

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



B E T W E E N:

ATAUR RAHAMAN CHODHURY

PLAINTIFF

AND

JOSEPHAT CHASAYA

DEFENDANT

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on 10th
April, 2017**

For the Plaintiff : Mr. K.M. Simbao, Messrs Mulungushi
Chambers

For the Defendant : Mr. R. Mainza, Messrs Mainza & Co

J U D G M E N T

Case Authorities Referred To:

1. *Sableland v Zambia Revenue Authority* 2005 Z.R. 109

Legislation and Other Works Referred To:

1. *Rules of the Supreme Court, 1999 edition*
2. *Lands and Deeds Registry Act, Chapter 185*
3. *Snell's Equity, London, Thomson Reuters (legal) Limited 2008*
4. *Land Law in Zambia, Cases and Materials, Frederick S. Mudenda, 2007*

The Plaintiff commenced this action by Originating Summons. By a Ruling dated 5th May, 2015, the proceedings continued by Writ of Summons, endorsed with the following claims:

- i) *An Order that the Defendant be evicted from the Plaintiff's land.*
- ii) *The Plaintiff be awarded damages for trespass.*
- iii) *Further or other relief as the Court may deem just and expedient.*
- ii) *Interest and Costs.*

In the Statement of Claim, the Plaintiff contended that he is the registered owner of Lot No. 14592/M, Lusaka. On 21st December, 2012, he executed a contract of sale for Lot No. 14592/M, Lusaka with Justine Mafuta and Chrispine Shachibamba. He later obtained Certificate of Title No. 296510 dated 4th April, 2014 from the Ministry of Lands. After he took possession of his property, the Defendant trespassed on it and built structures, which he did not authorise. As a result of the

Defendant's activities the Plaintiff contends that he has suffered loss and damages.

The Defendant settled a Defence where he denies that the Plaintiff is the registered owner of Lot No. 14592/M, Lusaka. He avers that the Plaintiff who is a Bangladesh citizen is not eligible to own land as he is neither a Zambian citizen nor in possession of an investment licence or Presidential Consent. The Defendant denies that he is a trespasser on the property and contends that he is in lawful occupation, having purchased it from Justin Mafuta on 28th February, 2013 at K72,000,000 un-rebased.

The Defendant avers that he paid Justin Mafuta, K68,000 and remained with a balance of K4,000, which Justin Mafuta has failed to collect. The Defendant also avers that Justin Mafuta continued staying on his property as his caretaker until final payment. The Defendant further avers that in the sale agreement, Justin Mafuta gave consent to the relevant authorities to process title in his name.

On that basis, the Defendant contends that he has vested equitable interest in Lot No. 14592/M, Lusaka.

The Defendant states that at the time of purchasing the property, Justin Mafuta had a letter of offer dated 8th December, 2011, which was lawfully issued by the Commissioner of Lands. He admits that in 2013, he built a foundation for storage facilities on the property.

The Defendant avers that Justin Mafuta fraudulently sold Lot No. 14592/M, Lusaka to the Plaintiff sometime in April, 2014 at the sum of K230,000.00, without his consent. Further, they under-declared the sale by K150,000.00 to the Ministry of Lands and Zambia Revenue Authority.

As particulars of fraud, the Defendant states that Justine Mafuta breached his written undertaking of giving consent to the relevant authorities to transfer the property into his name. Further, that the Plaintiff and Justine Mafuta obtained consent to assign the

property by under-declaring the purchase price. The Defendant states that on 13th April, 2014, Justin Mafuta, Chrispin Shachibamba, Margaret Shachibamba, Ernest Shachibamba and Teddy Kasaila executed a relocation agreement in which they forged his name and signature with the full knowledge of the Plaintiff from Lot No. 14514/M and Lot No. L/20413/M to Lot L/14592 Lusaka.

