

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

2014/HP/0872

BETWEEN:

HILLAN LITETA

PLAINTIFF

AND

ZHONGMEI ENGINEERING GROUP LIMITED

1<sup>ST</sup> DEFENDANT

ZHANG YUJIN

2<sup>ND</sup> DEFENDANT

BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA  
ON 7<sup>TH</sup> AUGUST, 2019 - IN CHAMBERS

For the Plaintiff : Ms. Mushipe- Messrs Mushipe & Associates  
For the Defendant : Mr. Alex Musanya - Messrs. Zambezi Chambers

## **JUDGMENT**

### **CASES REFERRED TO:**

1. *Dunlop Pneumatic Tyre Co. Limited v Selfridge Limited* (1915) AC 847
2. *Daulia Limited v Four Milibank Nominees Limited* (1978) 2 ALL ER 557
3. *Sablehand Zambia Limited v Zambia Revenue Authority* 2005 ZR 109
4. *Robson Banda (Suing as Administrator of the Estate of the Late Rosemary Phiri) v Varisto Mulenga (Suing as Administrator of the Estate of the Late Steven Kabamba)* 2003 SCZ
5. *Nkongolo Farms Limited v Zambia National Commercial Bank Limited and Others*, SCZ Judgment No. 19 of 2007
6. *Sithole v State Lotteries Board* (1975) ZR 106
7. *Khalid Mohammed v the Attorney General* (1982) 49
8. *Wilson Masauso Zulu v Avondale Housing Project* (1982) 172
9. *Nkongolo Farm Limited vs Zambia National Commercial Bank Limited, Kent Choice Limited (In receivership), Charles Haruperi* (2005) Z.R. 78 (S.C)

### **AUTHORITIES & OTHER WORKS REFERRED TO:**

1. *Chitty on Contracts General Principles* (2<sup>nd</sup> Edition) Volume 1 (2004) at page 3, paragraph 1-001



2. *Halsbury's Laws of England (4<sup>th</sup> Edition, Volume 9(1) & Halsbury's Laws of England (4<sup>th</sup> Edition) Vol 36, at paragraph 36(2)*
3. *Edward J. Imkwikelried, Evidentiary Foundations, 4<sup>th</sup> Edition, at page 41*

In this matter commenced by way of writ of summonstatement of claim filed on the 5<sup>th</sup> June, 2014, the plaintiff claims the following:

- (i) *Payment of 10% of the purchase price on the sum of ZMK250,000,000 (ZMW250, 000) owed as per contractual agreement;*
- (ii) *Damages for breach of contract;*
- (iii) *Interest on the said sum;*
- (iv) *Costs of and incidental to these proceedings;*
- (v) *Interest on the said sum;*
- (vi) *Any other relief the court may deem fit.*

In the statement of claim, the plaintiff alleges that the 2<sup>nd</sup> defendant is the Managing Director of the 1<sup>st</sup> defendant, who contacted the plaintiff leading to their entering into a written contract dated 5<sup>th</sup> February, 2013. It was agreed that the plaintiff would locate, bargain and transact on behalf of the defendants in the purchase of a 10-acre piece of land at the purchase price of K250,000. Pursuant to this agreement, between the plaintiff and the defendant, the 2<sup>nd</sup> defendant agreed to pay 20% of the purchase price for the plaintiff's services and in the event that the vendor was introduced to the 2<sup>nd</sup> defendant and the transact fail through then the defendants would pay the plaintiff 10% of the purchase price for the effort and time.



The plaintiff found the land under Certificate of Title number 51835 through a Mrs. Rebecca Mwale of Chamba Valley area and introduced the 2<sup>nd</sup> defendant. The defendants neglected and or refused to settle the total sum of K250,000.00 despite admitting the amount owed to the plaintiff as being due.

In defence the defendants admitted contacting the plaintiff but that it was a mere business discussion aimed at finding a piece of land on which to construct an office. However, the denied ever executing a contract to that effect. It was further stated that the land was not bought and therefore the defendant could not claim from the failed transaction.

