

THE HIGH COURT FOR ZAMBIA

2015/HP/0272

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

IN THE MATTER OF:



ORDER 113 SUPREME COURT RULES, 1999
EDITION, WHITE BOOK

AND

IN THE MATTER OF:

AN APPLICATION FOR POSSESSION OF HOUSE
ON PLOT NUMBER N 345 NANGONGWE
HOUSING AREA, KAFUE.

BETWEEN:

CREDA MWAMBULA:

APPLICANT

AND

ANNA CHULU:

RESPONDENT

Before The Honourable Mrs. Justice P.C.M. Ngulube in Chambers

For the Applicant: In Person

For the Respondent: Mr. F. Chombo, Messrs J.C. Mulunga and
Company.

JUDGMENT

Cases Refereed to:

- 1. Pettit vs. Pettit (1970) AC 777***
- 2. Gissing vs. Gissing (1971) AC 886***
- 3. Watchel vs Watchel (1973) 1 ALLER 113***

**4. *Nawakwi vs. Lusaka City Council and Another Appeal
Number 26 of 2001***

By Originating Summons issued on the 24th of February, 2015, the Applicant seeks the following reliefs:

1. An order that the Applicant is a bonafide purchaser for value of the house, on Plot Number N345, Nangongwe Area, Kafue
2. An order for leave to issue a Writ of Possession.
3. Mesne Profits
4. Costs of and incidental to the action.

The Applicant filed an affidavit in support of Originating Summons on the 24th of February, 2015, that she executed a contract of sale with one Moffat Jacobs Banda in respect of house number N345, Nangongwe Kafue in which she was the purchaser and the said Moffat Jacobs Banda was the vendor. The Applicant averred that she and the vendor proceeded to effect change of ownership and that title to the property has since passed to her. However, the Respondent, who was the vendor's wife has wilfully neglected to render vacant possession to the Applicant without any lawful justification. The Applicant prayed that she be granted the reliefs sought in the origination summons in the interests of justice.

The Respondent, Anna Chulu filed an affidavit in opposition on the 4th of September, 2015, stating that she lawfully got married to the vendor, Moffat Jacobs Banda on the 14th of June, 1992 and that although they are now living apart, the parties are not divorced.

The Respondent averred that she and the said vendor lived together at house number N345, Nangongwe, as husband and wife, which house was rented from the Kafue District Council. In 1996, the said house was offered to them as sitting tenants for sale, and was accordingly sold to the vendor Moffat Jacobs Banda and the Respondent. She stated that they paid the purchase price in full on or about 3rd November, 1998.

The Respondent averred that her husband, the vendor left home in 1998 to live with another woman and that she and the children continued to live in the house and have continued to be there. She further stated that all property acquired during the marriage is subject to property settlement in the event of dissolution of the marriage.

The Respondent averred that the Applicant should have inquired why the Respondent and her children were living in the house before she purported to buy the house from the vendor, the Respondent's husband. She further stated that the Applicant has a certificate of title which was issued to her on the 24th of July, 2012 while the Respondent has a certificate of title dated 2nd November, 1998. The Respondent therefore prayed that the Applicant's application be dismissed as it is misconceived. The Applicant should have appealed the decision of the Subordinate Court than commence a fresh action in the High Court over the same matter.

At the hearing of the matter, the Applicant Creda Mwambula testified that she desired to have vacant possession of House Number N345, Nangongwe, Kafue which she bought from the

Respondent's husband in 2010. The Applicant stated that when Moffat Banda sold the house to her, she saw the house but was told that there were tenants living in the house. The Applicant stated that the tenants then paid rentals to her after she bought the house.

The Applicant produced a laminated document which stated that Moffat Jacobs Banda sold House Number N345, Nangongwe, Kafue to her on the 8th of April, 2010. The Applicant stated that she and the vendor went to the Council to process the change of ownership and subsequently the Applicant was given a letter of offer. She stated that the vendor told her that she would be given the title deeds for the house later.

The Applicant testified that the vendor, Mr Banda told her that he lost the original letter of offer. They went to the Police Station to obtain a Police Report and then subsequently proceeded to the Council. The Applicant stated that when she went to the house and found the Respondent there, she informed the Respondent that she had bought the house from her husband Moffat Jacobs Banda. The vendor told the Applicant that he divorced his wife much earlier. However, the Respondent informed that Applicant that they were not divorced.

