kamanga following a court order No. 2004/SPB/LCA/275 dated 5th October 2005 that ordered the parties to sell the house and share the proceeds at 50% each. That after purchasing the property from the 1st Defendant at K60,000,00 (rebased) as the purchase price, he obtained title in his favour.

That the Defendants have without just cause whatsoever failed, refused or neglected to yield vacant possession of the property but have instead opted to rent out the property and have been collecting the rentals. The Plaintiff has consequently suffered loss, damage and inconvenience.

The 2nd and 3rd Defendants in their amended defence and counterclaim admit that they are residents of the subject property which at all material times belonged to their late father Favour Chinyala whose estate they are now administering. That the sale to the Plaintiff was a complete nullity as the said order was subsequently nullified and the Plaintiff's title deeds relating to the property in issue are defective. That they were not aware of any dealings between the Plaintiff and the 1st Defendant relating to the subject property.

The 2nd and 3rd Defendants in their counterclaim state that on or about 10th June, 1996, the subject property was offered to the late Favour Chiyala being the sitting tenant of the property. On diverse dates but between 18th September, 1996 and 20th November, 1996 the said Favour Chiyala paid the full purchase price for the said house in installments. Before the title deeds could be processed in his name, he died whereupon the 2nd and 3rd Defendants were appointed to administer his estate. Upon the death of the said Favour Chiyala, one Aaron Kanyama took out a frivolous action in the Subordinate Court claiming that he was beneficially interested in the subject property. That the Subordinate Court in its Ruling, erroneously ordered that the subject property be sold and the proceeds of sale be shared equally

which decision was overturned on appeal. As the appeal was being processed the said Aaron Kanyama irregularly sold the subject property to the Plaintiff and thus the Plaintiff has no claim to it and title Deeds were irregularly issued to him without taking into account the 2nd and 3rd Defendants' interests. The Defendants thus seek the following reliefs:

- i. *A declaration that the subject property namely, plot 1283/7917, house no 10 Chuswe road, Chilenje, belonged at all material times to the late Favour Chiyala whose estate the 2nd and 3rd Defendants are administering.*
- ii. *An order for the surrender of the certificate of title by the Plaintiff to the Lands Registry for cancellation and rectification of the lands' register*
- iii. *Any other relief the court may deem fit*
- iv. *Costs*

At the trial PW1 was the Plaintiff herein who testified that on 6th January, 2006 his mother Mrs. Elizabeth Kamanga, bought a house from Aaron Kanyama which was subsequently registered on 19th December 2007 in the Plaintiff's name and appears on the title deeds at page 1 to 9 of his bundle of documents.

At the time the title was issued he desired to take possession, however there were people renting the house who refused to vacate it. He thus commenced an action in the Subordinate Court which declared him to be owner and that his title was genuine. The said Judgment appears at pages 5 to 9 of his supplementary bundle of documents. There is also a High Court ruling at pages 1 to 4 of the 2nd and 3rd Defendant's bundle of documents. Another Judgment delivered in 2005 between Aaron Kanyama and Eney Chiyala is produced at pages 10 to 12 of

the Plaintiff's bundle of documents. The said 2005 Judgment ordered that the house should be sold and the parties share 50% of proceeds. The High Court Judgment ordered that the amount involved should have been under the High Court jurisdiction and not Subordinate Court jurisdiction.

Further, PW1 stated that Aaron Kanyama had a daughter by the name of Beauty Kanyama who was married to Favour Chiyala. Beauty Kanyama passed away and her husband remained in the house and wanted to change the house into his name. The matter was then taken to court. PW1's mother bought the house as a result of the Judgment passed in 2005 between Aaron Kanyama and the 1st Defendant. PW1 prayed for an order of possession.

Under cross examination he stated that page 6 of the 2nd and 3rd Defendants' bundle of documents is a confirmation of tenancy for Favour Chiyala in 1992 who was a sitting tenant at that time. Page 5 of the same bundle is the offer to purchase made to Favour Chiyala in 1996. Page 7 contains receipts from Lusaka City Council for first payment and final payment. The papers show that Favour Chiyala paid the purchase price and that he was the owner at the time of his death. When buying the property, PW1's mother was the one involved in the transaction and not PW1.

