

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2014/HP/1315

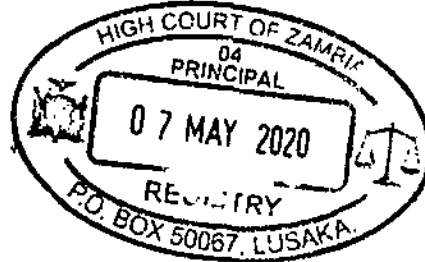
BETWEEN:

ESTHER CHIKONDO

PLAINTIFF

AND

**REEVES MALAMBO
BRUCE MUKUWA
BMC PROPERTY MANAGERS
AND REAL ESTATE LIMITED
FRANK TEMBO AND PARTNERS
(sued as a firm)**



**FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT
FOURTH DEFENDANT**

Before: The Hon. Mr. Justice Charles Zulu.

For the Plaintiff: Mr. M. Mulele & Mrs. S. J. Harawa of Messrs G. M.
Legal Practitioners.

Defendants: No Appearance.

JUDGMENT

Cases referred to:

1. *Chazyia Silwamba v Lamba Simpito (2010) Vol. 1 Z. R. 475.*
2. *Zambia Seed Company Limited v Chartered International (PVT) Z.R. 151.*

Legislation referred to:

1. *The High Court Rules (HCR) Chapter 27 of the Laws of Zambia.*

The Plaintiff, Esther Chikondo, took out a writ of summons accompanied by a statement of claim dated August 21, 2014 against the four Defendants: Reeves Malambo (now deceased); Bruce Mukuwa;

BMC Property Manager and Real Estate Limited, and a law firm, Messrs Frank Tembo and Partners. The reliefs sought by the Plaintiff are as follows:

- (i) A declaration that the Plaintiff is the legal owner of Subdivision No. 241 of Stand No. 8544 situate in Garden Site IV, Lusaka;**
- (ii) An order setting aside Consent Order dated 22nd July, 2014 under cause number 2014/HP/1009;**
- (iii) Damages for mental torture, anguish, stress and inconvenience as a result of fraud perpetuated by the Defendants herein;**
- (iv) Costs of and incidental to the action; and**
- (v) Any other reliefs the Court May deem fit.**

The matter was slated for trial on March 3, 2020, but on the return date none of the Defendants appeared. Having been satisfied that the Defendants were served with the notice of hearing, and having not excused their non-attendance either in person or through their representatives, I proceeded to hear the Plaintiff's case pursuant to Order XXXV r. 3 of the High Court Rules (HCR) Chapter 27 of the Laws of Zambia which provides:

If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the Court may, upon proof of service of notice of trial, proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant.

It is worth noting that when the matter failed to take off for trial on November 16, 2017, counsel for the first Defendant, Mr. S. K. Simwanza had this to say:

[T]he 1st Defendant who is deceased is the main principal in this cause who will help determine the matter. We find it difficult as there is no one from the estate who is able to give us instruction.

It appears the challenge with administration of the estate persisted even after the matter was referred to the *Task Force on Backlog and Delay Reduction*. And I did not consider it just and expedient that this procedural snag should perpetually be allowed to frustrate the ends of justice, to timely hear and determine the matter, which has been pending since 2014.

The Plaintiff's case as discerned from her pleadings and Bundle of Documents is that, in or around November 2011, the Plaintiff borrowed the sum of K40, 000.00, from the first defendant and pledged her property (house) namely, Subdivision No. 241 of Stand No. 8544 situate in Garden Site IV, Lusaka, as collateral to secure the said loan. It was averred that in December 2012, when payment of K40, 000.00 was paid to the first Defendant, the first Defendant later returned the money demanding to be paid K124, 000.00 instead. However, it was stated that a sum of K35, 000.00 was finally paid to the first Defendant. The Plaintiff alleged that the first Defendant fraudulently purported to assign the property to himself purporting that he had bought the same at K124, 000.00 from the Plaintiff. And that without her consent the fourth Defendant purported to represent her in the transaction. The Plaintiff stated that on October 11, 2012, the first Defendant fraudulently purported to sell the subject property to the third Defendant via a contract executed by the second Defendant. And that the fourth Defendant purported to represent the vendor and the purchaser.

