

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

2008/HP/0608

BETWEEN:

BESNART ZIMBA

LUKE PHIRI

AND

EDNAS BANDA

CHARLES ZIMBA

ATTORNEY GENERAL



1ST PLAINTIFF

2ND PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

3RD DEFENDANT

Before the Hon. Mr. Justice E. M. Sikazwe in Chambers.

For the Plaintiffs : *Mr. G. Cornhill – Mrs Wilson & Cornhill*

For the 1st & 2nd Defendants : *Mr. Nzonzo – Messrs I C N Legal Practitioners*

JUDGMENT

The Plaintiffs in this matter, Besnart Zimba and Luke Phiri commenced this action against the 1st and 2nd Defendants by a Writ of Summons. The claim on the summons is as follows:

- 1. The first Plaintiff is a natural daughter and the administrator of the estate of the late Samson Zimba.*
- 2. The late Samson Zimba was a Civil Servant in the Ministry of Local Government and Housing.*

3. *The Government of the Republic of Zambia (GRZ) offered to the late Samson Zimba for sale, the property known as CL/L/2 of Lus/4807 Lusaka at a price of K900.00 in 1999.*
4. *The late Samson Zimba accepted the offer and paid for the property by deductions from his payroll.*
5. *Later in 1999, the late Samson Zimba leased out the property to one Kennedy Phiri.*
6. *The late Samson Zimba died intestate on the 19th July, 2005.*
7. *After the death of the late Samson Zimba, the widow advised the beneficiaries that the tenant Kennedy Phiri had paid rent in advance and left all documentations relating to the property with the first Plaintiff.*
8. *The widow now deceased, left for the village for over a year and on her return the family decided to dispose of the property.*
9. *The first Plaintiff and other beneficiaries decided to visit the property to reconcile on the rentals due and found one Ronald Kalumbwa in possession of the property.*

10. The said Ronald Kalumbwa told the Plaintiff and the other beneficiaries, that he was a tenant of the first Defendant and did not know the late Samson Zimba or Kennedy Phiri.
11. The first Plaintiff commenced the process of obtaining title.
12. The first Plaintiff subsequently uplifted an Original Certificate of Title in the late Samson Zimba's name from the Commissioner of Lands upon production of late Samson Zimba's and her National Registration Cards and an Order of Appointment of Administratorship.
13. Subsequently, the Plaintiff met the first Defendant Ednas Banda at the property, and she was claiming ownership of the property alleging that she purchased the same from the second Defendant who was the administrator of the late Kennedy Mbophe Phiri, who allegedly bought the property from late Samson Zimba.
14. Neither the alleged sale of the property by late Samson Zimba to late Kennedy Mboshe Phiri nor the subsequent sale from the administrator of the late Kennedy Mbophe Phiri to the first Defendant have been registered at the Deeds Registry, but the 1st Defendant has had possession and claim of ownership of the property.

15. *The first Defendant is still claiming ownership of the property and the second Defendant alleges that the late Samson Zimba sold the property to late Kennedy Mbophe Phiri.*

16. *Pursuant to a Ruling of the Supreme Court obtained at the behest of the Defendant's herein, the Second Plaintiff is enjoined from selling the property.*

17. *In consequence of the matters aforesaid, the first and second Plaintiffs have suffered loss and damage and now claim for:*

(a) an Order that the second Plaintiff is the lawful owner of the property known as Unit CL/L/2 of Lus/4807 Lusaka;

(b) an Order that the purported Contract of Sale between the late Samson Zimba to late Kennedy Mbophe Phiri and the subsequent Contract of Sale between the Defendants are void;

(c) an Order that the Certificate of Title in the Defendants' Custody is a forgery and should be cancelled or annulled by the Registrar of Lands and Deeds;

(d) mesne profits for the period the Defendants had possession and or control of the property;

She presented her late fathers' payslip, Order of Appointment, her NRC together with her late father's NRC. She was later given a letter which she took to the Ministry of Finance. It was verified that her father had finished paying for the house and she was given another letter to take to the Ministry of Lands. She also managed to engage the Surveyors who prepared the Diagrams for presentation to Commission of Lands. Eventually she uplifted the Title Deeds in the name of her late father Samsonimba. She was then referred to the Defendant's Bundle of Documents at pages 3 and 4 which had a letter dated 27th May, 1999 addressed to one Kennedy of Post Box 76, Lusaka. She stated that it was a Contract of Sale and purported to be signed by her late father Samsonimba. The hand writing and signature to her looked like her father's but she disputed them as genuine like the ones she recognized which appeared in the 2nd Plaintiff's Bundle on the Zambia Public Services Document dated 15th February 1995.