When challenged over his statement that he bought the property from the 1st Defendant, he stated that he did not have papers signed for sale as his mother bought it on his behalf. He did not know that there

was an appeal of the 2005 Judgment and that there was a stay thereof dated 14th February, 2008. PW1 had no contract of sale or assignment between himself and the 1st Defendant and Aaron Kamanga. He did not know why his lawyers took eight (8) years to bring the action.

In re examination, PW1 stated that the stay of Judgment was addressed to Kanyanta and not PW1 and he did not have sight of it. He first brought the action over the property in 2007 a year after acquiring it. It took time for the title deeds to be finally issued. This was after they advertised in the newspaper in 2007.

PW2 was the Plaintiff's mother, Mrs. Elizabeth Kamanga who gave the history of how she acquired the property in issue. She outlined that there was a dispute over the house involving Aaron Kanyama and Eneyi Chiyala (the 1st Defendant) which was resolved by the 2005 Judgment. She came to know Aaron Kanyama through an estate agent who had a copy of the Judgment. She proceeded to buy the property from Aaron Kanyama based on the Judgment and paid a total of K60,000.00 (all figures are in rebased currency) in the presence of her son and Aaron's son at Shepande and Company and Mr. Willa Mutofwe was the mediator. Page I of the Plaintiffs supplementary bundle of documents shows the receipts for consent to assign, title deeds and registration fees dated 6th January, 2006. Upon payment she left the Plaintiff in charge of completing the title registration process as she was living outside Lusaka.

The title deed was issued two (2) years later in the Plaintiff's name but it was difficult to enter the house as the person in occupation of the house refused to vacate. She further explained that she never met Kanyama after buying the house. There was then a second judgment (2008 Judgment) between Joseph Kamanga and Eney Chiyala. There was no appeal against the 2005 Judgment but an appeal was lodged against the 2008 Judgment to the High Court.

Under cross-examination PW2 stated that she bought the property as she produced the money but that it was also true that the Plaintiff bought the property as all the documents are in his name. The Plaintiff bought the house from the 1st Defendant and Aaron Kanyama. However there was no evidence of payment to the 1st Defendant as it was made to the lawyer to ensure that the money was paid to the right people. The letter of sale was signed by Aaron Kanyama but was lost. PW2 could not confirm that the 1st Defendant received the money. She did not know that both were to be consulted or needed to sign but all she knew was that Aaron Kanyama was given the responsibility to sell. She admitted that there needed to be consent to sell by both parties and for the 1st Defendant to receive part of the proceeds but she did not have proof to that effect as she only dealt with Aaron Kanyama. She agreed that it seemed that the 1st Defendant was not part of the transaction.

Further PW2 stated that she was not aware of the Judgment by the High Court over the appeal. Pages 3 to 4 of the Defendants' bundle of documents showed that the Plaintiff was the Respondent in the High

Court and the Judgment decreed that the transaction was a nullity. Furthermore that she did not go to enquire from the occupants about the house but asked the neighbours who told her that the house was for Kanyama but that his in law, the 1st Defendant, was in the house. At that time there were tenants in the house who mentioned the 1st Defendant as the owner. PW2 did not try to speak to the 1st Defendant.

As regards the transaction documents, PW2 said the contract of sale was at the council but they did not find it. It was signed by PW2 and Aaron Kanyama and there was no provision for the 1st Defendant to sign. The assignment was not in existence. That the documents to support the transaction were with the Plaintiff.

In re-examination, PW2 stated that she transacted with Aaron Kanyama and his son. The Judgment between Aaron Kanyama and the 1st Defendant is the one that prompted her to buy the house. She only met the 1st Defendant in court after she had already bought the house. She gave authority to the Plaintiff to do all the necessary processes involved.

