

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

2015/HPA/0037

BETWEEN:

JOHN SOKO

AND

CURTIS MWEETE



PLAINTIFF

DEFENDANT

Before Honourable Mrs. Justice S. M. Wanjelani on 14th day of
May, 2020

For the Plaintiff: In Person

For the Defendant: Mr. T. K Ndhlovu, Messers Batoka Chambers

JUDGMENT

Cases referred to:

1. *Khalid Mohammed V. Attorney General* (1982) ZR 49
2. *Zambian Breweries Plc and David Chibwe Selected Judgment*
No. 41/2017
3. *David Howes and Others v Betty Butts Carbin SCZ Judgment*
Number 5 of 2012

Legislation and other material referred to:

1. *Statute of Frauds 1677*
2. *Edwin Peel Treitel on the Law of Contract, 14th Edition, Sweet and Maxwell (2015)*

This matter was initially commenced in the Subordinate Court on 18th February 2014 but came to this Court following an application

to transfer the matter to the High Court based on the subject matter of the dispute. In the Statement of Claim filed into this Court on 8th June 2017, the Plaintiff seeks the following reliefs:

- 1. Declaration that Plot 102/67 in extent 20.40 meter in length and 15.40 width belongs to the Plaintiff.*
- 2. An order for damages of the wall fence which was demolished while the matter was in Court by the Defendant.*
- 3. An order of interim injunction restraining the Defendant either by himself, agents servants or whosoever from trespassing, demolishing the wall fence built by the Plaintiff at Plot number 102/67 of Old Kanyama, Lusaka harassing the plaintiff until further order of this Court.*
- 4. Costs*
- 5. Any other relief that the Court can deem fit.*

According to the Statement of Claim, the Plaintiff purchased a Plot known as X32 from the Multi Party Democracy Cadres on 21st April 1999. It was averred that in 2001, the Plaintiff sold to the Defendant a subdivision of the said Plot in the extent of 20.40m X 15.40m and which was later numbered 67/30, while the remaining extent was 20.40 x 15.40 and numbered Plot No. 102/67 and an Occupancy Licence was issued to him. He added that the Defendant later started asking to be sold the remaining portion of 102/67 at the sum of K10,000.00, which the Plaintiff declined.

The Plaintiff contended that in 2014, the Defendant demolished the wall fence built by the Plaintiff at Plot No. 102/67, hence the matter now before Court for determination.

The Defendant filed a defence on 26th June, 2017, denying the Plaintiff's allegations and averring that he bought a piece of land then known as X32 from the Plaintiff in 2001, and could not have later sought to buy the land he already owned. He contended that the Occupancy Licence issued to the Plaintiff was fake as it was only issued after the Plaintiff had commenced these proceedings.

During the hearing, the Plaintiff **John Soko (PW)** testified alleging encroachment. He stated that on 10th December, 2013, the Defendant approached him to sell him the remaining portion of land from the land he had initially bought from him, but he refused to sell as he was keeping it for his children. PW narrated that he demarcated the property in the middle and he had asked the Defendant to choose which part of the property he wanted and the latter chose the portion that had a foundation and an incomplete one roomed house. He stated that the total size of the land was 38.40 x 20.50 and the agreed amount for the portion in extent of 15.40 X 20.40 was K800.00, while a similar sized portion remained for the Plaintiff.

The Plaintiff informed the Court that the Defendant paid an initial deposit of K250.00, with the balance to be paid in instalments. PW said they went to see the Chairman and a Receipt as reflected on Page 4 of the Plaintiff's Bundle of Documents was issued.

He stated that the Defendant kept asking him to sell the remaining property but he refused and it was then the Defendant built a wall enclosing his Plot and demolished the initial wall that was there. He added that they then went to Lusaka City Council where they were

told to produce papers which they did and it was discovered that they had different numbers. He testified that they were advised to settle the matter through the Courts.

During cross examination, PW testified that the measurement of the Plot sold were done using a measuring tape and footstep although they were not written down on the document on Page 4 of the Plaintiff's Bundle of Documents. He stated that the Plot sold to the Defendant was X32, renumbered Plot 67/30 while his remaining portion was Plot 67/102.

PW added that the Defendant paid for an Occupancy Licence earlier and was issued 67/30. PW added that he knew a Mr Shield Nyirenda as the latter had gone with the Chairman for MMD to attack him. He stated that he was not aware of the dispute between the Defendant and Shield Nyirenda and did not support the former and vehemently denied ever going to the High Court as a witness.

