

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



2019/HP/1322

B E T W E E N:

**CHOONGO HAMANYATI MWEEMBA
MAKONDO MWEEMBA-SIWABU**

**1ST PLAINTIFF
2ND PLAINTIFF**

AND

KELVIN PUMULO

DEFENDANT

Before the Hon. Justice Mr. M.D. Bowa the 3rd day of July 2020

For the Plaintiffs: Mr. S. Zulu SC of S. Zulu and Company

For the Defendant: In Person

RULING

Cases referred to:

1. *Wesley Mulungushi v Catherine Bwale Chomba* 2004 ZR 96 in
2. *Jane Mwenya & Jason Residence v Paul Kapinga* (1987) ZR 17
3. *Steadman vs. Steadman* (1974) 2 ALL ER 977
4. *Hodson vs. Heuland* (1893)2Ch 428
5. *Mpashi vs. Avondale Housing Project Limited* SCZ Judgment no 12 of 1992

Legislation:

1. *The High Court Act Cap 27 of the Laws of Zambia section 13 and order 5 r 24*

Other Works Referred to:

1. *Mudenda F S Land Law in Zambia: Cases and Materials Unza Press 2007*
2. *Blacks Laws Dictionary 9th edition at age 1545*
3. *RSC of England (White book 1999 edition) Order 14 A*
4. *Uniform Commercial Code par 2-8 at 82 (4th Edition 1995)*
5. *Halsbury's laws of England 4th edition volume 17 at page 28 paragraph 36*

This is a preliminary issue raised by the Plaintiff by way of Notice of motion dated 21st of January 2020 pursuant to Order 14A and Order 33 of the RSC 1999 edition. The background leading to the application is that the Plaintiffs commenced this action by originating summons on the 20th August 2019 seeking a determination of the following question.

1. *Whether the Plaintiffs as administrators of the estate of the late Raymond Himalambo Mwemba are not entitled to an order to recover vacant possession of a piece of land namely subdivision 32 of Subdivision C of farm 175a Mwembeshi Lusaka approximately 10 acres registered in the name of the late Raymond Himalambo Mweemba on the ground that the Defendant who is wrongfully occupying the said piece of land has failed to produce to the Administrators on demand any*

contract of sale, memorandum or note executed by the late Raymond Himalambo Mweemba evidencing a contract of sale for the alleged purchase by the Defendant of the said piece of land pursuant to section 4 of the statute of Frauds 1677.

In the affidavit in support dated 20th August 2019, the Plaintiffs contend that following their appointment as administrators they engaged the Defendant by letter twice requesting him to produce documentary evidence of the contract of sale or in default to vacate the premises within 14 days therefrom. They contended that to date the Defendant has not produced any document to prove his purchase of the land from the deceased Raymond H. Mweemba.

In his affidavit in opposition dated 7th January 2020, the Defendant averred that he informed the Plaintiffs he had misplaced the letter of sale due to passage of time and shifting from one house to another on 3 occasions and claimed he has a reasonable defence to the Plaintiffs claim for vacant possession of the property. He insisted he purchased the land from the late Mr. Mweemba and had witnesses who can

confirm the payment of the installments towards the purchase price.

on 22nd of January 2020 the Plaintiff filed a notice of motion to raise preliminary issues on a point of law pursuant to order 14 A RSC 1999 edition and order 33 rule 3 inviting the court to consider the following questions.

1. *Whether the Defendant is entitled to an order for specific performance and an order for vacant possession of the piece of land in dispute when he has failed to produce to the Administrators of the estate of the late Raymond Himalambo Mwemba a contract of sale or sufficient note or memorandum or receipt for the purchase price written by the deceased evidencing the existence of a contract of sale between the deceased and the Defendant.*
2. *Whether the Plaintiffs are not entitled to an order for vacant possession of the disputed piece of land.*
3. *Whether the Defendant should not be condemned in costs occasioned by these proceedings.*

Accompanying the Notice of motion was an affidavit titled “affidavit in reply and in support of Notice of Motion to raise preliminary issues at Law” sworn by the 1st Plaintiff. He maintained his earlier position that the Defendant had failed to produce any document of sale when demanded by letter exhibited “**CHM4**”. That when he demanded for the documentary evidence, the Defendant informed him that all his documents were taken away by his wife who refused to hand them over when she left the Matrimonial home. He thus disputed that he was told the documents were lost.