The Plaintiff also alleged that in order to obtain possession of the property, the second and third Defendants represented by the fourth Defendant commenced a "bogus" action under cause number 2014/HP/1009, against the first Defendant. The Plaintiff added that a fraudulent consent order dated July, 2014, was executed under cause number 2014/HP/1009, with the following agreed terms:

BCM Property Managers Limited

Plaintiff

And

Reeves Malambo

Defendant

BY CONSENT of the parties, IT IS HEREBY ORDERED as follows:

1. That judgment be and is hereby entered in favour of the Plaintiff (BMC Property Managers Limited) for specific performance of the contract of sale dated 4th January 2014 relating to all that piece of Land and property otherwise known as Stand No. 241 of 8533 Garden City IV Lusaka.

2. That the Plaintiff shall yield vacant possession of the aforesaid Stand No. 241 of 8533 Garden City IV Lusaka within seven days from the date hereof.

3. Should the Defendant (Reeves Malambo) fail to grant the Plaintiff vacant possession of the above mentioned property, the Plaintiff is hereby granted leave to take vacant possession forthwith. (words in brackets supplied).

The Plaintiff also averred that she was evicted from her house by court bailiffs, and that the first Defendant, a money lender, took possession of the house after execution.

The Plaintiff in her second claim seeks to set aside the above stated consent order. No defence was entered by the Defendants to the present action. Generally, the effect of failing to traverse allegations made by a plaintiff was stated in the case of **Chazya Silwamba v Lamba Simpto (2010) Vol. 1 Z. R. 475** wherein it was stated as follows:

In practice, an admission may be expressly made in defence, or a defence to counterclaim. An admission may also arise by virtue of the rules. For instance, where a defendant fails to traverse an allegation of fact in a statement of claim... it is also instructive to note that as a general rule, if a defendant fails to address an allegation, he is deemed to admit.

As already noted pursuant to Order XXXV r. 3 HCR, the Plaintiff testified, and her testimony in a material particular restated the above facts. She recounted that at the time the sum of K40, 000.00 was

borrowed, she was made to sign some documents and witnessed by her young sister, Fridah Lutatu, but she did not know the content of the same, and that she was illiterate. She said interest payable was in the sum of K14, 000.00 and the debt was payable in six months. She said after a month, she sought to pay a sum of K15, 000.00, but Mr. Reeves Malambo, the first Defendant, refused to accept the money, and advised her to return with another K15, 000.00. She said the second time in the company of her sister, she went back with K40, 000.00. She said Mr. Malambo took the money amidst complaints. She said Mr. Malambo kept the K40, 000.00 for a period of two weeks, and thereafter returned the money, by leaving it with a third party at her house. She said thereafter she sought to have audience with Mr. Malambo, but failed on several occasions. She added that she kept the money for a while, but used it when her child was sick.

According to the Plaintiff, to her surprise in 2014, bailiffs in the company of the second Defendant evicted her from her house. In relation to the sale agreement of the subject house dated November 2011, allegedly made between her as the vendor and Reeves Malambo as purchaser, she denied selling the subject house to Mr. Malambo at the price of K124, 000.00. She added that she was only told to sign because she borrowed K40, 000.00.

The Plaintiff's witness was her young sister, Fridah Lutatu, and her testimony in a material particular supports the Plaintiff's testimony. Suffice to add that, she said the money was borrowed on November 12, 2012. She said when the contract was executed, the Plaintiff was solely called into the Plaintiff's office, and afterwards she was equally shown some documents which she signed, but they were not given copies of the same. She said thereafter the money was released to the Plaintiff. She said interest was pegged at K14, 000.00 per month and the repayment period was six month.

She confirmed that Mr. Malambo returned the K40, 000.00 after two weeks which the Plaintiff had paid in February 2014. She said she was then advised to see his advocate, Mr. Frank Tembo, the fourth Defendant. She said when she went to see Mr. Tembo, she took with her two cheques in the sums of K15, 000.00 and K20, 000.00. She stated that after five days, Mr. Tembo called her back, and told her that he did not want the cheques, but wanted the whole amount of K124, 000.00. She said the Plaintiff never sold the house to Mr. Malambo, and denied having witnessed the alleged sale agreement of the house. According to her each time they took money for repayment of the loan, payment was rejected, and wondered what Mr. Malambo was up to.

