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

**2013/HP/1768**

**BETWEEN:**

**PIEMA MARCEL MINGASHANGA**

**PLAINTIFF**



**AND**

**C.K MARBLE LIMITED  
HOWARD KASONSO**  
*(Sued as the Administrator of the  
Estate of the late Elijah Kasonso)*  
**GEORGE CHILE  
FRANK WAKUMELO  
TIMOTHY HAKUYU  
OTHER PERSONS UNKNOWN**

**1<sup>ST</sup> DEFENDANT  
2<sup>ND</sup> DEFENDANT  
  
3<sup>RD</sup> DEFENDANT  
4<sup>TH</sup> DEFENDANT  
5<sup>TH</sup> DEFENDANT  
6<sup>TH</sup> DEFENDANT**

*Delivered in open Court by the Hon. Mr. Justice Mathew L.  
Zulu, at Lusaka the 17<sup>th</sup> day of March, 2020*

*For the Plaintiff: Ms. N. Mbuyi, Messrs. Ituna Partners  
For the 1<sup>st</sup> and 2<sup>nd</sup> Defendant: Ms. M. Mumba, Messrs. Dzekeszeke  
and Co  
For the 3<sup>rd</sup> Defendant: In person  
For the 4<sup>th</sup> Defendant: In Person  
For the 5<sup>th</sup> Defendant: N/A*

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## **JUDGMENT**

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**Cases referred to:**

- 1. Mwenya and another v. Kapinga(1998) S.J. 12(S.C)**
- 2. Vincent Mijoni v. Zambia Publishing Company Ltd(S.C.Z Appeal No. 10 of 1998)**

3. **Zambia Bata Shoe Company Ltd v. Vin Mas Ltd(1994) S.J. 35**
4. **G.F. Construction Ltd v. Rudnap(1999) Z.R. 134**
5. **Ndongo v.Moses Mulyango and another (2011) Z.R.1 Volume 1.**
6. **Wesley Mulungushi v. Catherine Bwale Mizi Chomba (2004) Z.R.96**
7. **Jonas Amon Banda v. Dickson Machiya Tembo (S.C.Z. Appeal No.184 of 2004)**
8. **Clementina Banda and another v. Borniface Mudimba(2011/HP/A39)**
9. **James Mbewe(Suing for and on behalf of the Small Scales Industries Association of Chipata District) v. Pot Ati Malunga ( Suing for and on behalf of the Small Scales Industries Association of Chipata District)(2009/HJ/14)**
10. **Claude Samuel Gaynor v. Cyril Robert Cowley(1971)Z.R.50**
11. **Joyce Banda v. The Attorney General(1978) Z.R. 233**

**Legislation referred to:**

1. **The Lands Act, Chapter 184 of the Laws of Zambia**

**Other materials referred to:**

1. **The Halsbury's Laws of England, Volume 97(5<sup>th</sup> Edition) 2015**

The plaintiff commenced this action against the defendants on 27<sup>th</sup> November, 2013 by way of writ of summons accompanied by a statement of claim seeking the following reliefs.

1. ***An injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from selling or allocating the plaintiff's property to any other individual;***
2. ***An injunction restraining the 3<sup>rd</sup> 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants whether by themselves, their servants or agents or otherwise from carrying out any further construction works on the plaintiff's property known as Subdivision N1 of Farm 1939, Lusaka;***

3. *A declaration that the plaintiff is the lawful owner of Subdivision N1 of Farm 1939;*
4. *An order requiring the 3<sup>rd</sup> 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> Defendant to demolish the structures already erected on the plaintiff's property or to meet the costs of the demolition of the structures;*
5. *Damages for trespass, malicious prosecution and false imprisonment;*
6. *Interest;*
7. *Costs; and*
8. *Any other relief that the court may deem fit.*

The case as pleaded by the plaintiff in his statement of claim is that he is the *bona fide* purchaser of Subdivision N1 of Farm No. 1939 which is also known as Plot 8058 Marble village ("**the Property**"). He asserts that on 8<sup>th</sup> February, 2012, the defendants out of spite and malice entered upon his property and accused him of being a Congolese National grabbing land meant for Zambia. He was put in a taxi and taken to Lusaka Central Police where he was detained. He was prosecuted but discharged on the failure by the prosecution to present witnesses but immediately re-arrested and detained at Lusaka Central Police and released in the night on the intervention of the Director for Public Prosecutions. The plaintiff

therefore, claims he has suffered mental anguish and stress and claims the reliefs in the writ of summons.