PW3 was Jonathan Miti who testified that the Plaintiff was his nephew and that on 6th January, 2006 PW2 informed him that she had found a house she desired to buy as she just retired and had been paid her benefits. He saw the documents which the agent brought which included a Judgment appearing at pages 10 to 12 of the Plaintiff's bundle of documents. PW3 then conducted a search at the

Subordinate's Court the following day and confirmed the existence of the 2005 Judgment upon which he advised PW2 to proceed with the transaction and she then bought the property. When the money was paid, Kanyama settled the outstanding utility bills and ground rent. The Plaintiff was in the process of going to the USA, he was told that he needed to have money, thus PW2 decided to register the house in the Plaintiff's name.

Under cross examination, PW3 stated that the 1st Defendant participated in the transaction but was not sure whether the 1st Defendant signed or approved the transaction. The payment was made to the lawyer. The 1st Defendant was not involved in the transaction in terms of payment. The Judgment indicated that the 1st Defendant should have been involved. PW3 visited the property with the agent and they found tenants but did not inquire from the tenants as to the owner.

In re examination PW3 stated that the 1st Defendant disagreed with what the 2005 Judgment said to the effect that the house be sold and proceeds shared.

The 2nd Defendant gave evidence on behalf of all the Defendants. He testified that he is the first born son of the late Favour Chiyala and an administrator of his estate as per letters of administration on page 3 of the 2nd and 3rd Defendants' bundle of documents. He explained the history of the property transaction involving his deceased father that in 1996 council houses were sold to sitting tenants. The deceased's

father as the sitting tenant of house number 10 Chuswe road received an offer letter from Lusaka City Council bearing his name. A copy of the offer is produced at page 5 of the 2nd and 3rd Defendant's bundle of document. His deceased father then bought the house from the council and receipts of payment were issued as shown at page 7 of the 2nd and 3rd Defendants' bundle of documents and a letter from the senior housing officer Lusaka City Council confirming full payment for the house. They continued staying in the same house.

On 27th November, 2007 his father Favour Chiyala died and Aaron Kanyama commenced an action against the beneficiaries in court claiming that he had a share in the house. The matter commenced in the Local Court where Aaron Kanyama lost the case after which he appealed to the Subordinate Court. The Subordinate Court Judgment of 2005 ordered that the house be co-owned by the two families of Favour Chiyala and Aaron Kanyama. They were not satisfied with this Judgment and thus appealed. But before appealing they applied for an order to stay the Judgment which was granted as shown at page 2 of the 2nd and 3rd Defendants' supplementary bundle of documents. Thereafter they started the process of prosecuting the appeal at the High Court. Before the appeal could be heard, Aaron Kanyama died. Whilst waiting for the appointment of an administrator of his estate, they received an eviction order from the Plaintiff who claimed that he was the owner of the said house. The 3rd Defendant was surprised at the turn of events and thus refused to comply to his demand because

the matter was not yet determined by the High Court and they never dealt with the Plaintiff concerning the issue of the sale of the house.

The 2005 Judgment stated that the house was to be co-owned and therefore they had the right to have a say in the sale. The Plaintiff sued them and their tenant Mr. Chama, in the Subordinate Court demanding that he was the owner. That whilst the matter was being heard in the Subordinate Court, the Defendant's family learnt that Aaron Kanyama sold the house to the Plaintiff for K60,000.00. They asked the Plaintiff as to who received the money and the Plaintiff said it was Aaron Kanyama. The Chiyala family never received the money as per Judgment which gave them a fifty (50) percent share. The Subordinate Court in the 2008 Judgment ruled in favour of the Plaintiff that he was the owner based on the documents he produced. The Defendants appealed against the 2008 Judgment to the High Court where a Judgment on appeal was delivered which set aside all the proceedings of the Subordinate Court. The Judgment appears at pages 1 to 4 of the 2nd and 3rd Defendants' bundle of documents.

That the Plaintiff's claims against the Defendant's stand thus the Court should cancel the title deeds for the subject property which bear the Plaintiff's name.