The Defendant denies that the Plaintiff's contract has preference over his and that he was the first in line to purchase the property. The Defendant states that at the time of the Plaintiff's alleged purchase, he had already established an equitable interest in the property. Further, that the Plaintiff had actual or constructive notice of the Defendant's interest.

The Defendant avers that the Plaintiff fraudulently obtained his certificate of title from the Ministry of Lands. He states that having lawfully purchased Lot No. 14592/M, Lusaka, from Justin Mafuta he is in legal occupation and is entitled to effect

developments thereon. In his counterclaim, the Defendant seeks the following reliefs:-

- (a) *A declaration that the purported Contract of Sale entered between the Plaintiff and one Justin Mafuta and Chrispin Shachibamba was subject to the Defendant's equitable right under the earlier Sale Agreement made between one Justin Mafuta and the Defendant and that the Plaintiff had actual or constructive notice of the said Sale Agreement.*
- (b) *A declaration that the purported Contract of Sale entered between the Plaintiff and one Justin Mafuta and Chrispin Shachibamba is null and void on account of fraud.*
- (c) *A declaration that the Plaintiff who is a Bangladesh Citizen is not eligible to own land in Zambia as he is neither a Zambian nor in possession of an Investment Licence or Presidential Consent.*
- (d) *An Order that the Certificate of Title No. 296510 relating to Lot No. 14592/M, Lusaka issued to the Plaintiff by the Registrar of Lands and Deeds on 4th April, 2014 be cancelled.*
- (e) *A declaration that the Defendant is the legitimate and lawful purchaser of Lot No. 14592/M, Lusaka.*
- (f) *Costs of the proceedings*

The Plaintiff **Ataur Rahaman Chodhury** testified as **PW1**. His evidence was that he bought Lot No. 14592/M, Lusaka, sometime in December 2012, from Justin Mafuta and Chrispin Shachibamba. Chrispin Shachibamba was the Administrator of the late Enala Mutonyo's estate, who was the co-owner of the property. PW1 testified that he executed a contract of sale with the vendors on 21st December 2012. The vendors were Justin Mafuta and Chrispin

Shachibamba. The vendors issued an acknowledgment receipt at pages 10-13 of his bundle.

It was PW1's evidence that the parties settled on the purchase price of K150,000,000.00. He bought 5,575 hectares of Lot No. L/14595/M from the vendors. After two years, the vendors processed the certificate of title in his name.

It was PW1's testimony that he paid the vendors an initial deposit on the property on 21st January, 2012. Thereafter, he paid them the balance, and took possession of the farm. His title was issued on 4th April, 2014 as shown in his bundle at pages 1-7. PW1, stated that he paid the vendors K140,000,000, and they used some of the money to sort out their personal problems. According to PW1, the vendors told him that they owed the Defendant and Mr. Kayumba money and this was stated in the acknowledgment receipt.

PW1 told the Court that he hailed from Bangladesh but had been resident in Zambia for twenty years. He did not know that the Defendant had already purchased the land at the time he acquired it. He only came to know of the Defendant's claim after he obtained title. PW1 testified that Justin Mafuta told him that he was the only purchaser of the property.

It was PW1's evidence that he was summoned to Woodlands Police Station to confirm if he bought land from Justin Mafuta and Chrispin Shachibamba. The duo were arrested after the Defendant lodged a complaint against them. According to PW1, he gave a statement at the Police Station. PW1 testified that in June, 2013, the Defendant confronted him over the property at his office and his response was that he bought the property in 2012, and he was the owner.

PW1 testified that the Defendant entered his property in July, 2014 and built structures as shown at page 8 of his bundle. PW1 concluded with a prayer beseeching the Court to grant him quiet

possession of his property and to eject the Defendant. He also prayed for costs.

In cross-examination, PW1 testified that he did not know the procedure followed by non Zambians in acquiring land. He maintained that he bought his property in 2012 and that the Defendant's interest in the land developed after his negotiations with the vendors. PW1 stated that the reference to the Defendant in the acknowledgment receipt was done at the instance of the vendors.