At trial, the plaintiff gave evidence (as **PW1**) and did not call any witnesses. He informed the court that he is an Estate Agent. He testified on the 4<sup>th</sup> February, 2013 he was called by the 2<sup>nd</sup> defendant to meet him at his Chamba Valley office. The 2<sup>nd</sup> defendant asked **PW1** to find him a piece of land for immediate purchase for not more than K2,500,000.00. The condition was that the land should be within 3 km radius from his Chamba Valley office. The 2<sup>nd</sup> defendant further told **PW1** that he would pay him 20% of the proposed purchase price. The 2<sup>nd</sup> defendant added that if **PW1** found the land and the transaction did not go through, **PW1** would be paid 10% of the purchase price, which translated to K250,000.00. The agreement was reduced in writing. He identified the contract on page 7 of the plaintiff's bundle of documents.



It was **PW1**'s testimony that he fulfilled his contractual obligations but was not paid. **PW1** found a client with a Certificate of Title whom he introduced to the defendants at their Chudleigh office. According to **PW1** the 2<sup>nd</sup> defendant was happy with the services of **PW1**.

He referred to a letter on page 8 of the plaintiff's bundle of documents, which he said he wrote to the defendant as a reminder. It was his testimony that when he took the letter to the defendant, where the 2<sup>nd</sup> defendant threatened to shoot him. When he was threatened, he reported the matter at Kaunda Square Police Station and later Mutendere Police Station. No arrests were made but call outs were sent. **PW1** also testified that he had written a letter of complaint. He referred the court to page 12 of the supplementary bundle of documents. It was his testimony that he has not been paid to date.

The defence witness, **DW1** was the 2<sup>nd</sup> defendant. He gave his evidence via video as he was outside jurisdiction. His testimony was that he met the plaintiff in April, 2013, when the plaintiff went to his office. It was his contention that the agreement was forged because he met the plaintiff in April 2013 but the agreement was forged showing February, 2013. He never signed any agreement. He refused ever seeing the agreement. He further disputed the fact that the signature on the document was his.



It was **DW1**'s testimony that when they first met with the plaintiff, the plaintiff was to join his business and introduce the business of timber, roofing sheets but that 12 months later he said he wanted to show the defendant land for purchase<sup>2</sup> in Chamba Valley. However, the defendant did not buy the land as there were too many arguments over the land. It was his testimony that the land issue came about in November.

**DW1** testified that he did not want to see the plaintiff because he was angry. He acknowledged that he was written to by the plaintiff on 13<sup>th</sup> March, 2014 and that he received the letter but he did not want to see the plaintiff because he had forged his name. It was his position that he could not pay the defendant because he did not buy the land.

In cross examination, **DW1** told the court that **PW1** went to his office with a view to join him as his assistant. He confirmed that in November **PW1** took someone who was selling land to his office. Further, **DW1** confirmed that he was looking for land in Chamba Valley for his office. He further confirmed that he saw the land but that the vendor was asking for too much. He denied that the purchase price was K2,500,000.00. Although he could not remember the price, he said it was too much. He denied being given a document for that land. He also denied asking **PW1** to look for land but that it was **PW1** on his own volition who took a couple that was selling land to him. He also testified that he met Rebecca, who was introduced to him by the plaintiff. It was



further his testimony that he was not in a position to make a decision to buy the land as he was not the boss. He reiterated that he did not give **PW1** any document with his signature. He however stated that there was an enquiry letter which he gave the owner of the land. It was **DW1**'s testimony that this letter had his signature. This letter was a reply to the letter the ones who were selling land had written to him.

It was **DW1**'s testimony that **PW1**'s forged letter had been sent to the police by his employer, Mr. Andrew but conceded that **PW1** was not taken to the police for forgery. He further conceded that he received the letters on page 8 and 9 of the plaintiff's bundle of documents. It was his testimony that he did not agree to pay any commission.

This marked the end of trial. Both parties filed submissions.