Under cross-examination the 2nd Defendant stated that he obtained a stay of execution of the 2005 Judgment in 2008 and was not aware that the Plaintiff's transaction was done in 2006. That according to the 2005 Judgment the sale was supposed to be done by both families

and not one party. That at the time of the appeal against the 2008 Judgment, the 2nd Defendant was not aware that the 2005 Judgment was not appealed against. The appeal is still pending before the High Court. He denied that it was the duty of Aaron Kanyama to sell. Beauty Kanyama was the 2nd Defendant's step mother.

The 2nd Defendant was still paying land rates to date in Chiyala's name as shown on pages 4 and 5 of the supplementary bundle of documents. The 2nd Defendant became the administrator in 2011. Prior to this the 1st Defendant was the administrator but had no dealings with the Plaintiff or his family over the sale. That the property has not changed ownership as records at the Lusaka City Council including rates are in the deceased's name. When referred to pages 1 to 4 the Plaintiff's supplementary bundle of documents, 2nd Defendant said they were not aware of the notice or advert and so they did not object. After becoming aware, he went and placed a caveat in 2011.

This marked the close of the trial. The Plaintiff and 2nd and 3rd Defendants filed submissions dated 8th February, 2016, 11th February, 2016 and 11th March, 2016.

It is submitted on behalf of the Plaintiff that a stay of execution was filed pending the determination of an appeal of the 2005 Judgment under cause number 2004/SPB/LCA/275 concerning the order of sale of the property and sharing the proceeds at 50% each and on the basis on which the Plaintiff's mother purchased the property. The Defendants only applied for the stay way after the transaction to sale

the property was concluded on 14th February, 2008 and as such was overtaken by events and it came after the Judgment had been enforced by selling the property to the Plaintiff's mother.

Counsel for the Plaintiff then referred to **Order 47 rule 5 of the High Court rules Chapter 27 of the Laws of Zambia** and the case of **Mulenga and Others v Investrust Bank Limited (1999) ZR 101** on the application for stay and the effect of an appeal. Counsel submits that the Defendants did not appeal at the time the 2005 Judgment was delivered. There is also no evidence on record of the proposed appeal for which the court was to preview the prospect of success of the proposed appeal in order to grant the stay or confirm it. Further, counsel relies on **Order 59 rule 13(2) of the Rules of the Supreme Court 1999 Edition** and the case of **Bimzi Limited vs B & C Commodities and Shipping Limited SCZ/8/177/98** on the conditions for the grant of a stay of execution and states that despite the requirements set out in the above authorities, the Defendants did not file an appeal or did not have on record a proposed appeal against the 2005 Judgment.

It is also submitted that the 2nd and 3rd Defendants were appointed as administrators of the estate of the Late Favour Chiyala in 2011 after the transaction of the sale of the house was concluded. That the 1st Defendant as the previous administrator knew about the 2005 Judgment and thus the duo should claim from her over the share she obtained from the proceeds of the sale. They have no claim against the Plaintiff because he is an innocent bonafide purchaser of the subject property.

Furthermore it is argued that the Plaintiff was granted a Certificate of Title upon observing all the procedures and the Certificate of Title was subsequently issued in his name. Thus he is the legal owner of the property as he has the Certificate of Title to the property and the Defendants should vacate the property.

On the issue of the Plaintiff being a bonafide purchaser for value, counsel cited the case of **Patel v Attorney General (2002) ZR 59** wherein it was held that **"a person who has no title cannot pass title to another person"** and argued that based on the 2005 Judgment, Aaron Kanyama passed good title to the Plaintiff as he was a co-owner of the house that he sold in that capacity. The 1st Defendant was aware of the 2005 Judgment and did not challenge it thus making the sale valid. That as held in **Enesi Banda v Abigail Mwanza (2011) vol 3 ZR 239:**

"any one dealing with land will be protected by the general equitable doctrine that a bonafide purchaser for value will take it free of any equitable interest which he does not have actual or constructive notice."

Further that in **Nora Mwaanga Kayoba and Vilizani Banda v Eunice Kumwenda Ngulube and Andrew Ngulube (2003) ZR 132** it was held that:

"In purchasing real properties parties are expected to approach such transactions with much more serious inquiries to establish whether or not the property in question has encumbrances. Buying real property is not as buying household goods or other personal property."