Curtis Sikalindi Mweete(DW1), the Defendant, testified in support of his case, saying that he met the Plaintiff while he was looking for some land to buy and after introduction he told the Plaintiff that he was looking to buy some land from someone and the Plaintiff advised that he had some land for sale.

When asked on the extent of the land, DW testified that the Plaintiff told him that the land was from the road to the road behind the Plot. DW1, in his testimony stated that he later went back to the Plaintiff and they counted 30 steps by 20 steps which he was selling at K800.00. DW1 added that he had K250.00, and the Plaintiff

asked that he should pay K50.00, for change of ownership and give him the rest to keep.

He also stated that the Plaintiff told him that the land was Plot No. X32 and directed him to the Chairman where he was given the Contract of Sale appearing on Page 1 of the Plaintiff's Bundle of Documents. DW1 further stated that the Plaintiff allowed him to start building and could pay the balance in instalments and this was fully done by 15th June 2003 and the Plaintiff signed off for the last payment.

The Defendant informed the Court that in 2008, the Council renumbered the plots and he was given No. 67/30 and an Occupancy Licence issued on 27th August 2008. DW1 averred that towards the end of 2008, he found someone digging in the land and when accosted that person, whom he later came to know as Shield Nyirenda, responded that the chairperson could do what he pleased. DW1 added that he commenced an action in the High Court which ended in a Consent Judgement.

DW1 further testified that around 2014, the Plaintiff went to him to ask him to buy him a Plot as he had helped him with his case in that he had testified that the Defendant was the rightful owner of the Plot as opposed to Shield Nyirenda but he refused. DW1 also stated that after the Consent Judgement he decided to complete the wall around the land but before he could complete, the Plaintiff tried to sale the structure built by Shield Nyirenda to four different people. He said he stopped building the wall because the Plaintiff had taken out summons at the Subordinate Court.

DW1 accused the Plaintiff of lying about demarcating the property before selling it and stated that Plot No.67/30 and Plot 67/102 were miles apart.

During cross examination, DW1 insisted that he bought the whole plot. He denied knowledge of the document on Page 3 of the Plaintiff's Bundle of Documents.

DW2 was **Stania Mwiinga** who testified that he has been living in Kanyama from 1998 and that in 2001, the Defendant bought a Plot from the Plaintiff near where he used to live. He stated that the Defendant built a house on the Plot but in 2008, Mr. Shield Nyirenda came and built a house on the Defendant's plot. He added that the matter was taken to Court in 2013 but it was settled amicably after discussions.

DW2 informed the Court that the Plaintiff jumped over the wall fence and started working on the house that the Defendant had bought from Mr. Nyirenda while the Defendant was at work. He stated that the Parties took the matter to the Police who advised them to take the matter to Court as it was a civil matter. DW2 stated that the Defendant has been living on the property since 2001.

In cross-examination, DW2 stated that he was present when the Parties went to the Police and that the Plaintiff jumped over the wall fence as the gate was closed.

At the close of the case, the Plaintiff informed the Court that he would not file submissions while the Defendant's Counsel intimidated

that he would. However, at the time of writing this Judgment, there were no submissions on record.

I have considered the Pleadings on record, and the oral testimonies of the witnesses. I bear in mind the fact that from time in memorial, a Plaintiff required to prove his claim as borne out by the various authorities including in the case of **Khalid Mohamed v The Attorney-General**⁽¹⁾, where the Supreme Court stated, *inter alia* that:

"...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..."

From the evidence before me, I find that the following facts are common cause:

1. The Plaintiff owned a piece of land in Kanyama which was Plot Number X32; and
2. In 2001, the Plaintiff sold to the Defendant a piece of land at the sum of K800.

The Plaintiff has stated that he sold the Defendant only half of Plot X32 while the Defendant has alleged that he bought the entire property. DW2 informed the Court the Defendant bought the land from the Plaintiff, that the Defendant had built a house thereon; that Shield Nyirenda had built a house on the Defendant's property; and that the Defendant has been living there since 2001. I find DW2's testimony to be inconsistent and unreliable as the Defendant

gave his address as Severest and did not state that he ever lived on the property. I therefore shall not attach any weight to it.

PW in his evidence testified that he sold to the Defendant a portion of Plot X32 which was 20.40 X 15:40 meters in size. He also testified that the remaining extent was also of the same size which was later numbered Plot 102/67. The Defendant, on the other hand, stated that he bought the whole Plot No. X32 from the Plaintiff and after a renumbering, his Plot was numbered 30/67. He added that Plot 102/67 was in another area of Kanyama.

