

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

2015/HP/2052

BETWEEN:

BEN SOCKS KONDOWE

AND

KONDWELANI ZULU

EMELDA KATUNGU

LUSAKA CITY COUNCIL



PLAINTIFF

1st DEFENDANT

2nd DEFENDANT

3rd DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 25th DAY OF
JANUARY, 2018**

For the Plaintiff : Mr S. Zulu SC, Zulu and Company

For the 1st Defendant : In person

For the 2nd Defendant : In person

For the 3rd Defendant : Legal Counsel, Lusaka City Council

J U D G M E N T

CASES REFERRED TO:

- 1. *Sablehand Zambia Limited V Zambia Revenue Authority 2005 ZR 109***

LEGISLATION AND OTHER WORKS REFERRED TO:

- 1. *The Rules of the Supreme Court, 1999 Edition***
- 2. *Circular No 2 of 1996***
- 3. *Black's Law Dictionary 10th Edition by Bryan A. Garner***

The Plaintiff commenced this action on 29th October, 2015 by way of writ of summons claiming;

- 1) *A declaration that he is the rightful owner of Sub division 54 b/24 Stand No 19174, Matero, Lusaka.*
- 2) *A declaration that the purported sale of the Plaintiff's house by the Defendant to the 2nd Defendant in May 2011 was wrongful, null and void.*
- 3) *An order that the Lands register at the Council Registry be rectified by cancellation of the registration of the said house in the name of the 2nd Defendant Emelda Katungu or in the name of any other person, and re-instatement of the Plaintiff's name on the said register.*
- 4) *Mense Profits of K1, 500.00 per month to be paid by the 1st Defendant to the Plaintiff from 1st September, 2014 to 30th April, 2015 at a total of K12, 000.00 for eight months.*
- 5) *Mense profits of K1, 500.00 per month to be paid by the 2nd Defendant to the Plaintiff from 1st May, 2015 to the date when she will handover vacant possession of the said house to the Plaintiff.*
- 6) *Interest.*
- 7) *Costs.*

According to the statement of claim filed, the Plaintiff in 1981 left Matero with his wife to go and live in Chongwe, leaving Faless Zulu, his aunt and his mother's young sister as caretaker of the house, together with her four sons. This was on account of the fact that she had been evicted from a house she was renting in Shadreck area in Matero by the 3rd Defendant for failure to pay rent, as her husband abandoned her and went to Chipata. That the Plaintiff used to pay rent for the house to the

3rd Defendant until he purchased it, following the government policy to sell its houses to sitting tenants.

The statement of claim further states that the 3rd Defendant offered the Plaintiff to buy the house on 3rd December, 1996, which offer he accepted, and on 22nd December 2010, the Defendant gave the Plaintiff a duplicate offer to buy house number 4561 B Matero, at the price of ZMW10.50, to be paid within 45 days of the date of receipt of the offer letter, because Falesi Zulu hid the original offer letter in 1996.

It is stated that on 28th January 2013, the Plaintiff paid the rental arrears in the amount of K33.75 to the 3rd Defendant, and on 3rd January, 2014, the 3rd Defendant through its Council Registrar issued the Plaintiff with certificate of title No 22633 in respect of Subdivision 54B/24 of Stand No 19174 Matero, which property was previously known as house number 4561 B Matero. The allegation is that Falesi Zulu as caretaker fraudulently pretended to the 3rd Defendant that the Plaintiff had died, and had left her in the house as a sitting tenant.

The particulars of the fraud are stated as;

- i. Hiding the original offer letter for sale from the Plaintiff in 1996.*
- ii. Pretending that the 1st Defendant or his mother Falesi Zulu was the sitting tenant of the house.*
- iii. Lying to the 3rd Defendant that the Plaintiff had died and had left the house with Falesi Zulu, the 1st Defendant's mother, when in fact not.*
- iv. Wrongfully obtaining title from the 3rd Defendant relating to the said house.*

It is also alleged in the statement of claim that the on 22nd June, 2015, the Council Registrar called the Plaintiff to his office and asked him to

take the certificate of title with him, and that when the Plaintiff presented the said certificate of title to the office of the Council Registrar, a Mr Kamanga who was a clerk in that office grabbed the certificate of title, and caused it to be cancelled, on the allegation that the house did not belong to the Plaintiff.