The 1<sup>st</sup> and 2<sup>nd</sup> defendant filed into court their defence on 25<sup>th</sup> August, 2014 which was later amended on 1<sup>st</sup> September, 2014. The 1<sup>st</sup> and 2<sup>nd</sup> defendant state that the plaintiff illegally obtained an offer letter for the Property measuring 50 x 25 meters and has since paid for it in full. They state that the plaintiff initially built his house on an illegally obtained piece of land which he sought to regularize with the 1<sup>st</sup> defendant by fraudulently obtaining an offer letter with wrong details on the size of the plot. The defendant claims that in 2007, the plots measuring 50 x 25 were being sold at K18, 000,000.00 and as such, the plaintiff could not have bought the plot measuring 75m x 50m at 18,000,000.00. The 1<sup>st</sup> and 2<sup>nd</sup> defendant state that the plot the plaintiff paid for is 50m x 25m and it is called plot 858. The 3<sup>rd</sup> to 6<sup>th</sup> defendants have been sold plots adjoining plot 858 which plots are different from plot 858.

The 1<sup>st</sup> and 2<sup>nd</sup> defendant assert that the plaintiff is in possession of the land worth the amount he paid for. They assert that a complaint was lodged at the Police Station when the plaintiff started building

beyond the extent of his property measuring 50 x 25m. The 1<sup>st</sup> and 2<sup>nd</sup> defendant assert that the plaintiff is not entitled to own land in Zambia as he does not qualify to do so under the Zambian Laws. The 1<sup>st</sup> and 2<sup>nd</sup> defendant admit that after being discharged the plaintiff was re-arrested on charges of criminal trespass for which he is appearing in court and that he was lawfully detained. They deny that the plaintiff has suffered any damage and loss and that in any event, the same cannot be attributed to them.

The plaintiff filed into court an application for an order of interim injunction which was granted *ex parte* on 6<sup>th</sup> August, 2014 but later discharged on 3<sup>rd</sup> September, 2014 following an order striking the matter off the active cause list. The matter and the application for an interim injunction were later restored to the active cause list on 9<sup>th</sup> December, 2014 but the interim injunction was discharged on 18<sup>th</sup> May, 2015 following an *inter partes* hearing.

When the matter came up for trial on 13<sup>th</sup> September, 2017, there was no appearance on the part of the 1<sup>st</sup> and 2<sup>nd</sup> defendant despite there being proof of service *via* an affidavit of service dated 12<sup>th</sup> September, 2017. I therefore, proceeded to hear the matter.

The plaintiff testified as the only witness in support of his case and he was PW1. He testified that he knew the 1<sup>st</sup> defendant when they advertised plots for sell. He purchased an application form at K10 and was given the letter of offer on 2<sup>nd</sup> March, 2007 appearing at page 6 the plaintiff's bundle of documents. He was told to start paying for the purchase price in installments which he paid in full as evidenced by the receipts at pages 8 to 16 of the plaintiff's bundle of documents. PW1 testified that in 2011 he was called by his brick layer that some people were tampering with his plot. He then met the 2<sup>nd</sup> defendant who took him to one of the Directors of the 1<sup>st</sup> defendant Company who told him that someone else should have a piece of the property he had bought. When he questioned them how this was so when he had paid for the property in full, he was not given the right answer.

PW1 testified that some days later when he wanted to start constructing on the property, he met the 3<sup>rd</sup> defendant who told him that he and his brother the 5<sup>th</sup> defendant had bought two portions of the Property. It was his evidence that he told the 3<sup>rd</sup> defendant that he had purchased the property and paid for it in full. Three

days later he received a call out from Central Police but he did not find the officer in charge. He later received a call from the 5<sup>th</sup> defendant offering to withdraw the case at Central Police if he could agree to share the plot which he refused.

It was PW1's evidence that on 5<sup>th</sup> February his bricklayers started working on the Property but they were stopped and threatened with arrest. The 5<sup>th</sup> defendant also threatened to have him arrested and deported. PW1 testified that he is a Congolese who has been living in Zambia since 1993 and holding an Investors Permit. He testified that from 2016 he qualified to hold a Residence Permit and he was in the process of obtaining the same. On 7<sup>th</sup> February, 2012, he arranged another group of brick layers and while they were working, the 3<sup>rd</sup> defendant went to his plot with reporters from Muvi Tv, ZNBC, the 2<sup>nd</sup> defendant, Council Police, Mr. Kaiza Zulu and Stephen Masumba insisting on the plaintiff's nationality that he was a Kasai who had grabbed land from Zambians.

