

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

**2003/HP/0106**

**BETWEEN:**

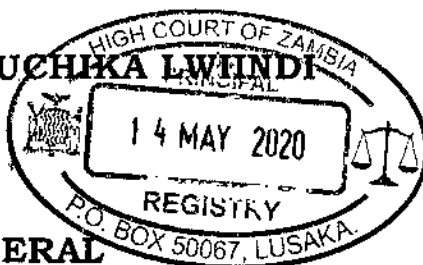
**FELISTAS MUTWA MUCHIKA LWINDI**

**PLAINTIFF**

**AND**

**THE ATTORNEY GENERAL**

**DEFENDANT**



**Before the Honourable Mrs. Justice S. M Wanjelani in Chambers  
this 14<sup>th</sup> day of May, 2020.**

*For the Plaintiff: Mr. C. Muneku, Messers Charles and Charles*

*For the Defendant: Mrs. G.M. Chisambasha, Attorney General's  
Chambers*

---

## **JUDGMENT**

---

**Cases referred to:**

1. *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 197*
2. *Patrick Chilambwe v Attorney General SCZ/ 8/018/2015.*
3. *Zambian Breweries PLC v David Chibwe Selected Judgment No. 41 of 2017*
4. *Ndongo v Moses Mulyango and Roostico Banda (SCZ Judgment No. 4 of 2011)*
5. *Rosemary Chibwe v Austine Chibwe, SCZ, Judgment No. 38 of 2000.*

**Legislation and other materials referred to:**

1. *The Lands and Deeds Registry Act.*

By way of an Amended Writ and Statement of Claim, filed on 13<sup>th</sup> March, 2019, the Plaintiff seeks the following reliefs from the Defendant:

- (i) *An Order that the Plaintiff was the owner of House/Flat No. 2, Lukashya Flats, Kabulonga, Lusaka with effect from 31<sup>st</sup> October, 2000 after paying the full purchase price and for the Title Deed to be released to her as Government has no further claim to the property in issue.*
- (ii) *An Order that the Plaintiff is entitled to be paid by the Government of the Republic of Zambia monthly rentals based on the Government Department Valuation of her property from the 28<sup>th</sup> June 2001 to 16<sup>th</sup> March 2018, a period of 17 years 3 months.*
- (iii) *Interest on the said debt from the date of issue of the Writ and date of Judgment and thereafter at a rate to be determined by the Court and in line with the Judgment Act.*
- (iv) *An Order that the Plaintiff be reimbursed the cost of materials, improvements and labour incurred on the maintenance of the property in issue.*
- (v) *Costs and any other order the Court may deem appropriate.*

According to the Amended Statement of Claim, the Plaintiff is a retired Civil Servant, who, in line with the Zambian Civil Service Home Ownership Scheme introduced by the Government in

September, 1996, was offered to buy Flat No. 2 Lukashya Flats, after approval by the Committee on the Sale of Government Houses.

It was averred that the Plaintiff paid the full purchase price of K6,300,000.00, on 31<sup>st</sup> October, 2000, and the Government, after acknowledging receipt wrote a letter under the Ministry of Finance to the Commissioner of Lands to release the Title Deeds to the Plaintiff and that it had no further claim on the property sold.

It was further vied that after purchasing the property, the Plaintiff evicted the then occupant, who had been staying there by virtue of being a Government employee and took possession on 19<sup>th</sup> April, 2001.

The Plaintiff averred that she at her own expense, she started renovating and repairing the premises, but while in the process of doing so, on or about 28<sup>th</sup> June 2001, she was compelled to surrender the Flat keys to the Committee on the Sale of Government Houses and vacated the Flat but left the materials for renovations on the premises.

She stated that on or about 18<sup>th</sup> August 2001, the former occupant gained forceful entry into the premises by breaking the access doors and the Plaintiff was not allowed access on the premises to retrieve the materials and other goods that she had brought onto the premises.

It was contended that the Government failed to avail the Plaintiff access or occupying rights and she only managed to gain access to

the property after the death of the unlawful occupant and after she engaged the Bailiffs to forcefully remove the family in March 2018.

