

IN THE HIGH COURT FOR ZAMBIA

2018/HP/1393

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

JUSTIN MULAMBA

AND

AARON MULOPE

MUSONDA BAMBALA



PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

**BEFORE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN
OPEN COURT, ON 24TH FEBRUARY, 2020.**

For the Plaintiff: Mr. J. Mulamba – In Person.

For the 1st Defendant: Mr. A. Mulope – In Person

For the 2nd Defendant: Mr. M. Bambala – In Person

JUDGMENT

CASES REFERRED TO:

1. *Nora Mwaanga Kayoba & Alizani Banda vs. Eunice Kumwenda Ngulube & Andrew Ngulube - SCZ Judgment No. 19 of 2003;*
2. *Zambia Consolidated Copper Mines vs. Katalayi & Others (2001) Z.R. 28;*
3. *Lonrho Cotton Zambia Limited vs. Mukuba Textiles Limited (2002) Z.R. 43;*
4. *Wesley Mulungushi vs. Catherine B. M. Chomba (2004) Z.R. 96; and*
5. *Gideon Mundanda vs. Timothy Mulwani & Ors (1987) Z.R. 30.*

OTHER WORKS REFERRED TO:

1. *Chitty on Contracts - General Principles, Volume 1, 30th edition, Sweet & Maxwell, Thomson Reuters.*

1. INTRODUCTION

1.1 This Court is called upon to principally determine whether or not Lot No. 11203/M/T (hereinafter referred to as "the subject property"), a subdivision of Lot No. 11203/M of Chalala Area, belongs to the Plaintiff.

2. BACKGROUND

2.1 This matter was commenced by way of Writ dated 16th August, 2018, at the instance of the Plaintiff, who seeks a declaration that the subject property, legally and lawfully belongs to the Plaintiff, being the first purchaser of the same from the rightful owner and damages for inconvenience caused by the 1st Defendant's action of selling the subject property to another individual.

2.2 The gist of the Plaintiff's claim against the Defendants is that the Plaintiff bought the subject property from the 1st Defendant on 30th January, 2012 and paid the purchase price in full. Despite receiving the full purchase price, the 1st Defendant went on to sell the subject property to the 2nd Defendant.

2.3 On the other hand, the 1st Defendant insists that the property sold to the Plaintiff on 30th January, 2012 and which the Plaintiff paid for in full is Subdivision R of Lot No. 11203/M and not the subject property, which he sold to the 2nd Defendant.

2.4 The 2nd Defendant also insists that he is a *bona fide* purchaser of the subject property having purchased it in 2017 and which he had started clearing in readiness to start constructions.

3. THE PLEADINGS

3.1 The Plaintiff averred that on 30th January, 2012, he bought the subject property from the 1st Defendant and paid the full purchase price. Despite receiving the full purchase price, the 1st Defendant went on to sell the subject property to the 2nd Defendant. The 2nd Defendant then proceeded to clear the subject property. When queried by the Plaintiff as to why he cleared the subject property, the 2nd Defendant alleged that he was sold the subject property by the 1st Defendant.

3.2 He further avers that the 2nd Defendant insisted that the subject property is his and went to the extent of purchasing building materials in readiness to construct a permanent structure.

3.3 The Plaintiff therefore seeks the following reliefs: -

- i. Declaration that Plot No. 11203/M/T, a subdivision of Lot. No. 11203/M of Chalala Area legally and lawfully belongs to the Plaintiff having been the first purchaser of the same from the rightful owner;*

- ii. *An Order of interim injunction restraining the 2nd Defendant, either by himself, agents, servants or whosoever from constructing a building or selling Plot No. 11203/M/T, a subdivision of Lot No. 11203/M, until further order of this honourable court;*
- iii. *Damages for inconvenience caused by the 1st Defendant as a result of selling the subject property to the 2nd Defendant;*
- iv. *Any other relief which this Court can deem fit; and*
- v. *Costs.*

3.4 Both Defendants did not enter appearance nor file their defences.

4. EVIDENCE AT TRIAL

4.1 On the date scheduled for trial, the Defendants were in attendance and indicated that they wished to present their case and cross-examine the Plaintiff. There being no objection raised by the Plaintiff, the matter proceeded to trial.