Counsel for the 2nd and 3rd Defendants submitted that the burden of proof in civil matters as was held in the case of **Wilson Masauso Zulu v Avondale Housing Project (1982) ZR 172** is on the Plaintiff to prove any allegations raised against a Defendant and a Plaintiff who has failed to

prove his case cannot be entitled to Judgment. That the Plaintiff herein failed to prove that he bought and paid for the house from the 1st Defendant as during cross examination he admitted that he did not participate in buying the house from either Aaron Kanyama or the 1st Defendant but his mother.

The 2005 Judgment ordered that the house be co-owned by both Aaron Kanyama and the 1st Defendant and the legal effect of co-ownership entails that each party has an independent and distinct share of the house which share cannot be sold without the approval of the owner of that share, as was held in **Annie Scott v Oliver Scott SCZ Judgment Number 3 of 2007**. Thus the 1st Defendant through the estate of the late Favour Chiyala had a separate and distinct share in the house which could not be sold without her consent. The Plaintiff when purchasing the house should have obtained her consent and thus in the absence of her consent the sale of the house is illegal, null and void ab initio. Counsel has urged this Court to nullify the sale.

The cases of **Nora Mwanga Kayoba and another v Eunice Kumwenda Ngulube and Another (5)** and **Enesi Banda v Abigail Mwanza (4)** were also cited on the need for a purchaser to conduct full investigation of title before purchasing property. A passage from the authors of **Cheshire's Modern Law of Real property, 9th Edition** is quoted wherein it is stated:

"... the equitable doctrine of notice of that purchaser is bound by any right which he would have discovered had he made ordinary investigations as sketched above. Again if he fails to make inquiries of third persons who happen to be in possession of the land, he is affected with notice of all equitable interests held by them as for example, an option to purchase the fee simple that has been granted to a lessee already in possession."

That any rights acquired by the Plaintiff are subject to the rights that he would have discovered (which he did by virtue of the Judgment) had he made prudent and proper inquiries before purchasing the house. Thus, the 2nd and 3rd Defendants rights will prevail or take precedence over the rights acquired by the Plaintiff by virtue of the irregular sale of the house.

Finally it is submitted that the Plaintiff did not plead the plea of bonafide purchaser for value without notice and therefore cannot rely on it. The cases of **Chief Bright Nalubamba and Zambia Co-operative Federation Limited v Muliyunda Wakunguma Mukumbuta (1987) ZR 75** and **Anderson Mazoka and another v Levy Mwanawasa and 2 others (2005) ZR 138** were cited on the importance of pleadings to give notice to the other party. Counsel has surmised that this Court is precluded from considering the said plea.

In reply, the Plaintiff's counsel argued that the Plaintiff had adduced evidence on a balance of probabilities to the effect his mother purchased house no. 10 Chuswe Road, Chilenje from Mr. Aaron Kanyama based on the 2005 Judgment which ordered that the house be sold and the proceeds shared at 50% each. Further the cases of **Enesi Banda v Abigail Mwanza (4)** and **Nora Mwaanga Kayoba and Vilizani Banda v Eunice Kumwenda Ngulube and Andrew Ngulube (5)** are relied on to support the argument that the Plaintiff bought the house without any encumbrances. That there was an implied consent by the 1st Defendant as she never appealed against the said 2005 Judgment.

I have considered the pleadings, evidence and submissions on record.

Plaintiff's claim

The Plaintiff's claims are mainly for vacant possession of the subject property and compensation for rentals or *mesne* profits. The 2nd and 3rd Defendants claims are for a declaration that the subject house belongs to the estate of the late Favour Chiyala and for cancellation of the certificate of title obtained by the Plaintiff. The burden of proof is on the respective parties to prove their claim or counter-claim to the required standard of the balance of probability. In this case, the common issue that has been raised by both parties is the validity or otherwise of the purchase of the subject house by the Plaintiff or his mother, PW2. It is not denied that as the result of the purported purchase a certificate of title has been issued to the Plaintiff.