That the Plaintiff demanded that 1st Defendant vacates the house in September, 2014 but he declined, and that the said 1st Defendant purportedly sold the house to the 2nd Defendant who continues to wrongfully occupy the house. It is stated that the Plaintiff is entitled to mense profits as a result of the occupation of the house from the 1st and 2nd Defendants at K1, 500.00 a month.

The 1st and 2nd Defendants filed a defence in which it is stated that the Plaintiff ceased to be a tenant of the 3rd Defendant in 1983 when he left for the village, and that the late Falesi Zulu was left to occupy the house as a tenant, and not as a caretaker. That when the directive to sell the houses was made by the President, it was the late Falesi Zulu who was a tenant of the house. The 1st Defendant denies being Kondwelani, stating that he is Gideon Zulu.

The 1st Defendant also denies that the late Falesi Zulu was evicted from the property in Shadreck's area, and it is stated that from time the Plaintiff left for the village, he did not pay rent for the house to the 3rd Defendant. The claim that the Plaintiff was offered the house to buy by the 3rd Defendant is denied, alleging that the house was offered to the late Falesi Zulu.

The 1st Defendant further denies that the late Falesi Zulu pretended to the 3rd Defendant that the Plaintiff had died, but that she purchased the house as a sitting tenant from the 3rd Defendant. That the title deed issued to the Plaintiff was cancelled due to the fact that it was wrongly

issued. The 1st Defendant admits having refused to vacate the house, but denies that the 2nd Defendant has been wrongly occupying the house. The claim for payment of mense profits is denied.

The 3rd Defendant did not file a defence. At the trial the Plaintiff testified and called no witnesses, and the 1st and 2nd Defendant each testified, and did not call any witnesses. The 3rd Defendant only appeared when the Plaintiff, 1st and 2nd Defendants testified, and despite the matter being adjourned twice to enable them appear, they did not do so, and the matter was adjourned for judgment.

The Plaintiff in his testimony told the court that he occupied house number 4561B Matero in 1970, which was a Council house at the time. He testified that after he applied for the tenancy, he was given a card which he used to use when paying rent. The document at page 2 of his bundle of documents was identified as the said card, and the one at page 3 and 4 was identified as the tenancy agreement. He went on to state that the rentals paid were K5.50, and that in 1981 he found a farm in Chongwe and he relocated there, leaving his aunt Falesi Zulu in the house, who lived there with her grandchildren who were still school going, as she was evicted from the house in Matero Shadreck where she was staying for failure to pay rent.

Further in his testimony, the Plaintiff stated that between 1995 and 1996 the President announced that all council houses would be sold to the sitting tenants, and he identified the document at page 9 of his bundle of documents as the offer letter that he was given to buy the house on 22nd December 2010. It was explained that the said letter was not the original as the original offer was given in 1996, and the late Falesi Zulu had hidden it from him. The Plaintiff testified that he bought the house at ZMW10.50, as evidenced on the document at page 6 of his bundle of

documents. He testified that he cleared all the rental arrears in the amount of ZMW33.75 before he could buy the house, and he was given a clearance certificate which was at page 14 of the Plaintiff's bundle of documents. The receipt for the payment of the rental arrears was at page 11 of the said bundle of documents.

The Plaintiff also told the court that he was thereafter issued a certificate of title for the property which was at page 16 of his bundle of documents. He stated that on 22nd June 2016 he was told by his cousin that Kondwelani Zulu had sold his house, and he went to the 3rd Defendant where he saw a Mr Kamanga. That after Mr Kamanga consulted from another office he had asked the Plaintiff if the house was his, and also told him that he would cancel the title deed, and that his friend cancelled it.

That after he fought with them, he was given back the cancelled title deed. The Plaintiff explained that Kondwelani Zulu is his young brother, their mothers having been sisters. That he had given himself the name of Gideon as the Plaintiff had known him as Kondwelani and Chris since he was born in 1964. It was the Plaintiff's evidence that he did not allow Kondwelani to sell the house, and that he does not know the 2nd Defendant. The Plaintiff prayed that he be declared owner of the house, and that it be given back to him, and that the certificate of title for the said property be restored, as it was not cancelled procedurally.