4.2 **PW1** was Justin Mulamba, the Plaintiff, who testified that he bought the subject property from the 1st Defendant on 30th January, 2012 and they executed a contract of sale, the purchase price being K60,000.00 (rebassed), which he paid to the 1st Defendant in

instalments as shown in the Plaintiff's Bundle of Documents.

- 4.3 He further testified that upon paying the full purchase price, he started planting crops on the subject property while he looked for money to develop it. That sometime in 2017, he lost his wife, thus he was not able to till on the subject property for that year. Early in 2018, he went to the subject property and found that the 2nd Defendant had just delivered sand and stones on the subject property. The 2nd Defendant had also started digging a foundation. He informed the 2nd Defendant that the subject property was his and phoned the 1st Defendant in his presence, who failed to justify why he had sold the property to the 2nd Defendant. He advised the 2nd Defendant to stop constructing on the subject land.
- 4.4 A week later, the Plaintiff went to the subject property and found that the 2nd Defendant had delivered more building materials, which prompted the Plaintiff to report the matter to the Police, where the parties were invited for a meeting by the Officer in Charge. The 1st Defendant did not show up for the said meeting. The Plaintiff showed the 2nd Defendant all the documents pertaining to the purchase of the subject property. Despite this meeting, the 2nd Defendant continued to construct on the

subject property, thus the Plaintiff was left with no option but to commence these proceedings.

- 4.5 He further testified that he placed a caveat on the subject property and had obtained consent to assign.
- 4.6 When cross examined by the 1st Defendant, he testified that he did not know how many subdivisions the 1st Defendant had created on Lot No. 11203/M. PW1 admitted that pages 12 - 13 of the Plaintiff's Bundle of Documents, show that the receipts issued to him for payment of the purchase price, were in respect of Subdivision R of Lot No. 11203/M and not the subject property. He further admitted that the contract of sale executed between the Plaintiff and 1st Defendant on 30th January, 2012, which is shown at page 19 of the same bundles relates to Subdivision R of Lot No. 11203/M and not the subject property. He also admitted that the contract of sale shown at page 1 of the Plaintiff's Bundle of Documents was prepared around March, 2018 and backdated to 30th January, 2012.
- 4.7 When cross examined by the 2nd Defendant, he testified that at the Police Station, the 2nd Defendant had insisted that he could not stop building on the subject property as he had already bought building materials, hence they were advised to take the matter to Court. He reiterated his testimony that the 2nd Defendant continued digging

the foundation on the subject property and put foundation stones.

- 4.8 In re-examination, PW1 testified that the contract of sale appearing at page 19 of his Bundle of Documents could not be accepted at Ministry of Lands, hence the new contract of sale at page 1 which was done in accordance with the advice received from Ministry of Lands. That it was the officers at Ministry of Lands, who advised him to indicate on the new contract, the date that was shown on the initial contract that had been rejected, hence the date of 30th January, 2012, on the new contract executed in March, 2018 by the Plaintiff and 1st Defendant. He stated that the new contract was thereafter accepted at Ministry of Lands.
- 4.9 The Plaintiff did not call any other witnesses and closed his case.
- 4.10 **DW1** was the 1st Defendant, Aaron Mulope, who testified that he subdivided his land on Lot No. 11203/M into 45 plots. The Plaintiff bought one of the subdivided plots from him which was numbered Subdivision R of Lot No. 11203/M in 2012 for the price of K60,000.00, which was fully paid to him as shown in the Plaintiff's Bundle of Documents.
- 4.11 It was his testimony that after he verified the number of plots that he had sold, he discovered that the subject property was free and that is how he sold it to the 2nd

Defendant. When the Plaintiff later queried him over this sale, they perused the contracts of sale and site plans together. It was established that the plot sold to the Plaintiff was Subdivision R of Lot No. 11203/M and the one sold to the 2nd Defendant was Subdivision T of Lot No. 11203/M (the subject property).