It was averred further that in December 2016 the Defendant’s wife paid the 1st Plaintiff K1200 in respect of ground rent for the property the Defendant is occupying and he accordingly issued her a receipt. When asked if she was keeping the documents for the sale of the property she denied having any such document. He thus believed that the Defendant has no reasonable defence to the action. Further based on their lawyer’s advice, the Plaintiffs also believed the Defendant has to produce a document or note in writing signed by the deceased Mr. Mweemba evidencing the

contract of sale and payment of the purchase price which he has failed to do.

He disputed the Defendant's averments in the affidavit in opposition to the originating summons that K15, 000 was paid to the deceased or that a surveyor was instructed to show the Defendant the boundaries of the land as the property had not yet been numbered by the office of the Surveyor General and no approved survey diagram had been produced.

He further questioned the authenticity of the sketch plan having been produced by Mr. Mudenda from the Surveyor Generals office or of a further payment of K10, 000 having been made due to Defendant's failure to produce receipts. The long and short of the rest of the affidavit was that the deponent was in essence refuting all of the Defendant's averments in the affidavits in opposition to the originating summons.

The Defendant filed an affidavit in opposition to the affidavit in support of notice to raise preliminary issue dated 6th of February 2020. He reiterated the position taken in his affidavit in opposition to originating summons that the letter of sale was lost in unknown

circumstances when shifting houses. It was averred further that the Defendant has material witnesses to testify that he is a bona fide purchaser of the land in issue.

He questioned the Plaintiffs knowledge of what he deposed to in his affidavit contending he couldn't possibly attest to the goings on as he was out of the Zambia at the material time and only returned after his father's demise.

It was also the Defendant's belief that the Plaintiffs had prematurely raised the preliminary issues to avoid a full trial at which he intended to avail material witnesses who had also purchased their respective pieces of land from the late Mr. Mweemba at the same time he did his.

In the skeleton arguments in support of the application, I was referred to section 4 of the Statute of Frauds 1677 which provides that:

"No action shall be brought ...whereby to charge the Defendants upon any special promise to answer for the debt default or miscarriages of another person... unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and

signed by the party to be charged there with or some other person there unto by him lawfully authorized.

It was argued that contrary to this provision, the Defendant had not produced any document signed by the deceased evidencing a contract of sale between them. I was referred to the case of ***Wesley Mulungushi v Catherine Bwale Chomba***¹ in which the Supreme Court held inter alia that:

“Iii where real property is the subject of sale, there is need for the sale to be evidenced by a contract of sale.

iv) 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 the consideration.

v) The court will decree specific performance only if it will do more perfect and complete justice than the award of damages.”

I was also referred to the case of ***Jane Mwenya & Jason Residence v Paul Kapinga***² in which the Supreme Court held that:

“A sufficient note or memorandum existed of which time was not of essence. There was no unreasonable delay to complete and that no

completion notice was issued. Therefore there was no basis of rescinding the contract.”

It was submitted that unlike the case above, the Defendant in the present case did not furnish the administrators any note or memorandum of contract signed by the late Raymond Himalambo Mweemba. That the deceased is not available to give viva voce evidence of the transaction and the law does not allow viva voce evidence of either the Defendant or other persons in order to prove that there was a contract of sale. It was therefore argued that in the circumstances there was no need of conducting a trial as the Defendant and his witnesses are incompetent to adduce any oral evidence to prove the contract of sale.

The Defendant filed in skeleton arguments dated 6th of February 2020. I was referred to the description of the Statute of Frauds preferred by **Blacks Laws Dictionary 9th edition at age 1545** which reads:

“A 1677 English statute that declared certain contracts judicially unenforceable but not void if they were not committed to writing and signed by the party to be charged.”

