

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

2017/HP/1702



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

AND

IN THE MATTER OF: PLOT NO.5 MAGOYE, SOUTHERN PROVINCE

BETWEEN:

ZAMBIA AGENCY FOR PERSONS WITH DISABILITIES APPLICANT

AND

K.C PATEL RESPONDENT

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

For the Applicant : Mrs E. Chanda- Messrs Chanda Chizu & Associates

For the 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. Galaunia Farms Limited v. National Milling Company Limited and another (2004) ZR 1.**
- 3. Lynch v. Segal (2006) Can LII 42240 (ONCA).**
- 4. Finsbury Investments v. Antonio Ventriglia, Manuel Ventriglia, Ital Terrazzo Limited (In receivership) SCZ/8/95/2016.**

Legislation and other material referred to:

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

On 2nd October, 2017, the Applicant commenced the action herein by way of Originating Summons seeking the following reliefs:

- (i) That a Vesting Order be issued in favour of the Applicant.***
- (ii) That a Court Order be issued allowing an officer of the court to execute any relevant conveyance documents.***

The Originating Summons is supported by an affidavit deposed to by **DR.BARNABAS CHITALU** the Acting Director in the employee of the Zambia Agency for Persons with Disabilities (ZAPD).

He deposed as follows:

That the Zambia Council for the Handicapped which was changed to the Zambia Agency for Persons with Disabilities by an Act of Parliament, was given Stand No.5 in Magoye by one Mr K.C Patel sometime in the early 1980s through a deed of gift.

He explained that with all due diligence and to the best of his knowledge, he had not been able to trace the documents or title deed relating to the property as the same was done through the Mazabuka Municipal Council. He further deposed that efforts were made to retrieve the same from

Mazabuka Municipal Council but did not yield any results. The Applicant exhibited a copy of the said letter marked **“KN1”**.

He further explained that ZAPD had over the years been renting out the property to various tenants as proof that they have had custody of the said property. He exhibited copies of the some correspondences and leases which were marked **“KN2”** to **“KN5”**. Further that sometime in 2014 ZAPD endeavoured to apply for change of ownership through the Mazabuka Municipal Council but did not succeed due to lack of any correspondence and title deed for the said property and efforts to locate the said Mr Patel and any of his family members yielded no results.

It was further deposed that in 2017 ZAPD sought guidance from the Ministry of Lands on how to go about with the process, and were advised to first advertise the said property in the press for a period of two weeks giving the intention to apply for a vesting order; that ZAPD proceeded to advertise in the Times of Zambia and a copy of the said advertisement was marked **“KN6”** in the affidavit.

The Respondent did not file any affidavit in opposition to the Originating Summons.

At the hearing of the matter, the Respondent was not present. However, I allowed learned counsel for the Applicant Mrs. E. Chanda to proceed with the matter after proof of service that the Applicant had served the process by advertising in the Zambia Daily Mail Newspaper.

Mrs. Chanda submitted that the application was made pursuant to **Section 14 of the High Court Act, Chapter 27 of the Laws of Zambia** and that she relied on the affidavit in support specifically paragraphs 1 to 13.

She submitted that the Applicant sought a vesting order of Stand No.5 in Magoye and an order allowing a relevant official to execute any relevant documents so as to effect the transfer or conveyance.

When asked by the Court why she relied on Section 14, Mrs Chanda submitted that this section allowed the Court to grant any order it deemed fit. She added that the matter did not arise out of a dispute but that the property was given to the Applicant as a gift by the Respondent in the early 1980s.

It was her submission that it was unfortunate that the Applicant did not get title at the time and when it tried to do so in 2014, it could not locate the Respondent.

Those were the submissions by counsel for the Applicant which I have carefully considered.

By this action, the Applicant seeks a vesting order to be issued in its favour and for the Court to allow an officer of the Court to execute any relevant conveyance documents relating to Stand No. 5 in Magoye because it has not been able to trace the documents or the title deed relating to the said property.

It is important to state from the outset that the onus is on the Applicant to prove on the balance of probabilities that it is entitled to the reliefs sought. This principle has been enunciated in a number of authorities such as **Khalid Mohammed v. Attorney General** ⁽¹⁾ and **Galaunia Farms Limited v. National Milling Company Limited and Another** ⁽²⁾

This action has been commenced pursuant to Section 14 of the High Court Act, Chapter 27 of the Laws of Zambia. Before I consider this provision, I find 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.

As I have already alluded to, the Applicant in this case has relied on Section 14 of the High Court Act. This section provides that:

“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 apparent that this section envisages a situation where there has been judgment or an order of the Court and the respondent neglects or refuses to comply with such a judgment or order to execute any conveyance. Under such circumstances the Court has power to nominate a person to execute a document or instrument as if it had been endorsed or executed by the person originally directed to execute or endorse it.