4.12 That is when the Plaintiff realised that he had been tending to the subject property, which was not his, instead of Subdivision R of Lot No. 11203/M, which he had bought from the 1st Defendant. Upon discovering this, the 1st Defendant agreed to give the Plaintiff an alternative plot as Subdivision R of Lot No. 11203/M was no longer available, due to lapses in his offices where he worked with his partners Mr. Harry Hampende and Mr. Msiska, who had honestly believed that the said property was free for sale as it had remained undeveloped and sold it. The Plaintiff accepted to get an alternative plot as the 2nd Defendant had begun to develop the subject property.

4.13 It was his further testimony that when the Plaintiff learnt that the property that he contracted to purchase was no longer available, he insisted on executing another contract of sale with the 1st Defendant for what he termed to be security reasons while the 1st Defendant looked for an alternative plot for him and further insisted on the new contract being in respect of the subject

property, which the 1st Defendant had already sold to the 2nd Defendant. The Plaintiff also insisted that the new contract be backdated to 2012. This is the new contract shown at page 1 of the Plaintiff's Bundle of Documents.

4.14 Since then the 1st Defendant has been trying to find the Plaintiff an alternative plot and now requests for three months to find this alternative plot.

4.15 When cross examined by the Plaintiff, DW2 reiterated that the plot that he sold to the Plaintiff was Subdivision R of Lot No. 11203/M, which is different from the subject property sold to the 2nd Defendant. He stated that he offered the Plaintiff to find him an alternative plot as he had not carried out any developments on the property that was sold to him. He further stated that he could not remove the 2nd Defendant from the subject property as the 2nd Defendant had developed the subject property, which was sold to him. It was also his testimony that both Subdivision R of Lot No. 11203/M and the subject property exist, but Subdivision R of Lot No. 11203/M is no longer available as it remained undeveloped for so long thus leading to his office's honest belief that it had not been sold to anyone and due to this oversight in his office, it was sold to someone else.

4.16 **DW2** was the 2nd Defendant, Musonda Bambala, who testified that in 2017, he entered into a contract of sale with the 1st Defendant in respect of the subject property

for the price of K130,000.00. He started constructing on the subject property in 2018 and had built up to foundation level when he was approached by the Plaintiff who claimed that the subject property was his. He conducted a due diligence at Ministry of Lands and the record revealed that the property was registered in the 1st Defendant's name. Thus he carried on building and the structure is now at lintel level. That he is still servicing the loan that he obtained to purchase the subject property.

4.17 He further testified that the parties were invited to the Police Station, but the meeting did not yield any result as the 1st Defendant was not in attendance. He stated that he was a *bona fide* purchaser and urged the Court to declare him as the owner of the subject property.

4.18 When cross examined by the Plaintiff, DW2 testified that he had informed the Police that he would not stop constructions on the subject property as there was no evidence on paper to suggest that the subject property belonged to the Plaintiff.

4.19 In re-examination, DW2 reiterated that he did all that was necessary to ensure that he bought the property in good faith and is thus a *bona fide* purchaser.

4.20 That marked the close of the defence.

5. ORAL SUBMISSIONS OF THE PARTIES

- 5.1 In his oral submissions, the Plaintiff emphasised that the contracts at pages 1 and 19 of the Plaintiff's Bundle of Documents were not different as all the terms and conditions were the same and that the parties to it appended their signatures freely. That the whole reason why they had to re-write the contract at page 1 was due to the fact that Ministry of Lands could only give him the consent to assign, if the contract was properly done. He submitted that that he got the format of the contract of sale shown at page 1 from Ministry of Lands and that the 1st Defendant agreed to sign the new contract at page 1. He further submitted that he has never accepted an alternative plot from the 1st Defendant and only wants the subject property.
- 5.2 In his oral submissions, the 1st Defendant submitted that he would abide by whatever the Court decided and was ready to either find the Plaintiff an alternative plot or refund him his money.
- 5.3 The 2nd Defendant opted to rely on the evidence on record.