In cross examining by Counsel Nzonzo she admitted that she was very conversant with her father's signature and handwriting and those referred to her in Defendant's Bundle of Documents were not genuine as her father's signature and handwriting, even though she was not a handwriting expert. She further confirmed that her father was paying for the house as well as was shown on her father's payslips, even though she never produced them in Court. She admitted that she was given a Government receipt number 219479 from the Ministry of Finance confirming the full payment of the purchase of her father's house dated 02/06/1999. This receipt

and other documents obtained from the Ministry of Finance were presented to the Commissioner of Lands to obtain the Title Deed. However, she does not know where she had placed the original receipt. She was not aware that the Defendants have had always in possession the original copy of the receipt together with the receipt for surveyors fees in the sum of K25,000.00. (old currency) According to her she had misplaced all the original copies of these two documents when she was making photocopies of them. She came to know later that both these documents were with the Defendants. She was not aware that her father had offered to sell the house to Kennedy Mbophe Phiri at a price of K5.5 million (old currency). She was also not aware that her father managed to pay the whole purchase price of the house for K900.00 after selling the house to Kennedy Mbophe Phiri, and that her father then decided to handle over all the house documents to him and that is how the original documents for the house moved from her father to Kennedy Mbophe Phiri and finally to the 1st Defendant. She never agreed that this is how the documents passed on from her father to the 1st Defendant. She was also not aware that before she collected the Title Deed the Defendants had already collected the Title Deed from Commissioner of Lands as earlier as 18th December, 2007. She only came to know about it when Writ of Summons were issued.

In re-examination she stated that her father was all along collecting rentals until the time of his death. She paid K25, 000.00 (old currency) for surveyors fees and she was given the receipt and this was in 2007. She further said that she was summoned by the

Registrar of Lands about the Title Deed she obtained for the same house in March 2008.

That was all in her evidence in Chief and there were no cross examination from the Attorney General's Counsel.

In Defence, Zimba Charles Kambani Paul a 63 years old man stated that the property in question LUS/480007/CL/L/2 otherwise known as house number 33 Luangwa Road Kamwala Lusaka belonged to his nephew Kennedy Mbophe Phiri who died on 14th July, 2002. On 12th July 2002 he visited his nephew who was very sick. He handed over to him documents pertaining to two properties, the same house in question and another house in Kuku Compound Lusaka. He was told that these properties were left by his father the late John Phiri. As for the property in question he was given the original letter of offer from the Ministry of Lands, accompanied by an original letter from the Ministry of Finance to the Commissioner of Lands authorizing the release of the Title Deed to Samson Zimba. Also a letter of authority for the sale of the house written by Samson Zimba to the late Mbophe Phiri. There was also a letter of Sale between Samson Zimba and Kennedy Mbophe Phiri at the price of K55, 000.00. This letter was written on a headed paper of Desting Estate Agency, and a photo copy of the NRC for Samson Zimba. There was also an original receipt for the payment of surveying the property. He was also given an original receipt for the final payment of the property from the Ministry of Finance for K900.00. Two days later his nephew Kennedy Mbophe

Phiri passed on and that was on 17th July, 2002. The family agreed that he should be the Administrator of the Estate of his nephew. He then sold the property to the 1st Defendant Ednas Banda for K25 million (old currency) and this was on 23rd November, 2003. However, he obtained the letter of Administrator for the Estate of the late nephew Kennedy Mbophe Phiri on 20th June, 2008, when the issue of the sale of the house was brought up by the 1st Applicant. He then requested the 1st Defendant to proceed to obtain the Title Deed for the house in the name of Samson Zimba.

In cross examination from Counsel Cornhill he confirmed that he uplifted a duplicate Title Deed from the Ministry of Lands and not an Original as he was told at the Ministry of Lands that the Original Title Deed will be given to the Government. And Samson Zimba being the second person to uplift the Title Deed he will be given a duplicate. All the documents he presented to the Ministry of Lands were given to him by his late nephew Kennedy Mbophe Phiri. The 1st Defendant paid him the full amount of K25 million (old currency) after he handed over a letter of offer dated 1st July 2003.