PW1 testified that the servant's quarters he was building was demolished and he was bundled into a taxi and taken to Central Police where he was detained from 8<sup>th</sup> February, 2012 to 22<sup>nd</sup>

February. 2012. He was transferred to Kamwala Prison where he spent almost two months and was subsequently released on police bond. The prosecution later withdrew the matter. It was his evidence that people have encroached on his property and the other piece has been taken by among others the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendant and other unknown people who have built on the property as shown at page 27 to 29 of his bundle of documents.

During cross examination, PW1 confirmed that he bought 75m x 50m and paid K18, 375.00 for it. This marked the close of the plaintiff's case.

On 21<sup>st</sup> August, 2018, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendant applied to substitute the 2<sup>nd</sup> defendant following the demise of the 2<sup>nd</sup> defendant and I accordingly granted the order.

The second defendant tendered oral evidence on his own behalf and on behalf of the 1<sup>st</sup> defendant and he was DW1. He testified that in 2007, the 1<sup>st</sup> defendant purchased part of N1 1938 in the extent of 70 acres. It was discovered that the land the 1<sup>st</sup> defendant had purchased was occupied by squatters. The 1<sup>st</sup> defendant took the



matter to court and there was a demolition order. They then sat down with the squatters and allowed them to regularize. They then subdivided the land into more than 1000 plots in the sizes of 25 x 25 and 15 x 30.

DW1 testified that the plaintiff was one of the people who came forward to regularize his plot. It was his evidence that before regularizing the land, they would send their men to view the land. The plaintiff was offered 25m x 50m and that at the time, a 25m x 25m plot was being sold at K9, 000.00 while a 25m x 50m was going for K18, 000.00. He testified that the plaintiff has even built a house on this plot. DW1 testified that sometime in 2008, they discovered that the plaintiff was interfering with the plots belonging to his neighbours claiming that they were part of his plot. It was his evidence that when they carried out their investigations they discovered that the plaintiff was one of the people that had been dealt with by one of their former employees a Mr. Musonda. DW1 testified that the offer letter that was given to the plaintiff was given to him dubiously with the connivance of Mr. Musonda who served a prison term for such activities.

DW1 testified that the only plot the plaintiff purchased was 25m x 50m and that they could not have given him 50m x 75m as the plots adjacent to the plaintiff's plot were already occupied when he applied for regularization. He further testified that when carrying out their investigations, they later discovered that the plaintiff was a refugee and this was confirmed by the Commissioner of Immigration.

During cross examination, DW1 confirmed that he was present when the plaintiff bought the land from the 1<sup>st</sup> defendant. He confirmed that he had not produced evidence that the plaintiff was one of the squatters in the court process he had mentioned. He testified that the plaintiff obtained the offer letter dubiously because the offer letter the plaintiff presented is not what they have on record and Mr. Musonda not only dealt with the plaintiff but other people as well hence his conviction. He confirmed that some of the receipts showed that the plaintiff bought 25m x 50m. DW1 testified that they did not issue the plaintiff with an offer letter for the 25m x 50m which they would ordinarily issue after one finished paying.

DW1 confirmed that the offer letter at page 6 of the plaintiff's bundle of documents was issued by Joseph Musonda to unsuspecting clients and he identified the signature of Joseph Musonda and Edith Daka who were in the sales department. He maintained that the plaintiff connived with the 1<sup>st</sup> defendant's staff but confirmed that he had no evidence to this effect. He confirmed that the receipts from page 2 in the defendant's bundle of documents show the money received from the plaintiff.

In re-examination, DW1 testified that they sold the plaintiff 25m x 50m at the price of 18,000.00 which he paid.

Kelvin Mukosai was the 1<sup>st</sup> and 2<sup>nd</sup> defendant's witness and he was DW2. He testified that he was a site manager in the 1<sup>st</sup> defendant Company. It was his evidence that in 2007, the plaintiff went to the 1<sup>st</sup> defendant's office to legalize his portion of land and he was tasked to go to the site to verify the land the plaintiff sought to legalize. He measured the land and the measurements were 25m x 50m and he advised the plaintiff to put beacons which was done.

DW2 testified that the plots were being sold at K9, 000.00 each and the plaintiff paid K18, 000.00 for two plots. He testified that he then

went to the office where he gave a report on his findings. DW2 identified the plaintiff's plot, as Plot No. 858 on the site plan at page 42 of the plaintiff's bundle of pleadings. He testified that the plaintiff is claiming plots: 857, 851, 830,852,855,831,832 and 819 which are part of the defendants' plots and the total extent of which is 75 x 75.

When cross examined, DW2 confirmed that he is not yet a qualified surveyor. He confirmed that he used a measuring tape when measuring the plaintiff's plot. He confirmed that the report he prepared was not before court. He confirmed that the receipts in the defendant's bundle of documents are from the 1<sup>st</sup> defendant. He also confirmed that the receipt at page 4 of the of the defendant's bundle of documents shows that the size of the property is 75 x 50.