The Plaintiff further stated that the 1st Defendant should pay the rentals from 1st September 2014 until 30th April, 2015 at K1, 500.00 a month totaling, K12, 000.00. That the 2nd Defendant should pay the rentals of K1, 500.00 a month from 1st May, 2015 to date. Further that the court should declare that the sale by the 1st Defendant to the 2nd Defendant as null and void, and the Lands register should be rectified.

In cross examination, the Plaintiff testified that the 1st Defendant's mother hid the original letter of offer for sale of the house, but that he did not report the same to the police. That that is why he had an offer letter dated 2010. The Plaintiff told the court that the 1st Defendant was not staying in the house at the time, and added that the 1st Defendant's late mother lied to the 3rd Defendant that he had died, and that the documents proving the alleged death were at the Council. That the 1st Defendant sold the house using the documents for the same that his late mother obtained from the 3rd Defendant.

The Plaintiff agreed that he had sued the 1st Defendant's mother at the Local Court in 1999, and stated that the judgment of that court was corrupt. He denied that he was asked to produce documents pertaining to the ownership of the house before the Local Court, and he failed to produce them resulting in the dismissal of the matter. It was stated that their cousin Richard Tembo who was working at the Council had destroyed the documents pertaining to ownership of the house, and he denied that he obtained the documents showing ownership to the house after Falesi Zulu died.

The Plaintiff did however agree that he had not lived in the house for many years, but stated that he bought the house after the 3rd Defendant asked him to provide his national registration card to prove his identity. He denied knowing the Director of Legal Services Mr Mulengesela.

When cross examined by the 2nd Defendant, the Plaintiff testified that there are two roomed houses in Matero that are rented at K1, 500.00 a month, if they are well maintained. He denied that the house in contention could only be rented at K350.00 due to the state that it was in.

The Plaintiff when cross examined by the 3rd Defendant told the court that he was the tenant of the house from 1969. That he was a tenant of the house from 1969 to 1996 when he was offered to buy it. He stated that the document at page 3 of his bundle of documents was the tenancy document, and that it was given to him on 19th November, 2012 at the Matero Council.

The Plaintiff agreed that all tenancy agreements are dated but stated that he did not know why the Matero Council did not date the one that he was given. He maintained that the original offer letter was lost, and that is why he had not produced it before the court, and he was subsequently given the letter at page 8 of his bundle of documents, which is dated 22nd December, 2010.

He went on to state that he first paid and was then given the offer letter, and he agreed that the certificate of title that he was given for the house was cancelled. It was stated that the Plaintiff informed the Director of Legal Services of the said cancellation but that there was corruption, as Mr Kamanga of the 3rd Defendant referred him to a man whom he said was his boss, and the man had asked him if he was the owner of the title deed. That the man had cancelled it, and they had struggled. It was his testimony that from there he had sought assistance, and was directed to an office where the Secretary told him that he could get an appointment, and be seen after three months as the officer was busy. He also testified that the offer letter that the 1st Defendant obtained was fraudulent.

The 1st Defendant in his evidence testified that after the Plaintiff vacated the house in 1983 he did not return to live there. That the Plaintiff returned in 1999 and found that his late mother Falesi Zulu had bought the house, and he started claiming it as his. The 1st Defendant went on to testify that the Plaintiff had sued his late mother in the Local court

where the Plaintiff was asked to provide documentation to show that he owned the house, and as only his late mother had produced the documents of ownership, the Plaintiff's claim was dismissed.

He stated that it was only when his mother died that the Plaintiff had made the fake documents in the name of a title deed, and in 2014 he started claiming the house again, and when the 1st Defendant reported the issue to the Director of Legal Services at the 3rd Defendant, the certificate of title issued to the Plaintiff was cancelled. DW1 explained that this was after investigations were conducted, and there was history documenting how the Plaintiff was sold the property. That he was given clearance that his late mother had bought the house, and as the house had problems he sold it to the 2nd Defendant.