The Applicant was told that the title deeds that she had in her possession were issued on the 22nd of August, 2012, while the title deeds that the Respondent had in her possession for the said property were dated 3rd November, 1998. The Applicant stated that the vendor told her that he lost the title deeds and as such, obtained another copy which he gave to the Respondent.

The Applicant stated that when she asked the vendor, Mr Banda to refund her the money for the house since she could not get vacant possession, he refused as he stated that he sold the house because it belonged to him and his relatives, and was therefore not a matrimonial home. The Applicant stated that the matter was initially before the Subordinate Court at Kafue but the court could not make a decision. As such, the Applicant decided to commence this action in the High Court.

Moffat Jacobs Banda, aged 54 years gave sworn evidence that the history of House Number N345, Kafue is that going back to 1965, the house belonged to his grandparents, Mungomba Sitangi and his wife Zelia Lungu. The witness stated that he grew up knowing that the house in issue was a family house. The witness stated that when Zelia Lungu left to go and live in Chawama, she left her son, James Sakala in occupation of the house. Moffat Jacobs Banda stated that in 1986, his uncle James Sakala asked him to stay in the house as the eldest nephew. He therefore went to live in the house with his wife and child but he knew that the house was for the extended family and that he and his family were mere caretakers. Moffat Jacobs Sakala stated that he went to the Council with his uncle, James Sakala and the tenancy was then changed into his name, so that he could keep the house for the family.

Moffat Jacobs Banda testified that the house was offered to him in 1996 and he asked members of the family to help him pay the purchase price of the house, which they did. The family gave him the first payment of K40, which he used to pay the deposit for the

house. He stated that he kept getting money from the family in small amounts until he completed the payment. However, due to family problem, he and his relatives decided to sell the house and it was accordingly sold to the Applicant. At this time, his youngest child was twenty two years old. The purchase price was Twenty Seven Million Kwacha.

In cross-examination, Moffat Jacobs Banda stated that he sold the house on behalf of his family as it was their property. He however admitted that the certificate of title was in his name. Banda stated that all the members of his family died and he was the surviving member. The house was offered to him by the Council on behalf of the family. When he decided to sell the house, his children were supposed to move to the place where he went to live. Banda stated that he got married to the Applicant in 1981. He stated that when he sold the house to the Applicant, the original title deed was missing. He shared the purchase price of K27,000-00 with his extended family. This was the close of the Applicant's case.

The Respondent, Anna Chulu aged 50 years of Kafue gave sworn evidence stating that she got married to Moffat Jacobs Banda in 1992 at Kafue Catholic Church. The couple initially lived at Kasengele with her husband's parents and later applied for a house from the Council. They were give house number N345, Nangongwe, Kafue. This was in 1984. She stated that she and her husband paid rent to the Council using a rent card in Moffat Jacobs Banda's name. In 1996, the house was offered to Banda

and they paid for it in instalments until the full purchase price was paid.

Anna Chulu stated that in 1999, her husband moved out of the house and went to live with a girlfriend. He abandoned the Respondent and their two sons. He did not support the children financially or morally and when he got his terminal benefits, he squandered the money. He decided to sell the house without informing his wife and children. The title deed for the house was with the Respondent's two sons. Mr. Banda took his wife and children to the Police in a bid to get the title deeds for the house from them. He therefore knew where the original title deeds were even when he went to report that they were lost.

The Respondent stated that since she is still married to Moffat Jacobs Banda, she is entitled to a share in the house. Her husband did not inform her that he had intentions of selling the house.

DW2, Antonio Maseko aged 27 years, was the Respondent's son. His testimony was that his father, Moffat Jacobs Banda sold the house that he and his brother lived in after he deserted them.

DW2 stated that he had lived at house number N345, Nangongwe all his life. His parents rented the house from the Council until it was sold to them as sitting tenants. In 1999, his father Moffat Jacobs Banda left the matrimonial home to go and live elsewhere. DW2 remained living at house number N345 with his mother and his brother. In 2004, DW2's mother left the house and the two children had to fend for themselves. In 2010, DW2 was informed that their house had been sold. DW2 and his brother refused to

move out of the house. They were taken to the Police Station and to court as the title deeds for the house were in their custody. He has the title deed for the house in his custody. This was the close of the case for the Respondent.

The learned Counsel for the Respondent filed written submissions and I am grateful for the same.