PW1 also stated that the documents in his bundle did not show that the vendors borrowed money from the Defendant. PW1 maintained that he paid the vendors K230,000.00 for the property as shown at page 16 of his bundle. He added that he bought 5.5 hectares from the vendors even though the hectarage shown on the certificate of title was 7.7 hectares. He added that, he bought an additional two hectares of land from Mr. Nalikenam Namitondo, even if the proof was not before Court, thus the 7.7 hectares.

PW1 testified that he visited his property on a number of occasions before purchasing it and never found structures. The Defendant's structures were constructed in 2014. PW1 also stated that he was not aware that he was only supposed to purchase Enala Mutonyo's portion because the rest of the land was encumbered.

In re-examination, PW1 maintained that he bought the property at K150,000,000 in 2012. Afterwards, he paid the vendors an additional K80,000,000, which they used to settle their problems. Altogether, he paid them a total of K230,000,000. According to PW1, some of the money was used to process his certificate of title.

PW2 was **Watson Mubanga** whose evidence that he witnessed the contract of sale between PW1 and Justin Mafuta. The contract was signed at Pearl of Health Hospital in Lusaka on 21st December, 2012.

In cross-examination, PW2 stated that he did not know who dated the contract and was not present when Mr. James Ntalasha signed it.

The witness was not re-examined.

Justin Mafuta testified as **PW3**. His evidence was that the Commissioner of Lands issued him and Enala Mutonyo a letter of offer on 8th December, 2011. He met PW1 in 2012 when he was selling Lot No. L/14592/M and he sold him 5.7 hectares at K150,000.00. A contract of sale was executed between him, Chrispin Shachibamba and PW1. PW3 testified that PW1's certificate of title was issued on 4th April, 2014. PW3 testified that in addition to his land, PW1 bought two additional hectares from Mr. Nalikena Namitondo bringing the total hectarage to 7.75.

It was PW3's evidence that PW1 moved on to the property on 4th December, 2012 and fenced the property. PW3 stated that he and Peter Shachibamba met the Defendant sometime in 2013 at his

office at the Ministry of Local Government and Housing. Peter Shachibamba told the Defendant that they were looking for money to refund Mr. Kayumba. According to PW3, the Defendant offered to assist them with K68,000.

It was PW3's evidence that the money was meant to refund Mr. Kayumba who bought 3.7 hectares from them in 2011 but later rescinded his decision to buy the property. As a result of the failed transaction, Mr. Kayumba reported PW3 and Peter Shachibamba to Woodlands Police station. PW3 testified that after he signed the sale agreement at page 1 of the Defendant's bundle, he realized that he had made a mistake to sell the property to the Defendant.

PW3 testified that after title was issued in PW1's name, the Defendant caused him and Chrispin Shachibamba to be arrested by Woodlands Police. PW3 confirmed that PW1 paid them an extra K80,000,000 as shown in the acknowledgment receipt dated 9th April, 2014, to sort out their personal problems. He also stated that payments were made to Mr. Kayumba, Mr. Nalikena Namitondo and

Chrispin Shachibamba. The Defendant was to be paid K40,000 but he refused the money insisting on the property.

According to PW3, his family then decided to find the Defendant an alternative piece of land, and a relocation agreement at page 11 of the Defendant's bundle was subsequently drawn up. PW3 testified that he did not know if the relocation agreement was forged because he was not present at the meeting. PW3 further stated that by the time the acknowledgment receipt and relocation agreement were signed the property belonged to PW1.

PW3 also stated that the Defendant built a foundation on PW1's property when he was still living on the property as PW1's caretaker. He maintained that his contract with PW1 was executed before the Defendant's. He further testified that the wire fence put by PW1 on the property was removed by the Defendant's workers and insisted that he made a mistake when he sold the land to the Defendant.