In his Amended Defence, the Defendant denied the Plaintiff's allegations and averred that the Plaintiff had been asked to hand over the keys to Mr. Cuthbert Chisaila, to re-occupy the property as he had been a sitting tenant and while awaiting the Supreme Court Ruling on whether civil servants like him were entitled to purchase Government Pool Houses.

It was contended that the Civils Servants who were buying house occupied by foreigners were doing so with the knowledge that they had to wait until such a time as when the houses would be left vacant, thus the Plaintiff was not entitled to any of the reliefs sought at all.

During the trial, the Parties called one witness each. The Plaintiff, **Felistus Mutwa Lwiindi**, testified in support of her case and gave a narration as outlined in the Amended Statement of Claim. She stated that she was allocated the No. 2, Lukashya Flats on 31<sup>st</sup> August, 1999 and was directed to take occupancy within the week of being given the Allocation Slip.

She said that she was offered to purchase the Flat by the Committee on the Sale of Government Houses and paid in full as reflected on Page 4 of the Plaintiff's Bundle of Documents and the Ministry of Finance communicated that it had no further claim to the property.

The Witness informed the Court that she took occupancy in April, 2001, but that she was asked to surrender the keys to Mr. Chisaila as she was undertaking repairs and renovations.

She stated that she had written to the Ministry to help her retrieve her things but it was in vain. She added that in February 2018, she engaged Bailiffs who evicted Mr. Chisaila's family and after she had obtained the title deeds. She stated that the house was in a deplorable state and she had to replace everything to make it habitable. Reference was made to the documents on Pages 17 to 27 of the Plaintiff's Bundle of Documents to show the expenses incurred.

PW stated that she wanted compensation as the Flat would have earned her income for the 17 years, had she rented it out. Reference was made to the Valuation Report at pages 28-36 to this effect.

Under cross-examination, PW stated that she did not take occupancy within one week as directed in the Allocation Slip but took occupancy in April, 2001 as the property was hers.

She stated that after being requested to hand over the keys in June 2001, she did not do so and the house was broken into while the keys were in her possession.

PW said that the house was occupied by Mr. Chisaila but he was not part of these proceedings, and that she was not aware of the Court proceedings at the time she was asked to hand over the keys. She conceded that a letter was written to Mr. Chisaila to vacate the house

and copied to her as reflected on page 13 of the Plaintiff's Bundle of Documents.

In re-examination, the Witness said that the Government had stated that it had no interest in the house but that she had left the house because of the instruction through the Committee which had directed her to leave so that Mr. Chisaila could re-occupy the house and as a Civil Servant, she complied.

The Defence witness, **Abraham Banda** (DW) informed the Court that at the time the Government introduced the policy of home ownership, Mr. Cuthbert Chisaila was illegible because of his nationality.

He stated that the Committee on the Sale of Government Houses received a recommendation from the Ministry of Higher Education that Flat No. 2 Lukashya be offered to the Plaintiff, which was done. DW testified that an Offer Letter was generated to the Plaintiff and she accepted and paid in full on 31<sup>st</sup> October, 2000.

He said the Plaintiff failed to gain access to the property but the Committee tried to get Mr. Chisaila to vacate, after which the latter started court proceedings for the determination of whether he was entitled to purchase the flat as a sitting tenant at the time. The Witness testified further that in a Judgment delivered in 2010, the Court held that Mr. Chisaila was ineligible.

DW stated that the Plaintiff had evicted Mr. Chisaila in April 2001, but he forcibly regained entry to the Flat in August, 2001. He added that Mr. Chisaila commenced legal proceedings and with the Court

Order, the Committee could not do anything until the process was completed. He said they had faced a lot of challenges in instances where Zambians had purchased houses occupied by foreigners and the understanding of the Committee was that the Zambian purchasers would be a little patient until those foreigners were paid their dues.

Under cross-examination, DW stated that after the Plaintiff paid in full, the Ministry and the Plaintiff tried to evict Mr. Chisaila and DW wrote to the latter to inform him that the property belonged to the Plaintiff. He said the letter was copied to the Plaintiff and the Government did not take any steps to evict as it was no longer a Government property after the Plaintiff had paid in full and thus had no role to play.

He stated that Mr. Chisaila had occupied the Flat as an incidence of his employment with the Republic of Zambia.