I was also referred to **Uniform Commercial Code par 2-8 at 82 (4th Edition 1995)** in which the authors commenting on the Statute of Frauds opine that:

“The primary theory of Statutes of Frauds, past and present is that they are means to the end of preventing successful courtroom perjury. The means to this end is simply the requirement of a writing signed by the party to be charged but the statute of frauds writing requirement is ...so far from any kind of guarantee against successful perjury that it is inappropriate even to call it means of fraud prevention at all.”

Based on the above, the Defendant submits that the purpose of the Statute of Frauds was to prevent giving of false testimony in court at common law. However that it is not effective especially where as in this case, the Defendant has material witnesses to testify to the facts of the matter at hand.

It was submitted further that the Defendant has been in possession of the land since 2008 on which he has put up structures and been cultivating. He thus qualified to be entitled to the land despite losing the letter of sale as far as he was concerned. Relying on a passage from **Halsbury’s laws of England 4th edition volume 17 at page 28 paragraph 36** the Defendant submits that he had

demonstrated acts of ownership in spite the absence of document of sale.

The Defendant also referred me to section 13 of the High Court Act Chap 27 of the laws of Zambia to argue that the High Court has power to administer law and equity concurrently in deciding matters before its. In this vain that there are material witnesses who are alive and will be able to testify and prove that the Defendant is a bonafide purchaser for value of the property in issue. In making the point that oral evidence can be received by the court in this case reliance was also placed on order 5 rule 24 of the High Court rules. He prayed that the preliminary issue be dismissed with costs.

At the hearing State Counsel S. Zulu relied on the notice of motion to raise preliminary issues and supporting affidavit. He also relied on the skeleton arguments filed on 21st January 2020. In his oral submissions, State Counsel more or less repeated the contents in the skeleton arguments and emphasized that it was not possible to adduce oral evidence in the absence of a memorandum to prove the existence of a contract of sale. Further that there is a likelihood that

the witness can perjure himself as the deceased cannot speak for himself.

He added that there was sufficient time between 2008 when the Defendant claims to have obtained the land and 2011 when the deceased passed away for the Defendant to have obtained a receipt of payment evidencing a contract of sale. Further that there was a discrepancy between what the Defendant told the 1st Plaintiff and what he deposed to in the affidavit about the whereabouts of the documents. He prayed that the court declares that the Plaintiffs are entitled to an order for vacant possession and the Defendants counterclaim for specific performance should be dismissed with costs.

The Defendant in response totally relied on the filed affidavit in opposition to the notice of motion and skeleton arguments dated 6th of February 2020.

I have carefully considered the application before me. The crux of the preliminary issue raised is that the Defendant has not exhibited or produced a contract and or memorandum to confirm the sale of the land in dispute and hence contravenes S.4 of the Statute of

Frauds 1677 requiring contracts for the sale of land to be evidenced in writing. State counsel submits that oral evidence is then not permissible to prove the fact of the sale in which case a trial becomes unnecessary.

The Defendant on the other hand maintains that he has the witnesses available who can confirm that he was the bonafide purchaser of the land in issue even in the absence of the contract which he professed to have lost. Further that he has been in possession of the land which he cultivates and has put up structures on from the time of purchase.

The intent of the Statute of Frauds 1677 has been well articulated by both parties. The Act was enacted primarily to prevent possible perjury and fraud by requiring contracts for sale of land to be evidenced in writing. However with time problems emerged. Commenting on this development, Mudenda Fredrick in his work **Land Law in Zambia: Cases and Materials Unza Press 2007**

writes at page 320 that:

“After the passing of the Statute of Frauds 1677 it was realized that the statute was being used for unconscionable dealings which itself was

designed to remedy. The Statute became an engine of fraud. A party to a verbal or oral contract for sale of land or disposition of any interest in land could disclaim liability (in spite of performance of reciprocal terms by the other party) for his own performance on the ground that the contract had not been reduced into writing. Common law offered no remedy in such a case or situation. Equity however intervened to deal with such unconscionable situations”

That intervention took the form of the doctrine of part performance as an exception to the requirement for contracts for the sale of land to be evidenced in writing. Thus in ***Steadman vs. Steadman***³ Lord Simon of Glasdale succinctly explained the doctrine in the following terms.