In cross-examination, PW3 testified that Enala Mutonyo died in 2011. He conceded that he gave consent to the relevant authorities to process title for the Defendant. He told the Court that he made a mistake by not informing the Defendant that he had already sold the farm to PW1. He conceded that he left the farm in June 2013 and before he received the last payment from the Defendant. It was PW3's testimony that he sold the Defendant the farm at half price because he made a mistake and realized his mistake soon after the transaction. PW3 testified that he acted fraudulently when he sold the property to both PW1 and the Defendant.

In re-examination, PW3 maintained that he acted fraudulently when he sold the property to three people, namely, Mr. Kayumba, PW1 and the Defendant. He testified that he first sold the farm to Mr. Kayumba in 2011, to PW1 in 2012 and later to the Defendant in 2013. Further, that he had only refunded Mr. Kayumba.

The Defendant **Josephat Mukalula Chasaya** testified as **DW1**. He testified that he was approached by Peter Shachibamba and PW3 on 27th February, 2013 at his office at the Ministry of Local Government and Housing. PW3 told him that he was selling his farm and he knew the property quite well because he had another in the neighbourhood.

It was DW1's evidence that on 28th February, 2013, PW3 and Peter Shachibamba went back to his office where he executed a sale agreement with PW3 for Lot. No.14592/M, Lusaka. The parties agreed on the purchase price of K72,000, which was to be paid in installments. DW1 told the Court that PW3 had a letter of offer from the Ministry of Lands, and when he conducted a search at the Ministry, he confirmed that the land belonged to him and Enala Mutonyo.

PW3 testified that the sale agreement between him and PW3 at page 1 of the Defendant's bundle was witnessed by Peter Shachibamba and Sunday Lombe. After signing the agreement,

PW3 agreed to stay on the property as his caretaker till payment of the full purchase price. According to DW1, PW3 allowed him to move on to the property after the first installment on 28th February, 2013.

According to DW1, he started to construct storage facilities on the property and his building materials were transported by Peter Shachibamba. He also testified that he used to monitor progress on the building every evening.

DW1 testified that on a date he could not recall, he found PW3 placing a barbed wire around a small portion of the property. PW3 told him that he wanted to mark the property boundaries so that trespassers would not enter DW1's land much to his dissatisfaction. DW1 stated that he was not privy to the acknowledgment receipt in the Plaintiff's bundle and only learnt of it when PW1 produced it at Woodlands police station. He stated that he was equally shocked to learn of the relocation agreement at page 11 in the Defendant's

bundle. DW1 told the Court that he had no interest in Mr. Nalikenda's property.

DW1 testified that he learnt of PW1's interest in the property after PW3 received the penultimate installment of the K72,000.00 in October, 2013. Thereafter, he never saw PW3 until he was arrested. It was DW1's evidence that sometime in April, 2014, Mr. Ntalasha PW1's agent, with police officers from Kabanana Police Post went to his property and chased his workers. DW1 stated that his purpose to PW1's office in April, 2014 was to inform him of his interest in the farm. DW1 testified that PW1 helped to apprehend the vendors and insisted that he purchased the property before PW1. He added that there was no trace that PW3 had sold the property before their agreement.

DW1 prayed to the Court to declare the sale agreement between PW1 and PW3 null and void. He told the Court that PW3 did not make a mistake when he sold him the property as he was the only purchaser at the time. He bought the property in good

faith and felt that it was criminal for PW3 and Chrispin Shachibamba to have forged his signature.

In cross-examination, DW1 stated that PW3 and Chrispin Shachibamba were the ones who committed fraud. He also stated that PW3 never told him that he sold the property to Mr. Kayumba in 2011 and to PW1 in 2012. He did not know if there was anything wrong with the contract between PW3 and PW1 but wanted it to be declared null and void because given his primary interest in the property. DW1 testified that when he bought the property from PW3, the parties agreed that Mr. Namitondo would retain his 2 hectares which he bought from Enala Mutonyo. He stated that his contract with PW3 did not state the hectares he bought.

