

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

2013/HP/1204

BETWEEN:

ESAU PHIRI



PLAINTIFF

AND

FRED WAMALA

DEFENDANT

***Delivered in open Court by the Hon. Mr. Justice Mathew L.
Zulu, at Lusaka the 30th day of June, 2020***

*For the Plaintiff: Mr. L.Banda, Messrs. T.S. Chilembo and
Partners*

*For the Defendant: Mr. M. Katolo with Mrs. C. Hampungani, Messrs
Milner and Paul Legal Practitioners*

JUDGMENT

Cases referred to:

1. Rachael Shankwanka v. Lubinga Demetria Nanganda(S.C.Z.Appeal No. 8 of 2013)
2. Admark Ltd v. Zambia Revenue Authority (2006) Z.R.61
3. G.F.C Construction(1976) Ltd v Rudnap(Z) Ltd(1999) Z.R. 134
4. Ndongo v. Moses Mulyango Roostico Banda(2011) Z.R.1 Volume 1.
5. Kabwe(Suing in his capacity as the Administrator of the Estate of Late Rosmary Mwanza)v. Wilson Nkhoma(2012) Z.R. 14
6. Said Chibwana and another v. Chitauka(Suing as Administratrix of Estate of the late Hachaambwa Chitauka(No. 215 of 2014)

7. *Justin Chansa v. Lusaka City Council*(2007) Z.R. 256

8. *Isaac Tantameni C. Chali (administrator of the estate of the late Mwalla Mwalla) v. Leslie Mwala (a single woman)*(1997) S.J. 22(S.C)

The plaintiff commenced this action against the defendant by way of writ of summons accompanied by a statement of claim on 16th August, 2013. The writ of summons was amended with leave of court on 29th October, 2013. The plaintiff seeks the following reliefs.

1. **Rescission of the contract;**
2. **Damages for breach of contract;**
3. **Further or alternatively damages for breach of contract;**
4. **Costs.**
5. **Interest; and**
6. **Any other relief the court may deem fit**

The plaintiff claims that he is owner of stand no. 4472, Kalundu Lusaka which property is in the process of being converted to stand no. 27378. The plaintiff states that on 23rd December, 2006, he agreed to sell to the defendant a proposed subdivision ("**the Property**") of stand no. 27378 Zambezi Road, Kalundu, Lusaka at the price of K40, 000,000.00. The defendant paid the sum of K5, 000,000.00 as commitment fee. It was agreed that the defendant would not carry out any developments on the Property until the

purchase price had been fully liquidated. However, the defendant without the consent and knowledge of the plaintiff and in breach of the agreement proceeded to erect a building on the Property. The plaintiff reported the matter to the Lusaka City Council who advised the plaintiff to fulfill the end of his bargain by processing the documents necessary to complete the transaction with the defendant. It is asserted that without his consent and knowledge, the defendant changed the ownership of his motor vehicle a Mitsubishi Pajero bearing registration no. ABL 5523 into the plaintiff's name and delivered it to the plaintiff in lieu of the balance of K35, 000.000.00. The plaintiff rejected the vehicle as it is a non runner and therefore seeks for rescission of the contract as the defendant has not paid the balance due on the purchase price.

The defendant entered appearance and filed into court his defence and counter claim on 14th November, 2013. The defendant concedes that he entered into an agreement whereby he agreed to purchase a proposed subdivision of stand no. 27378 Zambezi Road, Kalund which was to be known as 273778/B Kalundu. He states that in addition to the advance or deposit that he paid of K5, 000.00, it was

later agreed that the defendant would pay the ground rates owing to the Lusaka City Council on behalf of the plaintiff in the sum of K2, 376.64 and a further payment of K2, 723.36 bringing the total amount paid to the plaintiff towards the purchase price to K10, 000.00. He asserts that it was also part of the agreement that he would give the plaintiff the Mitsubishi Pajero valued at K32, 000.00 to settle the outstanding balance of K30, 000.00 which he did and started constructing on the property on the belief that the purchase price had been paid in full. He states that the plaintiff had the vehicle for more than a year and refused the vehicle after a dispute arose on completion.

