

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

2015/HP/2447

**IN THE MATTER OF: THE PROPERTY KNOWN AS LOT 805
KANAKANTAPA.**

**IN THE MATTER OF: SECTION 14 OF THE HIGH COURT ACT CHAPTER
27 OF THE LAWS OF ZAMBIA.**

**IN THE MATTER OF: SECTION 63 OF THE LANDS AND DEEDS
REGISTRY ACT CHAPTER 185 OF THE LAWS OF
ZAMBIA.**

**IN THE MATTER OF: AN APPLICATION FOR AN ORDER FOR THE
ASSIGNMENT OR TRANSFER OF LOT 805
KANAKANTAPA.**

**IN THE MATTER OF: AN APPLICATION THAT THE DEPUTY REGISTRAR
EXECUTES THE ASSIGNMENT IN RESPECT OF LOT
805 KANAKANTAPA.**

BETWEEN:

**CHOLA CHAKONTA
AGNESS NYONDO CHAKONTA**



**1ST APPLICANT
2ND APPLICANT**

AND

ADMINISTRATOR OF THE ESTATE OF PATRICK MALAYA RESPONDENT

Before the Hon. Mrs. Justice M. C. Kombe

For the Applicants : Mr. K. Wishimanga- Messrs AM Wood & Co.

For Respondent : No appearance

J U D G M E N T

Cases referred to:

1. Khalid Mohammed v. Attorney General (1982) Z.R 49.

2. **William Masauso Zulu v. Avondale Housing Project Limited (1982) Z.R 172.**
3. **Lynch v Segal (2006) Can LII 42240 (ONCA).**
4. **Peggie Zulu (suing as administrator of the estate of the late James Zulu) v Lucia Kamanga Makina and Walter Mununga Kangai -2017/HPF/0036 (Unreported).**

Legislation and other material referred to:

1. **High Court Act, Chapter 27 of the Laws of Zambia.**
2. **The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.**
3. **Bryan A. Garner, The Black's Law Dictionary, Ninth (9th) Edition, 2009.**

The Applicants commenced this action by way of Originating Summons seeking the following orders:

- (i) *That the property known as Lot 805 Kanakantapa be assigned or transferred to the Applicants; and*
- (ii) *That the Deputy Registrar of the High Court executes the Assignments.*

The action commenced pursuant to Section 63 of the Lands and Deeds Registry Act Chapter 185 and Section 14 of the High Court Act, Chapter 27 of the Laws of Zambia is supported by an affidavit deposed to by the Applicants **CHOLA CHAKONTA** and **AGNESS NYONDO CHAKONTA** both of Lusaka.

They explained that by a contract of sale entered into on 8th May, 2003, Mr. Patrick Malaya (the deceased) sold them the property known as Lot 805 Kanakantapa at the price of ZMK 6,000.00. A copy of the contract of sale was produced and marked '**CCANC1**'; that the full purchase price was paid and Mr. Patrick Malaya deposited the original Certificate of title with them which they had in their possession.

Unfortunately, before the conveyance could be concluded. Mr. Malaya passed away; that following his demise, they had made all reasonable attempts to locate the Administrator of the estate to have him or her conclude the conveyance but to no avail as they had not been able to locate the administrator; that the failure to locate the Respondent had resulted in the transfer of the property into their names to be delayed and or halted; that they believed that the Respondent would not suffer any prejudice as Mr. Patrick Malaya had already relinquished his title to the property which they were fully in possession and control of.

At the hearing of the matter, the Respondent was not in attendance. After proof that the Applicants had served the process by advertising in the Zambia Daily Mail Newspaper, I allowed the Applicants to proceed with the matter.

Learned counsel for the Applicants Mr. K. Wishimanga relied fully on the Originating Summons and affidavit in support filed into court on 16th December, 2016.

He submitted that Section 63 empowered the Registrar of Lands and Deeds to effect transfer of an interest or estate in land where a court of competent jurisdiction had vested such an interest to an applicant.