In re-examination, DW1 stated that PW1's title deed was defective because the land he allegedly bought did not tally with the hectarage on the title. He added that the contract between PW1 and PW3 was not genuine because it only came into existence in 2013 and after he bought the property.

DW2 was **Peter Shachibamba** who testified that DW1 bought PW3's farm. He repeated PW3's evidence that he and Enala Mutonyo were issued a letter of offer for Lot No. 14592/M by the Commissioner of Lands. He repeated the evidence of the meeting between PW3 and DW1. He stated that he and PW3 met PW1 earlier to offer him the property. PW1's response was that Zambian law did not allow land to be sold on the basis of an offer letter. He regurgitated PW3's evidence on the money paid by DW1 for the purchase of the property and the contract of sale they executed as well as its terms. DW2 testified that PW3 allowed DW1 to develop the farm and DW1 constructed a foundation box for storage facilities in 2013. It was DW2's evidence that PW1's workers mounted a barbed wire on the property sometime in 2014.

In cross-examination, DW2 testified that he visited PW1's office three times, the first being in 2013. He was employed as DW1's driver and found him builders. DW1 paid him K500.00 and he did not know of the contract between PW1 and PW3. He never went to PW1's office in December 2012 and February 2013 to

collect money. DW2 stated that he went to PW1's office in 2014 because PW1 bought 2 hectares of land from Mr. Nalikena Namitondo. He also stated that, he saw the wire fence in 2014 was told by the caretaker that PW1's workers had mounted it.

In re-examination, DW2 testified that he first went to PW1's office in 2013. He did not know anything about PW1 and PW3's contract.

Both Learned Counsels were given an opportunity to file submissions. At the time of writing the judgment, only Learned Counsel for the Plaintiff had filed written submissions for which, I am indebted.

Learned Counsel submitted that Order 18 Rule 12 Sub rule 18 of the Rules of the Supreme Court sets the basic law on fraud as follows:

“fraudulent conduct must be distinctively alleged and as distinctively proved and it is not allowable to leave fraud to be inferred from the facts.”

Counsel cited the case of **Sableland v Zambia Revenue Authority**¹ where the Supreme held that:

“at trial of the cause the party alleging fraud must equally lead evidence so that the allegation is clearly and distinctly proved ... allegations of fraud must, once pleaded be proved on a higher standard of proof than a mere balance of probabilities because they are criminal in nature.”

Counsel argued that the Defendant abandoned its Defence on fraud when he never led evidence to prove the allegation that the Plaintiff fraudulently obtained the certificate of title for Lot 14592/M.

Counsel submitted that by not leading evidence from the Registrar of Land and Deeds on the propriety of the Plaintiff's title, the Defendant failed to prove fraud as required in the **Sableland** case supra. Counsel further submitted that in terms of section 33 of the Land and Deeds Registry Act, the Plaintiff had a certificate of title which was conclusive proof of his ownership of the property. Counsel also contended that the evidence before Court established that PW3 was the person who acted fraudulently and not PW1. Counsel added that, DW1 failed to prove that the relocation

agreement was drafted with the full knowledge of PW1 and that the Defendant did not adduce evidence before Court to show that PW1 and PW3 signed the relocation agreement. Counsel contended that the Defendant should have called the persons who signed the document to prove his allegation. Counsel submitted that the Defendant never proved the allegation that PW1 and Justin Mafuta under-declared the value of the property to the Commissioner of Lands and the Zambia Revenue Authority.

Counsel further submitted that the explanation given on the acknowledgment receipt dated 16th May, 2014, that the vendor demanded extra money from PW1 to sort out family problems after his certificate of title dated 4th April, 2014 was plausible.

