

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2015/HP/1303

(Civil Jurisdiction)



BETWEEN:

CALADAMS PROPERTITIES

- PLAINTIFF

AND

THE ADMINISTRATOR GENERAL

- 1ST RESPONDENT

A M G GLOBAL TRUST LIMITED

- 2ND RESPONDENT

BEFORE: HON. MR JUSTICE E. L. MUSONA

For Plaintiff:

*Mr. Chali Tresford of Messrs H. H. Ndhlovu
and Co.*

For 1st Defendant:

*Mrs. D. Kafunya – Deputy Administrator
General with Ms. F. M. Wamundila*

For 2nd Defendant:

*Mr. C. Siamutwa with Ms. S. K. Sinkamba,
Mr. M. Mudenda and S. Siatwambo of
Messrs Charles Siamutwa Legal
Practitioners*

J U D G M E N T

Date: 13th August, 2019

CASES REFERRED TO:

1. *Wilson Masauso Zulu v Avondale Housing Project Ltd (1982) ZR.*
2. *Galaunia Farms Ltd v National Milling Corporation (2004) ZR*

LEGISLATION REFERRED TO:

1. *Chapter 59, the Intestate Succession Act of the Laws of Zambia*

Caladams Properties Ltd commenced this action by writ of summons with an accompanying statement of claim against the Administrator General in 2015, and on 25th October 2017 M. M. G Global Trust Limited joined the proceedings as second Defendants upon their own application.

The Plaintiff's claim as it currently stands against the Defendants is for the following reliefs;

- a. An order that the Plaintiff is the rightful owner of stand No. 6860, Akanono Road, Olympia, Lusaka.
- b. An order that the Defendants unlock the house stand No. 6860, Akanono Road, Olympia Lusaka for the Plaintiff to take possession

c. Costs

d. Any other relief the court may deem fit.

The duty for this court is to ascertain whether or not the Complainant has proved his claims. The standard of proof is on a balance of probabilities.

Accordingly, I have looked at the case of **Wilson Masauso Zulu v Avondale Housing Project Ltd** (1) in that case it was held that;

“A Plaintiff who fails to prove his case cannot be entitled to judgment, whatever may be said of the opponent’s case”.

I have also looked at the case of **Galaunia Farms Ltd v National Milling Corporation Ltd** (2) and Am well guided. In that case the court held that;

“A Plaintiff must prove his case and if he fails to do so, the mere failure of the opponent’s defence does not entitle him to judgment”.

The Plaintiff called one witness and the Defendants called two (2) witnesses. I shall refer to these witnesses only as PW1, DW1 and DW2 respectively.

PW1 was M/Amis Mwandezi. The evidence for PW1 was that when this matter arose he was Operations Manager for the Plaintiff. PW1

recalled that in June 2014 he was phoned by an agent for the Plaintiff who reported to PW1 that there was a property in Olympia, Lusaka which was on sale.

The Plaintiff was in the business of buying, building and sale of houses.

PW1 met M/Moses Makokwa Mwala who was the owner of that house and was the person selling that property. When M/Moses Makokwa Mwala met PW1, the said Moses Makokwa Mwala was accompanied by F/Faustina Mwinga. F/Faustina Mwinga was already known to PW1 through a Restaurant called Fajema which F/Faustina Mwinga was operating.

The property comprised a main house and a servant quarter.

PW1 saw the original copies of the National Registration Card for M/Moses Makokwa Mwala and copy of the title deed in the name of the said Moses Makokwa Mwala.

PW1 got the copy of the title deed and upon search at the Ministry of Lands, PW1 observed that there was no incumbrance on the property. The Plaintiff then proceeded to place a caveat on this property at the Ministry of Lands in July, 2014.

The Plaintiff paid for that house and M/Moses Makokwa Mwala signed the contract of sale with the Plaintiff.

M/Moses Makokwa Mwala was actually living in that house but following the purchase of that house by the Plaintiff, M/Moses Makokwa Mwala was permitted by the Plaintiff to live in that house but paying rentals to the Plaintiff.

Subsequently, M/Moses Makokwa Mwala defaulted paying rentals and was evicted by the Plaintiff. The Plaintiff put two (2) caretakers in the main house and a tenant in the servant's quarter.

Three (3) months after the eviction of M/Moses Makokwa Mwala someone from the office of the Administrator General locked the property.