In re-examination he stated that all the documents he presented to the Ministry of Lands he got them from the Ministry of Finance. Even the grammatical mistakes made in the Duplicate Title Deed were done by the Ministry of Lands. As regards the Order of Appointment and the address of his late nephew Kennedy Mbophe Phiri in the document that was done by the Chilenje Local Court. He lastly confirmed that he was referring to the Duplicate Title Deed

in his evidence as the Original Title Deed and this was in his Affidavit. The second Defence witness Ronald Musonda Kalumbwa stated that he was a tenant for the house number 33 Luangwa Road Kamwala from December 2003 up to early 2011. His Landlord was Mrs Ednas Banda. He came to know and meet the 1st Applicant in 2007, when she confronted him demanding to see his landlord to whom he was paying his rentals. He later managed to arrange a meeting for the first Plaintiff and her sister with Mrs Ednas Banda over the issue of the house. He also at one time was approached by the 2nd Plaintiff over the house and this was if not in 2009 then it was in 2010.

The third Defence witness was a 61 years old lady Mrs Ednas Lungu Banda. She stated that she was approached by Charles Zimba in May 2003 that he was selling a house number 33 Luangwa Road, Messengers Compound, Kamwala. He told her that he was appointed by his family to be an Administrator for his late nephew's Estate Kennedy Mbophe Phiri. The price for the property was K25 million (old currency). She was told that the original owner and the papers were in the name of Samson Zimba. She was given the original letters of offer from the Ministry of Finance and the Contract of Sale between the late Mr Samson Zimba and Mr KennedyMbophe Phiri. The purchase price for the house from the Ministry of Finance was K990.00 (old currency). The other documents she was shown was Mr. Samson Zimba's photocopy of his National Registration Card. The Contract of Sale of the house was written on a paper of an Estate Agent called Desting and the

price was K5.5 million Kwacha (old currency) she later went to the Ministry of Lands to satisfy herself if the documents given to her would be able to let her have Title Deed in her name. She was told that the paper would need to be accompanied with the Order of Appointment of Administrator from the seller. She finally paid cash to Mr Charles Zimba in December 2003. She started having discussions with the 1st Plaintiff in July 2007 when she asked her if she was the one who had bought house number 33 Luangwa Road, Kamwala. After some exchange of bitter words she reported the matter to the Police Victim Support Department. She met the second Plaintiff and one Alex Nyendwa at the Police Station who said he was the husband of the 1st Plaintiff. The Police told them that since both had Title Deeds they better approach the Court. On 23rd June 2008 she was sued in the matter.

In cross-examinations she stated that she bought the house from Mr Charles Zimba who was her neighbour for more than 20 years. When she first saw the house Mr Mhango was the one renting the house. She managed to check on various documents regarding the house which were with the Vendor Charles Zimba. To her, they looked to be original documents which were later presented to the Ministry of Lands. Even though some of the documents she remembers being in possession of Charles Zimba were legible the ones she was referred to in the Bundle of Documents seems to be distorted as some of the writings could not be read by her and also there was inconsistency in the type setting and spelling of the words "Ministry of Finance" which requested the Ministry of Lands to

issue Title Deed. She confirmed that Charles zimba and herself collected Duplicate Title Deed from Ministry of Lands, as they were told that the Original Title Deed will be sent to the Ministry of Finance (Government) the first owners of the property. All this was said by the assistant Deputy Registrar of lands. (The fourth witness)

In reexamination she stated that Charles zimba is the one who collected the Duplicate Title Deed from the Ministry of Lands in 2007.

Aquatha Mutuma Banda, the Assistant Chief Registrar, Ministry of Lands was the fourth witness. She stated that as regards the two Title Deeds in respect of property No. 4807/CL/L/2 Lusaka in the name of Samson zimba, the Title Deed with an earlier date took precedence of the later one which is the one dated 18th December, 2007. And she further stated that a duplicate Title Deed is only issued when the Original Title Deed is lost as per Section 56 of Cap 185 of the Lands of Zambia.

And when the lease is cancelled, it will be done by the Registrar and the copy given to the owner and marked "Cancelled" as required by Section 56 of Cap 185 of the Lands of Zambia. When the Title Deed is issued the original is given to the owner and the copy of same will remain on the file with the Ministry. It was not correct that **DW1** and **DW3** were told by any Ministry Official that the original will be sent to the Ministry of Finance. It was also not true that the Registrar issued a duplicate Title Deed on 18th December 2007. There was also no application from any one to issue a duplicate

Title Deed for the same property. There were also some typographical errors between the two memorials for the two Title Deeds for the same property. She admitted that there was a typographical error to include "Duplicate" for the Title Deed first issued on 18th December, 2007. If the Registrar discovered any typographical errors in a Title Deed this can be corrected but the Registrar under Section 11(1) of Cap 185 of the Laws of Zambia. She admitted that there was an error in typing the size of the property as 39.6 square meters and not 3.96 square meters as it appeared in the Title Deed of 18th December, 2007. There was also another error in the memorials as the slashes were left out in the number of the plot which read 4807/CLL/2/1. If there was an error in the Title Deed that did not invalidate the Title Deed as same can be corrected by the Registrar of Lands.