It was argued on behalf of the plaintiff that the defendant's evidence, was somewhat inconsistent as during examination in chief **DW1** denied having seen the contract between the parties but during cross examination he admitted having seen the contract with the plaintiff but rather denied signing it claiming his signature was forged. It was submitted that **DW1** clearly admitted that the plaintiff found land in Chainba Valley for the defendants and accordingly introduced the owners of the property to him and admitted having met Mrs. Rebecca Mwala.



Counsel further submitted that there was a contract between the parties and the argument by the defendants that he saw the contract but did not sign it is an afterthought because in his evidence **DW1** acknowledges the terms of the plaintiff as claimed.

It was argued that the action is as a result of the defendant's failure to fulfil his obligations under a contractual agreement which was entered into by the parties. I was referred to *Chitty on Contracts General Principles (2<sup>nd</sup> Edition) Volume 1 (2004) at page 3, paragraph 1-001*, on the definition of a contract. It was argued that there was a contract between the parties with clear terms and that consideration was sufficient. I was referred to the case of *Dunlop Pneumatic Tyre Co. Limited v Selfridge Limited (1915) AC 847*<sup>1</sup> where consideration was defined as:

*"An act or forbearance of one party or the promise thereof, is the price for which the promise of the other is bought and the promise given for value is enforceable."*

I was further referred to the *Halsbury's Laws of England (4<sup>th</sup> Edition, Volume 9(1)* which provides as follows:

*"Executory and executed consideration; consideration is said to be executory when it consists of a promise to do or to forbear from doing some act in future; and it is said to be executed when it consists in some act or forbearance completed at earliest when the promise becomes binding. Thus valuable consideration may be provided by either (1) mutual promises, which will give rise to a bilateral contract, or (2) a promise in return for an act, in which case there will be unilateral contract."*



Counsel further referred me to the case of *Lawrence Koffman and Elizabeth MacDonald, The Law of Contract (5<sup>th</sup> Edition) 2004, page 59*. I was further referred to the case of *Daulia Limited v Four Milibank Nominees Limited (1978) 2 ALL ER 557*,<sup>2</sup> Where Goff LJ, was said to have stated the following:

*"I therefore turn to the first question, was there concluded unilateral contract? The concept of a unilateral or 'if' contract is somewhat anomalous, because it is clear that, at all events until the offeree starts to perform the condition, there is no contract at all, but merely an offer which the offeror becomes bound so soon as the offeree starts to perform or satisfy the condition, or only when he has fully done so. In my judgment, however, we are not concerned in this case with any such problem, because in my view the plaintiffs had fully performed or satisfied the condition when they presented themselves at the time and place appointed with a banker's draft for the deposit and their part of the written contract for sale duly engrossed and signed, and they tendered the same, which I understand to mean proffered it for exchange. Actual exchange, which never took place, would not in my view have been part of the satisfaction of the condition but something additional which was inherently necessary to be done by the plaintiffs to enable, not to bind, the defendants to perform the unilateral contract. Accordingly, in my judgment, the answer to the first question must be in the affirmative."*

Counsel submitted that in that case the court found that there was a contract but found that the contract could not be enforced on the ground that no action may be brought upon any contract for the sale or other disposition of land or any interest in land unless the agreement upon which such action is brought is in writing.



Concerning the allegations of forgery it was submitted that the evidence by **DW1** that his signature was forged was not only an afterthought but also a criminal allegation in nature and had to be proved to a required standard by evidence. This submission was buttressed by the case of *Sablehand Zambia Limited v Zambia Revenue Authority* 2005 ZR 109<sup>3</sup> where it was held that:

*“A party alleging fraud must lead evidence so that the allegation is clearly and distinctly proved on a higher standard of proof than on a mere balance of probabilities, because the allegations are criminal in nature.”*

I was further referred to *Edward J. Imkwikelried, Evidentiary Foundations, 4<sup>th</sup> Edition, at page 41*, where it is stated that:

*“The common law generally requires that the proponent of evidence prove the evidence’s authenticity as a condition to the admission of the evidence. To authenticate an item of evidence the proponent must present proof that the article is what the proponent claims that it is.”*

Counsel further submitted that the evidence of the plaintiff concerning the contract and its terms was not challenged and cited the case of *Robson Banda (Suing as Administrator of the Estate of the Late Rosemary Phiri) v Varisto Mulenga (Suing as Administrator of the Estate of the Late Steven Kabamba)* 2003 SCZ,<sup>4</sup> in aid.