“where therefore, a party to a contract unenforceable under the Statute of Frauds stood by while the other party acted to his detriment in performance of his own contractual obligations the first party would be precluded by the court of Chancery from claiming exoneration, on the ground that the contract was unenforceable from the performance of his reciprocal obligations; and the court would, if required, decree specific performance of the contract. Equity would not, as put, allow the Statute of Frauds to be ‘used as an engine of fraud’...Part performance could be

viewed as a way of proving an agreement falling within section 4 notwithstanding the absence of writing...”

The case also settled the principle that mere payment of money can be considered as an act of part performance whereas in **Hodson vs. Heuland** ⁴ part performance was also upheld where the purchaser was allowed into possession before the contract and remained in possession.

In **Mpashi vs. Avondale Housing Project Limited** ⁵ the Supreme Court held that:

“There is no doubt that there was no written contract between the two parties, but there remains only an oral contract which could be enforced through part performance. The decision in the Steadman’s case shows, that there is no general rule that payment of money cannot be part performance but this payment must be referable to one transaction. The purchaser in this case said the deposit was in respect of the house which had been offered to her. The deposit therefore referred to only one particular transaction i.e. the purchase of the house in Avondale. The payment of the deposit in this case was clearly referable only to one transaction; such payment therefore amounted to part performance of the contract and is an exception to the rule requiring a memorandum in writing.”

The above authorities make the point that the doctrine of part performance is an exception to the stringent rule in section 4 of the Statute of Frauds 1677. Resultantly therefore, it follows that oral evidence is permissible to establish the part performance as claimed by the Defendant who asserts not only payment of the money but possession of the property in this case.

As correctly submitted by the Defendant this court by virtue of section 13 of the High Court Act Cap 27 of the laws of Zambia administers both law and equity concurrently. The section provides:

13. In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any

conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.”

Needless to state therefore, the court can consider the Defendant's evidence as he in essence appeals to equity in staking his claim to the land.

The above said, it is abundantly clear from the affidavits and submissions that the existence of the contact of sale for the land in issue is in dispute and the Defendant has clearly expressed a desire to call witnesses to prove his claims. Triable issues are therefore apparent. It is common cause that the Plaintiffs raised this application pursuant to Order 14A. Order 14 A 2(8) of the RSC provides that the summons in support of an application should be supported by affidavit evidence deposing to all the material facts relating to the question of law or construction to be determined by the court. The rule goes on to state:

“The Defendant may of course file affidavit evidence in answer but such an affidavit must also be confined to matters within the personal knowledge of the deponent. The object of the Defendants affidavit evidence should be to confirm or adopt or supplement the material facts

deposed to by or on behalf of the Plaintiff but not to traverse or challenge or contradict such facts since on an application under Order 14 A there is no room for any dispute between the parties as to the necessary material facts. (Emphasis mine)

Furthermore, under order 14 (A) rule 2 (3), the learned authors of the White Book state that a key requirement is that the question of law or construction is suitable for determination without a full trial of the action. A full trial as I have said is unavoidable in the present case which inevitably spells doom for the application before me. I would therefore dismiss the preliminary issue raised for the above reasons which in any event if successful would even have had the undesirable effect of preventing the Defendant from being given an opportunity to be heard at all.

Furthermore having concluded that triable issues are clearly evident in this matter, proceeding by affidavit evidence becomes wholly inappropriate. Therefore in terms of order 28 r 8 of the Rules of the RSC, I order that the matter shall now proceed as if commenced by writ warranting the reception of oral evidence. I further order that the affidavits on record will stand as pleadings

and grant the parties leave to file supplementary bundles of documents if they so desire.

Costs for this application are for the Defendant to be taxed in default of agreement.

Dated at Lusaka this 30th day of July 2020.



JUDGE.