I have carefully considered the evidence adduced. The facts as pleaded are not challenged; they are deemed to have been admitted. And most importantly, I am satisfied with the Plaintiff's testimony and evidence. It's clear that the Plaintiff took out this action in order to regain possession of her house which was pledged as security in respect of a loan she obtained from Mr. Malambo in the sum of K40, 000.00. And as a consequence of the consent order exhibited herein, she lost possession of the house. The gateway to regain possession of her house subject to proof of her case lies with an initial step to commence fresh proceedings to challenge the consent order, and seek to set aside the same. The judicial modality as to how that can be attained was outlined in the case of Zambia Seed Company Limited v Chartered International (PVT) Z.R. 151, wherein the Supreme Court held:

By Laws, the only way to challenge a judgement by consent would be to start an action specifically to challenge that consent judgment. (emphasis supplied)

Clearly, a fresh action to set aside a consent judgment or order ought to be instituted solely for that specific substantive relief. Therefore, the inclusion of others substantive reliefs as listed above was irregular. Those other reliefs can be sought elsewhere, in particular in the other

cause, and that will depend on whether the consent order is set aside or not. It should be noted that although the Plaintiff was not a party to the action under cause number 2014/HP/1009, nor a party to the consent order, she still has *locus standi* to challenge the said consent order since she was legally aggrieved by the same, because she was deprived of her property.

The crucial issue that falls to be determined is whether there is sufficient proof to set aside the said consent order, and whether it's just and expedient to do so. Indeed a consent judgement can be set aside if it was obtained by means of fraud, deceit, or by false pretences, including misrepresentation.

In the present case, I am mindful that the allegations as stated in the Plaintiff's pleadings were not challenged. Notwithstanding the foregoing, the Plaintiff in her testimony corroborated by her witness was categorical that she never intently signed the purported contract of sale to assign the subject house to the late Mr. Malambo. I believe the Plaintiff in this regard, and find her reliable at the same time. The issue between the Plaintiff and Mr. Malambo was about the loan and repayment of the loan, and not about sale of the property. The loan was secured because the Plaintiff surrendered her certificate of title to the lender, Mr. Malambo. It is inconceivable that on the one hand the Plaintiff was obtaining a loan and pledged her house as security, and on the other hand, she was selling the same property to the lender.

Similarly, it is unbelievable that she sold the property even before she defaulted. The suspicion that the lender was up to something was real, which is that, he was more interested to see the Plaintiff default, and thereby take advantage of her apparent indigence. For instance, when the principal amount was paid; surprisingly, in a manner that did not make commercial sense except for reason of unfair shrewdness, the first Defendant returned the money.

I reasonably believe that the sale agreement was procured by false representation and undue influence, which in a material way was connected to the conception of cause number 2014/HP/1009, and to the purported execution of the said consent order, otherwise there was no solid basis for Mr. Malambo to directly purport to sale the Plaintiff's house to BMC Property Managers and Real Estate Limited and make concessions thereof under cause number 2014/HP/1009.

The contract involving the sale of the Plaintiff's house was alleged to have been made between Mr. Malambo as the vendor, on the one hand, and BMC Property Managers and Real Estate Limited as the purchaser on the other, at the price of K450, 000.00. According to the Plaintiff, the second Defendant was an employee of the first Defendant, and a Print-Out from the Patents and Companies Registration Agency on the record show that the second Defendant was also a shareholder/director in the third Defendant, BMC Property Managers and Real Estate Limited. The "sale agreement" between Mr. Malambo and BMC Property Managers and Real Estate Limited given the circumstances of this case does not appear to be real. It appears it was part of the continued plan to unjustly deprive the Plaintiff of her house, and complicate the case by introducing the third party as if it was a bona fide purchaser. It is for this reason the Plaintiff in her statement of claim described cause number 2014/HP/1009 as a "bogus court action".

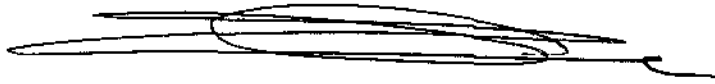
In the light of the foregoing, the Plaintiff's claim to set aside the said consent order has not only been proved on a balance of probabilities, but with convincing degree of satisfaction that indeed the consent order is aptly amenable to be set aside, and I so order. The consent order obtained under cause number 2014/HP/1009 is forthwith set aside. Incidentally, with the invalidation of the consent order, it follows the writ of possession that was issued is rendered ineffectual. And for the

avoidance of doubt the other claims for the reasons aforementioned are unsuccessful.

Costs to be borne by the first Defendant to be taxed in default of agreement.

Leave to appeal granted.

DATED THIS 7TH DAY OF MAY, 2020.



.....
THE HON. MR. JUSTICE CHARLES ZULU