I was further referred to the *Halsbury’s Laws of England (4<sup>th</sup> Edition) Vol 36, at paragraph 36(2)* which provides as follows: \*



*“Where a party relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence by another party, he must supply the necessary particulars of the allegation in his pleadings.”*

Counsel further cited the case of *Nkongolo Farms Limited v Zambia National Commercial Bank Limited and Others*, SCZ Judgment No. 19 of 2007,<sup>5</sup> in which the preceding provision was cited as follows:

*“The learned trial judge relying on the Halsbury Laws of England, 4<sup>th</sup> Edition, Vol 36, paragraph 36(2), where it is stated that: “where a party relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence by another party, he must supply the necessary particulars of the allegation in his pleadings”, held that it was vital for the appellate company to specifically set out the particulars of fraud alleged. We agree that the appellate did not plead fraud or misrepresentation with sub heads stating particularities of fraud or misrepresentation as provided under Order 18 rule 8(16) of the Rules of the Supreme Court, which states that “misrepresentation should always be pleaded with proper particularity.”*

Counsel concluded the submissions by submitting that the plaintiff has established his case against the defendants that there was a valid contract whose terms were breached by the defendants, and as such was entitled to his claims.

In response, it was submitted on behalf of the defendants that on 4<sup>th</sup> February, 2013, the 2<sup>nd</sup> defendant met with the plaintiff and discussed the sourcing of land. That the terms of the contract included that the plaintiff finds a ten-acre plot of land for immediate purchase for not more than K2.5million. The said land



as to be within a radius of 3 kilometres of the defendants' office and should be on title. In consideration of this the plaintiff was to be paid 20% of the proposed purchase price and should the transaction fail then the plaintiff would be paid 10% of the purchase price.

The defendants dispute that a contract was ever signed and that such contract never existed. The defendants however agreed that they met with the defendant on 4<sup>th</sup> February, 2013 and the business was discussed.

It was further submitted that the forgery was reported to the police but the police did not do anything. It was submitted that in this case, it was for the plaintiff to prove that a contract was signed and not vice versa. It was further submitted that the 2<sup>nd</sup> defendant admitted receiving letters from the plaintiff on 13<sup>th</sup> and 28<sup>th</sup> March, 2014 but it made him very angry that his name and signature had been forged on the purported contract.

It was disputed that the plaintiff was ever threatened with a gun by the 2<sup>nd</sup> defendant.

It was further contended that Rebecca and Ezekiel Mwale were not called to testify in favour of the plaintiff. Clarity was needed as to who owned the land. It was contended that the person who was introduced was Rebecca but the Certificate of Title showed that Ezekiel Mwale was the legal owner. It was contended that



because the Certificate of Title was invalid, the defendants could not buy the land and hence the plaintiff was not entitled to the 10%.

Counsel further contended that the Certificate of Title had many irregularities including: a mistake on the date which reads "thirtieth day of June two six"; further that the second date on the lease should read "1<sup>st</sup> July, 1975 pursuant to the Land Conversion of Titles Act 1975"; this is because it is a 100 years lease. Further that there is no date of document on the memorial and no date of registration. It was submitted that these irregularities plus the fact that the defendants were introduced to someone who was not the legal owner discouraged the defendant from buying. It was submitted that the plaintiff was not entitled to the 10% as efforts made to bring a property with wrong papers could not be remunerated.