Therefore the main issue for determination is whether the Plaintiff was a bonafide purchaser for value without notice. In **Mwenya and Randee v Kapinga (1998) S.J. 12 ZR 17 (SC)** the Supreme court at pages 26 and 27 cited the case of **Hunt v Luck (1902) 1 Ch. D 428** where it was held that:

"The occupation of land by a tenant affects a purchaser of land with constructive notice of all that tenants rights including an agreement for sale to him by the vendor.

It means that if a purchaser has notice that the vendor is not in possession of the property, he must make inquiries of the person in possession and find out from him what his rights are and, if he does not choose to do that, then whatever title he acquires as purchaser will be subject to the title or rights of the tenant in possession."

S.M Mudenda the learned author of **Land Law in Zambia**, states on **pages 153 to 158** as regards constructive notice that:

"A purchaser is under obligation to undertake full investigation of title before completing his purchase. He can only plead absence of notice if he made all usual and proper enquires. If he does not do so or is careless or negligent, he is deemed to have 'constructive notice' of all matters he would have discovered. A person has constructive notice of all facts of which he could have acquired actual notice had he made those inquires and inspections which he ought reasonably to have made, the standard of prudence being that of a man of business under similar circumstances. The purchaser should inspect the land and make inquires as to anything which appears inconsistent with the title offered by the vendor."

The learned authors of **Cheshire's Modern Law of Real Property 17th Edition** at **pages 60-62** explain one object of investigating title to be thus:

"One object of investigating title is to discover whether the land is subject to rights vested in persons other than the vendor, and the equitable doctrine of notice orders that a purchaser is bound by any right which he would have discovered had he made the ordinary investigations as sketched above. Again, if he fails to make inquires of third persons who happen to be in possession of the land, he is affected with notice of all equitable interests held by them, as, for example, an option to purchase the fee simple that has been granted to a lessee already in possession."

The facts which are not in dispute are that the property in issue known as House No. 10. Chuswe Road, Lusaka being Plot No. 1283/7417 situated in the Lusaka province was bought from Lusaka City Council in September 1986 by the late Favour Chiyala, as the sitting tenant from 1992 as per confirmation of tenancy by Lusaka City Council at page 6 of the Defendants' bundle of documents. From that time to date, the subject house has been occupied by or in possession of the beneficiaries of his estate.

Sometime in 2004, the late Aaron Kanyama sued the 1st Defendant as the then administrator of the estate of the late Favour Chiyala

claiming ownership of the house. Aaron Kanyama was the initial tenant of the subject house who left his daughter Beauty Kanyama in occupation. The said Beauty Kanyama was the wife of the Favour Chiyala who later became the official council tenant. The 2005 Judgment was delivered by the Subordinate Court to the effect that the house be co-owned and sold and that Aaron Kanyama and the estate of Favour Chiyala should share the proceeds at 50% each. On the basis of the 2005 Judgment, PW2 purchased the house from Aaron Kanyama but registered it in the Plaintiff's name. It was admitted by PW2 and PW3 that during the acquisition of the property, the 1st Defendant was not involved in the transaction despite the 2005 Judgment of the subordinate court having ordered that Aaron Kanyama and the 1st Defendant be co-owners and that they should sale the property and share the proceeds equally.

PW2 purchased the property from Aaron Kanyama sometime in 2006 but did not produce any single document involving the transaction. PW2 said the contract of sale was lost. The only document produced is the certificate of title in the name of the Plaintiff which was issued on 19th December, 2007 following a newspaper advert which was placed by the Plaintiff's counsel in form of a notice that the property would be transferred in the Plaintiff's name if there is no objection within 30 days. The Defendants' position is that they never saw this notice and only placed a caveat on the property when it was brought to their attention that title had been issued to the Plaintiff. The Plaintiff did not even serve the Defendants at the subject house

despite knowing that they were in occupation or possession of the same. It is also not in dispute that despite the title deeds in the Plaintiff's name the Defendants have been paying rates to Lusaka City Council even as late as June 2015 for the same property under the name of the late Favour Chiyala.