Under cross-examination, DW stated that he was not aware of any Court Order that stopped the Government from dealing with the property, and that the Court found that Mr. Chisaila was ineligible to purchase the flat.

He stated that the Committee wrote to the Plaintiff to hand over the keys in June, 2001.

In re-examination, DW stated that the Plaintiff never handed over the keys to the Ministry of Works and that Mr. Chisaila forcibly gained access in August 2001.

At the close of the case, respective Counsel opted to file in written submissions.

According to the Plaintiff's submissions the Defendant's defence lacked substance and the Defendant's witness had not rebutted any part of the Plaintiff's Statement of Claim.

It was submitted that the Defendant had not provided any proof in any form to substantiate the defence either orally or through the production of documents, and thus had accepted the Plaintiff's documents as produced.

It was further submitted that the Plaintiff had complied with the Government to move out of the Flat to accommodate the occupant who was a Government employee and whom the Government should have accommodated.

It was contended that there was no evidence that the Government took steps to help the Plaintiff occupy her residential property which the Government had sold to her in the 17 years, until she engaged private Bailiffs in March 2018. It was argued that the stay of the unlawful occupant was aided and facilitated by the Government through its employees and or agents. Thus, the Plaintiff was entitled to her claims.

In response, the Defendant submitted that the onus of proving the claims was on the Plaintiff regardless of the Defendant's defence and referred to the cases of **Wilson Masauso Zulu v Avondale Housing**



**Project Limited<sup>(1)</sup>** and **Patrick Chilambwe v Attorney General<sup>(2)</sup>**, for this position.

It was submitted that title to the property only passes after issuance of a Certificate of Title, which in this case was done in February 2018 and to this effect cited **section 33 of the Lands and Deeds Registry Act.**

It was contended that the fact that a letter from the Ministry of Finance and Economic Development stated that the Government had no further claim to the property did not entail that title had passed to the Plaintiff.

The Defendant further submitted that the fact that the Plaintiff had fully paid for the property did not make her the owner as the Handbook on the Civils Service Ownership Scheme had other conditions such as paying the registration fees before title could pass and there was no evidence that the Plaintiff had fulfilled that condition.

Having submitted that the Plaintiff was not the owner of the property, the Defendant argued that the Plaintiff was not entitled to rentals. It was further contended that although the Plaintiff had an equitable interest in the property but not having handed over the keys as directed in the letter of June 2001, she sat on her rights in not pursuing the late Mr. Chisaila's family who had benefitted from the initial renovations.

As regards reimbursements for the improvements to the property, the Defendant submitted that a purchaser is deemed to purchase the property in the state it was in, and thus it was inconceivable that the Plaintiff wants the Defendant to reimburse the costs of improvements after she had obtained title and taken possession.

I have considered the pleadings, the evidence and the submissions tendered in this matter. As alluded to by the Defendant in the submissions, the onus is on the Plaintiff to prove her case regardless of the Defendant's defence. This has been restated in various authorities including in the case of **Zambian Breweries PLC v David Chibwe**, that:

***“It is a time honored principal in civil proceedings that it is for the Plaintiff to prove its case against the Defendant even if it is difficult to do so. The burden of proof is at all times on the Party making the claim and it 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.” -***

The Plaintiff seeks an order that she is the owner of House/Flat No. 2, Lukashya Flats, Kabulonga. The evidence on record shows that there has been no dispute as regards the ownership of the subject property. I therefore find that making such an order is otiose.

The second claim is for the Defendant to pay the Plaintiff monthly rentals from 28<sup>th</sup> June 2001 to 16<sup>th</sup> March 2018, a period of 17 years and 3 months. According to page 3 of the Plaintiff's Bundle of

Documents, the Plaintiff was allocated the subject property on 31<sup>st</sup> August, 1999 and was to take up occupancy within one week of the allocation, but took up occupation sometime in April, 2001 after evicting the then occupant.

The Plaintiff's letter to the Permanent Secretary at page 6 of her Bundle of Documents shows that she was offered to buy Flat by the Ministry of Lands on 26<sup>th</sup> October, 2000 and she paid in full on 31<sup>st</sup> October, 2000. Further a document from the Ministry of Finance and Economic Planning dated 31<sup>st</sup> October 2000 addressed to the Commissioner of Lands directs the latter to release the title deeds to subject property to the Plaintiff and that Government had no further claim to the property.