The questions that fall to be determined in this matter are as follows -

1. Whether or not the Respondent's husband was the legal owner of the house.
2. Whether the Respondent's husband had the authority to sell the house in question without the authority of the Respondent.
3. Whether the Applicant had constructive notice of the Respondent's interest in the house

It is settled law that a wife who contributes directly or indirectly to the acquisition of a house has an equitable share in the house. The case in point is that of **Pettit vs. Pettit¹ (1970) AC 777 and Gissing vs. Gissing² (1971) AC 886.**

In the case of **Pettit vs. Pettit¹**, the court stated that -

“if the property in question is land, there must be some lease or conveyance which shows how it was acquired.

The property in issue is in Nangongwe, Kafue. The Respondent has the original title deed of the house which is in her husband's name. Her evidence is that they rented the house from the

Council from 1984 until the property was sold in 1996. It was sold in Moffat Jacobs Banda's name, the Respondent's husband. He however stated that he lived in the house as a caretaker for his extended family. He has not provided any evidence before this court to prove that he lived in the house as a caretaker on behalf of his family. I therefore find and hold that Moffat Jacobs Banda was the tenant who subsequently purchased the house in issue from the Council in 1996.

Did the Respondent's husband have power to sell the house? In the case of ***Gissing vs. Gissing***² (supra), it was stated that a wife who contributes directly or indirectly to the acquisition of a house obtains a share in the house.

As such, once a wife or a husband is in occupation, a purchaser would be advised to make inquiry from the wife or husband. From the facts of this case, I accept the fact that Moffat Jacobs Banda sold the house without his wife's knowledge or consent. The Respondent did not authorize the transaction between the Applicant and her husband.

The next question that the court must determine is whether the Applicant have constructive notice of the Respondent interest in the land? The legal position is that anyone transacting in land will be protected only by the general equitable doctrine that a bonafide purchaser of a legal estate for value will take it free only with equitable interest he does not have constructive notice of another person's interest. Purchasers should therefore inquire about equitable interests as well as legal interests. The Applicant should therefore have undertaken full investigation of the title

before completing the purchase. This should have included making inquiries about the persons in occupation of the house as well as concluding a search at Kafue District Council.

Section 33 of the Lands and Deeds Registry Act, provides that-

“a certificate shall be conclusive as from the date of issue and upon and after the issue thereof, notwithstanding the existence of any other person or of any estate or interest, whether derived by grant from the President or otherwise.....”

As such, the certificate of title that has been kept by the Respondent's children which was reported missing by Moffat Jacobs Banda is the original certificate of title for the property. The property is therefore family property and is jointly owned by the Respondent and her husband. The facts clearly show that Moffat Jacobs Banda reported the missing title deed to the Police when he knew that the original title deed was in his sons' possession. He proceeded to obtain another title deed, knowing that he could not retrieve the original title deed. The title deed that he obtained with a view to sale the property to the Applicant was not genuinely obtained and his actions were in fact fraudulent.

In the case of **Watchel vs Watchel³**, ***“family assets”*** are defined as-

“these things which are acquired by one or the other or both of the parties with the intention that there should be

continuing provision for them and their children during their lives, and used for the benefit of the whole family”

The house at 345 Nangongwe falls within this category. The evidence on record is that the parties rented the house from the Council for several years until it was purchased in 1996.

The Respondent produced a marriage certificate before this court to show that the parties were lawfully married at Kafue Catholic church in 1992. While I accept that this marriage certificate does not conform to one that is prescribed under the Marriage Act, I am satisfied that there was a marriage between the parties which according to the evidence on record has not been dissolved. It therefore follows that the Respondent's husband had no authority to sell the house to the Applicant in the manner that he did, as the Respondent did not consent to the sale.

In the case of ***Nawakwi vs Lusaka City Council and Another⁴ Appeal Number 26 of 2001***, the court stated that the purchasing of realty should not be approached as casually as purchasing household goods. I find that the Applicant should have inquired about the equitable interests with as much diligence as the legal interests relating to the house in issue.

On the facts of this case I find that the Applicant had constructive notice of the equitable or beneficial interest of the Respondent in property in issue. The purported sale of the house by Moffat Jacobs Banda to the Applicant was therefore misconceived as the said Moffat Banda could not sell the house without the consent of his wife who has fifty per cent shares in the house.

This action fails for lack of merit. The Applicant shall have to pursue Moffat Jacobs Banda to obtain a refund for the money that she paid for the failed purchase of the house. I will make no order for costs.

Leave to appeal is granted.

Delivered this 17th day of February, 2016.



P.C.M. NGULUBE
HIGH COURT JUDGE