

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

2016/HP/0434

BETWEEN:

**DUNCAN MUKE**

AND

**ABUID PHIRI****MWEETWA PRONJI ZIMBA****PLAINTIFF****1<sup>st</sup> DEFENDANT****2<sup>nd</sup> DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 28<sup>th</sup> DAY OF  
FEBRUARY, 2018**

*For the Plaintiff : Mr B. Mukatuka, Robson Malipenga and Company*

*For the Defendants : No appearance*

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## **J U D G M E N T**

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LEGISLATION REFERRED TO:

1. ***The High Court Rules, Chapter 27 of the Laws of Zambia***

The Plaintiff commenced this action by way of writ of summons on 4<sup>th</sup> March, 2016, which was amended on 14<sup>th</sup> April, 2016, claiming;

- i. *That the Plaintiff be declared the legitimate owner of Plot No LUS/36555 Matero East (SOS Area).*
- ii. *An order that the Defendant's letter of offer be revoked.*
- iii. *An order for a refund of K76, 900.00 for the works done.*
- iv. *In the alternative an order to sell the property, and share the proceeds equally.*

- v. Interest.*
- vi. Damages.*
- vii. Any other relief the court may deem fit.*
- viii. Costs.*

The statement of claim shows that the 1<sup>st</sup> Defendant was the beneficial owner of Plot No LUS/36555 situated in Matero East (SOS Area) in Lusaka, and that the 2<sup>nd</sup> Defendant has illegally encroached on the said land. It is stated that the Plaintiff bought the said property, being No LUS/36555 Lusaka from the 1<sup>st</sup> Defendant in December 2008 at K5, 000.00. That thereafter he proceeded to construct a slab on the property and spent K41, 900.00 on building materials, and paid K30, 000.00 as labour costs.

However when he ran out of money, he relocated to Zambezi whilst awaiting his retirement package, and in 2011, he was informed that the 2<sup>nd</sup> Defendant was constructing a house on the slab that he had built. That by reason thereof he has suffered loss and damage.

The Defendants did not enter appearance and file their defences, and pursuant to Order 12 Rule (1) (8) of the High Court Rules, Chapter 27 of the Laws of Zambia, as the nature of the reliefs sought include a declaratory order, orders for directions were issued, and the matter set down for trial. At the trial, the Plaintiff testified and called one witness, while the Defendants did not appear.

In his testimony, the Plaintiff told the court that the 1<sup>st</sup> Defendant approached him in December, 2008, and told him that he was selling land. That the 1<sup>st</sup> Defendant was one of the Ngombe residents that had been resettled, and was given land by the government. He told the court

that the 1<sup>st</sup> Defendant took him to see the land in Matero North and he was interested in buying it, as he had just retired. He further testified that he went to the Ministry of Lands to enquire about the said land, and the Commissioner of Lands had confirmed that letters of offer would be issued to the resettled Ngombe residents.

The Plaintiff told the court that he went to see the 1<sup>st</sup> Defendant and they signed a contract of sale for the said land, which the Plaintiff's son witnessed. He identified the document at page 1 of his bundle of documents as the said document, and it was his evidence that he started constructing and went up to slab level, when he ran out of money. He stated that he spent K41, 900.00 on the construction, and then relocated waiting for his retirement benefits to be paid. He referred to the document at pages 3-5 of his bundle of documents as being the document on which he documented the amount that he spent on the materials that he purchased.

Still in his testimony, the Plaintiff testified that in 2010, one of his workers phoned him asking if he had sold the plot, as people were constructing there, and his worker had also told him that the people constructing had informed him that Mr Kaluba owned the plot. That the Plaintiff came to Lusaka and met the people who were doing the construction, and they called Mr Kaluba. Mr Kaluba informed the Plaintiff that he had bought the plot from MMD cadres.

When the Plaintiff went to the Ministry of Lands he was told that the 2<sup>nd</sup> Defendant was the owner of the land. He wrote a complaint letter to the Ministry of Lands who asked him to call the 2<sup>nd</sup> Defendant for a meeting, but they could not meet. He then wrote to the Ministry of Lands asking them to intervene in the matter, but he was advised to sue. The Plaintiff

asked to be given the land or the money that he spent to build on the said land with interest.

PW2 was Mushima Muke, the Plaintiff's son. He testified that he went with the Plaintiff to see the land that the 1<sup>st</sup> Defendant was selling, and that the 1<sup>st</sup> Defendant had told them that letters of offer had not yet be given for the said land. He confirmed that verification was done at the Ministry of Lands and that the Plaintiff bought the said land at K5, 000.00. He identified the document at page 1 of the Plaintiff's bundle of documents as the contract of sale for the land that he had witnessed. PW2 also confirmed that the Plaintiff built up to slab level and then ran out of money, and he went to Zambezi to wait for the payment of his retirement benefits.