He identified the document at page 1 of the 1st and 2nd Defendant's bundle of documents as the tenancy card record for the house, while the document at page 2 was identified as the tenancy payment card, and the one at page 3 as the offer letter, while the document at page 4 was identified as the letter from the Director Legal Services confirming that the late Falesi Zulu was the tenant of the house. The document at pages 5, 6 and 7 was identified as the clearance letter for the arrears, while the one at page 8 was identified as the letter that the 1st Defendant wrote to the Director of Legal Services, and the document at page 9 was the receipt for the purchase of the house dated 22nd July, 1998 while the certificate of title was at page 11.

The statement of arrears of land rates was stated as the one at page 12, and the receipt for their payment was at pages 13, 14 and 15, and the clearance certificate was at pages 16 and 17, and at page 18 was the statement of rate arrears as at 5th August, 2014. He further told the

court that the order of his appointment as administrator of his late mother's estate was at page 19.

The 2nd and 3rd Defendants did not cross examine the 1st Defendant. When cross examined by Counsel for the Plaintiff, the 1st Defendant denied that his late mother hid the original offer letter that was addressed to the Plaintiff. He told the court that the document at page 3 of his bundle of documents shows that his late mother was offered to buy the house on 11th March 1998, while page 6 of the Plaintiff's bundle of documents shows that he paid for the house on 25th October, 1996. It was his evidence that the receipt exhibited by the Plaintiff was false as it does not have a genuine Council stamp. When referred to the document at page 5 of the Plaintiff's bundle of documents dated 22nd September, 1995, the 1st Defendant testified that the handwritten part under official use says that the mother is Falesi Zulu, and the tenant is Mr S. Kondowe.

The 1st Defendant alleged that the said document was also false, and that the Plaintiff may have placed a date stamp on it. He did however acknowledge that the Senior Housing Officer signed it. When referred to page 4 of the Defendant's bundle of documents, DW1 testified that the document shows that his mother became a tenant of the house on 11th March, 1998. That at the time the house had not been sold.

The 1st Defendant stated that the document at pages 14 and 15 of the Plaintiff's bundle of documents was forged as the Plaintiff did not have them when the matter was before the Local Court, as he said that he did not have documents for the house. It was stated that the document at page 5 of the Plaintiff's bundle of documents states that the monthly rentals were ZMW5.625, but stated that the document does not state when the Plaintiff started living in the house. He alleged that all the

documents that the Plaintiff had tendered in court were forged as the certificate of title was cancelled after investigations were carried out.

The 1st Defendant could not say whether it was the Registrar or a Clerk that cancelled the Plaintiff's title deed, and also could not say if the Registrar was supposed to call the Plaintiff before the title deed was cancelled.

In re-examination, the 1st Defendant testified that if his late mother was summoned by the Housing Department, she would have been told to vacate the house.

DW2 was 2nd Defendant Emelda Mwansa Katungu. Her evidence was that she bought the house from the 1st Defendant after she was shown original documentation for the house. She stated that she went to the Council to verify the authenticity of the documents, and found that the house had problems, and that the title deed for it had been cancelled.

DW2 further told the court that she bought the house in May 2015 at K40, 000.00, and that in the same month she was approached by the caretaker of the house who informed her that a man and woman had gone to the house claiming that they owned it. That when she got in touch with the 1st Defendant he told her that those people, among them the Plaintiff's son, had again started claiming the house. The 2nd Defendant stated that she had informed the claimants that she had bought the house, and referred all queries to the 1st Defendant, and that she thereafter extended the house and moved in. Still in her evidence, DW2 testified that the Plaintiff then commenced these proceedings.

In cross examination by the 3rd Defendant, DW2 told the court that she conducted a search on the file at the Council after the Plaintiff sent his brother to the house between June and July 2015. That the search had

revealed that the Plaintiff's certificate of title had been cancelled, as it was forged. She agreed that the 1st Defendant had told her that the house had problems before she bought it. That as at now the house has no title, and at the time she conducted a search, the 1st Defendant was in the process of obtaining the title deed.

That ownership of the property was not changed from the 1st Defendant into her name, as the file was moved from the Deeds Registry for investigations, but that she had paid for the deed of transfer.

When cross examined by the Plaintiff, DW2 told the court that there was no title deed that was issued in Falesi Zulu's name or the 1st Defendant. She reiterated that she knew that there was a dispute over the house before she bought it, but that she had paid for it as original documents were availed to her. That it was not the first time that she was buying a house.