6. FINDINGS OF FACT

- 6.1. I have carefully considered the Plaintiff's action and all the evidence in its entirety. I find that the following facts exist as relates to the evidence before me: -

- i. The 1st Defendant was at all the material time the registered owner of Lot No. 11203/M as shown by Certificate of Title No. 139196, which he subdivided into 45 plots, amongst these being the subject property and Subdivision R of Lot No. 11203/M;
- ii. An agreement was executed by the Plaintiff and 1st Defendant on 30th January, 2012, in respect of the sale of a Subdivision R of Lot No. 11203/M at a price of K60,000 (rebased) and in pursuance of that agreement, the full price was paid by the Plaintiff to the 1st Defendant.
- iii. The Plaintiff did not develop Subdivision R of Lot No. 11203/M, which he bought from the 1st Defendant and fully paid for, as he was financially cash strapped.
- iv. Sometime in 2017, the 1st Defendant sold the subject property to the 2nd Defendant, who has since built up to lintel level;
- v. In early 2018, the Plaintiff went to the subject property, which he believed was his property and found that the 2nd Defendant had moved on to the subject property and had since made certain developments;
- vi. A dispute arose and in the midst of resolving the issues surrounding the subject property, sometime in March, 2018, another agreement was signed by

the Plaintiff and 1st Defendant, in respect of sale of the subject property, which was backdated to 30th January, 2012 and is shown at page 1 of the Plaintiff's Bundle of Documents. The signature of the 1st Defendant is not attested;

- vii. The 1st Defendant admits that the subject property had already been sold to the 2nd Defendant and was not available for sale in March, 2018, when the back dated contract of sale at page 1 was executed between the Plaintiff and 1st Defendant;
- viii. Subsequently, premised on the backdated contract shown at page 1, the Plaintiff obtained a Consent to Assign the subject property which was registered with the Registrar of Lands and Deeds Registry on 7th August, 2018, naming the 1st Defendant as the Vendor and the Plaintiff as the Purchaser;
- ix. The Plaintiff bases his claim to ownership of the subject property on the backdated Contract of Sale shown at page 1 of the Plaintiff's Bundle of Documents; and
- x. The 1st Defendant admits that he should not have executed the backdated contract at page 1 and is willing to refund the Plaintiff the purchase price in respect of Subdivision R of Lot No. 11203/M, which is no longer available or find him alternative land.

7. ISSUES FOR DETERMINATION

7.1 Based on my finding of facts listed above, I am of the view that the pertinent issues which call for my determination are as follows: -

- i. Whether the back dated contract of sale at page 1 is valid and enforceable;
- ii. Which of the Parties between the Plaintiff and the 2nd Defendant are legally entitled to ownership of the subject land;
- iii. What is the fate, at law, of the Contract of Sale executed between the Plaintiff and 1st Defendant relating to Subdivision R of Lot No. 11203/M; and
- iv. Whether damages, if any, lie against the 1st Defendant.

7.2 *Backdated contract executed in March, 2018*

7.2.1 The Plaintiff claims that under the backdated contract of sale, he is entitled to ownership of the subject property. On the other hand, the 1st Defendant alleges that the Plaintiff is not entitled to ownership of the subject property as it had been sold to the 2nd Defendant at the time that the backdated contract was executed, but was entitled to Subdivision R of Lot No. 11203/M, which he initially contracted to purchase and which is no longer available.

7.2.2 In resolving the validity of the backdated contract, I have been greatly assisted by the testimony of the parties. According to the testimony of the parties, this contract was executed when the subject property had been sold to the 2nd Defendant who had even embarked on his developments. DW1 had explained that the backdated contract was merely executed for security reasons, whilst he looked for alternative land for the Plaintiff and that the Plaintiff was fully made aware that he had been tending crops on a wrong property which is the subject property that had never been sold to him under the initial contract.

7.2.3 In fact, what I do find is the most unfortunate state of events in which sometime in early January, 2018, the Plaintiff found that the subject property, which he believed to be his was being developed by the 2nd Defendant. Upon establishing that he had been tending crops on the subject property, when he should have been doing so on Subdivision R of Lot No. 11203/M, which he purchased from the 1st Defendant in 2012, he accosted the 1st Defendant, who suggested an alternative replacement as Subdivision R of Lot No. 11203/M, having

remained undeveloped for so long, had misguidedly been sold to someone else and was no longer available. Thus, the two executed the backdated contract in respect of the unavailable subject property, which the Plaintiff then used to secure Consent to Assign.