In cross-examination by Counsel Cornhill she admitted that the Title Deed issued on 15th December 2007 indicated that it was a Duplicate Title Deed.

This Title Deed was in the name of Samson Zimba. The one issued on 4th March, 2008 stated "Certified Title." She admitted that the 2nd Defendant wrote a letter to the Commissioner of Lands to verify the issuance of the Title Deed by the Ministry of Lands. The date of the Certificate Title dated 4th March, 2008 was not valid in the records at the Ministry of Lands. This Title Deed was not issued by the Registrar of Lands.

In reexamination she stated that there was no such records for serial dated 10th October, 1988 in the Lodgment Schedule and same could not appear in the print out from the Ministry of Lands. However she was aware that the Original Title Deed was in possession of the 2nd Defendant when she requested for the verification of same with her.

I have considered carefully this case involving one property number 33 Luangwa Road Kamwala, Lusaka, also known as property No. 4807/CL/ both verbal and by evidence on record. It is not in dispute that the same property was first offered to Samson Zimba by the Government by virtual of him employed as a messenger under the Ministry of the Local Government and Housing. This house was offered to him under the Government Housing Empowerment scheme which made it possible for most of the Civil Servant, be sold houses they were living in as sitting tenants. After purchasing the house Samson Zimba lived in it for a while and later decided to rent it out to one Kennedy Mbophe Phiri and himself shifted to John Laing Compound with his family. This was in 1999. After some years Samson Zimba died in 2005 and there was no problems with the house. The problem came up in 2007 when his daughter 1st Plaintiff on as Administrator of the Estate started looking for his fathers property which her mother told her that it was in Kamwala Compound. Going to the house she discovered that it was occupied by now one Ronald Musonda Kalumbwa who told her that he did not know her, but knew a Mrs Ednas Banda as her landlord. When she finally met Mrs Ednas Banda she was told

that the house was bought from one Charles Zimba. Charles Zimba stated that he was an Administrator of the estate of the late Kennedy Mbophe Phiri and he was authorized by the family of the late Kennedy Mbophe Phiri to sale the property. This is when he sold it to his neighbor another Civil Servant Mrs Edness Banda for K25 million (old currency). Charles Zimba to sell the property he produced some papers which he presented to Mrs Ednas Banda and the Registrar of Lands to obtain the Title Deed of the late Mr Samson Zimba on 18th December, 2007. That is how the 1st Defendant Mrs Ednas Banda got all the papers regarding the property in issue as a purchaser after a consideration of K25 million (old currency) was paid. The documents of the property passed on to one Kennedy Mpophe Phiri after the late Samson Phiri surrendered the papers after he was paid K5,500,000 (old Currency) including the other papers from the Ministry of Finance and Economic Development and these included:

- i. original letter of offer from Ministry of Lands;*
- ii. a letter from Ministry of Lands to the Commissioner of Lands to release Title;*
- iii. contract of Sale between late Samson Zimba and late K. M. Phiri*
- iv. photocopy of NRC for late Samson Zimba;*
- v. letter of offer from Ministry of Lands; and*
- vi. receipt of Survey.*

These documents were submitted to the Ministry of Lands on 11th December, 2007 and apparently uplifted the Duplicate Certificate of Title on 18th December 2007 in the name of Samson Zimba. On the other hand the Plaintiff also submitted the same documents from the Ministry of Finance and Economic Planning in June 2007 and submitted them to the Ministry of Lands and obtained the Title Deed in the name of her father Samson Zimba. On selling the property the 1st Plaintiff engaged her Advocates who did the transaction from the Assignment up to the obtaining the Certificate of Title to the Purchaser Luke Phiri the 2nd Plaintiff. The documents lodged with the Ministry of Lands included:

1. *certificate of Title No. 73252 (Samson Zimba);*
2. *order of appointment of Administrator;*
3. *consent to Assign;*
4. *property Transfer Tax Receipt;*
5. *property Transfer Tax clearance Certificate;*
6. *deed of Assignment; and*
7. *dr 53.*

And a Certificate of Title No. 78896 in the name of Luke Phiri (Second Plaintiff) was issued on 2nd July, 2008.

Further to that a Lands Register for the same property was submitted into Court which was printed on 26th November, 2009. It had all the necessary and correct information on how this property was assigned from the President of the Republic of Zambia starting

from 18th December, 2007 to 2nd July 2008 in the name of Luke Phiri the 2nd Plaintiff.