The Defendant has argued that payment of full purchase price did not transfer the property to the Plaintiff and only the Certificate of Title is proof of ownership. It was further submitted that the Handbook on the Civil Service Ownership Scheme had other conditions such as payment of registration fees before the title could be issued and there was no evidence that the Plaintiff had fulfilled this condition.

I must state that this last submission by the Defendant is misplaced as it is only being raised in submissions, it was not pleaded to enable the Plaintiff respond nor has the said Handbook been produced into Court. I therefore hold that this is evidence from the Bar and inadmissible.

The Plaintiff has alluded to a Letter of Offer from the Ministry of Lands. However, this letter is not before Court, for the Court to ascertain the terms of the Offer and whether there was compliance by the Plaintiff. I am therefore unable to ascertain when title should have passed to the Plaintiff and whether the default in issuance was entirely the Defendant's or not. In the case of **Ndongo v Moses Mulyango and Roostico Banda**<sup>(4)</sup>, the Supreme Court restated that:

***“a contract of Sale of land does not per se transfer ownership of land to the buyer and a mere payment of a deposit towards the purchase price does not transfer ownership to the buyer, much more is required.”***

I am cognizant of the fact that the Plaintiff paid the full purchase price but in the absence of the Letter of Offer to show that the conditions were fulfilled, I am unable to make a finding as to when the title vested in the Plaintiff. I also note that the document from the Ministry of Finance and Economic Planning has the following:

***“Note: Original Receipts should be presented to the Commissioner of Lands before the Title Deed is released.”***

No evidence was led to show that this was complied with and that the Defendant had no reason to delay the issuance of the Certificate of Title which was only granted on 1<sup>st</sup>December, 2016. This information again is based on my perusal of the letter from the Plaintiff's Advocates to the Chief State Advocate dated 4<sup>th</sup>December, 2017, a copy of the Certificate of title itself has not been availed to the Court.

Be that as it may, it has not been disputed that the Plaintiff has title to the property and based on what's on record, has been the owner from 1<sup>st</sup> December, 2016 in line with **section 33 of the Land and Deeds Registry Act**.

However, there is no evidence before me of a lease between the Plaintiff and the Defendant regarding the property from the time the property was sold to the Plaintiff up to the time she took occupation. In order for someone to pay rent, there has to be a legal agreement that would spell out the obligations of the Parties to the agreement. There was again no evidence led to show that the Plaintiff had demanded for payment of rent from the Defendant during the period she was not able to gain access to the property, and the demand is only being made 17 years later. In my view the Plaintiff slept on her rights and the Court cannot be used to assist the indolent without a plausible reason or explanation being advanced.

Further, the Plaintiff has alleged that after she had evicted Mr. Chisaila in April, 2001, she took occupancy but she was directed in a letter dated 28<sup>th</sup> June 2001 to surrender the keys to the Committee in order for Mr. Chisaila to take possession. However, she did not do so and Mr. Chisaila forcibly gained entry in August 2001 and had been in occupation till she evicted his family in March 2018. It is evident that the Plaintiff did not surrender the keys alleging that she was obeying the directive and has not done so to date. Therefore, I find no basis to hold that she had obeyed the Committee's directive which led to Mr. Chisaila's re-occupation of the property.

As regards the claim for reimbursements on the money spent to renovate the property to a habitable state, the Plaintiff has not produced evidence to show what the terms of the offer were as regards what the state of the property was or should have been at the point of Sale and upon taking up occupation. It has been stated time and again that the Court can only make a determination of the matters based on the evidence presented to it, as alluded to in the case of **Rosemary Chibwe v. Austin Chibwe SCZ Judgment No. 38 of 2000** the Supreme Court stated thus:

***"The Court can only make decisions based on the evidence on record."***

I thus find that the Plaintiff has failed on a balance of probabilities to prove her claims. The claims are dismissed in their entirety.

Each party shall bear its own costs.

Leave to appeal is granted.

**Delivered at Lusaka this 14<sup>th</sup> day of May, 2020.**



.....  
**S.M. WANJELANI**  
**JUDGE**