7.2.4 In my considered view, the Plaintiff should not have registered the backdated contract in the first place and obtained Consent to Assign on its basis. This is because the backdated contract lacked the essential elements of a valid contract, which made it incapable of being performed.

7.2.5 An agreement becomes enforceable by law when it fulfils essential conditions, which are necessary of a valid contract. Where these essential conditions are fulfilled, specific performance may be granted. One of the essential elements in a valid contract is an offer, which is the first element that makes certain that the contract is legally valid or acceptable. Accordingly, the offer must be lawful such that it is able to satisfy the requirement of a binding legal contract. The offer must be made with the intention of creating legal relations, otherwise, there will be no agreement.

7.2.6 The evidence placed before this Court was to the effect that the backdated contract was executed

for security reasons whilst the 1st Defendant looked for an alternative plot for the Plaintiff. Further, the Plaintiff was aware that the subject property belonged to the 2nd Defendant. This clearly shows that there was no intention to sell the subject property to the Plaintiff.

7.2.7 Another essential element of a valid contract is consideration. An agreement is enforceable only where both the parties get something and give something. In *casu*, the subject property which was consideration of the backdated contract was not capable of being sold to the Plaintiff as it did not belong to the 1st Defendant.

7.2.8 The other essential element of a valid contract is that the agreement must be made for a lawful object. The object for which the agreement has been entered into must not be fraudulent, illegal, immoral nor imply injury to the person or property of another. In *casu*, the object of the backdated contract was the subject property, which belonged to the 2nd Defendant who was not privy to the said backdated contract. It is trite that every agreement of which the object or consideration is unlawful, is illegal and therefore void. It was unlawful for the 1st Defendant to purport to sell the subject property to the

Plaintiff, when both these parties knew that the subject property belonged to someone else who was not privy to the backdated contract.

7.2.9 It is also an essential element of a valid contract to be capable of being performed. An agreement to do an act impossible in itself is void. If the act is legally or physically impossible to perform, the agreement cannot be enforced at law. Since the subject property was not available for sale, the backdated contract is therefore not capable of being performed.

7.2.10 Speaking of instances where specific performance will be granted, the learned author of ***Chitty on Contracts***³, stated at ***para 27-003*** as follows: -

"The jurisdiction to order specific performance is based on the existence of a valid, enforceable contract ... It will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality, which makes the contract invalid or unenforceable."

7.2.11 On the question of the validity of the backdated contract in relation to the subject property and being guided accordingly, I am satisfied that it was not properly perfected and that it ought not to have been registered. I am inclined to find

therefore that the backdated contract is null and void *ab initio*.

7.2.12 It is also quite clear to me that the 1st Defendant could not have passed title of the subject property to the Plaintiff as the subject property was not available for sale having been sold to the 2nd Defendant. Accordingly, the backdated contract of sale ought not to have been registered at Ministry of Lands because the Plaintiff could not have derived any Title to the subject property which had already been sold to the 2nd Defendant.

7.2.13 Since the 1st Defendant had already sold the subject property to the 2nd Defendant, which fact was made aware to the Plaintiff, he could not assign it to the Plaintiff. Unfortunately for the Plaintiff, the subject land had long been sold to the 2nd Defendant, as far back as 2017. It follows therefore that the backdated contract between the 1st Defendant and the Plaintiff was *null and void*, therefore unenforceable. It had no legal force since the subject property was not capable of being sold to the Plaintiff. In any case, ordering specific performance would make such performance impossible as there was evidence by all the parties that the subject property had been

sold to the 2nd Defendant before the backdated contract. To this end, the learned author of **Chitty on Contracts**¹ provides at **para 27-041** as follows: -

"Impossibility. Specific performance will not be ordered against a person who has agreed to sell land which he does not own and cannot compel the owner to convey to him because the Court does not compel a person to do what is impossible." (Court's emphasis)