That later on his father had phoned him and told him that someone was constructing on the slab, and the person said he was sold the land by MMD cadres. He further testified that when they complained to the Ministry of Lands no resolution was reached as the person constructing on the land did not show up, and they were advised to sue.

I have considered the evidence. Counsel for the Plaintiff did not file written submissions despite being stating that he would. It is not in dispute that the Plaintiff and a person called Mr Ebuity Phiri executed a contract of sale for Plot No 36555 at K5, 000.00 to the Plaintiff on 13<sup>th</sup> December, 2008. The question is whether the Plaintiff is entitled to reliefs sought? It is on record that after the 1<sup>st</sup> Defendant approached the Plaintiff with an offer to sell the land to him, the Plaintiff went to the Ministry of Lands to enquire about the status of the land, and there he was informed that letters of offer would be issued to the settlers in the area.

Therefore at the time that the Plaintiff bought the land from the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant did not own the said land, as the land had not yet been offered by the Commissioner of Lands. The land not having yet been offered it was not expected that the Plaintiff would find any encumbrances or adverse interests on the land that he would have been put on notice to. Most importantly, as the land had not yet been offered, the 1<sup>st</sup> Defendant could not pass good title to it. This matter was undefended and therefore there is no evidence on record to show how the 2<sup>nd</sup> Defendant acquired the property.

The evidence as given by the Plaintiff is that when he went to lodge a complaint at the Ministry of Lands after the 2<sup>nd</sup> Defendant started constructing on the slab that he had built, and he was told that the 2<sup>nd</sup> Defendant owned the land. What is clear though, is that the 1<sup>st</sup> Defendant was not the owner of the land when he sold it to the Plaintiff, and the claim that the Plaintiff should be declared owner of the land in issue shall fail, as the 1<sup>st</sup> Defendant not being the owner of the land could not pass good title to it.

The claim for cancellation of the Defendant's letter of offer will equally fail on that basis. The Plaintiff also claims a refund of K76, 900.00, broken down as K5, 000.00 for purchase of the plot, K41, 900.00 for building materials and K30, 000.00 for labour.

The document at page 1 of the Plaintiff's bundle of documents, being the contract of sale shows the purchase price for the property as K5, 000.00, and that the 1<sup>st</sup> Defendant would have no further claims over the property. From this document it can be deduced that the Plaintiff paid K5, 000.00 for the land in issue. It has been seen that the 1<sup>st</sup> Defendant was not the owner of the property when he sold it to the Plaintiff, and the Plaintiff can only be paid what he spent in restitution, and I so order that

the Plaintiff shall recover the purchase price from the 1<sup>st</sup> Defendant, as it is with him that the contract of sale was executed. I accordingly enter judgment in favour of the Plaintiff against the 1<sup>st</sup> Defendant for K5, 000.00, being the purchase price paid. The amount shall carry interest at the average short term deposit rate from date of issue of the writ until judgment, and thereafter at the Bank of Zambia lending rate until payment.

With regard to the amounts spent on building materials and labour, these are special damages that must be proved. The Plaintiff referred to pages 3-5 of the Plaintiff's bundle of documents as being where he had documented the building materials purchased. The itemization of the materials alone is not enough, and there being insufficient evidence to establish the cost of the materials and labour, and in view of the fact that the Plaintiff testified that he did indeed put a slab on the property after he bought it, I refer the determination of the amount due for labour and materials to the Registrar for assessment, against the 1<sup>st</sup> Defendant. The amount found due shall carry interest at the average short term deposit rate from date of issue of the writ until judgment, and thereafter at the Bank of Zambia lending rate until payment.

With regard to the 2<sup>nd</sup> Defendant, it is trite that the matter before court arises out of a contract for the sale of land. The 2<sup>nd</sup> Defendant was not a party to the agreement to sell the said land, and it is trite that contracts confers rights and liabilities on the parties to it. In this case the 2<sup>nd</sup> Defendant is said to have bought the land from MMD cadres who were also not privy to the agreement between the Plaintiff and the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant would only have been liable if it had been shown that he had started the construction with the knowledge that the 1<sup>st</sup> Defendant as beneficial owner of the land had sold it to the Plaintiff,

and then he constructed on it. There being no such evidence before me, I find that the 2<sup>nd</sup> Defendant is not liable in this matter, and the claims against him shall fail.

The Plaintiff is also awarded costs against the 1<sup>st</sup> Defendant, to be taxed in default of agreement. Leave to appeal is granted.

**DATED THE 28<sup>th</sup> DAY OF FEBRUARY, 2018**

*S. Kaunda*

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**S. KAUNDA NEWA  
HIGH COURT JUDGE**