The defendant states that the plaintiff would only manage to process the papers to the property through fraud as the plaintiff does not own property no. Lus/4472 and neither is there an extension of the said property. The defendant however asserts that Council confirmed the extensions of plots 4471 -4478. The defendant therefore alleges that the land on which the extensions are supposed to be effected belongs to New Apostolic Church Zambia Limited. He therefore, alleges fraud on this basis and also

on the basis that the plaintiff has no authority to sale a purported subdivision which did not exist at the time of the agreement. The defendant claims that the minutes that approved the extensions were wrong and so is the site plan that shows the purported extension over plot 26770. The defendant therefore, Counter claims for the following reliefs:

- 1. An order that the purported agreement of 23rd December, 2006 is null and void;**
- 2. An order directed at the plaintiff to pay back to the defendant the K40,000.00**
- 3. A declaration that the plaintiff is not the owner of the purported subdivision No. 27378/B;**
- 4. An order at the Lusaka City Council to legalize the purported subdivision 27378/B and issue out the offer letter the defendant herein(sic);**
- 5. Interest on(ii) above**
- 6. Any other costs the Court may deem fit; and**
- 7. Costs**

The plaintiff filed into courts his reply and defence to Counter claim on 11th December, 2013. The plaintiff maintains that he is the owner of stand No. 4472 which is in the process of being converted to stand 27378 and that the defendant was always aware of the

circumstances pertaining to the property as set out in the agreement. He denies that the sum of K5, 000.00 paid by the plaintiff was a deposit but a commitment fee and denies that the defendant made further payments of K2, 376.64 and K2, 723.36 towards the purchase price. The plaintiff states that he has submitted the plans and necessary documents to the Lusaka City Council to complete the transaction with the defendant. He denies the defendant's assertion of fraud and that subdivision 27378/B does not exist or that he does not own the same.

After the close of pleadings, the plaintiff sometime in 2014 obtained an ex parte order of interim injunction which was confirmed by a ruling dated 18th July, 2014.

At the hearing, the plaintiff gave oral evidence and he was PW1. He testified that on 23rd December, 2006, he entered into an agreement whereby he agreed to sell to the defendant a proposed plot No. 27378/B which he agreed to subdivide to him on the fulfilling of the agreement between them. He testified that he and the defendant executed a contract and in line of which he received the K5, 000,000.00 from the defendant as a commitment fee stopping him

from offering the property to someone else. PW1 testified that the defendant erected a structure on the proposed subdivision without paying the balance. In 2010, the defendant approached the plaintiff and offered to give him a vehicle to offset the balance on the purchase price but the plaintiff refused as it was not part of the agreement and the vehicle was a write off. PW1 testified that in the meantime, he proceeded to process the survey diagram for the property agreed to be sold which was approved and he obtained the survey diagram in 2008.

PW1 testified that he purchased property no. 4477, Zambezi Road, Roma Township from the Lusaka City Council who was his employers in 1996. It was his evidence that he has a certificate of title to the property. PW1 testified that in 2001 he and other property owners applied to the Lusaka City Council to have their boundaries realigned and the Council approved the extensions and advised them to pay the survey fees and to change the numbering of their plots from 27377 - 27374. It was his evidence that the survey was conducted and approved by the Surveyor General who re-numbered the properties. It was his evidence that initially the

access was to be through Apostolic Church his colleagues decided to sale to the church but he refused and consequently the church put a wall fence over the area. It was his testimony that because the defendant failed to pay the purchase price, he resolved to cancel the sale.

In relation to the minutes produced at page 2 and in particular paragraph 2 of the defendant's supplementary bundle of documents, the plaintiff testified that he was not aware of any court proceedings in which the defendant obtained a ruling in his favour over the house he has built on the proposed subdivision and that he was not called to a meeting where the defendant gave this information. In relation to the minutes at page 2 of the defendant's supplementary bundle of documents, PW1 testified that he has not joined the Lusaka City Council to the proceedings to challenge the said information.