7.2.14 The Plaintiff's predicament is further compounded by the fact that he cannot seek refuge in the equitable remedy of *bona fide* purchaser for value without notice of encumbrance. It is clear from the Plaintiff's evidence that he was aware that the 1st Defendant had sold the subject property to the 2nd Defendant, whom he did not deal or contract with. Further, it is clear from his evidence that he knew that the property whose contract for sale was backdated was already in possession of the 2nd Defendant. He should therefore, in my considered view, have exercised caution by insisting on proof of the 1st Defendant's authority to sell or consent from the 2nd Defendant before lodging any documents in relation to the subject property. In the case of **Nora Mwaanga Kayoba**

& Alizani Banda vs. Eunice Kumwenda Ngulube & Andrew Ngulube², the Supreme Court warned about the casual approach, with which property is purchased by the general citizenry when it opined that: -

"...in purchasing of real properties, parties are expected to approach such transactions with much more serious inquiries to establish whether or not the property in question has no encumbrances. Buying real property is not as casual as buying household goods or other personal property."

7.2.15 In any event, the basic principles of the law of contract are settled that you cannot enforce a contract against a third party unless certain criteria has been met. The fact that the 2nd Defendant was not a party to the backdated contract sought to be enforced against him is *ipso facto* a deciding factor in this matter. The case by the Plaintiff as against the Defendants in relation to the subject property fails for lack of merit.

7.3 Ownership of the Subject Land

7.3.1 What is clearly evident from the evidence on record, is that the Plaintiff has not come with clean hands as he intends to somewhat claim adverse possession to the subject property, on

the basis that he grew crops on it, when he is aware that the subject property is not the property that he initially contracted to purchase and paid for. Further, the Plaintiff is aware that there is the 2nd Defendant, who purchased the subject property and was not party to the backdated contract.

7.3.2 In the case of **Zambia Consolidated Copper Mines vs. Katalayi & Others**³, the Supreme Court refused to grant the relief of specific performance to the Respondents because there was an innocent third party involved who had overriding interest in the land.

7.3.3 I am of the considered view that the 2nd Defendant has proved that he is the owner of the property which the Plaintiff is claiming. The Plaintiff himself admitted that he was aware that the 2nd Defendant had bought the subject property from the 1st Defendant before the backdated contract and that he did not get the 2nd Defendant's consent before backdating a contract in respect of the subject property. He also confirmed that the 2nd Defendant was already in occupation when the backdated contract was executed. Further, his claim against the 1st Defendant, in respect of the

backdated contract relating to the subject property having failed, he has no reason to claim ownership of the subject property.

7.3.4 I therefore find and hold that the 2nd Defendant is the one who is legally entitled to ownership of the subject property. Accordingly, all claims sought by the Plaintiff in respect of ownership of the subject property fall off.

7.3.5 Having found that the 2nd Defendant is entitled to ownership of the subject property, there is no need for the caveat placed on the subject property by the Plaintiff to remain in force. Accordingly, I order that the caveat entered by the Plaintiff on the subject property be lifted with immediate effect because there is no justified interest for the Plaintiff to continue to sustain such an encumbrance on the subject property to the detriment of the 2nd Defendant.

7.4 *The fate of the original contract of sale relating to Subdivision R of Lot No. 11203/M*

7.4.1 The question that I pose to myself is that what is the fate, at law, of the Contract of Sale executed between the Plaintiff and 1st Defendant relating to Subdivision R of Lot No. 11203/M, which Subdivision was purportedly sold by the 1st Defendant by mistake to a third party, while the

Contract of Sale for the same property with the Plaintiff was still in force and full consideration had been paid by the Plaintiff to the 1st Defendant?

7.4.2 It is my considered view that the original contract relating to Subdivision R of Lot No. 11203/M, between the Plaintiff and 1st Defendant, still subsists as no evidence was placed before this Court to suggest that this contract had been rescinded. The 1st Defendant testified that this property is no longer available due to a mistake in his office which saw the said land being offered by his partners to a third person. However, the 1st Defendant did not place any cogent evidence before this Court to prove that this property is no longer available.