In the submissions in reply, the plaintiff cited the case of **Sithole v State Lotteries Board (1975) ZR 106**<sup>6</sup> where the court stated that:

***"If a party alleges fraud, the extent of the onus on the party alleging is greater than a simple balance of probabilities."***

It was contended that the issue of the Certificate of Title was not part of the contract, the plaintiff was engaged to find land for the defendant and that the plaintiff would be paid a commission arising from that agreement whether or not the defendant would buy the land.



It was further contended that the alleged mistakes on the title exhibited are merely photocopying mistakes where the page in question had some words cut out by the photocopier. It was submitted that there was no illegality to the Certificate of Title as the original title would prove the defendant wrong.

It is a principle of law that he who alleges must prove. The Supreme Court in the case of *Khalid Mohammed v the Attorney General* (1982) 49<sup>7</sup> stated that “....a plaintiff cannot automatically win whenever a defence has failed; he must prove his case.”

Furthermore, in the case of *Wilson Masauso Zulu v Avondale Housing Project* (1982) 172,<sup>8</sup> Ngulube, DCJ, as he then was, stated the following:

*“I think that it is accepted that where a plaintiff alleges..., as indeed any other case where he makes any allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponents case.”*

In the case before me, it is not in dispute, that the 2<sup>nd</sup> defendant engaged the plaintiff to source land for the 1<sup>st</sup> defendant and that he would be paid a commission of 20% of the purchase price if the transaction was successful and 10% if the transaction was not successful. It was also not in dispute that land being sold by Rebecca Mwale had been sourced by the plaintiff and that the vendor was introduced to the defendants.



What is in dispute is the fact that the agreement was reduced in writing and secondly whether the plaintiff was entitled to the 10% commission.

The 2<sup>nd</sup> defendant in his evidence denied that the agreement was reduced in writing. The plaintiff on the other hand exhibited a contract in writing and allegedly signed by the plaintiff and the 2<sup>nd</sup> defendant (page 7 of the plaintiff's bundle of documents). The defendant has alleged that his name and signature of the document were forged.

✓ Secondly, the defendants dispute that the plaintiff is entitled to his commission. The defendants contend that the plaintiff introduced a vendor with an invalid Certificate of Title and hence he cannot be entitled to a commission.

✓ The plaintiff brought a contract to this court to show that there was a contract between the parties. The defendant, in a long-winded way, at least agrees, especially in his submissions that there was a contract on the terms alleged by the plaintiffs. To this extent the plaintiff has discharged his burden of proof.

It has been admitted that the plaintiff brought a couple who was selling the land. He recalls meeting Rebecca.

However, he disputes that he ever signed a written contract with the defendant and alleges that it was fraudulently drawn up by



Ezekiel Mwale. I am mindful that **DW1** had testified that he was dealing with a couple, who he was introduced to as the owners of the land. He has not stated whether this couple was Rebecca and Ezekiel Mwale. Secondly, the defendants take issue with the dates and memorials of the Certificate of Title, in their submissions. To me this is an afterthought. I have perused the copy on the court record and I agree that the photocopier seems to have cut out some words. I however, do not believe and neither has anything been talked about the original Certificate of Title being presented to the defendants with those issues. Should the defendants have taken the transaction seriously, they would have demanded for the original Certificate of Title and this fact would have been stated in the pleadings and in the evidence of **DW1** or indeed the submissions.

In view of the foregoing, I am of a firm view that the plaintiff has proved his case on a balance of probability that the parties entered into a contract at the alleged terms and that the same was reduced in writing as exhibited on page 7 of the plaintiff's bundle of documents. The plaintiff has further demonstrated that he performed his part of the contract and that he is entitled to the claim of his commission of 10% since the defendants chose not to purchase the land.

I also find that the defendants by refusing to pay the commission, which was a term of the contract, has breached the contract.



In view of the foregoing, I award damages for breach of contract to the plaintiff. I order that the plaintiff be paid the 10% of the purchase price plus interest and costs as pleaded.

Leave to appeal is granted.

**DELIVERED AT LUSAKA THIS 7<sup>TH</sup> DAY OF AUGUST, 2019.**



**G.C.M CHAWATAMA**  
**HIGH COURT JUDGE**