When cross examined, PW1 confirmed that property no. 4472 was realigned to no. 27378 which was a consolidated plot and that he did not have title to it. He testified that at the time of the contract of sale with the defendant, plot 27378/B was a proposed plot by him

to the Council and the Ministry of Lands. He also maintained that he obtained approval for the proposed extension through the minutes at page 16 of the plaintiff's bundle of documents and that he complied with the requirements stipulated in the minutes though he had not exhibited the survey receipt.

PW1 confirmed that according to the Land Register at page 37 in the defendant's bundle of documents, the Lusaka city Council is the title holder of Lus 4472. He confirmed that according to the entry on the land register at page 36, Lus 26770 is part of the extension of the land that they are neighbours. He confirmed that he has no certificate of title for 27378. PW1 maintained that 4472 was given to him by the Council as is confirmed by the minutes marked EP3 in his affidavit in opposition of the summons for an injunction. He maintained that he had approved diagrams which were not before court and that EP5 has no names. PW1 confirmed that he had been in court before with the defendant at the Subordinate Court and there was a judgment that he received money from the defendant for the sale of land before approval from the Ministry of Lands. PW1

confirmed that the only documents he had in relation to the extension to 4472 were the minutes.

In re examination, PW1 confirmed that the case in the Subordinate Court was between the State and himself and that there is an appeal. He told the court that the extensions were approved in 2008. This marked the close of the plaintiff's case.

The defendant testified in his own stead as the sole witness and he was DW1. It was his evidence that on 23rd December, 2006, he entered into an agreement with the plaintiff for the purchase of land at the price of K40, 000,000.00. He paid the plaintiff a deposit of K5, 000,000.00. It was his evidence that the Lusaka city council levied distress against the plaintiff and total costs came to K3, 000,000.00. The plaintiff requested the defendant for a round figure of K5, 000,000.00 bringing the total paid towards the purchase price to K10, 000,000.00. Later on the plaintiff told the defendant that he wanted a car and the defendant happened to have cars for Professional Insurance (PICZ) who owed him. The defendant entered into an arrangement with PICZ to set off the price of the car valued at K32, 000,000.00. It was his evidence that the vehicle was

delivered to the plaintiff in 2008 and he had it until 2010 when he took it to the mechanic where it is. He testified that the plaintiff asked Mr. Sam Mumba to be his arbitrator so that the vehicle could be in his name and he signed for the keys. It was DW1's evidence that he was allowed to begin developing on the property while the plaintiff processed the papers.

DW1 told the court that in 2010, he received a message from the New Apostolic Church to the effect that the land he was building on was not approved. He followed it up with the plaintiff who availed him minutes from the Council, site plan and survey diagrams for 4472 and assured him that he would avail him the other documents for his plot. DW1 testified that he was not satisfied with the documents hence he engaged counsel who wrote to the plaintiff but received no response which prompted him to write to the Council to seek legalization of his plot.

It was DW1's evidence that the plaintiff only owned 4772. He received a call out on 31st March, 2010 from the Council at the instance of the plaintiff which was later withdrawn. He was referred to the fraud department where he stated his case and the plaintiff

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was arrested for obtaining money by false pretence as he did not have the papers for the property he had sold to the defendant. The plaintiff was tried and found guilty. DW1 applied to the Council for his plot to be numbered and he was recommended for the plot.

DW2 testified that the minutes the plaintiff showed him were not in his name but were referring to plots 4471 to 4478. It was his evidence that the certificate of title for 4472 and the land register at page 37 of his bundle of documents 1 and 37 of the defendant's bundle of documents show that the property is in the name of the Council and there has been no change as at September, 2013. DW1 testified that he sought an order of this court to declare that 23738 is not owned by the plaintiff as established in the case before the Subordinate Court. He testified that the plaintiff had no land to sell to him.

When cross examined, DW1 testified that the plaintiff has blocked access to his plot but he confirmed that he has no title to this plot. He confirmed that he did not conduct a search at Lusaka City Council when he signed the contract. He confirmed that he had no

proof that the plaintiff wanted a car and of the agreement for a debt swap. He confirmed that he had no document from the plaintiff to start building. He confirmed that there has been no complaint from the New Apostolic Church. He confirmed that he had no approved plans from the Council. He confirmed that he did not have a receipt for the K3, 000,000 paid to the bailiffs and the additional amount.