In relation to Section 14 of the High Court Act, Mr. Wishimanga submitted that this section empowered the Court to grant an Order allowing the Deputy Registrar to execute an instrument as though that instrument had been executed by the person who should have executed it.

After counsel read out Section 14 to the Court, he submitted that since the Respondent could not be found, the Applicants were asking the court to invoke the provisions of Section 14 because what the Respondent had done amounted to neglect or refusal to comply with the order of the Court.

In another vein, counsel argued that the Court should proceed to grant the order to transfer and if the Respondent neglected or failed to do so even after the order had been advertised, and then the court should nominate an officer to execute the assignment on behalf of the Respondent.

When the court sought clarification if there was any order or judgment of the court, in this case, Mr. Wishimanga submitted that no order or judgment had been made. However, his argument was that the reason why the Applicants had sought both reliefs was to avoid duplicity of actions before the court. He further submitted that the Court was empowered to grant one relief pending the other and therefore the Court could grant the order transferring the interest or estate in the land and then order the Respondent to execute the assignment within a given period of time. He added that it was only after there was failure to comply with the Order of the Court that Section 14 could be invoked. He therefore sought the order to transfer pursuant to Section 63 of Cap 185.

Mr. Wishimanga also submitted that the Applicants had paid the full purchase price and the original Certificate of title had been handed over to them and so they were in possession of the property and had control of it.

In answer to a question from the Court whether the Applicants had shown proof of the full purchase price, counsel submitted that there was no proof that full purchase price had been paid. However, it was his argument that the fact that the original Certificate of title had been deposited with the Applicants was sufficient to show that the Respondent would not have any further claims regarding the property.

He added that special condition No. 11 of the exhibited contract showed that vacant possession of the property would be given to the Applicants upon completion of the sale; that the Applicant had shown that they had vacant possession of the property as evidenced by paragraph 12 of the affidavit. This

therefore showed that the Applicants had fulfilled the obligations under the contract of sale and ought to have the property transferred to them.

Those were the submissions made by counsel which I have taken into account when arriving at this decision.

In making a determination on the reliefs sought, I have read the affidavit filed by the Applicants.

As I have already mentioned, the Applicants have commenced this action pursuant to Section 63 of the Lands and Deeds Registry Act and Section 14 of the High Court Act for an order that property known as Lot 805 Kanakantapa be assigned or transferred to the Applicants and for an order that the Deputy Registrar of the High Court executes the assignment. In short, they have applied for a vesting order.

Although the Respondent who was sued in his or her capacity as administrator of the estate of Patrick Malaya did not attend court after the Applicants showed proof of service of the court process, it is important to state from the outset that the onus is on the Applicants to prove on the balance of probabilities that they are entitled to the reliefs sought. This is a principle that has been articulated in a plethora of authorities such as ***Khalid Mohammed v. Attorney General*** ⁽¹⁾ and ***William Masauso Zulu v. Avondale Housing Project Limited*** ⁽²⁾

Before I consider the provisions of the law relied on, I have found it pertinent to examine the nature of a vesting order.

According to the Black's Law Dictionary, a vesting order is defined as:

“A court order passing legal title in lieu of a legal conveyance.”

Being an equitable remedy it is by its nature discretionary and results from a finding by a court that fairness demands that the court act in a way to transfer property from one party to another.

Therefore, when the court grants such an order, it fills in the gap where a person with the legal or beneficiary title to property is unable to transfer title to a purchaser or another beneficiary.

Vesting orders may also be appropriate in the context of an insolvency where a court appointed receiver may be in possession and control of property and may wish to sell that property to a proposed purchaser. However, as the receiver is not the registered owner of the property, there may be need to obtain an order from the court permitting the transfer of the property to the new purchaser.

In other contexts, a court may grant a vesting order where it has determined that a transfer of title is appropriate but due to the nature of the legal proceedings, it is unlikely that an actual conveyance of title can be effected on a consensual basis. This situation may arise in contentious family law disputes over property or in civil disputes where the plaintiff is claiming specific performance or where a party's beneficial ownership is disputed.