The 1<sup>st</sup> and 2<sup>nd</sup> defendant's third witness was Siame Penza who is a director in the 1<sup>st</sup> defendant Company and he was DW3. He testified that sometime in 2010 he met the plaintiff in the late Elijah Kasoso's office where he was negotiating to buy a plot he went to legalize. It was his evidence that the plaintiff bought two plots in the extent of 25 x 50 and he paid a deposit of K600, 000 (rebased)

towards the purchase price. DW3 testified that the plaintiff paid the total amount of about K13, 625,000.00 leaving a balance of about K6, 000,000.00.

When cross examined DW3 confirmed that he joined the defendant Company in 2016. He testified that the plaintiff bought two plots in the extent 25 x 25 and 25 x 50 but he had no evidence to prove this. He confirmed that the receipt at page 16 of the plaintiff's supplementary bundle of documents shows that there was no balance on the purchase price. He confirmed that some receipts the plaintiff had produced and the offer letter were fake.

The 3<sup>rd</sup> defendant testified as the only witness in support of his case. It was his evidence that he was a councilor until 2006 or 2007 and one of the people who legalized the property for the 1<sup>st</sup> defendant. He bought a plot in the extent of 25 x 25 at K10, 000.00. The offer letter and receipt are at page 1 and 3 of his bundle of documents. The 3<sup>rd</sup> defendant testified that he started developing the land but was surprised that he had been sued by the plaintiff in the Subordinate Court for encroaching on his land. He testified that DW2 verified the size of his plot as well as surveyors from Lusaka

City Council and they established that the plot was outside the 75m x 50m the plaintiff is claiming. He testified that it is the plaintiff who has encroached on his plot.

When cross examined, the 3<sup>rd</sup> defendant confirmed that he bought his plot in 2008 though he was shown the plot in early 2007. He confirmed that he met the plaintiff at the plot in late 2007 putting up a structure on his land. He maintained that it was the 1<sup>st</sup> defendant who called the police. He maintained that his plot is highlighted in green at page 4 of his bundle of documents but he did not know the property number and he did not have the findings of the survey as they were communicated verbally. He confirmed that the certificate of title is still being processed.

The 4<sup>th</sup> defendant also tendered into court oral evidence. He testified that he bought a plot from the 1<sup>st</sup> defendant on 13<sup>th</sup> January, 2012 in the extent of 25m x 25m in the sum of K13,000.00. He was shown the plot by the DW2 and a few days later he started building. He then received a call from his bricklayers that there was a person claiming that he was building on his land. He

later came to know that person was the plaintiff. He was however told to continue building by the 1<sup>st</sup> defendant.

In cross examination he confirmed that there was no structure on the land when he was allocated the land. This marked the close of the 4<sup>th</sup> defendant's case.

The plaintiff filed into court his submissions on 28<sup>th</sup> September, 2018. Counsel for the plaintiff submits that there was a binding contract for the sale of land and consequently that the court should order specific performance as damages cannot be adequate compensation for a breach of a contract for the sale of land. The plaintiff relied on the case of **Mwenya and another v. Kapinga**<sup>1</sup> and **Vincent Mijoni v. Zambia Publishing Company Ltd**<sup>2</sup>. It is submitted that the offer between the plaintiff and the defendant is binding and enforceable. Countering DW1's evidence that the offer was issued fraudulently and that the plaintiff had connived with the 1<sup>st</sup> defendant's previous officer to obtain the land, counsel for the plaintiff contends that the 1<sup>st</sup> defendant did not adduce evidence to prove this. It is further alleged that the plaintiff could not be reasonably expected to be aware that the 1<sup>st</sup> defendant's officer had

no authority to sell the land to him and as such the plaintiff is a bona fide purchaser for value without notice and the 1<sup>st</sup> defendant Company is bound. The plaintiff relied on among others the celebrated case of the **Zambia Bata Shoe Company Ltd v. Vin-Mas Ltd**<sup>3</sup>.

The 1<sup>st</sup> and 2<sup>nd</sup> defendant filed into their submissions on 12<sup>th</sup> November, 2018. The 1<sup>st</sup> and 2<sup>nd</sup> defendant contend that **section 3(3) of the Lands Act, Chapter 184 of the Laws of Zambia** sets out the category of foreigners who qualify to own land in Zambia. Counsel submits that the plaintiff did not fall under any of the categories of the preceding section. It is however conceded that the plaintiff later changed his status to Investor from his refugee status but he cannot enforce his rights after the fact as the contract with the 1<sup>st</sup> defendant was void *ab initio* as he was a refugee and therefore had no capacity to purchase land.

Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendant contends that the 3<sup>rd</sup> to 6<sup>th</sup> defendants were bona fide purchasers for value without notice as the evidence shows that there were no structures on the land they were offered on which they had constructed their houses. It was



further argued that the plaintiff and the other defendants only have offer letters and as such the court should apply the rules of equity. It is further argued that though the plaintiff concealed this evidence, the defendants' evidence revealed that the plaintiff already has a plot measuring 25m x 50m and as such, his claim for land to the extent of 50m x 75m entails that he is claiming 2 plots in the extent of 25m x 25m. Counsel contends that the plaintiff has not identified which of the defendants are occupying the plots he is claiming and that what he is claiming on the ground exceeds what is on paper. Additionally it is argued that the amount the plaintiff paid of K18, 000.00 represents two plots as one plot was K9, 000.00 at the time.

Furthermore counsel argues that a perusal of the document at page 5 of the plaintiff's bundle of documents shows a discrepancy on the size of the plot as the application form at page 6 of the plaintiff's bundle of documents shows a 25 x 25 and the same form shows that the plaintiff had already started building on the property thereby confirming that the plaintiff was in fact a squatter and

regularized his acquisition of the plot after he had already started building.

On the claim for damages for trespass, the 1<sup>st</sup> and 2<sup>nd</sup> defendant's contend that the plaintiff is the one who encroached on the land that was offered to other developers. With regard to the claim for malicious prosecution, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendant contends that the burden of proof lies on the plaintiff but concedes that there was a prosecution by the defendant and that the plaintiff was acquitted or discharged. However, counsel contends that the plaintiff has not established that the defendant acted without any reasonable and probable cause and malice and that the prosecution was done out of malice.

I have considered the pleadings, the bundles of documents, the parties' oral evidence and the written submissions. From the evidence before me, the following facts are not in dispute: The plaintiff is a Congolese National and was granted refugee status as is confirmed by the refugee identity card at page 17 of the plaintiff's supplementary bundle of documents issued on 22<sup>nd</sup> April, 1997. The plaintiff was later granted a self employment permit on 30<sup>th</sup>

March, 2003 valid until 20<sup>th</sup> May, 2004. It appears the plaintiff applied for an extension of the self employment permit in 2010 as is confirmed by the letter at page 10 of the plaintiff's supplementary bundle of documents. The plaintiff was later granted an investor's permit valid from 18<sup>th</sup> April, 2013 to 20<sup>th</sup> May, 2014 which was extended to 20<sup>th</sup> May, 2015.

I further find that the plaintiff applied for land from the 1<sup>st</sup> defendant on 19<sup>th</sup> February, 2007 and he was offered land by the 1<sup>st</sup> defendant, though DW1 denied that the 1<sup>st</sup> defendant company issued the offer letter at page 6 of the plaintiff's bundle of documents claiming that the same was not what they had in their records. I also find that at the time the plaintiff applied for the land he had already started building on it and was therefore, regularizing his occupation of the land. My finding is based on the information in the application letter which shows that he had already started building when he applied for the land. It is undisputed evidence of DW1 and DW2 that at the time the plaintiff was purchasing his plot, a 25m x 25m plot was being sold at K9, 000,000 (unrebased).

Furthermore, I find that the plaintiff paid the full purchase price for the property he purchased in the sum of K18, 000.00. It is further not in dispute that the plaintiff is in possession of land in the extent of 25m x 50m. The plaintiff was arrested, charged for forcible detainer contrary to **section 87 of the Penal Code, Chapter 87 of the Laws of Zambia** and detained at Lusaka Central Police from 8<sup>th</sup> February, 2012 to 22<sup>nd</sup> February, 2012 and spent almost two months at Kamwala Remand Prison. I also find that the plaintiff was discharged on the aforementioned offence.

The questions to be resolved in this matter are firstly, whether the plaintiff had the capacity to own land in Zambia at the time of the purchasing the land; secondly what was the extent of the land that was agreed to be sold to the plaintiff; whether the defendants have trespassed on the plaintiff's land; whether the 3<sup>rd</sup> to 6<sup>th</sup> defendants are bona fide purchasers of a legal estate for value without notice; and whether the plaintiff is entitled to damages for malicious prosecution and false imprisonment.

I will begin by determining the issue of whether the plaintiff was eligible to own land at the time of the purchase of the property.

