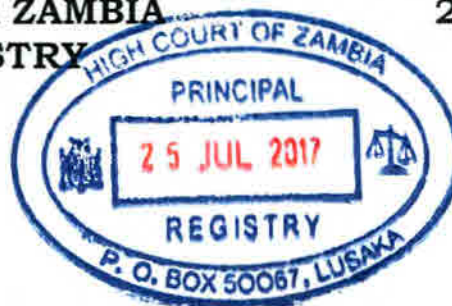


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2009/HP/0279

**B E T W E E N:**

WELUZANI ZULU

PLAINTIFF**AND**

S. P. MULENGA INVESTMENTS LTD.

1st DEFENDANT

G. MARTIN KWENJE

2nd DEFENDANT

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 25th day of
July, 2017**

For the Plaintiff : *Mr. C. Siatwinda, Legal Aid Counsel, Legal Aid
Board*

For the Defendants : *Mrs. A. Kapita, Messrs Kangwa Kapita Advocates*

J U D G M E N T

Cases Referred To:

1. *Salomon v Salomon and company (1897) AC 22*
2. *Jones v Lipman (1962) 1 WLR 832*

The Plaintiff issued Writ of Summons endorsed with a claim
for:

- (i) *An order declaring the purported rescission and sale of Lot S/F/5/3780/217D by the 1st Defendant as null and void.*
- (ii) *An order that the title deed in the above Lot be transferred in Plaintiff's name.*

- (iii) In the alternative, an order for damages against the 1st Defendant*
- (iv) Any other relief the Court may deem fit*
- (v) Interest on all claims*
- (vi) Costs*

The Statement of Claim discloses that the Plaintiff purchased a house from Mr. G. M. Kwenje in 1996 at K20,000,000, through S. P Mulenga Associates International, his agent. On 10th September, 1996, S. P Mulenga Associates International paid Price Water House Coopers K9, 900,000 which was the balance due on the house. The Company retained 10% of the purchase price (K 900,000) which was only payable after securing the title deed as stipulated in clause 15 of the Sale Agreement for Zambia Airways houses.

The Plaintiff states that by Receipt No. 1564 dated 27th September 1996, Price Water House Coopers (the Liquidator) acknowledged payment of the full purchase price, from S.P. Mulenga Associates International less the retention fee. However, on 1st March, 2001, Price Water House Coopers issued a notice of vacation to the Plaintiff because he did not pay the retention fee. The house was subsequently repossessed.

The Plaintiff avers that the 1st Defendant acted negligently by failing to remit the retention fee to the Liquidator and suffered loss because of its actions. He prays for the reliefs set out in his claim.

The 1st Defendant settled a Defence where it generally denies the Plaintiff's claim and avers that it never dealt with him.

The 2nd Defendant did not defend this action.

At trial, Weluzani **Zulu** testified as **PW1**. His evidence was that he met Mr. Kwenje between April and May, 1996 outside the 1st Defendant's offices at Parirenyatwa Road. He had gone there to buy a house because he had information that the 1st Defendant was selling houses of ex-Zambia Airways employees. PW1 testified that Mr. Kwenje told him that the 1st Defendant was his agent and that he was selling his house. According to PW1, the 1st Defendant facilitated the contract of sale between the parties, wherein PW1 bought the house at K20, 000,000.00.

Kenneth Mulenga the Company Secretary in the 1st Defendant Company testified as **DW1**. His evidence was that the 1st Defendant Company holds the personal assets of its directors. Its registered address is Chainama Hotel, although it does not have physical presence. He stated that the Company is not related to S. P Mulenga Associates International. DW1 stated that the 1st Defendant never acted as Mr. Kwenje's agent in the sale agreement between him and PW1.

In **cross- examination**, DW1 testified that he was aware of S.P. Mulenga Associates International through the media. He did not know if the directors in the 1st Defendant Company and S.P. Mulenga Associates International were the same. DW1 testified that the shareholders in the 1st Defendant Company were Kelvin Mulenga and Florence Mulenga.

DW1 told the Court that he had little knowledge of the 1st Defendant's business and did not know if S.P. Mulenga Associates International was the fore runner to the 1st Defendant Company, and thereby avoiding liability already incurred.

The witness was not **re-examined**.

Both Counsels were given an opportunity to file submissions. At the time of writing the Judgment, only Learned Counsel for the 1st Defendant filed written submissions. I am grateful for Counsel's submissions.

The gist of her submissions, were that the 1st Defendant was not the agent of S.P Mulenga Associates International. She argued that the Plaintiff was estopped from claiming damages against the 1st Defendant because no evidence was adduced in Court to that effect.

Counsel submitted that the doctrine of privity of contract applied in casu because the 1st Defendant being a stranger to the transaction could not be held liable for the acts of S.P Mulenga Associates International. Counsel cited the case of **Salomon v Salomon and Company**¹, where a distinction was drawn between

the legal personality of a Company and its shareholders. She asserted that all the correspondence tendered by the Plaintiff in Court referred to S.P Mulenga Associates International and not the 1st Defendant. On that basis, she contended that the 1st Defendant was wrongly cited as a party, being a stranger to the transaction. She prayed to the Court to dismiss the action and for costs.

It is common cause that the Plaintiff bought a house from Mr. Kwenje through his agent S.P. Mulenga Associates International. The Plaintiff paid the agreed purchase price for the house. The parties never perfected the transaction because S.P. Mulenga Associates International never remitted the 10% retention fee to the Liquidator.

In my considered view, the issue that arises for determination, is, whether the 1st Defendant is liable to the Plaintiff on the failed sale of Lot S/F/5/3780/217D? I take judicial notice that this is not the first time that the 1st Defendant and SP Mulenga Associates

International have been jointly sued. It is therefore, not farfetched, to conclude that the former is the fore runner of the 1st Defendant Company.

I had the opportunity of observing DW1 in Court and found his evidence to be contrived and of little value to the Court. DW1 testified that he is the Company Secretary of the 1st Defendant Company and yet has no knowledge of its directors.

Let me state that information about shareholders or directors of a company can be easily accessed from the Patents and Companies Registration Agency (PACRA). It is therefore, shocking that DW1 is so oblivious to such rudimentary information, unless his ignorance is meant to mislead the Court.

It is quite clear from the evidence adduced that the 1st Defendant shares a very close relationship with S.P. Mulenga Associates International. The name S.P. Mulenga is quite unique

and it would be a wonder for any other person to use it for his/her business venture, unless related to the shareholders or directors of that Company.

It matters less that the 1st Defendant is now known by S.P. Mulenga Investments because I am convinced that the directors in the 1st Defendant Company are the same people behind S.P. Mulenga Associates International. This probably explains why a very basic Defence was filed by the 1st Defendant presenting no real challenge to the Plaintiff's claims.

In the case of **Jones v Lipman**², Lipman was contracted to convey a portion of land to Jones, but later changed his mind. In an attempt to avoid an order for specific performance, Lipman incorporated a company to which he was shareholder and then sold the land to the company. The Court ordered specific performance against Lipman and his company because it was clear that the company Lipman incorporated was intended to be used as a device to avoid an order of the Court.

From the evidence adduced, I find the 1st Defendant is liable to the Plaintiff under its new name S.P. Mulenga Investments Limited. I find no merit in the Plaintiff's claim for rescission of the contract because it was not completed.

Albeit, I find merit in the Plaintiff's claim for damages. These are awarded and to be assessed with interest thereon.

Costs are awarded to the Plaintiff to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 25th day of July, 2017.



M. Mapani-Kawimbe
HIGH COURT JUDGE