PW2 and PW3 also admitted that they found the 1st Defendant as the then administrator of Favour Chiyala's estate, in occupation or possession of the property in issue. But despite having so found, they did not inquire as to what rights she had in occupying that property but went ahead and completed the transaction without her involvement or consent whilst being armed with the Judgment which directed that she was a co-owner. This shows that the Plaintiff or PW2 had actual notice of the interest of the Defendants in the property. They therefore decided not to involve the 1st Defendant in their sale transaction at their own peril.

Further as confirmed in cross examination by the Plaintiff, some of the details regarding the property such as the rates account which still appears in the name of the late Favour Chiyala, is an indication that there were issues which affected the title to the property herein which if diligently searched for would have been discovered.

The Plaintiff has argued that he is a bonafide purchase for value without notice. To prove this defence, the Plaintiff has to show that he acted in good faith, that he gave value for the property, that he obtained a legal interest in the property and had no notice of the legal

or equitable interest of the Defendants. It is not in dispute that the Plaintiff or his mother PW2 gave value for the property having paid Aaron Kanyama K60,000.00. However, the Plaintiff has not proved that he and PW2 acted in good faith and had no notice of the Defendants interest. This is so because the 2005 Judgment they acted upon stated that the subject house was co-owned by Aaron Kanyama and the estate of Favour Chiyala represented by the 1st Defendant. The ownership was said to be in equal portions of 50% each. In their sale transaction, they chose to ignore the 1st Defendant and only dealt with Aaron Kanyama.

This shows that they had both actual and constructive notice of the interest of the Defendants. By ignoring the party that co-owned 50% of the property and dealing with only one party, they cannot turn around and claim that they transacted over the entire 100% of the property. The evidence shows that they transacted with Aaron Kanyama with regard to his 50% co-ownership and cannot be entitled to the entire 100% share of the property. Further, as found above, the manner in which the certificate of title was obtained is not above board as it was done without the knowledge of the Defendants while being fully aware of their interest and the objection by the 1st Defendant. The Defendants were with easy contract, being in possession of the house, but the Plaintiff only placed on advert in the papers without alerting them. There is no evidence that the 1st Defendant was party to the sale transaction.

The 2005 Judgment of the Subordinate Court which ordered a 50% share of the proceeds between Aaron Kanyama and the 1st Defendant was never appealed against or stayed until after the transaction had been completed and title had been transferred to the Plaintiff. That notwithstanding the fact that they were all these issues should have put PW2 on alert as to who was in possession and whether the right parties were selling the property. Therefore, for all intents and purposes, their transaction is only valid as against the late Aaron Kanyama and his estate and not the Defendants.

Thus the Plaintiff's claim cannot succeed against the Defendants. He however has a valid claim against Aaron Kanyama's estate.

Defendants' Counterclaim

The 2nd and 3rd Defendants' counter-claim is for a declaration that the subject property at all times belonged to the estate of the late Favour Chiyala and for an order for cancellation of the Plaintiff's certificate of title and rectification of the lands' register.

As already stated above, the 2005 Judgment has not been set aside and I will therefore not comment on it.

Since the said 2005 Judgment of the Subordinate Court still stands, the counterclaim is successful only to the extent that the estate of the late Favour Chiyala is entitled to the 50% ownership of the property herein. The other 50% is for the Plaintiff through the purchase transaction with Aaron Kanyama as the owner. The 2nd and 3rd

Defendants cannot therefore be granted the declaration they seek as regards full ownership.

The second relief is for cancellation of the Plaintiff's certificate of title. In light of the findings above that the property does not entirely belong to the Plaintiff or to his predecessor in interest being the late Aaron Kanyama, I hereby grant the order of cancellation of the Plaintiff's certificate of title which was issued on 19th December, 2007.

I have not granted the order for rectification of the register as the same can finally be done after the appeal against the 2005 Judgment is determined. For the avoidance of doubt, the subject property stands co-owned as ordered by the Subordinate Court Judgment of 2005.

On the facts of this case and considering that none of the parties has fully succeeded in its claims, I order that each party should bear its own costs.

Leave to appeal is granted.

Dated this 10th day of May 2016



**M.S. MULENGA
HIGH COURT JUDGE**