Learned Counsel referred me to the Learned author on Snell's Equity, Cloudon Reuters (Legal) Limited, paragraph 4 – 03 at page 5b where the author states that:

“in law, as in equity, the basic rule is that estates, and interests primarily rank in the order in which they are created. In equity, the result is expressed more directly in the maximum Qui prior est tempore potior est that is he who is earlier in time is stronger in law.”

Counsel submitted that PW1's contract of sale dated 21st December, 2012 compared to DW1's contract dated 28th February, 2013, proved that PW1's interest in the land was superior to DW1's. Counsel urged me to note the Plaintiff's contract was expressed in unrebased currency as opposed to the Defendant's contract. He also invited me to note that the Defendant's contract was ambiguous on the description of the property.

Counsel concluded by stating that PW1's interest in the land was legal and not equitable. Thus, the Defendant's remedy lay with the fortfeasers who were well known. He prayed for a judgment order to evict the Defendant from the Plaintiff's property and costs.

I have seriously considered the evidence adduced and the written submissions filed herein. The issue that falls for determination is whether the Plaintiff's certificate of title is liable to cancellation on account of fraud.

There is no dispute that PW3 sold land to both PW1 and DW1. The land was earlier sold to Mr. Kayumba who repudiated the contract between himself and PW3. There is also no dispute that PW3 and the late Enala Mutonyo had joint interest in the land and held 5.5 hectares in common. Mr. Nalikenda Namitondo owned 2 hectares of land, which was next to the duo's land and to which DW1 has no claim. The controversy therefore rests on the land which was jointly owned by PW3 and Enala Mutonyo.

To prove his case, PW1 produced a certificate of title in Court and asserted that he executed a contract of sale with the vendors before DW1. On the other hand, DW1 forcefully contended that PW1's acquisition of title was tainted with fraud and he was the first to arrive on the property.

Let me start by stating that, I am in toto agreement with the Learned Counsel's submissions that the Defendant abandoned his allegation of fraud against the Plaintiff as no evidence was led by him. PW3's admission that he acted fraudulently when he sold the

land to DW1 knowing fully well that he had sold the land to PW1 clearly defines him as the fortfeisor. This being the case, the Defendant should have pursued a claim against him. I am mindful that the Defendant never led evidence to prove the Plaintiff's fraudulent involvement in his acquisition of title from the Ministry of Lands. I must state that what the Defendant presented as evidence of fraud, was impeached by the Plaintiff's evidence. Had the Defendant called evidence from the Registrar of Lands and Deeds, I might have perhaps reached a different conclusion. In the result, the Defendant's counterclaim of fraud fails.

I find that there was no evidence called by the Defendant to prove the under-declaration of the transaction to Zambia Revenue Authority and the Ministry of Lands. As a result, the counterclaim suffers similar fate in that it has not been proved.

I wish to dispel the misconception that because the Plaintiff hails from Bangladesh and is only a Zambian resident, he is disentitled from owning land. In my view as long as he meets all

the statutory requirements, the Plaintiff can own land. Thus, I find no reason to fault his title.

As the Learned author **Fredrick S. Mudenda** puts it at Chapter 8 of his book:

“A legal right is a right in rem (in the thing itself) which is enforceable against the whole world whereas an equitable right would be enforced only against a person who the chancellor considered was unable in good conscience to deny liability...A legal interest in land is a right in the land itself so that whoever acquires the land is bound by that right, whether he knew of it or not. A legal right is like a live electric wire which shocks those who touch it whether or not they know of it.”

Given that the Plaintiff has a legal right in the land, the Defendant is bound by it. Accordingly, I evict the Defendant from the Plaintiff's property forthwith. I award the Plaintiff damages for trespass to be assessed. Costs will abide the event to be taxed in default of agreement.

Leave to appeal is granted.

J27

Dated this 10th day of April, 2017.

M. Mapani

M. Mapani-Kawimbe
HIGH COURT JUDGE