In re- examination, DW1 testified that the letter at page 28 of his bundle of documents was written to seek clarification on the facts he had from the plaintiff. This marked the close of the defendant's case.

After the close of trial, only the plaintiff filed into court his written submissions which I have considered in arriving at this Judgment though I have not reproduced them at this point. The first issue I shall consider arose in the plaintiff's submissions. The plaintiff contends that the defendant is a non-Zambian and that as such, he is ineligible to own land. Though the issue was not raised in the pleadings, I was guided by the decision of Supreme Court in the case of **Rachael Shankwaya v. Lubinga Demetria Nang'andu**¹ that a point of law can be raised at any stage of the proceedings even

after trial. The Supreme Court referred to their decision is **Admark Limited v. Zambia Revenue Authority**² where they agreed with the trial judge to allow a point of law to be raised in the submissions. They also referred to **Order 33 rule 3 of the White Book**.

I therefore, asked the parties to address me on this issue after the close of trial. The defendant filed into court a notice to produce on 17th March, 2020 where he exhibited a residence permit issued in his favour. The Supreme Court in the case of **G.F. Construction (1976) Ltd v. Rudnap (Z) Ltd**³ in determining the eligibility of a non-Zambian to own land stated the following:

It is quite clear from this Section that no land should be granted alienated, transferred or leased to a non-Zambian after 2nd April, 1985, the date of assent, except to an approved Investor. We take judicial notice of the fact that a Contract of Sale of Land does not per say transfer ownership of land to the buyer. Much more is required. There must be a deed of assignment executed by the parties which must be lodged with the Registrar of Lands together with the necessary consents or licences. We do not therefore agree with Mr. Adams that an Investor's licence is a re-requisite to an agreement for the sale of land to a non-Zambian.

.....

The Supreme Court further stated thus-

...There was evidence at the trial that the appellant had not only applied for but obtained the exemption under Section 13 A (2) (a) of the Act. This case is therefore distinguishable from Mukosa case (2). We would therefore agree with Mr. Mubanga that the absence of an Investor's licence does not render a contract illegal, null and void but merely unenforceable and that it is an irregularity which is curable. The appeal would therefore succeed on this ground and in view of what we have said here we do not intend to consider the other grounds.(the underlining is for emphasis only)

From the above cases, it may be discerned that the lack of capacity by a non Zambian to own land does not render a contract of sale null and void but merely makes it unenforceable. This irregularity is however, one which is curable though parties are not encouraged to enter into unenforceable contracts whose irregularity may be subsequently cured as stated by the Supreme Court in the case of **Ndongo v. Moses Mulyango, Roostico Banda**⁴ in the following passage-

Indeed, as we said in G. F. Construction (1976) v Rudnap (Z) Ltd and Another (11), a contract of sale of land does not per se transfer ownership of land to the buyer and this is the position in this case. At the same time, a mere payment of a deposit towards the purchase price does not transfer ownership to the buyer. Indeed, much more is required. It is trite law that parties to a contract must be eligible to enter into such contract ab initio and our

holding in G.F. Construction (1976) Limited v Rudnap (Z) Ltd Another (11) should not be misinterpreted to mean that we are encouraging parties to enter into unenforceable contracts; whose irregularity can be cured later.

I have considered the permit produced before me issued to the defendant on 7th February, 2014. Though the defendant was undoubtedly ineligible to own land at the time he purportedly entered into a contract of sale of land with the plaintiff on 23rd December, 2006, this defect was curable and has been cured by the defendant obtaining the residence permit. The defendant is therefore eligible to own land in Zambia though he is a Ugandan National.

Coming to the substantive issues, the plaintiff claims that the defendant has breached the contract of sale of land and seeks the remedy of rescission. At the same time, the defendant in his defence challenges the plaintiff's title to Lus 4472 Kalundu and claims that there is no extension to the said property in short that the subdivision he was sold by the plaintiff does not exist and that the said land is already on title to the New Apostolic Church. The

defendant in his counterclaim therefore, claims that the contract between the plaintiff and himself is null and void ab initio. The first issue for determination is whether the plaintiff has title to stand Lus 4472 Kalundu and whether there was an extension to the plaintiff's and whether the plaintiff has title to deal with the said extension.