**Section 3(3) of the Lands Act, Chapter 184 of the Laws of Zambia** is categorical on the ownership of land by a non Zambian and it states a follows:

*Subject to any other provisions and procedures relating to alienation of land, the President may alienate land to a non-Zambian under the following circumstances:*

- (a) where the non-Zambian is a permanent resident in the Republic of Zambia;*
- (b) where the non-Zambian is an investor within the meaning of the Investment Act or any other law relating to the promotion of investment in Zambia; Cap. 385*
- (c) where the non-Zambian has obtained the President's consent in writing under his hand;*
- (d) where the non-Zambian is a company registered under the Companies Act, and less than twenty-five per centum of the issued shares are owned by non-Zambians;*
- (e) where the non-Zambian is a statutory corporation created by an Act of Parliament;*
- (f) where the non-Zambian is a co-operative society registered under the Co-operative Societies Act and less than twenty-five per centum of the members are non-Zambians;*
- (g) where the non-Zambian is a body registered under the Land (Perpetual Succession) Act and is a non-profit making, charitable, religious, educational or philanthropic organization or institution which is registered and is approved by the Minister for the purposes of this section;*
- (h) where the interest or right in question arises out of a lease, sub-lease, or under-lease, for a period not exceeding five years, or a tenancy agreement;*

*(i) where the interest or right in land is being inherited upon death or is being transferred under a right of survivorship or by operation of law;*

*(j) where the non-Zambian is a Commercial Bank registered under the Companies Act and the Banking and Financial Services Act; or*

*(k) where the non-Zambian is granted a concession or right under the National Parks and Wildlife Act.*

It is not dispute that at the time the plaintiff was offered the land in 2007, the plaintiff was not a permanent resident and neither did he hold an investor's licence under the **Zambia Development Agency Act** nor obtain the President's consent in writing in his own land. The plaintiff therefore, had no capacity to enter into a contract for the purchase of land. The documents before me however, show that the plaintiff was subsequently granted an investors permit in April, 2013. This leads to the next question which is whether the subsequent acquisition of an investors permit by the plaintiff could cure the initial lack of capacity. The Supreme Court in the case of **G.F. Construction (1976) Ltd v. Rudnap (Z) Ltd**<sup>4</sup> 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 2<sup>nd</sup> 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<sup>5</sup>** 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.***

In the Nongo case above, the Supreme Court observed that the question was whether the non Zambian was eligible to apply for an investments certificate under the investment Act at the time he entered into the contract. Upon analyzing the evidence, the Supreme Court found that the significant aspect was that the appellant's husband who had entered into a contract to purchased land from the 2<sup>nd</sup> respondent was a prohibited immigrant at the time of the contract. They therefore, found that the trial judge would have still found that the contract was enforceable.



Coming to this case, it is my finding that though the plaintiff was a refugee and ineligible to purchase land at the time he entered into the contract for sale of land with the 1<sup>st</sup> defendant in 2007, the same did not render the contract null and void but merely unenforceable. The plaintiff subsequently obtained an investors permit in 2013 and as such was eligible to own land in Zambia. The defect was therefore, cured.

The next issue for determination is what was the extent and the part of the land that was agreed to be sold to the plaintiff? Though not pleaded in his statement of claim, during trial, the plaintiff testified that he purchased plot 8058 from the 1<sup>st</sup> defendant in the extent of 75m x 50m at the price of K18, 000.00. DW1 and DW2 however, testified that the plaintiff purchased a plot measuring 50m x 25m and the same is marked with beacons. It was DW1's evidence that the plaintiff has even built a house on the said plot. The 3<sup>rd</sup> defendant contends that his plot is outside the extent of the land the plaintiff is claiming.

I have considered the conflicting oral evidence of the parties and the documents before me. Firstly, according to **section 4 of the Statute of Fraud**, in order to be enforceable, a contract for the sale of land must be evidenced in writing and note or memorandum will suffice. However, the note must identify the parties, the description of the subject matter and the nature of the consideration. See: **Wesley Mulungushi v. Catherine Bwale Mizi Chomba<sup>6</sup>**.

It is not in dispute that the plaintiff and the defendant entered into a contract for the sale of land and that the plaintiff paid a consideration of K18, 000.00. What is in dispute is the description of the subject matter or the land agreed to be sold. The plaintiff contends that he purchased land in the extent of 75m x 50m as shown on the offer letter at page 6 of his bundle of documents and some of the receipts exhibited in both the plaintiff's and the 1<sup>st</sup> and 2<sup>nd</sup> defendant's bundle of documents. The 1<sup>st</sup> and 2<sup>nd</sup> defendant however contend that the offer letter produced by the plaintiff was issued dubiously by one of its former employees with the connivance of the plaintiff. They contend that the plaintiff purchased land in the extent of 25m x 50m and not 75m x 50m.