PW1 went to the office of the Administrator General and was told that the owner of that house was dead. Not having seen any probate during a search at the Ministry of Lands, PW1 phoned M/Moses Makokwa Mwala but the said M/Moses Makokwa Mwala did not answer the phone call. When PW1 phoned F/Faustina Mwinga, the said F/Faustina Mwinga answered the phone call but said that she would go to PW1 later because on that date she was allegedly in Kasumbalesa. The matter was latter reported to state police.

The prayer by the Plaintiff is for an order that the Plaintiff is the rightful owner of that property because at the time of purchase the Plaintiff exercised due diligence and found that the property was not incumbered.

PW1 stated that when they did a search at the Ministry of Lands they found that the property was not incumbered, when they went to the property they did not find the Administrator General in possession of the property.

After the Plaintiff purchased this property they were in possession for one year before the Administrator went to lock it.

DW1 was M/Peter Silishebo Makokwa Mwala. The evidence for DW1 was that he was son of M/Moses Makokwa Mwala who was owner of that property and that M/Moses Makokwa Mwala died on 12th July, 1998 at Lewanika General Hospital in Mongu and was buried in Mongu in the presence of DW1.

The late Makokwa Mwala was survived by 21 children of whom DW1 is the second in the line of children.

DW1 was one of the three (3) Administrators for the estate of the late M/Moses Makokwa Mwala, others being Lubinda Mwala and Patricia Mwala. DW1 recalled that the disputed house was occupied by different tenants and one such tenant was F/Faustina Mwinga. The Administrators had directed F/Faustina Mwinga to be depositing rental payments into Zanaco account of Mongu branch.

Family wrangles arose over this house, and, so the family approached the Administrator General with a view to selling that house.

It was finally resolved to sell that house. Page 10 the Defendant's bundle of documents filed on 21st November, 2016 is a letter of consent by some of the beneficiaries to have that house sold and authorizing the Administrator General to sell the said house. Page 11 of the Defendant's bundle of documents filed on 21st November, 2016 is an offer of sale of the said house to F/Faustina Chivweka by the Administrator General. Page 13 of the Defendant's bundle of documents is the acceptance of the offer of the sale of that house by F/Faustina Chivweka, wherein she also requested for an original copy of the title deed for onward transmission to her financier.

DW2 was M/Mutoshi Kawatu an estates examiner from the office of the Administrator General.

DW2 told this court that this disputed property was reported to the office of the Administrator General in 2013 when children of late M/Moses Makokwa Mwala had wrangles concerning that house. The office of the Administrator General started administering that property. At that time F/Faustina Chivweka was already a tenant in that house and so she was directed to pay rentals through the office of the Administrator General.

When that house was put on sale F/Faustina Chivweka was offered and she accepted the offer to purchase that house. Consequently, she requested for a copy of the title deed and she was availed the copy.

DW2 later discovered that there was a person living in the disputed house and when asked about it that person claimed that the house was bought by his uncle.

Having considered all the evidence in this case I shall now consider the claims.

1. **An order that the Plaintiff is the rightful owner of stand No. 6860, Akanono Road, Olympia, Lusaka**

What happened in this case, though sad, is indeed very interesting. The evidence which is on record tells it all.

Briefly, what happened is that the Plaintiff purchased a house situated on stand Number 6860 Akanono Road, Olympia, Lusaka. The sale was between the Plaintiff and M/Moses Makokwa Mwala of National Registration Number (NRC) 121556/15/1 and witnessed by Faustina Mwinga. Before the Plaintiffs concluded the conveyancing they conducted a search and satisfied themselves that indeed the house was owned by M/Moses Makokwa Mwala who was the vendor.

There was also no incumbrance placed on that property at the Ministry of Lands.

The purchase price was five Hundred Thousand Kwacha (K500,000).

After that sale, M/Moses Makokwa Mwala who was the vendor lived in that house for at least three (3) months as a tenant to the Plaintiffs and was only evicted by the Plaintiffs after that M/Moses Makokwa Mwala defaulted in rental payments.

The Plaintiffs were in ownership of that house for at least one year before perplexing events begun to unfold.

What emerged was not only scary but also novel. What followed is that the Plaintiffs learnt that M/Moses Makokwa Mwala from whom they purchased that house in 2014 had actually died on 12th July, 1998, aged 71 years at Lewanika General hospital. By simple arithmetic, M/Moses Makokwa Mwala had been dead for at least sixteen (16) years when the Plaintiffs purchased the property from him.