In my view, the crux of the matter is whether the Plaintiff sold the entire Plot X32 to the Defendant or not.

The Parties to the matter herein do not dispute that they entered into a contract for the sale of land. A perusal of the documents shows that both Parties have produced a Contract of Sale appearing on Page 4 of the Plaintiff's Bundle of Documents as well as on page 1 of the Defendant's Bundle of Documents.

The Plaintiff has further produced a document on Page 2 of his Bundle of Documents, dated 26th August, 2001, which alludes to a sale of Plot X32 or 67 /30 and stating that the size of the plot sold was 20.40X 15.40., with a similarly sized plot being the Plaintiff's. The document is not signed by the Parties and the Defendant denied any knowledge of the said document. Recently, the Supreme Court in the case of **Zambian Breweries Plc And David Chibwe**⁽²⁾ stated that:

"It is a time honoured principle in civil proceedings that it is for a plaintiff to prove its case against the defendant even when it is difficult to do so. The burden of proof is at all times on the Party making the claim and does not shift to the defendant simply because there is need for the defendant to cooperate so as to assist the plaintiff to prove its case."

As regards what a contract is, the Learned author of Treitel on the Law of Contract, opines:

"a contract is an agreement giving rise to obligations which are enforced or recognised by law. The factor which distinguishes contracts from other legal obligations is that they are based on the agreement of the contracting Parties."

Given the fact that the document on Page 2 of the Plaintiff's Bundle of Documents is untitled, unsigned and denied by one of the alleged contracting Parties, I find that there is insufficient evidence for me to conclude that this was the Contract of Sale executed in relation to the sale of the property as it does not evidence agreement of the Parties concerned.

I have further perused the Contract produced both Parties at Page 4 of the Plaintiff's Bundle of Documents wherein it is stated that the Plaintiff has sold his house X32 to the Defendant at the cost of a cost of K800,000.00, and it is executed by both Parties with their

respective witnesses. However, this Contract does not also specify the dimensions of the property.

The Plaintiff in his evidence stated that they measured the size of the land sold by a measuring tape. The Defendant, on the other hand, stated that the Plaintiff used his feet and measured 20 footsteps to 30 footsteps. These measurements do not assist the Court in ascertaining the actual size of the Plot. The Occupancy Licences are equally devoid of this detail.

Be that as it may, it is my considered view that the document on Page 4 of the Plaintiff's Bundle of Documents is a valid contract in relation to the sale of land as it has the names of the Parties; the subject matter has been identified and the consideration stated. It thus fulfils the requirements of **Section 4** of the **Statute of Fraud** and as alluded to in the of **David Howes and Others v Betty Butts Carbin**⁽³⁾ where it was stated that:

“For a note or memorandum to satisfy section 4 of the Statute of Frauds 1677, the agreement itself need not be in writing. A note or memorandum of it is sufficient, provided that it contains all the material terms of the contract, such as names, or adequate identification of the subject matter, and the nature of consideration”.

I have also examined the Occupancy Licences produced by both Parties. The Occupancy Licence held by the Plaintiff and issued on 2nd September 2015 is registered Number 102/67. The Defendant, on the other hand holds an Occupancy Licence issued on 27th

August 2008 and is numbered 30/67. PW in his evidence testified that the reason for the different numbers is because the Defendant paid earlier.

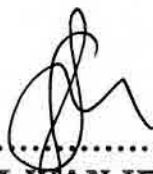
The Defendant alleged that the Occupancy Licence produced by the Plaintiff is fake but did not adduce any evidence to support this assertion. It is therefore evident that both Parties have Occupancy Licences to properties Kanyama. The question as to the proximity of the properties is uncertain and the Court cannot hazard a guess. What is cardinal is that I have made a finding of fact that the document on Page 4 of the Plaintiff's Bundle of Documents is the Contract of Sale in relation to House No. X32 in Kanyama.

Given the above, and based on what has been produced before me, I find that the Plaintiff has failed to show that what he sold to the Defendant was only a portion of the land initially known as X32 and not the whole land. Arising from this finding, the Plaintiff's claim damages for the wall fence that was demolished also fails.

The sum total of my findings is that the Plaintiff has failed to prove his claims on a balance of probabilities and they are dismissed. Each Party shall bear its own costs.

Leave to appeal is granted.

Delivered at Lusaka this 14th day of May, 2020.



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S.M. WANJELANI
JUDGE