The question paused is whether the 1<sup>st</sup> defendant is bound by the offer letter it claims was issued dubiously by its employee a Mr. Musonda and whether the plaintiff connived with the former in the issuance of the said letter. In the case of **Zambia Bata Shoe Company Ltd v. Vin-Mas Ltd**<sup>3</sup> the Supreme Court held that a director or other officer could bind the company if he had ostensible or apparent authority even if not empowered by the board of directors with actual authority. On the facts before me, it is has not been contested that Mr. Musonda was authorised to have dealings with the 1<sup>st</sup> defendant's clients and to offer and for sale to its clients. There is further no evidence that the plaintiff was aware as has been argued by the 1<sup>st</sup> and 2<sup>nd</sup> defendant that a plot measuring 75m x 50m could not cost K18, 000.00 at the time. The 1<sup>st</sup> defendant is therefore, bound by the offer letter which became binding as soon as the plaintiff accepted and signed it. The plaintiff therefore, purchased land in the extent of 75m x 50m.

I however, note that during cross examination of DW2 counsel for the plaintiff pointed out the receipts produced in the plaintiff's bundle of documents showing that the plaintiff had purchased land

in the extent of 75m x 50m. However, a careful perusal of both the plaintiff's bundle of documents also shows some receipts which indicate that the plaintiff purchased land in the extent of 25m x 50m. It has further not been contested that the plaintiff is already in occupation of land in the extent of 25m x 50m. Be that as it may, the receipts and the aspect of occupation cannot override the terms of the offer letter which became binding upon acceptance by the plaintiff.

The above however, does not resolve the issue of which part of the land was sold to the plaintiff. The offer letter shows that the plaintiff had purchased 75m x 50 of Sub N1 of Farm 1938/Lusaka West. The preceding subdivision constitutes the entire property belonging to the 1<sup>st</sup> defendant and the plaintiff clearly only purchased a portion of it. I however, find solace in the case of **Jonas Amon Banda v. Dickson Machiya Tembo**<sup>7</sup>.

In this case, the appellant entered into an oral agreement with the respondent whereby the appellant purchased a part of the respondent's farm. The respondent later on refused to proceed with the transaction prompting the appellant to issue court process. The

trial court found that it could not order specific performance of the contract because the size of the land and the part to be sold was not described as a survey had not been done. On appeal, the Supreme Court found that there was a receipt which was signed by the respondent which described the land agreed to be sold as 60 hectares. They also found that the evidence also showed that the appellant's relatives occupied the part of the farm intended for sale since 1999 and that they remained there without resistance from the respondent. The Supreme Court therefore, found that the size and part of the land agreed to be sold was sufficiently described.

Coming to this case, during trial, DW1 and DW2 also testified that the plaintiff is already in possession of land in the extent of 25m x 50m. He testified that the plaintiff has built a house on that land and that the boundaries of his land are marked with beacons. This evidence was uncontroverted. I therefore, find that the portion of the property that was agreed to be sold to the plaintiff is sufficiently described.

Counsel for 1<sup>st</sup> and 2<sup>nd</sup> defendant contends that the 3<sup>rd</sup> to 6<sup>th</sup> defendant are *bona fide* purchasers for value without notice as

there is evidence that there was no structure on the land when they purchased the property. The elements of the defence of *bona fide* purchaser for value of a legal estate without notice are set out in inter alia; **Clementina Banda and Another v. Borniface Mudimba<sup>8</sup>** and **James Mbewe( Suing for and on behalf of the Small Scales Industries Association of Chipata District) v. Pot Ati Malunga(Suing for and on behalf of the Small Scales Industries Association of Chipata District)<sup>9</sup>**.

During trial, the 4<sup>th</sup> defendant testified that at the time he bought his plot in January 2012, there was no structure on the land. I therefore, find that there was evidence that the land had already been purchased and as such find that the 4<sup>th</sup> defendant was a bona fide purchaser of land for value without notice. The 3<sup>rd</sup> defendant testified that he purchased his land in 2008 though he was shown the land in 2007. He however, testified that he met the plaintiff on this plot at the end of 2007 when the plaintiff was putting up a structure on his plot. A perusal of the 3<sup>rd</sup> defendant's bundle of documents shows that he was offered the land on 24<sup>th</sup> May, 2008 but the purchase price was paid on 3<sup>rd</sup> March, 2008. I am therefore

of the considered view that the 3<sup>rd</sup> defendant was aware of the plaintiff's claim to the plot he subsequently purchased prior to the purchase. I therefore, find that he cannot rely on the doctrine of a bona fide purchaser for value without notice should his land be found to fall within the plaintiff's land.