7.4.3 The legal issues to interrogate are whether the 1st Defendant could hide behind a mistake in his alleged office to sell Subdivision R of Lot No.11203/M, when it was already sold to the Plaintiff and full consideration received; whether the 1st Defendant could pass good title to a third party on the back of a mistake; and whether damages rather than specific performance, on the contract between the Plaintiff and 1st Defendant can be the most appropriate remedy for the

Plaintiff especially that the 1st Defendant had no legal power to re-sell Subdivision R of Lot No. 11203/M for lack of development. Such power, to re-possess land for want of development, is only vested in the Commissioner of Lands after following the laid down due process in this regard.

- 7.4.4 It is trite that as long as a contract of sale remains in force, it is capable of being performed. The learned author of ***Chitty on Contracts***¹ stated at ***para 22-025*** that: -

"A partially executed contract can be rescinded by agreement provided that there are obligations on both sides which remain unperformed. Similarly a contract which has been fully performed by one party can be rescinded provided the other party returns the performance which he has received and in turn is released from his own obligation to perform under the contract." (Court's emphasis)

- 7.4.5 As can be seen from above, a contract which has been fully performed by one party can be rescinded provided that the other party returns the performance which he has received and in turn is released from his own obligation to perform under the contract. The consideration for the discharge in each case is found in the

abandonment by each party of his right to performance or his right to damages as the case may be. Nothing of the sort happened in *casu* so as to suggest that the original contract was rescinded. Rescission could only have occurred if the 1st Defendant had returned to the Plaintiff, the performance which he had received. The 1st Defendant did not return the money paid by the Plaintiff for this property.

7.4.6 The learned author further went on to state at **para 22-028** as follows: -

"A rescission of a contract will also be implied where the parties have effected such an alteration of its terms as to substitute a new contract in place. The question whether a rescission has been effected is frequently one of considerable difficulty, for it is necessary to distinguish a rescission of the contract from a variation which merely qualifies the existing rights and obligations. If a rescission is effected the contract is extinguished; if only a variation, it continues to exist in an altered form... Rescission will be presumed when the parties enter into a new agreement which is entirely inconsistent with the old, or, if not, entirely inconsistent with it, to an extent that goes to the very root of it. The change must be fundamental."

7.4.7 At first glance, this rule would appear to operate so as to prevent me from granting an order of specific performance of the original contract in *casu* due to the subsequent backdated contract. However, the Court cannot imply rescission of the original contract relating to Subdivision R by the backdated contract, which for all purposes and intent had no subject matter to be conveyed by the 1st Defendant to the Plaintiff. I take the view that there is nothing that has been put forward as a defence to make the original contract unenforceable.

7.4.8 This contract, not having been rescinded, remains enforceable and the 1st Defendant could not therefore, have passed good title to a third party on the back of a mistake in his alleged office. This in effect entails that the purported sale of this property to a third party, if any, was *null* and *void ab initio* and unenforceable as the 1st Defendant could not give that which he no longer owned. This property was already sold to the Plaintiff by the 1st Defendant who had received full consideration. If at all the 1st Defendant sold this property to a third party, the 1st Defendant did not pass good title in these

circumstances to the third party that purportedly acquired Subdivision R of Lot No. 11203/M.

7.4.9 Any subsequent buyers of this property could not have acquired title to this property as the 1st Defendant did not obtain consent of the Plaintiff to sell this property to them. The Rightful owner of Subdivision R of Lot No. 11203/M is therefore the Plaintiff. Accordingly, I order that the sale of this property to a third party, if any, is void *ab initio* and is hereby set aside. I am fortified by the case of ***Lonrho Cotton Zambia Limited vs. Mukuba Textiles Limited***³, in which the Supreme Court held that:-

"A person who is not the owner thereof, and who did not sell them under the authority of with consent of the owner, acquires no better title than the seller had."