The 2nd Defendant maintained that the house could be rented at only K350.00 today, and she agreed that it has electricity and water from the Council with water borne toilets, and is two bedroomed. When pressed further, her evidence that the house could now be rented at K1, 000.00, but that at the time she bought it, it could have been rented at K350.00. She expressed ignorance that Falesi Zulu was the Plaintiff's aunt, and agreed that if a tenant had a relative staying in the house, the receipts for rent would be in the tenant's name. That the sitting tenant is the person who has a rent card that is used to pay rent, but DW2 did not know in whose name the rent card for the house was between 1996 and 1998. She stated that the Council had stated that the Plaintiff's documents were forged, but that she had no proof to that effect.

I have considered the evidence. It is not in dispute that the Plaintiff rented the property subject of this matter, and that he left it in between

the years 1981 and 1983. That when the Plaintiff left the house, the late Falesi Zulu his aunt remained living in the house. It is further not in dispute that the house in contention was offered for sale after the President of the Republic of Zambia announced that Council houses would be sold to sitting tenants.

It is common cause that the Plaintiff paid for the house on 22nd December 2010, and was in fact issued with a title deed for the property on 3rd January, 2014, which was subsequently cancelled, and that the 1st Defendant's mother Faless Zulu was offered the house to buy on 11th March, 1998, and paid for the same on 22nd July, 1998.

The question is whether the Plaintiff was a sitting tenant of the house and was in fact offered the house to buy, and based on that a declaration should be made to the effect that he is the legal owner of the property? Further should the cancellation of the title deed that was done be reversed, and a rectification of the Lands Register be made, and the Plaintiff be awarded damages in the name of mense profits?

It can be seen from the evidence on record that the Plaintiff was a tenant of the 3rd Defendant. His evidence was that between 1981 and 1983 he went to reside at the farm in Chongwe, and he left his aunt the late Falesi Zulu in the house. The Plaintiff's testimony was that he continued paying the rent while the late Falesi Zulu was in occupation of the house, adding that she had been evicted from the house that she had been renting in Shadreck Matero for non -payment of rentals.

The Plaintiff however did not adduce any documentary evidence in the form of receipts for payment of the rentals to show that even after he vacated the house he continued paying the rentals. At page 2 of the Plaintiff's bundle of documents is a payment record card for house number 4561 Matero with the tenants name as Mrs Kondowe. This

document is not dated. The 1st Defendant attacked this document on the basis of it not being dated. However the evidence which is not disputed is that the Plaintiff was indeed a tenant of the 3rd Defendant.

The Plaintiff at page 5 of his bundle of documents exhibited a letter dated 22nd September, 1995 from the Matero Housing Office asking the occupier of house number 4561B Matero to report to that office on 26th September, and on the part for official use it states that the mother is Falesi Zulu, and the tenant Mr S. Kondowe. The 1st Defendant again attacked the authenticity of this document stating that it is not known who endorsed the part for official use, and that the date stamp on the document was not genuine.

At pages 3 and 4 of the Plaintiff's bundle of documents is the tenancy card with the terms of the tenancy. This document is not dated. At page 6 is a receipt dated 25th October 1996 for the payment of ZMW10.50 by the Plaintiff for purchase of the house, while at page 7 is the certificate of clearance on payment for sale of the house dated 28th January, 2013. The offer letter for the sale of the house at pages 8 and 9 of the Plaintiff's bundle of documents is dated 22nd December 2010, with the Plaintiff's explanation being that the late Falesi Zulu had hidden the original offer letter, and that is why he was given the duplicate.

At page 1 of the 1st and 2nd Defendant's bundle of documents is the tenancy card for Falesi Zulu for the said house in issue. The date of this document is faint but the year 1998 appears on it. At page 3 of the 1st and 2nd Defendant's bundle of documents is the offer letter to Falesi Zulu to buy the house dated 11th March, 1998, and the document at page 4 of the said bundle of documents is a letter from the 3rd Defendant dated 15th April, 1999, confirming that Falesi Zulu was a tenant of the house effective 25th February, 1998. The document at page 5 of the 1st and 2nd

Defendant's bundle of documents shows that the rental arrears for the house stood at ZMW142, 500.00, as at 29th April, 1998, and that ZMW15, 000.00 was paid towards the same on 10th March, 1998. The late Falesi Zulu paid for the house on 22nd July, 1998, as evidenced on the receipt at page 9 of the 1st and 2nd Defendant's bundle of documents.