The plaintiff is claiming damages for malicious prosecution against the defendants for his prosecution before the Subordinate Court. In order to establish a claim for malicious prosecution, the plaintiff must prove the following elements: that he was prosecuted by the defendant; that the prosecution terminated in his favour; the prosecution was instituted without reasonable and probable cause; the prosecution was instituted maliciously; and the plaintiff suffered damage. See: **the Halsbury's laws of England, Volume 97, (5<sup>th</sup> Edition) (2015) para 725**. The 1<sup>st</sup> and 2<sup>nd</sup> defendant in their submissions at page 8 concede that the first and second elements are not in dispute i.e. that there was a prosecution by the defendants and that the plaintiff was acquitted or the matter was discontinued against the plaintiff. prosecution was at their

instance. The 3<sup>rd</sup> defendant however denied this allegation and stated that it was the 2<sup>nd</sup> defendant that called the police.

On the facts before me, there is no evidence that the plaintiff was prosecuted by the 3<sup>rd</sup> to 6<sup>th</sup> defendants. The issue is whether the 1<sup>st</sup> and 2<sup>nd</sup> defendant had a reasonable and probable cause for the prosecution and whether there was malice. The plaintiff bears the burden of proving the foregoing. The plaintiff claims that the defendant prosecuted him for no reason but that he was a Congolese national. However, it is clear that the plaintiff had no capacity to own land at the time. The plaintiff has further not shown that his prosecution was without any reasonable or probable cause and as the matter stands, the extent of the plaintiff's land is yet to be ascertained once a survey is conducted. I further find that there is no sufficient evidence of malice. I accordingly dismiss this claim.

The plaintiff claims damages for false imprisonment. To establish a claim of false imprisonment, the plaintiff must establish imprisonment and onus is on the defendant to justify it: **Claude Samuel Gaynor v. Cyril Robert Cowley**<sup>10</sup>. In the case of **Joyce**



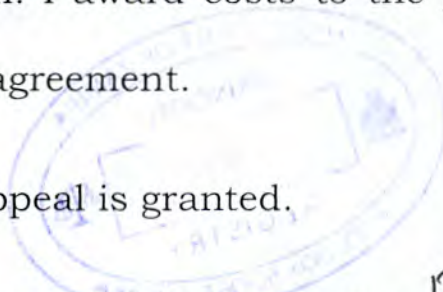
**Banda v. the Attorney General**<sup>11</sup>, the Supreme Court the following:

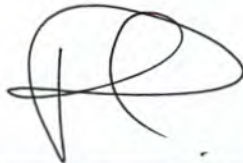
*That proposition is sacrosanct. And it leads to the further proposition, which is well settled, that in an action for false imprisonment all the plaintiff is required to do in the first instance is to assert the imprisonment and its unlawfulness. If the defendant denies the imprisonment then of course the onus is on the plaintiff to prove it; but if the defendant admits the imprisonment the onus is on him to justify it. If he fails to establish a legal justification for the deprivation of liberty he fails on the merits.*

To begin with while the 1<sup>st</sup> and 2<sup>nd</sup> defendant in their submissions concede that the prosecution was at their instance, there is no evidence that the 3<sup>rd</sup> to 6<sup>th</sup> defendants were part of the prosecution. However, before dealing with that, I must determine whether the defendants lay a charge or merely gave information. The fact that the plaintiff was imprisoned is not in dispute. I find that the 1<sup>st</sup> and 2<sup>nd</sup> defendant did not lay a charge against the plaintiff but merely gave information. It was the responsibility of the police to carry out investigations and determine whether or not to effect an arrest. In the circumstances, the claim for false imprisonment must fail.

In the light of the above, I find that the plaintiff purchased land in the extent of 75m x 50m. I order that the same be surveyed and accordingly marked off. I however, find that the 4<sup>th</sup> defendant has obtained a good title to his plot as bona fide purchasers for value without notice. I also grant the plaintiff the reliefs in paragraphs (1), (2) and (4) of his statement of claim in so far as they relate to the 75m x 50m against the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendant. I however, dismiss the claims in paragraph 5 and 3 of the statement of claim. I dismiss the claim in paragraph 3 because the plaintiff purchased 75m x 50m of Subdivisions N1 of Farm 1939 and not the whole subdivision. I award costs to the plaintiff the same to be taxed in default of agreement.

Leave to appeal is granted.

  
**Delivered at Lusaka the.....day of March, 2020**



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**MATHEW. L. ZULU  
HIGH COURT JUDGE**