Having considered the nature of the vesting order and the law relied upon, the question I have to determine is whether the Applicant is entitled to the reliefs sought.

To begin with, the Applicant contends that Stand No. 5 in Magoye was given through a deed of gift by Mr. K.C Patel in the early 1980's. However, there is no evidence that has been adduced that there exists a prior order or judgment directing the Respondent or indeed any other person to execute any conveyance or other document in relation to the said property and that the Respondent or such other person so directed has neglected or refused to comply with such order or judgment.

In the premise, I find that Section 14 cited by the Applicant is not applicable on the facts of this case and therefore I decline to invoke my powers under the said section.

Having made the above finding, I am alive to the fact that a vesting order is an equitable remedy which passes legal title in lieu of a legal conveyance. By virtue of Section 13 of the High Court Act, I am required to administer law and equity concurrently. The Supreme Court in the case of **Finsbury Investments v. Antonio Ventriglia, Manuel Ventriglia, Ital Terrazzo Limited** ⁽⁴⁾ had an opportunity to discuss the powers under the said section in the pursuit of the proper administration of justice. Mutuna J. stated that:

'In its unlimited jurisdiction, the High Court is vested with ... power to grant either absolutely or on such reasonable terms and conditions as shall seem just all such reliefs whatsoever, interlocutory or final to which any of the parties thereto may appear to be entitled...'

However, notwithstanding the powers that this Court has, the onus, as I have already mentioned is on the Applicant to prove that it is entitled to the reliefs sought. I am therefore of the considered view that before this Court can exercise its discretion and grant the reliefs sought herein, the Applicant must show that Stand No. 5 in Magoye was indeed given by the Respondent through a deed of gift.

To support its assertion that the said property was given as a gift by Mr. K.C Patel, the Applicant has exhibited a copy of a lease agreement and

correspondences that it has been renting out the said property to various tenants.

I have carefully considered this evidence. However, I cannot express myself as wholly satisfied that the documents exhibited sufficiently prove that Stand No. 5 in Magoye was given to the Applicant by the Respondent through a deed of gift. I say this for the following reasons:

- (i) While I acknowledge that a deed of gift is one way of transferring real estate property, the deed of gift has not been exhibited and notwithstanding the contents of paragraph 4 of the affidavit in support that the transfer was done through the Mazabuka Municipal Council there is no confirmation from the Council that the Respondent made such a transfer to the Applicant.

- (ii) The letter marked '**KN1**' does not by any stretch demonstrate that the Applicant made efforts to retrieve documents or the title deed relating to the property as deposed to in paragraph 5 of the affidavit. The letter merely shows that the Applicant made a request to Mazabuka Municipal Council to have all the correspondences relating to Magoye Properties addressed to it and not K.C. Patel.

- (iii) No explanation has been proffered by the Applicant why the Certificate of Title was not obtained at the time the deed of gift was purportedly executed through the Council in the early 1980's.
- (iv) The Lease Agreement marked '**KN2**' does not sufficiently prove that Stand No. 5 in Magoye belongs to the Applicant in the absence of any other documentary evidence.
- (v) There is no specific reference to Stand No. 5 in Magoye in the letter marked '**KN3**' authored by the Assistant Secretary in the Ministry of Labour, Social Development and Culture to the General Secretary, Zambia Council for the Handicapped but to a building that belongs to the Zambia Council for the Handicapped. Therefore, it is not clear to the Court what property was being referred to in the said correspondence.
- (vi) The identification of the purported donor (owner of the property) is inadequate as the full names have not been disclosed. Moreover, the advertisement marked as '**KN6**' refers to M. Patel and not K.C Patel. Therefore in the absence of other supporting documents, it is not clear to the Court who the purported donor of the property is.

In view of the foregoing, I find that the Applicant has not proved to the satisfaction of the Court that Stand No. 5 in Magoye was given by Mr. K.C Patel through a deed of gift. Therefore there is no basis upon which this Court can exercise its discretion and grant a vesting order in favour of the

Applicant and also allow an officer of the Court to execute any relevant conveyance documents.

In the final analysis and taking into account the above findings, I have no hesitation in pronouncing that the Applicant has failed to prove its case on a balance of probabilities that it is entitled to the reliefs sought in this cause. The action is accordingly dismissed. Considering the circumstances of this case, I make no order as to costs.

Leave to appeal granted.

DELIVERED at Lusaka this 28th day of December, 2017



M. C. KOMBE
JUDGE