The order appointing the 1st Defendant as administrator of the estate of the late Falesi Zulu shows that she died on 9th June, 2011.

In order for the Plaintiff to succeed in his claims, he must prove to the court on a balance of probabilities that he did not cease to be a tenant of the 3rd Defendant, and that he was in fact offered to buy the house in dispute. Further that he had continued to pay rent for the house in question when he left it to go and live in Chongwe. The Plaintiff in his evidence and his submissions alleged that the documents produced by the 1st Defendant are fraudulent as the 3rd Defendant sold the house to the late Falesi Zulu two years after the Plaintiff had paid for it. Indeed as already seen the receipt at page 6 of the Plaintiff's bundle of documents shows that the Plaintiff paid the purchase price for the house on 25th October 1996.

However the offer letter that he tendered before the court is dated 22nd December, 2010 and the explanation given for this is that the original offer letter was hidden by the late Falesi Zulu. The Plaintiff in the statement of claim pleads fraud and specifies the particulars of the fraud being that the original letter of offer was hidden from him, and that Falesi Zulu, the 1st Defendant's mother pretended that they were the sitting tenants of the house and that the Plaintiff had died, and had left the house to the late Falesi Zulu. The other particular of fraud alleged is the obtaining of the title for the house from the 3rd Defendant wrongfully.

Order 18/8/16 of the Rules of the Supreme Court, 1999 edition provides that;

“It is the duty of counsel not to enter a plea of fraud on the record "unless he has clear and sufficient evidence to support it"....Any charge of fraud or misrepresentation must be pleaded with the utmost particularity and see "Fraud", para. 18/12/18, and "Concealed fraud", para. 18/12/8.

In an action for damages for misrepresentation under the Misrepresentation Act 1967, s.2, it is enough to plead misrepresentation and not to plead fraud in the statement (or points) of claim, but where the plaintiff seeks to allege fraud, then fraud must be specifically pleaded.....”

In the case of **SABLEHAND ZAMBIA LIMITED V ZAMBIA REVENUE AUTHORITY 2005 ZR 109** it was held that;

“1. Where fraud is an issue in the proceedings, then a party or wishing to rely on it must ensure that it is clearly and distinctly alleged. Further, at the trial of the cause, the party alleging fraud must equally lead evidence, so that the alleging fraud must equally lead evidence, so that the allegations is clearly and distinctly proved.

2. Allegations of fraud must, once pleaded, be proved on a higher standard of proof, than on a mere balance of probabilities, because they are criminal in nature.”

In this case the Plaintiff, while pleading the allegations of the fraud with particularity did not lead any evidence to prove the said fraud, which he was required to prove on a higher standard than a balance of probabilities. Therefore while the Plaintiff was a tenant of the 3rd

Defendant he has not shown that he continued paying rent for the house, and was therefore not in breach of the tenancy agreement. I say so because the document at page 5 of the 1st and 2nd Defendant's bundle of documents shows that the house was in rental arrears of ZMW142, 500.00 as at 29th April, 1998.

The Plaintiff did not discredit this document in any way. However it is noteworthy that the 3rd Defendant issued the documents at pages 13 and 14 of the Plaintiff's bundle of documents on 28th January, 2013 as certificate of clearance to purchase the house to the Plaintiff. The 3rd Defendant issued the same documents to the late Falesi Zulu on 22nd July, 1998 as shown on the documents at pages 6 and 7 of the 1st and 2nd Defendant's bundle of documents. It was wrong for the 3rd Defendant to issue clearance certificates to two people to purchase the property in question as separate individuals, as this brought about the confusion now before the court.

I believe there are procedures that are available to cancel an offer made to one person if it is strongly felt that the offer was unlawfully made, or should be cancelled for any other legitimate reason, for example when the person offered to buy the property does not meet the eligibility criterion etc. Therefore the 3rd Defendant was callous by allowing two individuals to buy the same property.