7.4.10 Having found that this contract still subsists, the Court hereby compel the 1st Defendant to transfer title to it to the Plaintiff. I am further fortified by the case of ***Wesley Mulungushi vs. Catherine B. M. Chomba***⁴, wherein it was held *inter alia*, by the Supreme Court that the Court will decree specific performance only if it will do more perfect and complete justice than the award of damages. In the circumstances of this case, I am of the considered view that an order granting specific

performance would do more justice than damages. Accordingly, I grant an order of specific performance against the 1st Defendant in favour of the Plaintiff for Subdivision R of Lot No. 11203/M. The 1st Defendant is ordered to take all the steps necessary to convey title of this property to the Plaintiff. I further order the Register of Lands to cancel title of the purported current owner, if any and issue one to the Plaintiff.

7.5 Damages

7.5.1 On the final issue of whether or not damages, if any, lie against the 1st Defendant, it follows, therefore, that this Court decreeing specific performance of the original contract relating to Subdivision R of Lot No. 11203/M, damages for the delay in completion may also be awarded.

7.5.2 The learned author of ***McGregor on Damages***² provides in ***para 968*** as follows: -

"DELAY IN COMPLETION

If the seller delays in effecting a conveyance of the property in circumstances which allow the purchaser to regard the breach as discharging the contract and justifying him in refusing the property, then, since he will not have the property transferred to him, the situation is the same as with a failure to complete as far

as the measure of damages is concerned. More often he will have the property transferred to him late, either because the delay does not discharge, or because he forces the seller's hand by successfully suing for a decree of specific performance. In such a situation the measure of damages is properly regarded as damages for delay."

7.5.3 In *casu*, it is not disputed that in 2012, the 1st Defendant sold Subdivision R of Lot No. 11203/M to the Plaintiff and received full consideration for it. It is also not disputed that the Plaintiff has never taken possession of Subdivision R of Lot No. 11203/M as he was tending to the subject property by mistake, which had not been sold to him. In the circumstances, the Plaintiff has been deprived the use of Subdivision R of Lot No. 11203/M from 2018, when he became aware that it was the actual property that was originally sold to him and therefore, I am inclined to consider the issue of the award of damages.

7.5.4 I must, however, state that I am alive to the Supreme Court's decision in the case of ***Gideon Mundanda vs. Timothy Mulwani & Ors***⁵, where the Court held, *inter alia*, that damages cannot adequately compensate a party for breach of a contract for the loss of an interest in a particular

piece of land or of a particular house (however ordinary) but, nevertheless, this Court's award of damages to the Plaintiff relates only to being deprived the use of this property. In my view this would do more perfect and complete justice for the delay occasioned by the 1st Defendant in concluding the original contract.

8 CONCLUSION

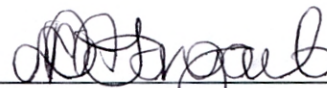
- 8.1 For the reasons recorded in my Judgment above, I find that the Plaintiff has not proven, on a balance of probabilities that he is lawfully entitled to ownership of the subject land. The caveat entered by the Plaintiff on the subject property must forthwith be lifted and the injunction granted to the Plaintiff on 18th September, 2018, is hereby discharged.
- 8.2 However, the Plaintiff is entitled to ownership of Subdivision R of Lot No. 11203/M, the property that he originally purchased and in light of this, I order that the 1st Defendant and all persons on this property yield up vacant possession to the Plaintiff.
- 8.3 In the event that there exist a third party who purchased Subdivision R of Lot No. 11203/M, I order that the 1st Defendant reimburses the third party, the purchase price paid to him and for the unexhausted improvements on Subdivision R of Lot No. 11203/M, if any, which will be determined by the Valuation Report of the government

valuation surveyor. Judgment in that sum of valuation amount and purchase price is entered in favour of the third party, if any, of unexhausted improvements of Subdivision R of Lot No. 11203/M against the 1st Defendant.

8.4 Because the Plaintiff has partially succeeded in his claims in this action, which was necessitated by the conduct of the 1st Defendant, costs are awarded to the Plaintiff, as against the 1st Defendant, to be taxed in default of agreement.

8.5 Leave to Appeal is granted.

Delivered at Lusaka on the 24th day of February, 2020.



**P. K. YANGAILO
HIGH COURT JUDGE**