From the evidence before me, it is not in contention that on 23rd December, 2006 the plaintiff and the defendant entered into an agreement whereby the plaintiff agreed to sale to the defendant a subdivision no. 27378/B Zambezi Road, Kalundu Lusaka. The plaintiff has at pages 8 to 16 of his bundle of documents produced an executed contract for the sale and assignment relating to stand Lus 4472, between the Council to him. These documents have not been challenged. I therefore, find that as the plaintiff is a purchaser of Stand 4472, he is the owner of the said land in equity as equity looks at things agreed to be done as actually done. I am persuaded in this respect by the case of **Kabwe (suing in his capacity as the administrator of the Estate of the Late Rosemary Mwanza) v. Charles Wilson Nkhoma**⁵.

On the issue of whether there was an extension to Stand Lus 4472, the plaintiff has at page 16 to 17 of his bundle of documents produced minutes number PWD/153/08/01 which show that there was an application to extend or re-align plots 4471 to 4478 off Zambezi road and there was a recommendation to approve the said proposal and for the new lay out arising from the extension to be numbered. The proposed extension layout was approved by the City Council under minute number PWD/153/10/2001. It is uncontested that the plaintiff's plot being stand number 4472 was among the properties that were proposed for extensions.

The plaintiff has produced an approved survey diagram marked EP5. PW1 testified that when the extension of stands 4470 to 4478 were approved, the rest of the property owners sold their land to the Apostolic Faith Mission while he declined. This testimony appears to be consistent with the diagram at page 4 of the defendant's supplementary bundle of documents and with the print out at page 36 of the defendant's bundle of documents. However, the defendant has in his supplementary bundle of documents produced minutes dated 18th June, 2015 from the Lusaka City Council. The said

minutes state that the property does not belong to the plaintiff and that it is unsurveyed based on investigations on the ground. However, the minutes do not show whether the information was verified by an investigation by the council or if it was based on the information presented by the defendant. The letter at page 39 of the defendant's bundle of documents shows that the defendant told the Council that the land in dispute was not numbered and that it was not part of the plaintiff's property. The defendant in one vein argued that the extension of the plaintiff's land was not feasible because it was already on title to the Apostolic Church but in another vein seeks regularization of the same property and for the property to be offered to him.

From the above, it is clear that while the plaintiff claims ownership of the extension which he sold to the defendant as a proposed subdivision based on the minutes from the Council, the minutes produced by the defendant from the Council show otherwise. I am guided by the decision of the Supreme Court in the case of **Said Chibwana, Lynn Baines and Mutinta Chitauka(suing as administratrix of the late Hachabwaa Chitaula)**⁶. The brief facts

of the case are that the Hachabwaa applied to be allocated a plot which was approved by the council who then wrote to the Commissioner of Lands recommending that the deceased be offered the land. In the meantime the Hachabwaa signed an agreement in which he agreed to sale the plot to the 1st appellant. The 1st appellant subsequently sold the plot to the 2nd appellant. After the death of Hachabwaa, the respondent issued process against the appellants for trespass as there was no proof that the 1st appellant had paid the full purchase price as agreed.

The Supreme Court in this case referred to the case of **Justin Chansa v. Lusaka City Council**⁷ where they acknowledged that applications for land by the members of the public can take two forms; directly from the Commissioner of Lands or through the Council as an agent of the Commissioner of Lands. Where one applied through the Council, the latter is mandated to advertise the land to the public, receive applications and make recommendations to the Commissioner of Lands. The Commissioner would then accept or reject the recommendation. In the **Said Chibwana case**, the Supreme Court found that the deceased was only recommended

to the Commissioner of Lands to be considered for an offer in respect of the property in issue. Reference was made to Learners Dictionary of Current English, 6th Edition which defined a recommendation as “*an official suggestion about the best thing to do*”. The Supreme Court found that at the time the deceased entered into the contract of sale, he had no offer to the land but he had merely been recommended to be offered the land. They held that a recommendation is not synonymous with an offer and that it confers no legal right to the person recommended to the subject of the recommendation. They therefore, found that the deceased had no beneficial interest in the property to enter into a valid contract of sale.