Coming back to the issue of who is the legal owner of the property in dispute, 1st Defendant when cross examining the Plaintiff asked him if he did not sue the late Falesi Zulu in the Local Court over the house in 1999, and he lost the said case on account of his failure to produce documents to show that he had purchased the house, and the late Falesi Zulu had produced documents showing that she owned the property. The Plaintiff had denied being asked to produce documents to prove

ownership of the house before the Local Court, and he denied having obtained documentation for the house after the late Falesi Zulu died on 9th June, 2011.

While it cannot be said that the Plaintiff obtained the documentation for the house after Falesi Zulu died, as the offer letter addressed to him to buy the house is dated 22nd January, 2010, which is before Falesi Zulu died, the evidence shows that the Plaintiff sued the late Falesi Zulu over the house in 1999. This evidence establishes that Falesi Zulu paid for the house before the Plaintiff did. It therefore follows that the document at page 6 of the Plaintiff's bundle of documents being the receipt dated 25th October, 1996 for purchase of the house could not have been issued on that date.

The Plaintiff in his evidence did not show when the late Falesi Zulu went to the 3rd Defendant and represented that he had died, hence the letter of offer being issued in her name, after one had initially come out in his name, or that after he had paid for the house on 25th October, 1996, after the letter of offer had come out in his name, that is when the late Falesi Zulu had made the said representations to the 3rd Defendant.

In any event if the representations had been made after he had paid the purchase price, this would have entailed that the offer was issued in his name, and any title to the property would have come out in his personal representative's name.

Circular No 2 of 1996 being the Revised Procedures for Sale of Council Houses states that under that policy, only individual Zambian tenants/occupiers were eligible to purchase Council houses. The Plaintiff may have been the official tenant of the house registered at the 3rd Defendant at the time the houses were offered for sale in 1996, as the late Falesi Zulu only became a tenant of the house on in February, 1998,

as seen on the document at page 1 of the 1st and 2nd Defendant's bundle of documents. However the burden rests on the Plaintiff to prove on a degree higher than a balance of probabilities that the late Falesi Zulu did in fact hide the original letter of offer to him to buy the property, and that is how she was offered the same to buy after she made false representations that he had died.

I have already stated that there is no such evidence on record, and seeing that the criterion for eligibility to purchase a Council house was that one needed to be a Zambian and tenant/occupier of the house, then Falesi Zulu was eligible to buy the said house as she occupied the house. I say so because Oxford Dictionary defines an occupier as **"a person or company residing in or using a property as its owner or tenant or (illegally) as a squatter"**. *Black's Law Dictionary* by Bryan A. Garner, 10th Edition on the other hand defines an occupier as **"someone who has possessory rights in or control over certain property or premises or someone who acquires title by occupancy**, and defines a tenant as **"someone who holds or possesses land or tenements by any kind of right or title"**.

The Plaintiff had not been paying the rentals as a tenant of the house as it has been seen that there were arrears for rent when Falesi Zulu was offered to buy the said house. He was therefore in breach of the tenancy agreement, and the late Falesi Zulu being an occupier of the house was eligible, and the evidence shows that in February, 1998 she became a tenant, and was offered to buy the house. On that basis the Plaintiff's claim for a declaration that he is the rightful owner of Sub division 54 B/24 of Stand No 19174 Matero will fail, and it is dismissed. Flowing from this, the claim relating to the declaration that the purported sale of

the house by the 1st Defendant to the 2nd Defendant will equally fail, as I have found that the late Falesi Zulu was eligible to buy the house.

Further the claim for an order to rectify the cancellation of the title deed that was issued to the Plaintiff in respect of the said property shall also fail, as the certificate of title was issued to him after he paid for the property after the late Falesi Zulu had already bought the property, and he could not have legally bought the property, unless the purchase by the late Falesi Zulu had been cancelled. The claim for mense profits will fail on account of the fact that the Plaintiff is not the legal owner of the property. Each party shall bear their own costs, and leave to appeal is granted.

DATED THE 25th DAY OF JANUARY, 2018



S. KAUNDA NEWA
HIGH COURT JUDGE