Following all this, I find that the transaction of the 1st Plaintiff and the 2nd Plaintiff to be genuine and all the procedures and requirements followed in selling the property.

I find the transaction between the 1st Defendant and 2nd Defendant dubious and cannot be accepted by this Court. Yes the documents relating to the same property could be in the hands of the 2nd Defendant before selling the property to the 1st Defendant. That does not mean that his late nephew Kennedy Mpophe Phiri bought the house from Samson Zimba at K5,500,000 (old currency) that is why all the papers were with him. But there was no proof to ascertain that from the 2nd Defendant. My doubt also goes to the submitted hand written documentary evidence of the letter dated 27th July, 1999 by the late Samson Zimba, offering the property for sale to Kennedy Mpophe Phiri. At the same time there is now a typed letter dated the same 27th May, 1999 stating that Samson Phiri had received the sum of K5,500,000 (old currency) and that he had no claim whilst over with the same house. The question one would ask is why, two letters the same day, one hand written offering the property and the other typed and having more information of even receiving cash from the Purchaser? There are also other anomalies with the papers held by the 2nd Defendant, and this is to do with the "*Headed Paper*" of the whole Government Ministry regarding its Department ie "*Developmentally*" instead of Development? The

Original Certificate of Title came out on 2nd July, 2008 then where, how and why did the Duplicate Title Deed come out on 18th December, 2007?

A Duplicate Title Deed can only be obtained after the necessary application has been submitted to the Commissioner of Lands in misplacement of the Original Title Deed. In this case there is not such required documents shown to this Court for obtaining a Duplicate Title Deed. Then why and how did the 2nd Defendant obtain a Duplicate Title Deed before the Original Title Deed was issued? It has also come to the notice of this Court that both 1st and 2nd Defendants are well educated and employed by then as teachers why then were they transacting in an important issue of land as if they were dealing with ordinally consumables other than land? Looking at the 2nd Defendant's proposed sale letter to the 1st Defendant dated 5th May, 2003 clause 10, stated that:

"Mr Samson Zimba original owner of the property to be contacted on the release of the Title Deed from Commissioner of Lands for transference of the deed to you".

Why then he did not do likewise as he promised the 2nd Defendant? He must have known that the Title Deed was to be in name of the Samson Zimba and not in the name of his nephew Kennedy Mbophe Phiri. There is no way a property like a house can be sold to a third party as in his case at hand.

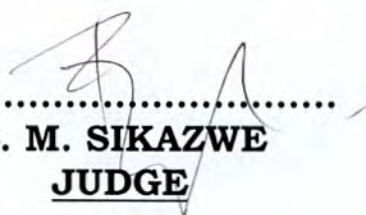
The first Applicant in her capacity as an Administrator of the deceased's estate offered to sell the property to the 2nd Applicant and followed the formality of executing the Law Association of Zambia Contract and Conditions of Sale through her Advocates Messrs Wilson and Cornhill. A consent to assign was obtained from the Commissioner of Lands and property transfer tax was paid. A tax clearance Certificate was issued to the Commissioner of Lands on 24th June 2008. The second Applicant completed the purchase of the property as agreed and was issued with the Certificate of Title No. 78896 on 2nd July 2008. The Land Register printout indicated all the registered interests from the date this property was registered under common leasehold on the 15th December, 2007 to the date the Certificate of Title No. 78896 was registered in favour of the second Applicant on the 2nd July 2008. All this appear from the exhibited documentary evidence before the Court.

As can be seen from the Original Memorials endorsed on Samson Zimba's Certificate of Title neither of the Defendants registered any registerable interest in the property at hand. It follows that none of the Defendants has any lawful claim of right of any sort, as a lawful purchaser even though the Second Defendant was an Administrator of the late estate of Kennedy Mbophe Phiri. Which was even obtained after the sale of the purported property. The 2nd Defendant had no right to sell the property to the 1st Defendant in the manner it was done, as the purported sell of the property to her was invalid at law.

I therefore find that the transaction between the 1st Plaintiff and the 2nd Plaintiff was genuine and Order that the 2nd Plaintiff is the rightful owner of the property known as Unit CL/L/2 of Lus/4807 Lusaka. The 1st Defendant and the 2nd Defendant to pay mesne profits to the 2nd Plaintiff the rightful owner of the property from the date of the Writ, being 23rd June, 2008 to date. Costs of this action to be in favour of the Applicants same shall be taxed in default of agreement.

Appeal to the Higher Court granted.

Dated at Lusaka this 17th day of July, 2020.


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E. M. SIKAZWE
JUDGE