Reverting to this case, PW1 confirmed that the land he sold to the defendant was proposed by him to the Council and Ministry of Lands. The minutes produced at pages 16 and 17, 19 of the plaintiff's bundle of documents show that the same were recommendations for the extension of *inter alia* the plaintiff's property Lus 4472 and an approval of the layout plan. In the circumstances, there is no evidence that the plaintiff was offered

the extension to stand 4472 by the Commissioner of Lands. The plaintiff has therefore, failed to show that he had a beneficial interest in the said extension capable of being transferred to the defendant.

In the circumstances, the plaintiff's claim for breach of contract and rescission of contract must fail as the plaintiff had no land to sale and as such the contract between him and the defendant was null and void. The plaintiff's claim is therefore, dismissed.

Coming to the defendant's counter claim, the same succeeds in so far as he sought an order that the purported contract between the plaintiff and him was null and void on the basis that the plaintiff did not own the land in issue at the time the contract was entered into. The defendant claims for a refund of the purchase price. From the facts before me, it is not contested that the purchase price of the property was K40,000,000.00 (unrebased). It is not contested that the defendant paid to the plaintiff what was termed a commitment fee of K5 million (unrebased) on even date. The agreement did not specify when the balance of the purchase price was to be paid. The plaintiff claims that the defendant has not paid

the balance of K35, 000.00. The defendant on the other hand claims that in addition to the K5, 000.00 he paid the plaintiff K5, 000.00 bringing the total to K10, 000.00. DW1 testified that the plaintiff needed a car and the defendant had a car valued at K32, 000.00 which he gave to the plaintiff for cancellation of the balance on the purchase price. The plaintiff however, disputes this.

During trial, DW1 confirmed that he had no proof that he paid the full purchase price and that the plaintiff agreed to a debt swap. However, the defendant has produced a notice to complete at page 19 of his bundle in which he asserted having paid the full purchase price. The defendant has at page 30 of his bundle of documents produced a letter in which it was alleged that the plaintiff had accepted the vehicle and used it for over a year and that he had paid 10 million in two installments. This is also the only intimation that the plaintiff was challenging the performance of the agreement by the defendant and there is no evidence that the plaintiff made a demand for the performance of any obligation at any time prior to the defendant requesting completion.

The plaintiff confirmed that he knew Samuel Mumba who signed for the receipt of the certificate of change of ownership of ABL 5523 on his behalf. He however, denied having given him authority to receive the said keys. The defendant testified that the said Mr. Mumba was chosen by the parties to help them resolve their dispute and to help deliver to the defendant the documents pertaining to the property and to the plaintiff the documents for the change of ownership of the ownership of the vehicle.

While the defendant claims that there was a debt swap, there is no evidence of the same and neither is there evidence to prove that in addition to the K5, 000.00 paid as commitment fee, he paid the plaintiff a further K5, 000.00. In the circumstances, I find that the defendant has failed to prove that he paid the plaintiff the balance on the purchase price being K35, 000.00(rebased). The defendant has however, proved the payment of the K5, 000.00 as commitment fee. I therefore, order that the plaintiff refund the defendant this amount with interest as there was a total failure of consideration.

In his counter claim, the defendant also seeks an order directing the Council to legalize Subdivision 27378/B and to issue a letter of

offer to him. The Council is not a party to these proceedings. It consequently follows that this court is precluded from making an order against it. See: **Tantameni C. Chali (administrator of the estate of the late Mwalla Mwalla) v. Leslie Mwala (a single woman)**⁸. I therefore dismiss this claim.

In a nutshell the plaintiff's claim fails. The defendant's counter claim partially succeeds and I find that the contract of sale was null and void as the plaintiff has failed to prove that he was the owner of the purported extension at the time of the sale. I also order a refund of K5, 000.00 with interest paid by the defendant as commitment fee. Each party shall bear its own costs.

Leave to appeal is granted.

Delivered at Lusaka the ^{30th}.....day of June, 2020.



MATHEW. L. ZULU
HIGH COURT JUDGE