Thus in the Canadian case of **Lynch v Segal** ⁽³⁾ several unsatisfied support orders led the Court of Appeal to grant a vesting order transferring property to a spouse to effect the sale of the property and to satisfy the prior court orders. It was observed by the Court of Appeal that in the family law context, the vesting order was in the nature of an enforcement order.

It is clear from the foregoing, that a vesting order may be available in the context of a court proceeding or in proceedings commenced specifically for the purpose of obtaining a vesting order. However, since a vesting order passes legal title in real property in lieu of a legal conveyance, certain requirements

have to be met by the applicant before a court can exercise its discretion to grant such an order.

In the present, the Court has been referred to Section 14 of the High Court Act as the provision which empowers this Court to grant a vesting order. For the sake of completeness the said section reads as follows:

14. Where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract or other document, or to endorse any negotiable instrument, the Court may, on such terms and conditions, if any, as may be just, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the Court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it.

It is clear that the above provision envisages the existence of a prior judgment or order. Therefore I am of the considered view that the court can only invoke its powers under this provision where any person has neglected or refused to comply with that prior judgment or order directing him to execute any conveyance, contract or other document. When such a situation arises, the court may then nominate a person for the purpose of executing the conveyance, contract or other document and for all intents and purposes that execution or endorsement would operate as if it had been executed or endorsed by the person originally directed to execute or endorse it.

This is the observation that was also made by Sharpe- Phiri. J in the case of **Peggie Zulu (suing as administrator of the estate of the late James Zulu) v Lucia Kamanga Makina and Walter Mununga Kangai**⁽⁴⁾ which I agree with. She stated in reference to Section 14 that:

'The preceding section empowers a court to nominate another person to execute instruments where there has been neglect or refusal to comply with a Judgment or Order of the Court. For this section to be invoked, there must be neglect or failure by a party to comply with a Judgment or Order issued by a Court of competent jurisdiction.'

Based on the foregoing, the Court in the above case granted a vesting order because she found that there was a judgment in favour of the applicant which the respondents had neglected to comply with.

Section 63 of the Lands and Deeds Registry Act which has also been cited by the Applicants provides that:

'63. Whenever any order is made by any court of competent jurisdiction vesting any estate or interest in land in any person, the Registrar, upon being served with an office copy of such order, shall enter a memorandum thereof in the Register and on the outstanding instrument of title and, until such entry is made, the said order shall have no effect in vesting or transferring the said estate or interest.'

Having considered the foregoing, I have to determine whether the Applicants are entitled to the reliefs sought based on the above provisions of the law.

As I have already alluded to, Section 14 of the High Court Act is clear when a vesting order can be granted by the Court. Counsel for the Applicants in his submissions has asked the Court to invoke the provisions of Section 14 because in his view, the Respondent has neglected or refused to comply with the order of the Court since he cannot be found.

However, there is no evidence that has been adduced by the Applicants that there exists a prior order or judgment directing the Respondent to execute any conveyance, contract or other document in relation to Lot No. 805

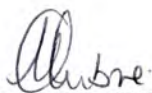
Kanakantapa and that the Respondent so directed has neglected or refused to comply with such order or judgment.

Furthermore, in view of what I have explained above, I do not accept the argument by counsel that this Court should proceed to grant the order to transfer and if the Respondent neglects or fails to execute any conveyance even after the order of the Court has been advertised, then the Court should nominate an officer to execute the assignment on behalf of the Respondent. I say so because this is not the situation envisaged under Section 14. I should hasten to mention that Section 63 of the Lands and Deeds Registry Act which has also been cited can only be invoked once a Court has granted a vesting order.

For the reasons I have highlighted above, I find that Section 14 relied upon by the Applicants is not applicable on the facts of this case as there is no formal order or judgment in favour of the Applicants to permit this Court invoke its powers under the said section.

In the final analysis, I have no hesitation in pronouncing that the Applicants have not proved their case on a balance of probabilities that they are entitled to the reliefs sought in this action. The action is misconceived and it is accordingly dismissed.

DELIVERED at Lusaka this 28th day of September, 2017



M. C. KOMBE
JUDGE