The truth relating to this mystery begun to unfold.

According to evidence on record Faustina Mwinga who witnessed the sale of that house by M/Moses Makokwa Mwala, her real name was Faustina Chibweka not Faustina Mwinga. Faustina Chibweka was a tenant in that disputed house and paying rentals to the Administrators of the estate of late M/Moses Makokwa Mwala one of whom was DW1.

There is no dispute that M/Moses Makokwa Mwala died on 12th July, 1998 aged 71 years at Lewenika General Hospital. There is also no dispute that "*M/Moses Makokwa Mwala*" who sold

the disputed house to the Plaintiff in 2014 was a rogue who used the names and details of the deceased.

There were wrangles within the family of the late M/Moses Makokwa Mwala concerning the administration of that disputed house which was an estate of the late M/Moses Makokwa Mwala.

At the crescendo of these wrangles it was resolved to request the Administrator General to administer the estate which included the disputed house.

At the time when the Administrator General started administering the estate, F/Faustina Chibvweka was already a tenant in the disputed house and started paying rentals to the Administrator General.

The family then resolved to sell that house through the office of the Administrator General and F/Faustina Chibvweka was offered to buy that house. F/Faustina Chibvweka requested that she be given a copy of the certificate of title and she was availed the copy. This, seems to suggest how F/Faustina Chibvweka and her companion who styled himself as M/Moses Makokwa Mwala obtained the details. F/Faustina Chibvweka requested the conveyancing to be in the name of AMG Global Ltd who were her financiers. This suggests how the second Defendants became party to this case.

While the office of the Administrator General transacted with AMG Global Financiers Ltd, Caladams Properties Ltd transacted with a putative M/Moses Makokwa Mwala. The vendors and the purchasers dealt with the same property being No. 6860 Akanono Road, Olympia Lusaka.

The question is, who is now the owner of this house?

I have gone through the evidence in this case. I note that at the time of the purchase of the disputed house by the Plaintiff, the Plaintiff conducted a search at the Ministry of Lands. The search results showed that there was no caveat or probate registered on that property. This shows that at the time of the purchase of that property by the Plaintiff, the property was unencumbered. The Plaintiff proceeded to place a caveat on that property as an intending purchaser.

The Plaintiffs advertised before applying for a duplicate title deed.

The assertion that the 1st Defendants sold the disputed house to the 2nd Defendants is not supported by law. I say so because **Chapter 59 of the Intestate Succession Act** requires a vendor to obtain a court order before selling property that is administered under the Intestate Succession Act as this disputed house was. There is no evidence by the Administrator

General to show that there was a court order obtained by the office of the Administrator General to sell the disputed house.

The disputed house was offered to Faustina Chibvweka by the office of the Administrator General and I have seen documentary proof of that. There was no offer made to the 2nd Defendant and there was no acceptance by the 2nd Defendant. What is there is just a request by Faustina Chibvweka who was the offeree to the Administrator General who were the offeror to effect the conveyancing in the name of AMG Global trust Ltd.

The above show that there was dereliction of duty on the part of the office of the Administrator General.

I am satisfied that the Plaintiff exercised due diligence before concluding the sale with the putative M/Moses Makokwa Mwala and notwithstanding that the M/Moses Makokwa Mwala who the Plaintiffs dealt with was a rogue and vagabond who can now not be located, but because of the due diligence exercised by the Plaintiffs prior to concluding the conveyance I find that the Plaintiffs were bonafide purchasers without notice of any defect in title.

Now therefore, I accordingly order that the Plaintiffs are the rightful owner of that disputed property known as stand number 6860 Olympia, Lusaka.

2. **An order that the Defendant unlocks house stand No. 6860
Akanono Road Olympia, Lusaka for the Plaintiff to take
possession**

I have already ordered that the Plaintiffs are the rightful owner of that disputed house. It is therefore, ***res ipsa loquitur*** that the disputed property which was locked by the 1st Defendant be unlocked by the 1st Defendant Forthwith, and, in any event allow the Plaintiff access to the disputed property which by operation of this judgment now belongs to the Plaintiff, and so, I order.

I have seen no other relief available to the Plaintiff.

I order costs in favour of the Plaintiffs.

Leave to appeal is granted.

Delivered at Lusaka this the 13th day of August, 2019.


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HON MR JUSTICE E.L. MUSONA
HIGH COURT JUDGE

